

**STATEMENT**

I, the undersigned Leonardus Kolbe Joubert, declare that “**The Mandate of Political Representatives with special reference to Floor-crossing: A Legal Historical Study**” is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

**L K JOUBERT**

THE MANDATE OF POLITICAL  
REPRESENTATIVES WITH SPECIAL  
REFERENCE TO FLOOR CROSSING:  
A LEGAL HISTORICAL STUDY

BY

LEONARDUS KOLBE JOUBERT

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Lastly my wife and family: the time I spend on this study I should have spent with you. Thank you for your support and encouragement. I owe you!

This manuscript was written in various places: it was started in Volksrust continued in Cape Town, London, Dar es Salaam and Maputo but as it was finalized in Cape Town, the mother city of parliament in South Africa, it is considered apt that it be signed at Cape Town.

L K Joubert  
Cape Town  
2006

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<sup>1</sup> Woodrow Wilson as quoted by Malherbe FJM *Die Wetgewende Prosedure van die Parlement* unpublished LL D thesis Johannesburg Randse Afrikaanse Universiteit (1991).

## SUMMARY

South Africa has had a free mandate theory of representation up to 1994. From 1994 to 2002 an imperative theory applied and in 2003 a limited hybrid free mandate was introduced. The origin of parliament, the development of representation as a concept in Public Law and the birth of political parties are studied. It is shown that parliament and representation were natural developments that occurred at the same time, not by grand design, but by chance.

It is also shown that political parties appeared first as informal intra-parliamentary groupings that developed into extra-parliamentary organisations, organised to achieve and exercise power in the political system as the franchise became more liberal.

The factors that influence a member's mandate and floor-crossing as such are discussed.

Finally it is concluded that from a legal historical perspective, a free mandate of representation is the preferred theory of representation in public law.

## KEY TERMS

History of Parliament, origin of political representation, virtual representation, birth of political parties, floor-crossing, constitutional development, franchise, free mandate, selection of candidates, election results.

**LIST OF ABBREVIATIONS OF POLITICAL PARTIES**

AB	Afrikaner Bond
AEB	Afrikaner Eenheids Beweging
ACDP	African Christian Democratic Party
ANC	African National Congress
AP	Afrikaner Party
AZAPO	Azanian People's Organisation
CP	Conservative Party
DA	Democratic Alliance
DP	Democratic Party
FA	Federal Alliance
FF	Freedom Front
FF+	Freedom Front Plus
HNP	Herenigde Nasionale Party (1934-1951); Herstigte Nasionale Party (1977- )
ID	Independent Democrats
IFP	Inkatha Freedom Party
MF	Minority Front
Nadeco	National Democratic Conference
NP	National Party
NNP	New National Party
NRP	New Republic Party
PAC	Pan African Congress of Azania
PFPP	Progressive Federal Party



PIM	Progressive Independent Movement
PP	Progressive Party
SACP	South African Communist Party
SAP	South African Party
UCDP	United Christian Democratic Party
UDM	United Democratic Movement
UIF	United Independent Front
UP	United Party (United National Party of South Africa)
UPSA	United Party of South Africa

## CHAPTER 1

### INTRODUCTION

*“For the roots of the present lie deep in the past, and nothing in the past is dead to the man who would learn how the present comes to be what it is”*

William Stubbs *The Constitutional History of England* vol 1(1870) v.

#### 1.1 MOTIVATION FOR THE STUDY

It is common knowledge that prominent political leaders such as Sir Winston Churchill,<sup>2</sup> General JBM Hertzog<sup>3</sup> and Mrs Helen Suzman<sup>4</sup> all crossed the political floor in their long public careers more than once. That an anti-defection clause was deemed to be necessary for political stability in 1993 is understandable, but the outcry with which the return to a semi-free mandate system of representation was met in 2002 was surprising in the light of South Africa’s constitutional history.

Since the first attempt to reintroduce the free mandate in 2002, the issue of floor-crossing became a very heated debate, but no or very little reference was made to the fact that South Africa had always had a free mandate system of representation and that floor-crossing was a regular feature in the pre-1994 Constitutional regime.<sup>5</sup> In both the certification judgments<sup>6</sup> and in the *United Democratic Movement v*

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<sup>2</sup> Churchill was elected as a member for Oldham in 1900 as a Tory but jointed the Liberal Party in 1904. In 1924 he returned to the Conservative Party where he remained, becoming Prime Minister twice.

<sup>3</sup> Hertzog left the South African Party in 1913 and founded the National Party shortly thereafter. In 1934 he, together with Smuts, formed the United Party and in 1940 he joined the Herenigde Nasionale Party.

<sup>4</sup> Suzman was elected to Parliament in 1953 as a member for Houghton for the United Party but crossed to the Progressive Party in 1959 and became a member of the Progressive Federal Party and the Democratic Party in due course.

<sup>5</sup> It appears that since candidates’ particulars no longer appear on the ballot paper and that because the ballot paper contains the particulars of political parties only, it is seen as inherently contradictory for individuals to cross the floor with retention of their seats. See NW du Plessis *Alternative Electoral Systems for South Africa* (2001) 19.

<sup>6</sup> *Ex parte Constitutional Assembly: In re Certification of the Constitution of the RSA* 1996 (4) SA 744 (CC) and *In re Certification of the Amended Text of the Constitution of the RSA* 1996 1997 (2) SA 97 (CC).

*President of the Republic of South Africa and Others*<sup>7</sup> the Constitutional Court did not refer to the position before 1994 and the matter seems to have been approached purely from the view of the Constitutional Principles and the Constitution itself. Reference was made to the constitutions of other countries,<sup>8</sup> but the Court did not refer to the development of the concept of representation or floor-crossing as it appeared in the past.

In *Executive Council Western Cape Legislature v President of the Republic of South Africa*<sup>9</sup>, the Constitutional Court stated that the 1993 Constitution showed a clear intention to break away from the past.<sup>10</sup> This notion was reiterated by the outgoing Chief Justice in a farewell address to the Parliamentary Portfolio Committee on Justice and Constitutional Development, when he said that although South Africa was spared a revolution in the political sense of the word, the country did experience a constitutional revolution.<sup>11</sup> That the new constitutional dispensation in South Africa did herald the beginning of a new chapter in South Africa's constitutional history can not be overstated, but to say that it was a constitutional revolution implies that a line has to be drawn through the pre-1994 Constitutional regime, negating the fact that many aspects of the old system were in reality used as the building blocks for the new system. Notwithstanding the fundamental changes introduced by the 1993 and 1996 Constitutions, the changes were introduced through the existing constitutional process

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<sup>7</sup> Please see Chapter 6.3.

<sup>8</sup> Please see Chapters 6.3.1 and 6.3.2.

<sup>9</sup> 1995 (4) SA 877 (CC) .

<sup>10</sup> A more acceptable approach was taken by Mahomed J in *S v Makwanyane & Another* 1995 (3) SA 391 (CC) at 487 where he stated that that part of the past which is defensible is retained but that there is a decisive break from "that part of the past which is disgracefully racist, authoritarian, insular and repressive."

<sup>11</sup> Address by Chief Justice Arthur Chaskalson in Good Hope Chamber, Parliament, Cape Town, 7 June 2005.

of the time, therefore perpetuating the nexus between the old and new.<sup>12</sup> It is consequently writer's submission that the democratisation of South Africa was not a revolutionary process but an evolutionary process and that the golden thread that runs through our constitutional history from the earliest times was not severed by the new Constitution.<sup>13</sup> The new Constitution is silent on aspects such as the responsibility of political representatives, their mandates, how candidates should be appointed by political parties etc. and it is submitted that the common law remains relevant in such cases as long as it is brought into conformity with the spirit, purport and objects of the Constitution.<sup>14</sup> On the question of floor-crossing the Constitution has been changed two times and the Constitutional Court has considered the matter twice, giving slightly divergent views in the two judgments. In none of these cases was an historical approach adopted. Although the Constitutional history of British public law is very well documented and authoritative research has been done in South Africa on representation in public law,<sup>15</sup> very little research has been done on the development of the mandate of political representatives and the matter of floor-crossing. Furthermore, since South African politics became more and more dominated by the ruling party from 1960 to 1994 and post-1994 by the new ruling party with even a stronger position in Parliament, the mandate of a Member of Parliament appears to have become less defined. This situation was aggravated by the strong hold that

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<sup>12</sup> Please see Section 229 of the interim Constitution that stated that "Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force...shall continue in force...subject to any repeal or amendment of such laws by a competent authority". Schedule 6 clause 2 of the 1996 Constitution similarly provides for the continuation of existing law subject to repeal or amendment.

<sup>13</sup> The evolutionary development of our Constitutional Law is illustrated by the judgment of Chaskalson P in *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) where he dealt with the development of the power of the Courts to review administrative decisions under the different constitutions since the South Africa Act, 1909 at 692 to 698.

<sup>14</sup> *Commissioner of Customs & Excise v Container Logistics (Pty) Ltd; Commissioner of Customs & Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 271 (SCA) at 786 F G.

<sup>15</sup> Basson DA *Verteenwoordiging in the Staatsreg* unpublished LLD thesis University of South Africa (1981).

political parties started to get over individual members, which hold was constitutionalised by the 1993 and 1996 Constitutions.<sup>16</sup>

In the light of the above, the focus in this study is on the historical development of Parliament, the development of the concept of representation, the development of political parties and matters that influence a Member's mandate. Against this backdrop floor-crossing is studied as it occurred in South Africa from 1910 to the present. Finally, a conclusion is reached as to whether floor-crossing should be permitted or not in South African public law.

## **1.2 DELIMITATION OF STUDY**

Our Constitutional heritage includes the history of the development of Parliament in England over more than 700 years. Although that history has been well documented, it was considered necessary to recapitulate the salient aspects of its development to indicate how our present day Parliament can be traced back to the original Parliament at Westminster. Parliament and representation go hand in hand but had different origins. A study of the development of representation as it eventually manifested in South African constitutional law is made. The emphasis is historical and theories of representation are referred to only where relevant.

To get the full picture of the development of Parliament and representation as a public law concept it is also necessary to understand the development of political parties and

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<sup>16</sup> Section 43(b) of the interim Constitution and item 13 of Annexure A of Schedule 6 of the 1996 Constitution.

the interaction of these three phenomena. However, as the development of political parties is a vast study on its own, this work will focus only on the foundation of political parties and the development of their control over Members of Parliament. Both intra and extra-parliamentary factors that influence a representative's mandate are looked at, and in the final analysis floor-crossing as such is addressed.

Developments of a temporary nature that had no effect on the final outcome of the present situation in South Africa, such as the Homeland Policy and Tricameral Parliament are referred to but not discussed in detail. Since the subject matter is vast and the scope of the study limited, it is not intended to fully explore the subject but rather to tickle the appetite for more study of a very interesting and topical subject.

Representatives in this study are limited to Members of Parliament<sup>17</sup> and more specifically Members of the National Assembly, unless the context clearly indicates the contrary.

An historical approach was followed in this study and the emphasis therefore is on historical fact and not on theory.

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<sup>17</sup> Presently both members of the National Assembly and members of the National Council of Provinces (NCOP) are referred to as Members of Parliament but as there is a clear distinction between the functions and election of the members of these two Houses of Parliament, it is suggested that another name be found for referring to members of the NCOP. In *Doctors for Life International v Speaker of the National Assembly and Others CCT 12/05* (not yet reported at time of submission) Ngcobo J pointed out that the two institutions represents different interests in the law-making process. The National Assembly represents the people while the NCOP represents the provinces. See par 29.

### **1.3 CLASSIFICATION OF STUDY**

The approach to the subject matter and the system that is followed will be determined to a great extent by the intention of the research. Since the aim of this study was to show that the roots of the present lie deep in the past and that to understand the present one has to know the past, an historical approach was followed. It was therefore a premise that the study should commence with the origin of parliament and its development to the present. The concept of representation in public law developed by chance at the same time as parliament and it flowed from this that a study of the origin of representation in public law should follow the chapter on the origin of parliament. Since representation in public law cannot be imagined without political parties, the birth of political parties had to be studied to fully understand the position of a representative, hence Chapter 4.

In all three these Chapters the research commenced with the position in Britain where these concepts originated and their development as it manifested in South Africa was followed to the present. Since these concepts developed without a grand plan and purely by chance, there are no clear dividing lines between the development of the concepts studied, with the result that there is a certain degree of overlap between the chapters. In Chapter 5 the factors that influence a representative's mandate are studied and in view of the fact that political parties play such a dominant role in this regard, much attention was given to their control over members, especially in the compilation of candidate lists.

In Chapter 6, floor-crossing as it occurred since 1910 is discussed in detail. A conclusion is made at the end of each chapter and a final conclusion is reached in Chapter 7. Finally four recommendations are made.



## CHAPTER 2

### THE DEVELOPMENT OF PARLIAMENT AND THE ELECTION OF ITS MEMBERS

*“It was a lucky thing indeed for Great Britain that her people had the good sense to choose the path of peaceful, if slow, constitutional evolution. Any other course, which tended unduly to hasten changes, would have been dangerous, considering the extremely backward state of the political education of the great mass of the population.”*

GE Hall *A Brief Survey of English Constitutional History* (1925) 219 – 220.

#### 2.1 INTRODUCTION

The origin of the South African Parliament lies far back in British Parliamentary history and the development of the Westminster Parliamentary system over a period of more than seven hundred years.<sup>18</sup>

Constitutional development in England was a slow process and the growth of constitutional institutions was so gradual that when their significance came to be realised they had already been in existence for some time.<sup>19</sup> Consequently it cannot be stated with any degree of certainty exactly how and when the concept of representation, as found in all modern democratic systems, took root in England, but the oldest writ of summons to the Royal court dates back to between 27 May 1204 and 27 May 1205.<sup>20</sup> It can therefore safely be accepted that the origins of Parliamentary representation date back to the beginning of the thirteenth century. Nevertheless, general regular Parliamentary elections in which every adult man and woman secured the right to vote,

<sup>18</sup> Carpenter Gretchen *Introduction to South African Constitutional Law* (1987) 26.

<sup>19</sup> Lovell CR *English Constitutional and Legal History: A survey* (1962) X1.

<sup>20</sup> Pasquet D *An Essay on the Origins of the House of Commons* (1925) 1964 reissue 1.

only date back to 1928 in Britain<sup>21</sup> and to 1994 in South Africa.<sup>22</sup> The idea of regular general elections once every five years is therefore in historical terms, a recent development even in the United Kingdom where the system developed.<sup>23</sup>

It is generally accepted that the word Parliament is derived from the French verb “*parlar*”, (to speak), and originally simply meant speech or dialogue.<sup>24</sup> However, Ilbert<sup>25</sup> traces its Latin form as applied by Monistiquie Statutes of the 13<sup>th</sup> Century to the talk held by monks in their cloisters after dinner. The term was later used to describe solemn conferences such as that held between Louis IX of France and Pope Innocent IV in 1245. In England the word was first used when Henry III (1216-1272) summoned a council or conference of great men to discuss grievances. This event was described by a contemporary chronicler as holding a Parliament.<sup>26</sup> The word took root in England and was soon applied regularly to the national assemblies summoned by Edward I (1272-1307).

Parliament as a lawmaking body has its roots in the Germanic concept that the law was supreme and immutable. The law could therefore not be changed, but had to be found and it was found by the council of the King’s wise men<sup>27</sup> or by an assembly of the people.<sup>28</sup> These findings or judgments took place in the form of dooms and were regarded as declaratory. The concept of statal government authority was vague and the only legal order as such existed within the family group where the *pater familias*

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<sup>21</sup> Keir DL *The Constitutional History of Modern Britain 1485 – 1937* 3<sup>rd</sup> ed (1947) 472.

<sup>22</sup> See paragraph 4.3 post of this study.

<sup>23</sup> It is interesting to note that the tenure of Parliament was seven years as from the Septennial Act of 1716 until 1911 when it was reduced to five years. Carpenter op cit 46 footnote 124.

<sup>24</sup> Carpenter op cit 29.

<sup>25</sup> Ilbert C *Parliament: It’s History, Constitution and Practice* (1948) 1.

<sup>26</sup> Ilbert op cit.

<sup>27</sup> Witenagemot.

<sup>28</sup> Folkmoot.

exercised wide, practically unrestricted powers. The individual was expected to take the law in his own hands to correct any wrongs he may have suffered but the peace of the household precluded members of the family from making war on one another. This led to families grouping together in clans which in turn grouped together to form tribes.<sup>29</sup>

Certain customs and usages developed over time to regulate the legal relationships between members, the most important from a public law point of view being the allegiance relationship and the community relationship which led to the creation of a legal order based on the concept of state authority.<sup>30</sup> The absolute power wielded by the *pater familias* within the family, in time led to outsiders being drawn to stronger families which they could join by swearing an oath of allegiance to the *pater familias*, which brought them under his authority. A reciprocal relationship developed between the *pater familias* (liege lord) and the new member (liegeman) in terms whereof the liegeman undertook to support the liege lord in time of war and to perform certain duties in peacetime. For his part, the liege lord had to protect his liegemen and to treat them as members of his family.<sup>31</sup>

Although the allegiance relationship could initially be terminated at any time except when the liege lord was in danger and entitled to rely on the support of his liegemen, it eventually became a permanent relationship in terms whereof the liegeman, or vassal, owed the liege lord allegiance for life. This developed into the feudal system which was based on the relationship between vassal and the feudal lord, which was in turn

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<sup>29</sup> Carpenter op cit 27.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

based on the feudal lord's holding of land. This was also the foundation of the relationship between the king and the people.<sup>32</sup>

When Eadmund acceded to the English throne in 941, all his subjects swore an oath of allegiance to him, not individually but by proxy to the members of the *witenagemot* who swore allegiance on behalf of the entire nation.<sup>33</sup> Because of the concept that the law could not be changed but only “found by the wise men and declared, in their dooms” the king could not make new laws but had to rely on the dooms of the *witenagemot* or Council of Wise Men. The King could also not impose taxes and this too was a function of the *witenagemot* or Council of Wise Men.<sup>34</sup> It is not clear how the *witenagemot* was constituted but according to Plucknett<sup>35</sup>

“(Its) members were the king, the ealdormen or governors of shires, the king's thegns, the bishops, abbots, and generally the *principes* and *sapientes* of the kingdom. *Sapientes*, called ‘witan’ and meaning wise men in modern English, was the common description of those who attended it. The lesser thegns, if entitled to be present, probably did not attend in any numbers, so that the assembly can never have been very large.”

Plucknett concludes that “although the *witenagemot* was not a representative body in the modern sense, it was unquestionably looked upon as representing in some sort the whole people, and consequently the national will”.<sup>36</sup> In the sense that the Norman Conquest was seen by William the Conqueror as asserting by force what was legally his, his ascension to the throne was constitutional in theory, with the result that the continuity of the English Public Law was not broken. However, the conquest itself was illegal from a constitutional law point of view.<sup>37</sup>

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<sup>32</sup> Carpenter op cit 28.

<sup>33</sup> Carpenter op cit 29.

<sup>34</sup> Carpenter op cit 30.

<sup>35</sup> Plucknett TFT *Taswell – Langmeade's English Constitutional History* 11<sup>th</sup> ed (1960) 18.

<sup>36</sup> Ibid.

<sup>37</sup> According to Plucknett, op cit 32-33, William “professed to be asserting his legal right and further alleged that Harold (who had been elected by the witan to succeed Edward) himself had once sworn to recognise his claim to the throne.”

During the Norman period, which started with the reign of William the Conqueror in 1066, the *witenagemot* was gradually replaced by the Great Council of the King and later became known as the *Magnum Consillium* or the *Commune Consilium Regni Nostrum*.<sup>38</sup> The Norman kings therefore recognised the rule that the king could not levy taxes “save by the common council of our realm” as well as the principle that the king could only make laws through his *Curia Regis* which was his permanently appointed councillors.<sup>39</sup> At that point in time the king and his subjects had an indirect relationship and the king was more concerned with the barons with whom he was in constant conflict.<sup>40</sup> In an effort to strengthen his position *vis-à-vis* the barons, King John in 1213 summoned four men from each County to attend the Great Council as well as the feudal lords and the lords temporal and spiritual.<sup>41</sup> From these beginnings Parliament then gradually developed from an advising council to a sovereign body representing the people.

## 2.2 BRITAIN 1215 TO 1928<sup>42</sup>

It is an interesting constitutional fact that the Parliament at Westminster, which is considered the mother of all Parliaments, is not regulated by a written constitution,

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<sup>38</sup> Carpenter op cit 31.

<sup>39</sup> Ibid.

<sup>40</sup> Carpenter op cit 36.

<sup>41</sup> Carpenter op cit 2.

<sup>42</sup> It falls outside the scope of this study to give a detailed account of the development of Parliamentary government in Britain, but to understand the development of representative government in South Africa, a very brief summary of the history of Parliamentary government in Britain will be given. For a detailed account please see the following works:

Anson WR *The Law and Custom History* (1922), Chrimes SB *English Constitutional History* (1965), Erskine May *Constitutional History of England* (1889), Von Gneist R *The History of the English Constitution* (1886), Holdsworth WA *A History of English Law* (1936), Joliffe JEA *The Constitutional History of Medieval England* (1961) Keir DL *The Constitutional History of Modern Britain* (1937), Maitland FW *The Constitutional History of England* (1955), Plucknett TFT *Taswell-Langmead's English Constitutional History* (1960), Stubbs W *The Constitutional History of England* (1880), Pasquet D *An Essay on the Origins of the House of Commons* (1925), Pike LO *Constitutional History of the House of Lords* (1894), Pollard AF *The Evolution of Parliament* (1920) and Porritt Edward *The Unreformed House of Commons: Parliamentary Representation Before 1882* (1903).

but by conventions that developed over time. However, certain guarantees for basic liberties were from time to time enacted of which the *Magna Carta* of 1215 is the most famous English constitutional document. Carpenter<sup>43</sup> points out that although the *Magna Carta* contained no new legal rules or principles but was actually a confirmation of existing rules which the king had been disregarding, the signing of the document was of major importance as future kings would be faced with a constitutional document and not merely unwritten rules of constitutional law.

Initially members were called to Parliament by writ “*de veniendo ad Parliamentum*”.<sup>44</sup> Different writs were issued to the lords, the clergy, the knights and the commoners.<sup>45</sup> Hallam<sup>46</sup> describes the government of England as having been, in all times recorded by history, one of those of mixed or limited monarchies which the Celtic and Gothic tribes established in preference to despotism, tyranny or the various models of republican polity which prevailed on the Continent and in the East. In its constitutional development England was more fortunate than the rest. By the fifteenth century it had acquired a just reputation for the goodness and the security of her citizens from oppression.<sup>47</sup> The relative liberty that English subjects enjoyed in the fifteenth century had been “the slow fruit of ages still waiting a happier season for its perfect

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<sup>43</sup> Op cit 31.

<sup>44</sup> Churchill Winston S *A History of the English-Speaking People* vol 1(1956) 220.

<sup>45</sup> The lords were summoned “*ad tractaturi vestrumque consillium impensuri*” i.e. to negotiate with the king and give council. The knights and commoners were summoned to represent their constituencies and to consent on behalf of their constituents and to await further instructions – “*ad faciendum et consentiendum hiis quae tunc ibidem de communi consilio regni nostri favente domino ordinari contigerit super negotiis antedictis.*” The only difference between the knights and commoners being that the knights were summoned individually whereas the commoners were to be selected. In the case of the clergy the verb *faciendum* was later left out as only their consent was required. Their actual presence was therefore not required as their absence was considered consent enough. (See Maitland FW *The Constitutional History of England* (1955) 176-177). It is interesting to note that even today, when a general election is announced, the Lord Chancellor still issues a writ under the seal of the Sovereign calling for candidates to be nominated. (Writ issued on 5 April 2005).

<sup>46</sup> Hallam H *The Constitutional History of England* vol 1(1867) 1.

<sup>47</sup> Hallam op cit 2.

ripeness, but already giving proof of the vigour and industry which had been employed in its culture”.<sup>48</sup>

Churchill<sup>49</sup> calls the latter years of Henry III’s reign (1216 – 1272) “the seed time of the Westminster Parliamentary system.” In particular, the Provisions of Oxford of 1258, supplemented and extended in 1259 by the Provisions of Westminster, served as a catalyst for further development. These Provisions consisted of baronial proposals, the paramount one being a demand that the “King in future should govern by a Council of Fifteen to be elected by four persons, two from the baronial and two from the Royal Party”.<sup>50</sup> The King issued a proclamation accepting the arrangement, but in 1261 the Pope freed Henry from his oath to accept the provisions of Oxford and Westminster, which led to civil war.<sup>51</sup> Simon de Montfort defeated the Royal Army, took the King captive and made a treaty with the captive King whereby the rights of the crown were to be strictly controlled.<sup>52</sup> De Montfort called the famous Parliament of 1265 to which he summoned representatives from both the shires and towns, making it the first representative parliament.<sup>53</sup>

During the next 200 years the progress made toward government by consent was “extraordinarily rapid”<sup>54</sup> and the power of the House of Commons increased gradually.<sup>55</sup> Although legislation still emanated chiefly from the King, the principle

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<sup>48</sup> Ibid.

<sup>49</sup> Op cit 215.

<sup>50</sup> Ibid.

<sup>51</sup> Churchill op cit 217 -218.

<sup>52</sup> Churchill op cit 219.

<sup>53</sup> Churchill op cit 220. Churchill, however, also points out that the fact that de Montfort probably summoned the strong popular element to weight the Parliament with his own supporters detracts from the constitutional significance attached to the first representative Parliament. Nevertheless, “de Montfort had lighted a fire never to be quenched in English History” Churchill op cit 220-223.

<sup>54</sup> Marriott, Sir John *This Realm of England Monarchy, Aristocracy, Democracy* (1938) 137.

<sup>55</sup> Hall DGE *A Brief History of English Constitutional History* (1925) 90.

was established that all legislation had to be enacted by the King in Parliament so that no legislation was valid “unless it was done in the presence of, and received at least the formal assent of Parliament.”<sup>56</sup> According to Hallam no laws were ever enacted by English kings without the assent and advice of their Great Council.<sup>57</sup> He then quotes a statute of Edward II (1307 – 1327) which declared that:

“...the matters to be established for the estate of the king and of his heirs, and for the estate of the realm and of the people, should be treated, accorded and established in Parliament, by the king and by the assent of the prelates, earls and barons, and the commonality of the realm, according as had been before accustomed.”<sup>58</sup>

He concludes that there was:

“not a single instance from the first dawn of our constitutional history, where a proclamation or order of council has dictated any change, however trifling in the code of private rights, or in the banalities of criminal offences.”<sup>59</sup>

However, as the Commons began to assert itself in Parliament towards the end of the fourteenth century, the barons realised that Parliament was the best way to curb the king’s power and interest in Parliament started to increase.<sup>60</sup> In 1430 a Franchise Act was passed which would regulate the franchise in counties for more than 400 years.<sup>61</sup> According to this Act electors had to be persons resident in the county, having freehold to the value of 40 shillings per annum.<sup>62</sup>

Although it has been pointed out that there are no sharp dividing lines in medieval English history, the succession of the House of Tudor to the English throne in 1485

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<sup>56</sup> Hall op cit 91.

<sup>57</sup> Op cit 3.

<sup>58</sup> Op cit 3 to 4 my underlining.

<sup>59</sup> Hallam op cit 4.

<sup>60</sup> Hall op cit.

<sup>61</sup> Hall op cit 93.

<sup>62</sup> Maitland FW *The Constitutional History of England* (1955) 173.



heralded a period of 200 years of Tudor dictatorship under which very little constitutional development occurred.<sup>63</sup> Tudor monarchs and Elizabeth I gained control over the House of Commons by creating the so-called “rotten” and “pocket” boroughs, which were urban constituencies with very few voters in which the elections could be manipulated.<sup>64</sup> It is therefore not surprising that it appears as if parliament during the period of Tudor monarchs was used to legalise the King’s appetite for wealth and power as taxes were exorbitant.<sup>65</sup> When Parliament did attempt to make a stand against the inroads upon the public purse, as in 1523 when a request for £800 000.00<sup>66</sup> to be raised by a tax of one fifth upon lands and goods was not approved, no Parliament was assembled for nearly seven years.<sup>67</sup>

Hallam<sup>68</sup> identifies five essential checks upon the authority of the king at the time of Henry VII (1485-1509) of which two are relevant to this study, namely:

- the king could not levy new taxes upon his people except by the grant of his Parliament;
- the assent and authority of Parliament were necessary to every new law.

A subsequent statute passed by Parliament granting the king all monies borrowed by him including such debts that have been repaid is proof that Parliament at that time served the king’s interest.<sup>69</sup> Hallam<sup>70</sup> writes that Henry VIII (1509 – 1547) had almost

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<sup>63</sup> Churchill op cit 394.

<sup>64</sup> Carpenter op cit 42 footnote 100.

<sup>65</sup> Hallam op cit 15.

<sup>66</sup> Said to have exceeded all current coin in the kingdom at that time.

<sup>67</sup> Hallam op cit 18.

<sup>68</sup> Op cit.

<sup>69</sup> Hallam op cit 23. Apparently most of this House of Commons held office under the crown which underlines the important principal of separation of powers and independence of representatives.

absolute dominium over Parliament and only one instance is known where Parliament refused to pass a bill recommended by the crown. However, during the reign of Edward VI (1547 – 1553) there were several instances when the Commons rejected Bills sent down from the Upper House. There were still more rejections in the reign of Mary (1553 – 1558) and it appears that Parliament started to assert itself: notwithstanding the fact that she dissolved her two first Parliaments for not being submissive, the third Parliament rejected several of her favourite bills.<sup>71</sup> How the crown attempted to influence the election of members to the Commons is clear from the following circular letter of Edward VI to all the sheriffs commanding them to give notice to the freeholders, citizens, and bourgeoisies within their respective counties:

“...that our pleasure and commandment is, that they shall choose and appoint, as nigh as they possibly may, men of knowledge and experience within the counties, cities and boroughs.”

Recommendations of several persons then followed. Those so elected either belonged to the court or were in the king’s trust.<sup>72</sup> Hallam comes to the conclusion that it appears probable that persons in office formed a very considerable portion of the House of Commons at all times.<sup>73</sup> The execution of noblemen such as the Earl of Warwick,<sup>74</sup> the Earl of Suffolk,<sup>75</sup> Sir Thomas Moore<sup>76</sup> and the Duke of Buckingham<sup>77</sup> is proof that the Tudor governments intimidated the great families of England of that time. In an effort to strengthen their influence over the Commons, Edward VI created twenty-two new boroughs and Mary added fourteen to the number.<sup>78</sup> Matters did not

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<sup>70</sup> Op cit 43.

<sup>71</sup> Hallam op cit 44.

<sup>72</sup> Hallam op cit 45.

<sup>73</sup> Ibid.

<sup>74</sup> Hallam op cit 26.

<sup>75</sup> Hallam op cit 27.

<sup>76</sup> Hallam op cit 32.

<sup>77</sup> Hallam op cit 27.

<sup>78</sup> Hallam op cit 45.

improve under the House of Stuart and when James (1603-1625) succeeded Elizabeth in 1603, an entire year lapsed before he summoned his first parliament. He also ruled for long periods without calling a Parliament.<sup>79</sup> The proclamation that called his first Parliament:

“charges all persons interested in the choice of knights for the shire to select them out of the principal knights or gentlemen within the counties; and for the bourgeoisies, that the choice be made of men of sufficiency and discretion, without desire to please parents and friends, that often speak for their children or kindred; avoiding persons noted in religion for their superstitions, blindness one way, or for their turbulent humour otherwise. We do command he says, that no bankrupt or outlaws be chosen, but men of known good behaviour and sufficient livelihood. The sheriffs are charged not to direct a writ to any ancient town being so ruined that there are not residents sufficient to make such choice, and of whom such lawful election may be made. All returns are to be filed in chancery, and if any be found contrary to this proclamation, the same to be rejected as unlawful and insufficient, and the place to be fined for making it; and anyone elected contrary to the purport, effect and true meaning of this proclamation, to be fined and imprisoned.”<sup>80</sup>

Parliament saw such an assumption of control over the election of its members as a glaring infringement of the privileges that had become the prerogative of the House of Commons.<sup>81</sup> However, during the ensuing elections the county of Buckingham returned Sir Frances Goodwin in preference to Sir John Fortesque, a privy councillor. Sir Frances had been outlawed some years before and the writ was therefore returned to the sheriff as it was in contradiction to the king’s proclamation. A second election was held and Sir John was elected. This matter was discussed in the House of Commons a few days after the opening of the session and it was resolved that Goodwin was lawfully elected and returned. The House of Lords thereupon requested a conference between the two houses which was refused by the Commons stating:

“... that they conceived it not according to the honour of the house to give account of any of their proceedings...”<sup>82</sup>

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<sup>79</sup> Wiechers M *Verloren van Themaat Staatsreg* 3<sup>rd</sup> ed (1981) 87.

<sup>80</sup> Hallam op cit 299 to 300.

<sup>81</sup> Hallam op cit 300.

<sup>82</sup> Hallam op cit 300 to 301.

The king then became involved, but the House of Commons stood its ground and in the end the matter was resolved by a compromise in terms whereof both members were set aside and a new writ issued.<sup>83</sup>

During the reign of Charles I (1625-1649) the tension between the king and the Commons increased. The king appears to have been solely intent on entrenching the excesses of prerogative<sup>84</sup> while the Commons was intent on rendering the existence of the monarchy compatible with that of freedom.<sup>85</sup> It thus became inevitable that the King would clash with Parliament.<sup>86</sup> When he acceded to the throne he immediately tried to rule as an absolute monarch.<sup>87</sup> The first Parliament of Charles' reign was assembled in 1625 and possibly because none of the main grievances of the previous reign were yet redressed and in an effort to force the king to reform, the customary grant of *tonnage and poundage* was not made for the king's lifetime as had been the practise for two centuries, but only for one year.<sup>88</sup> The king reacted by dissolving Parliament.<sup>89 90</sup>

The King then resorted to exacting money under the guise of loans and those who did not comply were pressed to serve in the navy if commoners, while the gentry were committed to prison.<sup>91</sup> This led to the Petition of Right presented by the Commons at the next Parliament in the shape of a declaratory statute<sup>92</sup> which *inter alia* stated:

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<sup>83</sup> Hallam op cit 301 to 302.

<sup>84</sup> Hallam op cit 374.

<sup>85</sup> Hallam op cit 419.

<sup>86</sup> Wiechers op cit 87.

<sup>87</sup> Ibid.

<sup>88</sup> Hallam op cit 376.

<sup>89</sup> Ibid.

<sup>90</sup> The reason for not making the grant for the king's life was most probably an effort to force the king to hold regular parliaments, as life grants made the kings less dependent on parliament. Despite laws requiring parliaments to be held every year, Edward IV during his reign of 22 years held but 6 parliaments (Maitland op cit 178).

<sup>91</sup> Hallam op cit 383.

<sup>92</sup> Hallam op cit 389.

“...that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax or such like charge, without common consent by Act of Parliament.”<sup>93</sup>

Eventually civil war broke out and Charles was beheaded in 1649 whereupon Oliver Cromwell took over as Lord Protector. Eleven years of “republican rule” followed but the constitutional changes that Cromwell attempted to introduce was of little consequence to public law.<sup>94</sup> An interesting insight into Charles I’s belief in his divine right to rule appears from his last words before execution quoted by Fraser:<sup>95</sup>

“For the people truly I desire their liberty and freedom as much as anybody whatsoever; but I must tell you that their liberty and freedom consists in having government, those laws by which their lives and goods may be most their own. It is not their having a share in the government; that is nothing appertaining to them; a subject and sovereign are clear different things...”

The monarchy was reinstated in 1660 and Charles II (1660 – 1685) succeeded in avoiding open confrontation with Parliament.<sup>96</sup> Of significance from a public law point of view during this period was the principle that was laid down in the impeachment case of Danby in which Danby’s defence of having acted on the express instructions of the King was rejected as:

“No Minister can shelter himself behind the throne by pleading obedience to the orders of his sovereign.”<sup>97</sup>

James II (1685 – 1688) succeeded Charles II. He was the second son of Charles I and like his father started his reign on a collision course by proclaiming absolute power and also acting accordingly.<sup>98</sup> Within three years of his succession, the so-called glorious revolution broke out in 1688 and James II was deposed.

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<sup>93</sup> Hallam op cit 392.

<sup>94</sup> Wiechers op cit 91. For a biography of Cromwell see Fraser A *Cromwell our Chief of Men* (1975).

<sup>95</sup> Op cit 291.

<sup>96</sup> Wiechers op cit 91.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

The throne was offered to William of Orange (1689-1702) and his wife Mary.<sup>99</sup>

When it became apparent that William III would leave no heir, Parliament passed the Act of Settlement (1701) which was primarily aimed at governing succession to the throne but also had important public law provisions such as:

- The principle that no member of the House of Commons is permitted to hold a remunerative office under the Crown.<sup>100</sup>
- The appointment of judges at a fixed salary that could not be reduced *quamdiu se bene gesserint*.<sup>101</sup>
- The King's pardon would not be a defence in the case of an impeachment by the Commons.
- The Kings were to rule in accordance with the law and the law guaranteeing the religious rights and freedom of the people were reinstated.<sup>102</sup>

After the Act of Settlement the struggle between the King and Parliament came to an end.<sup>103</sup> Parliament started to assume absolute power and the doctrine of parliamentary sovereignty became established.<sup>104</sup> A catalyst occurred in 1714 when the Hanoverian monarchs acceded to the throne. Probably because George 1 (1714-1722) did not have a good understanding of English, the King gradually withdrew from attending

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<sup>99</sup> Carpenter op cit 41 – see footnote 93 for an interesting observation on the legality of the succession and its constitutional implications.

<sup>100</sup> This principle became part of South African public law and is presently contained in Section 47 (1) (a) of the 1996 Constitution.

<sup>101</sup> This principle is also contained in Section 177 of the South African Constitution 1996.

<sup>102</sup> See Wiechers op cit 93 and Carpenter op cit 42.

<sup>103</sup> Wiechers op cit 94.

<sup>104</sup> Wiechers op cit and Carpenter op cit 43. For a history of the development of the doctrine of parliamentary sovereignty see Barry GN *Die Soevereiniteit van die Parlement* unpublished LLD thesis University of South Africa (1968).

Cabinet meetings.<sup>105</sup> This led to one of the Members of Cabinet having to chair Cabinet meetings, which eventually gave rise to the position of Prime Minister.<sup>106</sup>

Cabinet government developed during this period from what was originally an advisory body (*Curia Regis*) to the executive arm of government that we know today.<sup>107</sup> Whereas the King dominated policies up to the end of the Seventeenth Century, the Eighteenth Century heralded the era of great parliamentarians, such as William Pitt the Elder, William Pitt the Younger, Lord Chatham, Lord North, John Wilkes and Edmund Burke.<sup>108</sup> Although Parliament had by then been accepted as sovereign,<sup>109</sup> Parliament was by no means representative of the people. Apart from the fact that the franchise was still limited, there existed glaring inequalities of constituencies.

Hall<sup>110</sup> is of the opinion that very few people initially exercised their vote and that voting was considered a burden. It was not considered a *right* but a liability, which the majority would have preferred to escape.<sup>111</sup> In the case of the boroughs, the franchise varied from borough to borough,<sup>112</sup> but it appears that the general rule was that a voter had to be a *freeman* of the borough, although there was no uniform definition of *freeman*.<sup>113</sup> As far as the composition of the Commons was concerned, the majority of the members were knights of the shire although there were only 37 counties compared

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<sup>105</sup> Carpenter op cit 45 and Mackintosh JP *The British Cabinet* (1977) 51 and May op cit 7.

<sup>106</sup> Carpenter op cit 46.

<sup>107</sup> See Mackintosh op cit; Wiechers op cit 95 to 101 and Carpenter op cit 43 to 48 for detail.

<sup>108</sup> Howat GMD *From Chatham to Churchill* (1966) 12 to 19.

<sup>109</sup> Carpenter op cit 138.

<sup>110</sup> Op cit 91.

<sup>111</sup> Hall op cit 174 quotes the example of the borough of Torrington who successfully petitioned the king to be excused from sending members to parliament.

<sup>112</sup> Maitland op cit 174.

<sup>113</sup> Hall op cit 93.

to 166 boroughs.<sup>114</sup> It is therefore clear that up until that point, Parliament was seen as representative of, but by no means as being *responsible to the people*.<sup>115</sup> Significant development towards responsible government only started after the Industrial Revolution,<sup>116</sup> although the excesses of the French Revolution initially had a negative effect on political advancement.<sup>117</sup>

During the reign of George III (1760 to 1820), the House of Commons had over 550 members of which more than 400 represented boroughs and less than 100 the counties.<sup>118</sup> Cornwall with its 21 boroughs returned 42 members, which was totally out of proportion to its population size.<sup>119</sup> Making matters worse was the fact that almost half the boroughs in the country were in the “pockets” of influential families and it often happened that the same family held a seat in Parliament for generations. In Somerset, for example, the Whitemore family represented Bridgenorth in Parliament for more than 200 years.<sup>120</sup>

Reform was slow as both the Tory Government and the Whig opposition were adamant that Parliament should remain in the hands of men with land and property.<sup>121</sup> However, the Industrial Revolution created a new propertied class that was unrepresented in Parliament. Although the Whig leader, Lord Grey (1764 to 1845), was sympathetic to extending the franchise to include the new class, the gulf between Whig concessions

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<sup>114</sup>Each returning two members. See Hall op cit 94 and Maitland op cit 172.

<sup>115</sup> Hall op cit 94.

<sup>116</sup> Hall op cit 214.

<sup>117</sup> Ibid.

<sup>118</sup> Howat op cit 11.

<sup>119</sup> Ibid.

<sup>120</sup> Howat op cit 12.

<sup>121</sup> Howat op cit 73.



and radical ambitions was bridged by Lord Durham (1792 to 1840), a rich aristocrat who appreciated that reform was necessary.<sup>122</sup>

The revolutions in France and Germany in 1830 brought matters to a head as it was realised just what a dissatisfied people might do.<sup>123</sup> When George IV (1820 to 1830) died, the Tory majority of Wellington was seriously reduced in the general election that followed the King's death. The new King, William IV (1830 to 1837) invited the Whigs under Lord Grey to take office and Grey's ministry introduced three reform bills. The House of Lords rejected the first two Bills and the country responded by rioting. England came very near to revolution and Grey persuaded William IV to create a sufficient number of Whig peers to pass the third reform Bill through the House of Lords.<sup>124</sup>

Before the reforms of 1832 there were glaring inequalities in the relation of representatives to population, especially in the boroughs.<sup>125</sup> The changes in population which followed the Industrial Revolution greatly increased the inequality and Adams describes the situation as follows:<sup>126</sup>

“Larger new towns arose which had no representation. Old boroughs lost populations heavily. Old Sarum had no electorate, Galton had seven voters and Tavistock had ten, yet they each returned two members to Parliament, while Manchester and Birmingham returned none. Forty-six constituencies, each with less than fifty electors returned a total of Ninety members. Moreover, the decline in population combined with a limited suffrage delivered many boroughs completely into the hands of neighbouring great landowners. These landowners either controlled the election through their ownership (the so-called pocket boroughs), or found it easy to buy the required number of votes (the rotten boroughs). The Duke of Newcastle nominated eleven Members of the House of Commons, Lord Lonsdale nine, and Lord Fitzwilliam eight. Six peers together sent forty-five members to Parliament. In this way, nearly half the Membership of the House represented private interest rather than a public constituency.”

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<sup>122</sup> Howat op cit 74.

<sup>123</sup> Howat op cit.

<sup>124</sup> See Adams GB *Constitutional History of England* (1941) 436 – 440 for a full account of the constitutional intrigues preceding the passing of this Act.

<sup>125</sup> Adams op cit 435.

<sup>126</sup> Ibid.

The Reform Act of 1832 removed the “rotten” and “pocket” boroughs that were created by the Tudor monarchs and Elizabeth I.<sup>127</sup> At that stage, the population of Britain was 15 million of which less than half a million could vote. The reform bill extended the vote to just over three-quarters of a million people, which was still a far cry from real representative democracy.<sup>128</sup> However, that this was considered a great achievement is clear from Lord Macaulay’s (1800 to 1859) description of the event to a friend:<sup>129</sup>

“Such a scene as the division of last Tuesday I never saw, and never expect to see again. If I should live fifty years, the impression of it will be as fresh and sharp in my mind as if it had just taken place. It was like seeing Caesar stabbed in the Senate-house, or seeing Oliver Cromwell taking the mace from the table; a sight to be seen only once, and never to be forgotten. And so ended a scene which will probably never be equalled till the reformed Parliament wants reforming; and that I hope will not be till the days of our grandchildren.”

Nevertheless, Parliament still consisted mainly of aristocrats and landowners. The middle classes, let alone the working classes, did not gain much.<sup>130</sup> The Reform Act of 1867 further enlarged the electorate and rearranged constituencies in such a way that they were more representative than before, which stimulated greater public interest in politics.<sup>131</sup> Many of the working classes in towns could now vote, but agricultural labourers numbering approximately 2.5 million were still excluded.<sup>132</sup> Further reform, however, followed rapidly. The secret vote was introduced in 1872, agricultural labourers received a vote in 1885 and by 1900 six million men had the vote based on household or parental qualifications.<sup>133</sup> Women over 30 received the vote in 1918 and in 1928 all adult subjects received the vote.<sup>134</sup>

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<sup>127</sup> Carpenter op cit 164 and 189.

<sup>128</sup> Howat op cit.

<sup>129</sup> Howat op cit 75.

<sup>130</sup> Ibid.

<sup>131</sup> Mackintosh op cit 175 and Carpenter op cit 49.

<sup>132</sup> Howat op cit 77.

<sup>133</sup> Howat op cit 146.

<sup>134</sup> Howat op cit 147.

This may sound strange to the present day voter, but the continuity of Parliament was an historic achievement by which erratic monarchy was replaced with a self-regulating body and it was the most critical link in the democratic process that distinguished Britain from other countries at that point in history. This may have prompted Jean Jacques Rousseau to make the following statement:

“The English people believes itself to be free; it is gravely mistaken; it is free only during the election of members of Parliament; as soon as the members are elected, the people are enslaved; it is nothing. In the brief moments of its freedom, the English people make such a use of that freedom that it deserves to lose it.”<sup>135</sup>

The Westminster system therefore developed from a system where members were called (summoned) to sit in Parliament, to a system where members were elected by popular vote. In-between various election practices developed, none of which could be said to achieve representation of the population as a whole until general suffrage without qualifications prevailed in 1928. However, irrespective of how members of Parliament were elected, it appears that the House of Commons was always seen to represent the people as a whole and that laws passed by Parliament were accepted as the law of the land by the whole population.<sup>136</sup>

### 2.3 SOUTH AFRICA PRE-UNION

Before 1853 elected representatives of the people played no part in the government of South Africa, although directly elected municipal councils existed after 1834.<sup>137</sup> Prior to the settlement of the Dutch East Indian Company at the Cape in 1652, the inhabitants of the territory that later formed South Africa were not organised in a constitutional

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<sup>135</sup> As quoted by Sampson, Anthony *The Changing Anatomy of Britain* (1981) 14. Rousseau was of the opinion that every representative government was in its own nature illegitimate as he conceived representation delusive and impossible. See Guizot M, *History of the Origin of Representative Government in Europe* (1852) 335. See Chapter 3.

<sup>136</sup> Wiechers op cit 80.

<sup>137</sup> Rautenbach and Malherbe *Constitutional Law* (1996) 11.

framework comparable to that of a representative state and representation in its modern sense was not known.<sup>138</sup>

Under Dutch rule, legislative and executive powers were entrusted to a political council that consisted of four nominated members with the governor as chairperson.<sup>139</sup> The earlier form of local government in South Africa was the system of *Landdros* and *Heemrade* which was instituted in 1658. However, the members were appointed and not elected.<sup>140</sup> The first constitution in South Africa was adopted on 6 June 1837 by a general assembly of Voortrekkers at Winburg when a provisional constitution consisting of nine articles was adopted and in terms whereof the supreme legislative powers were vested in a chamber named the *Volksraad* (National Assembly).<sup>141</sup> The Voortrekkers had a form of direct democracy in that every matter of importance after adoption by the Volksraad, had to be referred to the burghers in primary assembly for approval. This resulted in a very weak government as the burghers refused to pay any but the most trifling taxes.<sup>142</sup> This system ended when the British annexed Natal in 1840 and it can therefore be stated that before 1853 elected representatives of people played no part in the government of South Africa.<sup>143</sup>

### 2.3.1 CAPE COLONY 1853 TO 1910

Representative government was instituted for the first time in South Africa in 1853 in the then Cape Colony by ordinance number 2 of 1852 which took effect on 1 July

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<sup>138</sup> Rautenbach and Malherbe op cit.

<sup>139</sup> Potgieter DJ Editor-in-Chief *Standard Encyclopaedia of South Africa* Vol 2 (1970) 202.

<sup>140</sup> *Standard Encyclopaedia of South Africa* Vol 7 12.

<sup>141</sup> Theal G M'C *South Africa* sixth ed (1899) 201.

<sup>142</sup> Theal op cit 219 to 220.

<sup>143</sup> Rautenbach and Malherbe op cit 11.

1853.<sup>144</sup> The Westminster model was followed and Parliament consisted of the Governor (representing the head of state), a Legislative Assembly (upper house) and a House of Assembly (lower house).<sup>145</sup>

The Legislative Assembly consisted of the Chief Justice and fifteen elective members.

<sup>146</sup> Eight of the fifteen members were elected by the Western districts and seven by the Eastern districts.<sup>147</sup> The House of Assembly consisted of forty six members elected in twenty two electoral divisions each returning two members except Cape Town which returned four members.<sup>148</sup> It is interesting that the upper house (Legislative Assembly) was also an elected chamber (with the exception of the Chief Justice) and not a nominated body, as one would have expected a second chamber would have been introduced to safeguard the interests of the crown. In this respect the Cape Legislature was ahead of the “mother of Parliaments”.<sup>149</sup>

Franchise qualifications were liberal compared to the position in Britain at that time and no distinction was made on grounds of race or colour. All adult male British subjects resident in the Colony, who occupied land and premises of £25.00 value or earned a salary or wages of £50.00 per year, or £25.00 with free board and lodge, could vote.<sup>150</sup> The qualifications were later altered to exclude commercial land tenure.<sup>151</sup> The property occupation test was raised from £25.00 to £75.00 and the £25.00 salary and

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<sup>144</sup> Eybers GW *Select Constitutional Documents Illustrating South African History 1795 to 1910* (1918) 45.

<sup>145</sup> Section 1.

<sup>146</sup> Section 3.

<sup>147</sup> Section 4.

<sup>148</sup> Sections 6 and 7.

<sup>149</sup> Eybers op cit XXXV. It is interesting that according to the Colonial Laws Validity Act of 1865 representative legislature was defined as “Any colonial legislature which ...comprise a legislative body of which one half are elected by inhabitants of the colony.” Wheare KC *The Constitutional Structure of the Commonwealth* (1963) 170.

<sup>150</sup> Hahlo HR and Kahn E *South Africa the Development of its Laws and Constitution* (1960) 54.

<sup>151</sup> *Parliamentary Voters Registration Act* 14 of 1887, section 17.

board and lodge qualifications were eliminated by the Franchise and Ballot Act Number 9 of 1892. At the same time, the secret ballot was introduced. Although political parties started to rise towards the end of the nineteenth century,<sup>152</sup> they seem to have had very little control over individual members of Parliament who enjoyed a free mandate of representation, at least in theory. However, Eybers,<sup>153</sup> without quoting any authority, was of the opinion that the principle of a free mandate as enunciated by Edmund Burke<sup>154</sup> may still have been the guiding principle of most members in Britain, but that it was denied at the Cape from the very start. He put it as follows:<sup>155</sup>

“...in 1775 Edmund Burke made it clear to his electors at Bristol, that in every question brought before Parliament, it was he as member who was to decide, and not they as constituents. This principle, it has been said by a distinguished author who ought to know, is still the guiding principle of most members in Great Britain today. At the Cape this principle was denied from the very start. Members, when elected, were instructed – there is no other word to use – to act on broad issues in a certain way. Had they not signified their intention to act in such a way they would not have been elected; and having signified such an intention, and having been consequently elected, they were bound to adhere to their undertakings or to resign their seats. If it were not so, democracy would not be anything real, and party government would be an oligarchic rule. So many thousand men selected one man to represent their views on certain matters and to do his utmost to get those views enforced. If at any time he found that he could not at any time support those views, it was his duty to make place for someone who could, though nowhere in the Empire has a law yet been passed compelling him to do so. Occasionally a member would be sent to Parliament on the understanding that he would act at his own discretion; then the case was different. And there were always numberless matters on which a constituency could not, or at any rate did not make up its mind. In every such case the member would act as seeing best to him.”

In contradiction to Eybers’ imperative theory of representation, an example of the free mandate enjoyed by members of the Cape legislature is manifested by the motion of no confidence in Sir Gordon Sprigs’ Government, passed in 1899. Sir Gordon had a majority of seven in the house, but the motion of no confidence was carried by four votes which means that eleven members changed their allegiance.<sup>156</sup> However, it should be borne in mind that political parties at this stage still did not have full control over their members. The Cape Parliament was a model of a representative government

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<sup>152</sup> See Chapter 3.2.

<sup>153</sup> XXXVI.

<sup>154</sup> See Chapter 4.

<sup>155</sup> Eybers op cit XXXV to XXXVI.

<sup>156</sup> Deverux Roy *Sidelights on South Africa* (1899) 17.

towards the end of the nineteenth century and it served as a mould for the Parliaments later introduced to the other colonies as well as the later Union Parliament.<sup>157</sup>

### **2.3.2 ORANGE FREE STATE 1837 – 1910**

As indicated above, the first constitution adopted by the Voortrekkers was at Winburg in 1837. This constitution was, however, never ratified and it was only after the Orange Free State formally came into existence as a republic on the conclusion of the Bloemfontein Convention, on 23 February 1854, between Sir George Clark as British Envoy and representatives of the White population between the Orange and Vaal rivers, that the first formal constitution was adopted by an elective assembly of twenty nine representatives.<sup>158 159</sup>

A Volksraad specifically elected for that purpose adopted the first constitution in 1854.<sup>160</sup> The franchise was limited to citizens resident for six months but as it was not clearly stipulated who was entitled to vote the matter was revised in 1866. The vote was extended to White males born in the Orange Free State<sup>161</sup> or resident in the state for more than one year and the registered owner of immovable property to the value of at least 2000 Rix Dollars (article 1.II) or White persons who had been living in the state for at least three consecutive years (article 1.III). Citizens were defined as Whites born in the state, Whites resident for three years or Whites resident for one year owning

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<sup>157</sup> See Chapters 2.3.2, 2.3.3, 2.3.4 and 2.3.5.

<sup>158</sup> *Standard Encyclopaedia of South Africa* Vol 8 346.

<sup>159</sup> The Constitution was modelled on the French Constitution of 1848 with a few modifications based on the American Constitution.

<sup>160</sup> Scholtz GD *Die Konstitusie en Staatsinstellings van die Oranje Vrystaat 1854 tot 1902* (1937) 3.

<sup>161</sup> Section 1.

registered immovables to the value of 2000 Rix Dollars<sup>162, 163</sup> who produced a certificate of good conduct from the Government of the last country of residence and who made a written promise of loyalty.<sup>164</sup> Civil and judicial officials could immediately acquire citizenship through taking the oath of allegiance which meant that they immediately qualified to vote.

The National Assembly consisted of one member for each ward (*veldkornetskhap*) of a district and one member for each town.<sup>165</sup> The first assembly consisted of 29 members who represented approximately 15,000 voters.<sup>166</sup> As the population increased more districts and towns were proclaimed which resulted in a disproportional increase in the size of the Assembly. In 1874 the town of Bethlehem, for example, with only 10 voters and the town of Bethulie, with 24 voters, each sent a member to the National Assembly. Efforts to change the formula were not successful.<sup>167</sup> Further constitutional changes were adopted in 1879 and 1898. In 1879, after the discovery of diamonds and the influx of foreigners, citizenship and the franchise were more concisely determined and in 1898 after the discovery of gold, further amendments were made to the attainment of citizenship and the franchise as a precaution against foreign domination.<sup>168</sup>

These measures were not unreasonable under the circumstances and judged against prevailing conditions met with acceptable public law norms of the time. It appears that

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<sup>162</sup> Changed to £150 in 1868.

<sup>163</sup> Eybers op cit 286.

<sup>164</sup> Hahlo HR and Kahn E *The South African Legal System and its Background* (1968) 75.

<sup>165</sup> Section 6.

<sup>166</sup> Scholtz op cit 49.

<sup>167</sup> Ibid.

<sup>168</sup> Scholtz op cit 14 to 17.



the Orange Free State demonstrated itself to be a stable and well-governed state.

Bryce<sup>169</sup> was prompted to observe that:

“In the Orange Free State, I discovered in 1895 the kind of commonwealth which the fond fantasy of the philosophers of the last century painted. It is an ideal commonwealth...”

He described the constitution as:

“...well suited to the community which lives happily under it...”<sup>170</sup>

and from a constitutional law point of view it is worth noting his observation that:

“...it is a simple constitution, and embodied in a very short, terse, and straightforward instrument of sixty-two articles, most of them only a few lines in length...”<sup>171</sup>

This idyllic situation came to an end with the outbreak of the Anglo Boer War in October 1899. The Orange Free State was formally annexed by Britain on 24 May 1900 by a proclamation by Lord Roberts proclaiming it part of Britain’s dominions to be administered by himself until further notice.<sup>172</sup>

In terms of the peace treaty whereby hostilities were ended<sup>173</sup>... “military rule would at the earliest possible date be succeeded by civil government and as soon as circumstances permit, representative institutions leading up to self-government will be introduced.”<sup>174</sup> But self-rule was only restored in 1907 when responsible government was introduced according to the Cape model.<sup>175</sup>

No records exist of any floor crossing during this period, but as political parties did not exist in the Free State prior to the Anglo Boer War and were still in their infancy during

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<sup>169</sup> Bryce James *Impressions of South Africa* (1900) 393.

<sup>170</sup> Op cit 394.

<sup>171</sup> Ibid.

<sup>172</sup> Eybers op cit 344.

<sup>173</sup> The Vereeniging Peace Treaty signed at Pretoria on 31 May 1902.

<sup>174</sup> Article 7.

<sup>175</sup> May HJ *The South African Constitution* third ed (1955) 2. See also letters patent dated 5 June 1907 Eybers op cit XVII.

the short period of representative government before union, it can be accepted that members had a free mandate as this was the accepted theory of representation at the time.<sup>176</sup>

The peace of Vereeniging<sup>177</sup> contained an agreement in terms whereof the question of granting the franchise to Natives would not be decided until after<sup>178</sup> self-government was introduced.<sup>179</sup> According to Sir Charles Bruce<sup>180</sup> this precluded the British from extending the votes to non-Whites as was the case in the Cape colony, although strictly speaking the term 'Native' did not include Coloureds or Indians. Accordingly the vote was granted to White male British subjects with a qualification which practically only excluded paupers and loafers.<sup>181</sup>

### 2.3.3 SOUTH AFRICAN REPUBLIC (TRANSVAAL) 1852 - 1910

Bryce<sup>182</sup> was not so complimentary towards the South African Republic, the Orange Free State's neighbouring Republic across the Vaal River, also known as the Transvaal. The independence of the South African Republic was recognised by Britain by the Sand River Convention signed on 17 January 1852.<sup>183</sup> However, a rudimentary constitution

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<sup>176</sup> Please see Chapter 4 of this study.

<sup>177</sup> Signed at Pretoria on 31 May 1902, which formally ended the Anglo Boer War.

<sup>178</sup> My underlining.

<sup>179</sup> Article 8 of the Treaty see Bruce Sir Charles *The Transvaal Constitution* Empire Review (1904) 4 and 5.

<sup>180</sup> Ibid.

<sup>181</sup> Op cit 403.

<sup>182</sup> Op cit 187, 512 to 519 and 590 to 595.

<sup>183</sup> Botha PR *Die Staatkundige Ontwikkeling van die Suid Afrikaanse Republiek onder Kruger en Leyds* 1844 to 1899 (1926) 697.

had already been drawn up in 1844 which was adopted on 23 May 1849.<sup>184</sup> Provision was made for annual elections of members of the House of Assembly (*Volksraad*).<sup>185</sup> A formal constitution was adopted by the House of Assembly on 13 February 1858.<sup>186</sup> As in the case of the Orange Free State, the vote was limited to White males only, but the following clauses of the 1858 constitution are relevant to this study.

- Article 12 stated that the people delegated the function of legislation to a House of Assembly (*Volksraad*) which would be the highest authority in the country, but provision was made for a period of three months within which the people could convey their opinion (*oordeel*) to the assembly concerning a law passed except in the case of laws which were urgent. This can be seen as a form of veto power by the electorate which would have had an influence on the manner in which members exercised their mandates.
- Article 31 of the Constitution created a mechanism by which any person could object to the President of the Executive Council about a member, and such a member could be removed before the commencement of a session.
- Article 40 contained the prescribed oath which members had to take prior to taking their seats. Translated into English, it read as follows:

“As elected member of assembly of this Republic I declare, promise and swear solemnly that I have not given or promised any gift to anyone in order to obtain this position; that I will be faithful to the people in the discharge of my office; that I will conduct myself in accordance with the constitution of this republic to the best of my knowledge and according to the dictates of my

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<sup>184</sup> Botha op cit 8.

<sup>185</sup> Section 20, Botha op cit 9.

<sup>186</sup> Botha op cit 12.

conscience and that I will aim at nothing else than to promote the happiness and the welfare of the inhabitants in general.”<sup>187</sup>

It is therefore clear, especially from the reference to the dictates of a member’s conscience, that a member enjoyed a free mandate, although he was subject to a recall and the veto rights of the electorate.

On 12 April 1877 the independence of the South African Republic came to an end with its annexation by Sir Theophilus Shepstone to the British Crown.<sup>188</sup> Two deputations were sent to London to protest against the annexation, but they were not successful.<sup>189</sup> When Shepstone proclaimed the annexation he announced that local autonomy would be instituted, but by 1880 the constitution under which they were to enjoy self-government had not been promulgated.<sup>190</sup> When it was realised that their independence was not going to be restored, the National Assembly of the Old Republic was convened for a special meeting at Paardekraal in December 1880.<sup>191</sup> Gladstone who had criticised the annexation while in opposition had now become Prime Minister in Britain but indicated that Britain would not withdraw from the territory. On 16 December 1880 the Republican flag was hoisted at Heidelberg and fighting ensued at Bronkhorstspuit, Potchefstroom, Laingsnek, Ngogo and finally at Majuba where the British force was defeated.<sup>192</sup> An armistice was concluded on 5 March 1881 in terms whereof the Transvaal state (as it was called in the Treaty) was again recognised as an independent political community to enjoy complete self-government but under the sovereignty of the British Crown.<sup>193</sup>

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<sup>187</sup> My translation from Eybers op cit 371.

<sup>188</sup> Botha op cit 101.

<sup>189</sup> Botha op cit 102 to 103.

<sup>190</sup> Bryce op cit 195.

<sup>191</sup> Botha op cit 105.

<sup>192</sup> Botha op cit 105.

<sup>193</sup> Bryce op cit 200.

As in the case of the Orange Free State the Republican constitution of the South African Republic ended with the Anglo Boer War and was replaced by Crown Colony government until 1906 when responsible government was introduced following the Cape model.<sup>194</sup> Letters patent conferring full responsible government to Transvaal were issued on 6 December 1906 and published in the Transvaal Government Gazette on 12 January 1907.<sup>195</sup> As in the case of the Cape Colony, two chambers were instituted: a Legislative Council and a Legislative Assembly. However, unlike the Cape Colony, the members of the Legislative Council (15) were to be nominated by the Governor, while the members of the 69-member Legislative Assembly were elected by White male British subjects possessing certain qualifications.<sup>196</sup> The first political party, *Het Volk*, was formed by General Louis Botha.

### 2.3.4 NATAL 1856 - 1910

Eybers<sup>197</sup> divided the early constitutional history of Natal into five periods, namely:

- 1835 – 1838 British Settlers in Natal
- 1838-1844 Boer occupation
- 1844-1856 Annexation to Cape Colony
- 1856-1893 separate colony and Legislative Assembly
- 1893-1910 responsible government

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<sup>194</sup> May op cit 2.

<sup>195</sup> Eybers op cit XXIV.

<sup>196</sup> Eybers op cit XXV.

<sup>197</sup> X\_xxx.

However, for the purpose of this study the periods up to 1856 are not relevant, except for a reference to the manifest signed by Piet Retief on 7 May 1838 when he left the Cape Colony to settle in the hinterland.<sup>198</sup>

“We are resolved, wherever we go, that we will uphold the just principles of liberty”<sup>199</sup>

There is no record of a constitution of the Republic of Natal but by the end of 1838 there was a Legislative Assembly chosen by the people consisting of 24 members, one of whom was appointed president.<sup>200</sup> The British took military possession of Natal in 1841 and in 1844 it was annexed to the Cape Colony. In 1856 Natal was proclaimed a colony by Charter number 113 and representative government was introduced creating a single chamber of sixteen members of which twelve were to be elected and four nominated.

Membership of the Legislative Assembly was gradually increased and by 1883 it numbered thirty, of which twenty three were elected, five were appointed officials and two were appointed non-officials. The franchise, as in the Cape colony, was open to all adult male British subjects and the qualification was ownership of immovable property of £50.00 or rental of it to the annual value of £10.00.<sup>201</sup> The qualification excluded almost all non-Whites at that time, but by 1865 there was a distinct danger that Black voters could swamp the polls as the Blacks outnumbered the Whites twelve to one,

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<sup>198</sup> Clause 5 of the Manifest.

<sup>199</sup> Eybers op cit 144.

<sup>200</sup> Eybers op cit x-vii.

<sup>201</sup> Labistour GA de Roqueneuil *The Constitutional Settlement of the Orange River Colony and the Transvaal* (1901) 19.

excluding the territory of Zululand.<sup>202</sup> Consequently, Act number 11 of 1865 was passed, disenfranchising Black voters, other than those especially given the vote by the Lieutenant Governor, in his free discretion on the grounds of twelve years residence, exemption from Native law for seven years, the recommendation by three White voters and possession of the ordinary property qualifications. However, prior to this a Native trust was created by Letters Patent of 27 April 1864 to hold and administer land occupied communally by Blacks. Further measures to curtail the vote of non-Whites were introduced in 1883<sup>203</sup> and again by the Constitution Act of 1893.<sup>204</sup>

The lower house had thirty seven elected members (later 43) from thirteen electoral districts (later seventeen) with two, three or four representatives each. The ratio of seats to registered voters of the colony as a whole was one to five hundred and fifty one, but a Durban borough, for example, averaged 1500 voters per seat, while Alfred County with only 389 voters had two seats,<sup>205</sup> resulting in very unequal representation. In 1896 the Franchise Amendment Act No.8 of 1896 was adopted in terms whereof non-Whites were excluded from future rolls, while respecting existing rights.

It is interesting to note that by the turn of the nineteenth century, 99% of the names of those on the roll were those of Europeans, although even two thirds of adult White males were not registered. According to the 1904 census, Natal had 97,109 Europeans, 100,918 Asiatics and 910,727 Blacks.<sup>206</sup>

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<sup>202</sup> Hahlo and Kahn op cit 67.

<sup>203</sup> Franchise Amendment Law 2 of 1883.

<sup>204</sup> Law number 14 of 1893 introduced a bi-cameral Parliament with an upper house composed of eleven nominees resident in the Colony for ten years, of the age of thirty years or above and owning immovables of the value of £500.00 excluding mortgages.

<sup>205</sup> Hahlo and Kahn op cit 17.

<sup>206</sup> Hahlo and Kahn op cit 71 to 72.

Towards the close of Natal's colonial life, the mismanagement of the administration of Native affairs led to an uprising and the proclamation of martial law. It can be safely stated that if it was not for the formation of the Union of South Africa 1910, Natal would have had to introduce serious political reforms.<sup>207</sup> By the time Union was formed in 1910 no political party activity of note existed in Natal and most members of the Union Parliament were elected as Independents, which is the ultimate free mandate.

## 2.4 UNION OF SOUTH AFRICA 1910 TO 1961

When Union was proclaimed on 2 December 1909, to take effect on 31 May 1910, the four colonies that were to form the Union of South Africa, all enjoyed equal status as responsible government colonies.<sup>208</sup> The colonies had similar constitutions based on the Cape model and the constitution of the Union was, "except for the Provincial Council system", a replica on a larger scale of the pre-existing constitutions of the four colonies.<sup>209</sup> As shown above, there existed different qualifications for the franchise in the four colonies that became the Union of South Africa in 1910.<sup>210</sup>

At the National Convention (1908-1909) where the constitution of the Union of South Africa was deliberated, the major objection of the Cape Colony was the political colour bar.<sup>211</sup> Although the British Government indicated that the further the convention went in the direction of a colour-blind general civilisation test for the franchise, the better the prospects for transfer of power to a union Parliament would be, Transvaal and Orange Free State delegates insisted that there would be no Union at all should the non-White

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<sup>207</sup> Hahlo and Khan op cit.

<sup>208</sup> May HJ op cit 1.

<sup>209</sup> Ibid.

<sup>210</sup> See chapters 2.3.1, 2.3.2, 2.3.3 & 2.3.4.

<sup>211</sup> Cape House of Assembly debates (1909) 1 to 156.



vote be extended to the northern provinces.<sup>212</sup> In the end a compromise was reached in terms whereof the position in the Cape was safeguarded by requiring a two-third majority of all members of both houses at a third reading for a repeal or amendment of Section 35 that regulated the qualification of voters.<sup>213</sup>

WP Schreiner (1837-1919), a former Cape premier, was a strong supporter of the retention of the traditional colour blind Cape voting policy and proposed that the non-White franchise should not only be entrenched by a two-third majority of both houses as was laid down in the Draft Bill, but also by a two-third majority of Cape members.<sup>214</sup>

Schreiner was of the opinion that the so-called entrenched clauses did not provide sufficient safeguards, and he led a deputation to Britain to plead the case with the British Government. However, Britain approved the Draft Bill and on 20 September 1909 it was enacted by the British Parliament as the South Africa Act of 1909. The only concession to the colour-blind advocates was that non-Whites could sit in the Provincial Council of the Cape and Natal but not in the National Parliament. The South Africa Act did therefore not change the position that existed prior to the formation of Union as far as the franchise was concerned. The position immediately after 31 May 1910 was that every subject who had the right to vote immediately before 31 May 1910, had the right to vote under the constitution of the Union of South Africa.

The South Africa Act made provision for a Senate and a House of Assembly. The first Senate was to consist of forty members appointed for ten years. Each of the four

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<sup>212</sup> Hahlo and Kahn op cit 1 to 2. That colour was not a political factor in Britain is borne out by the fact that the first black Member for Parliament, Dadshai Naoroji was elected as the Member for Finsbury as far back as 1892. *Insight UK*, Foreign and Commonwealth Official Publication, January 2003 Order No. 2056.

<sup>213</sup> Section 152.

<sup>214</sup> De Kock and Kruger (eds) *South African Dictionary of Biography* Vol 2 (1972) 637.

provinces could nominate eight Senators elected by the Members of Parliament of a Province sitting together with the Members of the Provincial Council of such a Province.<sup>215</sup> The Governor General in Council could also nominate eight Senators, four of whom were to be selected on the ground of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the Coloured people of South Africa.<sup>216</sup> The smaller Provinces were clearly advantaged by this system as they received many more seats than they would have received if seats were to be allocated proportionally. The House of Assembly was initially composed of 121 seats which were also allocated to favour the smaller Provinces. The Cape Province received 51 seats, the Transvaal 36 seats and the Orange Free State and Natal 17 seats each.<sup>217</sup>

The population of the four provinces at that stage was approximately as follows:

**Table 1**<sup>218</sup>

<b>PROVINCE</b>	<b>WHITES</b>	<b>NON- WHITES</b>	<b>TOTAL</b>
Cape	579,741	1,830,063	2,409,804
Natal	97,109	1,011,645	1,087,054
OFS	142,679	244,636	387,315
Transvaal	297,674	927,674	1,270,348
<b>Totals</b>	<b>1,117,203</b>	<b>4,059,018</b>	<b>5,176,221</b>

<sup>215</sup> Hahlo and Kahn op cit 166 – 168.

<sup>216</sup> Section 24 (ii to iv).

<sup>217</sup> Section 32.

<sup>218</sup> 1904 Census.

At the outset it therefore appears that approximately 70% of the male population had no voting rights and that all females were disenfranchised.<sup>219</sup> In 1930, the Women Enfranchisement Act 18 of 1930 granted the vote to all adult White women without qualification which led to the anomaly that in the Cape and Natal White men still had to meet the income or resident's qualifications, while no such qualifications existed for White women. The Franchise Laws Amendment Act 26 of 1931 abolished all qualification requirements for White males and resulted in general suffrage for all adult White citizens in the Union.

Over time various other amendments to the South African Constitution followed, of which the Representation of Natives Act 12 of 1936 and the Amendment Act 9 of 1956 were the most notable. The first mentioned Act which was adopted with a majority of 169 against 11 votes in a combined sitting of both Houses of Parliament, removed the Black voters in the Cape from the common voters roll to a separate voters roll.

#### **2.4.1. REMOVAL OF BLACKS FROM THE COMMON VOTERS ROLL**

As indicated above, the Representation of Natives Act 12 of 1936 removed the Blacks in the Cape from the common voters roll and at the same time divided the Cape into three constituencies with one seat each in the House of Assembly. However, only Whites were eligible for election in these constituencies. The legality of the removal of the Black voters from the common voters roll was challenged in court but the Appeal

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<sup>219</sup>It is interesting to note that at the National Convention (1908 to 1909) it was proposed that provision be made for the extension of the ballot to women of European descent. General CR de Wet opposed the proposal and General JC Smuts proposed an amendment that Parliament be clearly mandated to extend the ballot to women of European descent with an absolute majority. *National Convention Minutes* (1909) 149. *Notule van verigtingen met aanhangsels van der Zuid Afrikaanse Nasionaal Conventie* (1909) 140.

Court dismissed the Action.<sup>220</sup> To compensate in part for the Cape Blacks' loss of their vote on the common voters roll, Act 12 of 1936 introduced four additional seats in the Senate, whereby the Blacks of the Union could indirectly, through electoral colleges, elect four Senators.

#### **2.4.2 REMOVAL OF COLOUREDS FROM THE COMMON VOTERS**

##### **ROLL<sup>221</sup>**

The most controversial amendment to the South African constitution was the removal of the Coloureds from the common voters roll. The National Party came into power in May 1948 winning 70 of the 150 seats in Parliament and obtaining the support of the Afrikaner Party who had 9 seats. Hancock<sup>222</sup> points out that the 1948 election was South Africa's most momentous election since Union and that it was decided by a minority vote. Hancock<sup>223</sup> analysed the 1948 election results and came to the conclusion that on a one-vote one-value basis the United Party would have received more than 50% of the seats (80 seats) and that the NP/AP alliance combined, less than 40% (60 seats).<sup>224</sup> According to Carpenter,<sup>225</sup> General Smuts of the Transvaal delegation at the National Convention was in favour of a proportional electoral system but in the end a constituency based winner-take-all system was adopted. If the election results of 1948 and 1953 were recalculated proportionally, the history of South Africa

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<sup>220</sup> *Ndlwana v Hofmeyer* 1937 AD 229.

<sup>221</sup> For a concise discussion of this subject see Corbett M M *The Truth About the Constitution Crisis* (1952).

<sup>222</sup> Hancock W K *Smuts-The Fields of Force 1919 to 1950* (1968) 506.

<sup>223</sup> op cit 505.

<sup>224</sup> It can therefore be argued that the apartheid laws introduced between 1948 and 1958 were introduced without a proper mandate even from the White electorate.

<sup>225</sup> Op cit 165.

would have been totally different, which demonstrates just how important the electoral system that applies at a given point in time is.

After the 1948 election the new government knew that it did not have the support of the Coloured voters who rejected the apartheid policy of the National Party. As a step towards implementing its policy of separate development it introduced the Separate Representation of Voters Act,<sup>226</sup> which attempted to remove the Coloureds from the common voters roll and to provide for the election of four White members of Parliament on a separate voters roll for Coloureds. This Act was passed by a simple majority in both houses of Parliament and not by a two-thirds majority as required by section 35 of the South African Act.

A number of Coloured voters challenged the legality of the Act and the Appellate Division had no hesitation in finding that the provision of section 35 had not been complied with. The Statute was declared invalid.<sup>227</sup> In response, the government embarked on a series of actions to achieve its goal, but it was eventually unable to achieve a two-thirds majority in Parliament.

The first attempt was to introduce the High Court of Parliament Bill<sup>228</sup> which provided for a review by Parliament of an Appeal Court judgment invalidating an Act of Parliament. A Minister could bring the review and the members of the Court would be the Members of Parliament sitting as a court of appeal. Harris et al also challenged the legality of the High Court Act and the Act was eventually declared invalid by the

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<sup>226</sup> Act 46 of 1951.

<sup>227</sup> *Harris v the Minister of the Interior* 1952 (2) SA 428 AD.

<sup>228</sup> Act number 35 of 1952.

Appellate Division in the *Minister of the Interior and Another v Harris and Others*.<sup>229</sup>

A general election followed in 1953 and although the National Party slightly increased its majority, it still lacked a two-thirds majority in Parliament and indeed did not receive a majority of the popular vote either.<sup>230</sup>

Undeterred, the Government again strove to remove the Coloureds from the common voters roll by introducing the Appellate Division Quorum Act,<sup>231</sup> requiring eleven judges to sit in final appeal when the validity of an Act of Parliament was in question. At the same time the Senate Act<sup>232</sup> was passed, enlarging the Senate substantially and changing the method of electing its members. Under the new Act, the Senate was to have 60 nominated and elected members. The number of seats for each province was one fifth of its electoral college (Members of Parliament and Members of Provincial Councils combined), with a minimum of eight per province, who would now be elected jointly and not by proportional representation. This resulted in the majority party returning all the elected members. In the enlarged Senate, the government was able to obtain a two-thirds majority in a combined session of both houses of Parliament and consequently secured the passage of the South Africa Amendment Act<sup>233</sup> employing the entrenched procedure. Aggrieved Coloured voters again took the government to court, but in *Collins v Minister of the Interior*<sup>234</sup> the enlarged appeal court upheld the new legislation with a majority of ten to one.<sup>235</sup>

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<sup>229</sup> 1952 (4) SA 769 AD.

<sup>230</sup> The National Party obtained 94 seats to the United Party's 57 seats and the Labour Party's 5 seats. Of the 1,385,591 registered voters 1,218,631 went to the polls. The National Party received 598,718 votes while the opposition received 611,204 votes. The government obtaining 60, 25% of the seats in Parliament while only receiving 49, 1% of the vote was mainly due to the demarcation of constituencies engineered by the ruling party in 1951.

<sup>231</sup> Act number 27 of 1955.

<sup>232</sup> Act number 53 of 1955.

<sup>233</sup> Act number 9 of 1956.

<sup>234</sup> 1957(1) SA 552 AD.

<sup>235</sup> New appointments had in the meantime been made to the appeal court bench.

### 2.4.3 INDIANS

In 1945 an Act was passed to allow for separate representation of Indians in the Transvaal and Natal by three White Members in Parliament.<sup>236</sup> The Indians, however, were not satisfied and boycotted the new dispensation. With the change of government in 1948 the chapter giving representation to Indians was repealed,<sup>237</sup> without having been implemented. The position of the Indians was only again addressed twenty years later in 1968, and thereafter in 1983.<sup>238</sup>

### 2.4.4 FURTHER LAWS OF CONSTITUTIONAL SIGNIFICANCE

Further laws of constitutional significance adopted by Parliament were the Bantu Authorities Act,<sup>239</sup> which laid the basis for a system of self-rule by rural Black communities according to their traditional *public law*, and the Promotion of Black Self-Government Act,<sup>240</sup> which removed the so-called Native representatives from Parliament. It also enacted the ethnic diversity of the Black people of South Africa and divided them into eight ethnic groups. Each of these ethnic groups was granted a specific geographic area in which a degree of self-government could be exercised within the framework of the Bantu Authorities Act.<sup>241</sup>

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<sup>236</sup> Asiatic Land Tenure and Indian Representation Act No.28 of 1946.

<sup>237</sup> Act number 47 of 1948.

<sup>238</sup> See Chapter 2.6.

<sup>239</sup> Act 68 of 1951.

<sup>240</sup> Act 46 of 1959.

<sup>241</sup> Basson DA and Viljoen HP *South African Constitutional Law* (1988) 310.

Basson and Viljoen <sup>242</sup> quote Verloren van Themaat/Wiechers as follows in this regard:

“By 1959 the government’s policy regarding self-governing Black areas had attained new perspectives. In the light of developments in Africa and the growing process of decolonization it was accepted for the first time that these areas could even develop to full independence.”

South Africa went to the polls on 5 October 1960 to decide whether to become a Republic and in the first plebiscite of White voters held in the country: 850,458 votes were brought out in favour of a Republic, against 775,878 opposing a Republic. Percentage-wise the split was 52.29 to 47.71 which was a close shave considering that approximately a hundred and sixty thousand (plus minus 10%) abstained from voting. White voters in South West Africa were also allowed to vote notwithstanding the fact that the territory was never *de jure* a part of the Union of South Africa.

This was the only case of direct democracy applied in the Union of South Africa, albeit only amongst the Whites.

## **2.5 REPUBLIC OF SOUTH AFRICA 1961 TO 1984**

A new constitution was adopted by Parliament in 1961 <sup>243</sup> constituting the Republic of South Africa. The change from Union to a Republic brought no drastic constitutional changes, except for a change in the formal name of the state and the replacement of the British Queen by a State President as head of State with the consequent redundancy of

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<sup>242</sup> Op cit 311.

<sup>243</sup> Act 32 of 1961.



the position of Governor General.<sup>244</sup> The composition of the House of Assembly remained the same and no changes were made to the franchise.

A further phase in the Government's separate development policy for Blacks was introduced in 1963 with the adoption of the Transkei Constitution Act<sup>245</sup> which granted self-government to the *Bantu resident in the Transkei*. A concurrent Transkei citizenship was created and this citizenship granted Transkei citizens the right to vote in the Transkei. The Executive Authority was vested in a Chief Minister and six other Ministers who were responsible for Finance, Justice, Education, Internal Affairs, Agriculture and Forestry, Roads and Works.<sup>246</sup> The Legislative Authority was vested in the legislative assembly which consisted of five Paramount Chiefs, sixty Chiefs and 45 elected members.<sup>247</sup>

In 1968 the South African Indian Council was established,<sup>248</sup> consisting of 45 members of whom 40 were elected and five nominated. However, the Council had no legislative powers, acted only in an advisory capacity and was therefore unsuccessful as a means of exercising political rights.<sup>249</sup> The South African Indian Council was abolished by the Constitution Act of 1983.<sup>250</sup>

In 1969 Parliament created the Coloured Persons Representative Council<sup>251</sup> which was an attempt to establish a type of Parliament where the Coloureds could exercise their

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<sup>244</sup> Basson and Viljoen op cit 37 to 38.

<sup>245</sup> Act 48 of 1963.

<sup>246</sup> Part 4 iv of the Act.

<sup>247</sup> Section 37. Changes to the composition of the legislative assembly were made from time to time.

<sup>248</sup> Act 31 of 1968.

<sup>249</sup> Basson and Viljoen op cit 323.

<sup>250</sup> Act 110 of 1983.

<sup>251</sup> Act 49 of 1964.

political rights. The Council had Legislative powers on matters such as finance, education, local government and community welfare subject to extensive restrictions. The Council consisted of 60 members of whom 40 were elected by the Coloured voters and 20 nominated by the State President. However, the Council was not a political success and it was dissolved in 1980<sup>252</sup> at which stage it had passed only a few Acts.<sup>253</sup>

In 1971 the National States Constitution Act<sup>254</sup> was passed to make provision for the development of Black nations to self-government and independence. Chapter II of the Act provided for self-government for other ethnic groups to the same extent as the Transkei had after 1963 and self-government was subsequently introduced in all the so-called homelands.<sup>255</sup>

In 1974 the National Assembly passed the Status of Transkei Act<sup>256</sup> to provide for the Transkei to become independent where after the Transkei Legislature passed the Transkei Constitution Act. Basson and Viljoen<sup>257</sup> described the Transkei Constitution as follows:

“The Transkei Constitution Act has been modelled on the South African constitutional tradition and is, therefore, in the Westminster mould of the Constitution Act of the RSA. For this reason, then, the Transkei Constitution Act, is called a borrowed constitution. It incorporated to a large extent the most important features of the 1963 Constitution Act. The British doctrine of Parliamentary sovereignty is very evident in this Constitution Act.”

Legislative power was vested in a one chamber Parliament comprising the President and the National Assembly. The National Assembly consisted of 150 members of

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<sup>252</sup> Act 24 of 1980.

<sup>253</sup> Basson and Viljoen op cit 322.

<sup>254</sup> Act 71 of 1971.

<sup>255</sup> Bophuthatswana, Venda, Ciskei, Gazankulu, KwaZulu, Lebowa, QwaQwa, KaNgwane and Kwa Ndebele.

<sup>256</sup> Act 100 of 1976.

<sup>257</sup> Op cit 313.

which 75 were elected and 75 non-elected, being five Paramount Chiefs and 70 Chiefs.<sup>258</sup>

Of the other self-governing Black territories only three opted for independence after the Transkei, namely Bophuthatswana,<sup>259</sup> Venda<sup>260</sup> and Ciskei.<sup>261</sup> Each of these states passed its own Constitutional Act, but it falls outside the scope of this study to discuss these constitutions, suffice to say that they deviated more from the Westminster mould than the Transkei.<sup>262</sup>

An important constitutional amendment was enacted in 1980 when the Senate was abolished and the President's Council<sup>263</sup> established, at the same time instituting the office of Deputy State President. The main purpose of instituting the President's Council was to create a multiracial body to advise the government regarding a new constitutional dispensation for South Africa.<sup>264</sup>

The Council originally consisted of 60 members of all population groups except the Black Group and they were all appointed by the State President. The Council made recommendations that led to the adoption of a new constitution in 1983,<sup>265</sup> which constitution deviated from the Westminster mould in many ways. Apart from the fact

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<sup>258</sup> The Transkei Parliament therefore deviated in two important aspects from the Westminster tradition, namely one chamber and half the members being non-elected. In fact the non-elected Members were later increased to 77 putting them in the majority which is contrary to democratic principles.

<sup>259</sup> 7 December 1977.

<sup>260</sup> 13 September 1979.

<sup>261</sup> 4 December 1981.

<sup>262</sup> Basson and Viljoen op cit 317.

<sup>263</sup> In view of the short lifespan of the President's Council only a very brief overview is given in this study.

<sup>264</sup> Basson and Viljoen op cit 76.

<sup>265</sup> Act 110 of 1983.

that the President's Council excluded the largest part of the population it was, as an appointed body, not representative and therefore had no mandate from the electorate.

## **2.6 REPUBLIC OF SOUTH AFRICA 1984 TO 1994: THE TRICAMERAL PERIOD**

The 1983 Constitution came into effect on 2 September 1984 and had introduced major constitutional changes of which the following are relevant to this study:

- Three lower houses of Parliament were created:<sup>266</sup> the House of Assembly for Whites, the House of Representatives for Coloureds and the House of Delegates for Indians
- The vote was extended to Coloureds and Indians, albeit for their own houses (Blacks were however, still excluded)
- An Executive President replaced the position of Prime Minister<sup>267</sup>
- A new concept, foreign to South African constitutional law namely appointed Members of Parliament was introduced<sup>268</sup>
- The system of indirectly elected Members of Parliament introduced in 1980 was extended<sup>269</sup>
- The functions of the President's Council were extended so that it became a unique body which had both an advisory role in executive authority as well as an arbitrator's role in legislative authority<sup>270</sup>

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<sup>266</sup> Section 37(1).

<sup>267</sup> Section 6.

<sup>268</sup> Sections 41B, 42B, and 43B.

<sup>269</sup> Sections 41C, 42C and 43C.

- The President's Council consisted partly of indirectly elected members and partly of nominated members<sup>271</sup>
- The Executive Authority was divided into the own affairs of the three population groups concerned and general affairs.<sup>272</sup>

In the case of own affairs the State President acted on the advice of the Ministers' Council concerned and in the case of general affairs he acted on the advice of the Cabinet. The Cabinet consisted of the State President,<sup>273</sup> Ministers appointed to administer departments of state for general affairs,<sup>274</sup> any Minister designated by the State President as a member of the Cabinet,<sup>275</sup> and any member of a ministers' council designated by the State President as a member of Cabinet.<sup>276</sup>

The Ministers' Councils consisted of Ministers appointed to administer Departments of State for own affairs of one and the same population group.<sup>277</sup> For the directly elected members the one-member constituency electoral system was maintained and the three Houses of Parliament were composed as follows:

- The House of Assembly<sup>278</sup> consisted of 166 elected members, 4 members, one from each province, appointed by the State President, and 8 members elected indirectly by the 166 elected members by means of a proportional system of representation.

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<sup>270</sup> Section 78.

<sup>271</sup> Section 70(1).

<sup>272</sup> Part IV of the constitution.

<sup>273</sup> Section 20(a).

<sup>274</sup> Section 20 (b).

<sup>275</sup> Section 20 (c).

<sup>276</sup> Section 20(d).

<sup>277</sup> Section 21(i).

<sup>278</sup> Section 41.

- The House of Representatives<sup>279</sup> comprised 80 elected members, 2 members appointed by the State President and 3 members elected indirectly by the 80 members as in paragraph 1 above.
- The House of Delegates<sup>280</sup> consisted of 40 elected members, 2 members appointed by the State President, and 3 members elected indirectly by the 40 members as in 1 and 2 above.

Although the 1983 Constitution broadened the basis of representation by extending representation to other population groups apart from the Whites (i.e. the Coloureds and Indians) the largest population group, the Blacks were excluded (as indicated above) with the result that it did not meet the ideal of a truly representative system of government.<sup>281</sup>

The 1983 Constitution also brought an interesting change to the government versus opposition style of politics as the majority parties in the various Houses of Parliament now needed to agree to pass Acts concerning general affairs.<sup>282</sup>

The Provincial Councils that existed in the four provinces since Union were abolished in 1986,<sup>283</sup> but provision was made at the same time for the appointment of members of all population groups to provincial executive committees. The Act also made provision for executive cooperation between the provinces, and the self-governing territories on

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<sup>279</sup> Section 42.

<sup>280</sup> Section 43.

<sup>281</sup> For criticism of the 1983 Constitution see Basson and Viljoen op cit 80.

<sup>282</sup> Basson and Viljoen op cit 96.

<sup>283</sup> By the Provincial Government Act 69 of 1986.

matters of mutual interest.<sup>284</sup> The rights of Black citizens domiciled in the Republic of South Africa who became *strangers* through the independence of the Black homelands were restored by the Restoration of South Africa Citizenship Act,<sup>285</sup> but this was still a far cry from the demands of the disenfranchised majority of the population. However, the most important development during this period was the unbanning of prohibited political organisations in 1990 which was followed by multi--party negotiations. These negotiations in turn led to a declaration of intent, signed by the majority of South African political parties and organisations in December 1991, in which they committed themselves to draw up a new democratic constitution for South Africa. Agreement was reached on the particulars of an interim constitution in 1993 and the interim Constitution was promulgated on 28 January 1994.<sup>286</sup>

## 2.7 REPUBLIC OF SOUTH AFRICA 1994 – 2005

The interim Constitution took effect on 27 April 1994 and the extent to which it changed the South African constitutional order is evident from the fact that it repealed no fewer than 59 Acts of Parliament.<sup>287</sup> The interim Constitution<sup>288</sup> brought an end to the constitutional discrimination that existed at that point in time and the first fully democratic elections in South Africa were held on 27 and 28 April 1994.<sup>289</sup> Apart from giving the active right to vote to all South African citizens, the interim Constitution

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<sup>284</sup> The Executive Authority for KwaZulu and Natal Act 80 of 1986 was a direct outcome of this provision.

<sup>285</sup> Act 73 of 1996.

<sup>286</sup> Act 200 of 1993. Please see Thompson Leonard *A History of South Africa* 3<sup>rd</sup> ed (2006) 249-257.

<sup>287</sup> See Schedule 7.

<sup>288</sup> Although called as such, it was indeed a complete constitution and its transitional nature stemmed from the fact that Chapter 5 made provision for a constitutional body to pass a new constitutional text within 2 years from the date of the first sitting of the National Assembly under the interim Constitution.

<sup>289</sup> Rautenbach IM and Malherbe EFJ *Constitutional Law*, revised 2<sup>nd</sup> ed (1996) 16.

produced four important new constitutional concepts as far as this study is concerned, namely:

- proportional representation
- supremacy of the constitution
- fundamental human rights for all and
- an imperative mandate

### Proportional Representation

A two-chamber Parliament, comprising the National Assembly and the Senate was reintroduced.<sup>290</sup> The National Assembly was to consist of 400 members elected in accordance with a system of proportional representation of voters.<sup>291</sup> A system of election of Members for the National Assembly was provided for in Schedule 2. It made provision for 200 seats to be filled from Regional lists submitted by the respective political parties, with a fixed number of seats reserved for the nine new provinces<sup>292</sup> created by the constitution as follows:

- |                                    |   |          |
|------------------------------------|---|----------|
| • Western Cape                     | - | 21 seats |
| • Eastern Cape                     | - | 26 seat  |
| • Northern Cape                    | - | 4 seats  |
| • KwaZulu-Natal                    | - | 40 seats |
| • Orange Free State <sup>293</sup> | - | 15 seats |
| • Northwest                        | - | 17 seats |

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<sup>290</sup> Section 36.

<sup>291</sup> Section 40.

<sup>292</sup> See Section 1-4.

<sup>293</sup> Presently Free State.



- Northern Transvaal<sup>294</sup> - 20 seats
- Eastern Transvaal<sup>295</sup> - 14 seats
- Pretoria, Witwatersrand, Vereeniging<sup>296</sup> - 43 seats

The remaining 200 seats were to be filled from National lists submitted by the respective political parties or from regional lists where national lists were not submitted.

Seats were to be allocated in terms of a quota established by dividing the total number of votes casts in a region/nationally by the relevant number of seats plus 1. The interim Constitution was silent on how political parties had to compile their candidate lists.<sup>297</sup>

The proportional list system brought an end to the era of the constituency based Member of Parliament. As such it removed Members of Parliament from their constituents, thereby terminating the mandate that a Member needed to have from the constituency he/she represented.<sup>298</sup>

The new senate was composed of 10 senators from each province nominated by parties represented in a provincial legislature according to a proportional representation formula.<sup>299</sup>

Nineteen political parties participated in the first election under the interim Constitution and seven parties gained seats in the National Assembly. The results were as follows:

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<sup>294</sup> Presently Limpopo.

<sup>295</sup> Presently Mpumalanga.

<sup>296</sup> Presently Gauteng.

<sup>297</sup> See Chapter 5.2.5 of this study.

<sup>298</sup> See Chapter 6.1 and 6.2 of this study.

<sup>299</sup> Section 48.

<sup>300</sup> Reynolds, Andrew (Editor) *Election 1994 South Africa: The campaigns, results and future prospects* (1994) 183.

**Table 2:**

African National Congress	-	252 seats
National Party	-	82 seats
Inkatha Freedom Party	-	43 seats
Freedom Front	-	9 seats
Democratic Party	-	7 seats
Pan African Congress	-	5 seats
African Christian Democratic Party	-	2 seats

### Supremacy of Constitution

Section 4 (i) of the interim Constitution determined that the constitution shall be the supreme law of the Republic and that any other law or Act inconsistent with its provisions would be of no force and effect. Section 4 (ii) made the constitution binding on the Legislative, Executive and Judicial organs of state at all levels of government. This brought an end to the sovereignty of Parliament and therefore limited the mandate of Members of Parliament to at most what they are permitted to do in terms of the Constitution. This fundamental change was summed up as follows by the President of the Constitutional Court in *Executive Council Western Cape*

#### *Legislature v President of the Republic of South Africa:*<sup>301</sup>

“Our history, also the history of commonwealth countries such as Australia, India and Canada, was a history of Parliamentary supremacy. But our constitution of 1993 shows a clear intention to break away from that history. The Preamble to the Constitution begins by stating the ‘need to create a new order’. That order is established in s 4 of the Constitution, which lays down that:

‘This Constitution shall be the supreme law of the Republic and any law or Act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.’...Parliament can no longer claim supreme power....it is subject in all respects to the provisions of the Constitution...’<sup>302</sup>

<sup>301</sup> 1995 (4) SA 877 (CC) at 904.

<sup>302</sup> See also *De Lille and Another v Speaker of the National Assembly* 1998(3) SA 430 (CPD) at 451 and *Speaker of the National Assembly v De Lille MP and Another* SA 1999(4) All SA 241 (CPD) at 245. Please also see Chapter 5.7.

### Fundamental Rights

The inclusion of a Bill of Rights in the Constitution, especially such rights as freedom of expression,<sup>303</sup> freedom of assembly, demonstration and petition,<sup>304</sup> freedom of association,<sup>305</sup> and political rights<sup>306</sup> have a bearing on a political representative's mandate as will be more fully discussed later in this study.<sup>307</sup>

### An imperative mandate<sup>308</sup>

Section 43 (b) constitutionalised an imperative mandate in South African constitutional law in as much as it in effect stated that a member who changes political allegiance had to vacate his or her seat.

This appears to infringe fundamental rights such as freedom of expression, freedom of association and political rights such as the right to form, participate in the activities of and to recruit members for a political party, to campaign for a political party or cause and freely to make political choices. However, this matter is more fully discussed in Chapter 6 of this study.

As mentioned above, the interim Constitution, according to its own dictates,<sup>309</sup> was of a transitional nature and as determined by Section 68(2) the Constitutional Assembly had to adopt a constitution which had to be referred to the Constitutional Court for certification in terms of Section 71 of the interim Constitution.

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<sup>303</sup> Section 15.

<sup>304</sup> Section 16.

<sup>305</sup> Section 17.

<sup>306</sup> Section 21.

<sup>307</sup> Chapter 4.

<sup>308</sup> Section 43 (b).

<sup>309</sup> Chapter 5, Sections 68-74.

The certification process as far as it concerns this study is dealt with in Chapter 6.3.1. At this stage it only needs to be pointed out that the final constitution was approved by the Constitutional Court after certain amendments and that the Constitution of the Republic of South Africa Act 1996 came into force on 4 February 1997. As far as this study is concerned, the 1996 Constitution did not, in material terms, change much of the new constitutional order introduced by the interim Constitution, except to replace the Senate by a National Council of Provinces which was also an indirectly elected body and therefore outside the true scope of this study.

However, the 1996 Constitution did deviate from the interim Constitution in one important aspect as far as the mandate of political representatives is concerned: the imperative mandate introduced by the interim Constitution was repealed, although in terms of item 13 of Annexure A, schedule 6, the imperative mandate still applied to members elected in the first election in terms of the 1996 Constitution, i.e. the 1999 election.<sup>310 311</sup>

The 1996 Constitution is more fully discussed in Chapter 6.3.2.

The first elections under the 1996 Constitution were held in June 1999 and 26 political parties participated in the election, of which thirteen obtained seats in the National Assembly.

The results were as follows:<sup>312</sup>

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<sup>310</sup> Rautenbach and Malherbe op cit 113.

<sup>311</sup> The 1966 Constitution is more fully discussed in Chapter 6.3.2.

<sup>312</sup> *National and Provincial Election Results South African Election June 1999.*

**Table 3**

African National Congress	-	266 seats
Democratic Party	-	38 seats
Inkatha Freedom Party	-	34 seats
New National Party	-	28 seats
United Democratic Movement	-	14 seats
African Christian Democratic Party	-	6 seats
Pan African Congress of Azania	-	3 seats
United Christian Democratic Party	-	3 seats
Freedom Front	-	3 seats
Federal Alliance	-	2 seats
Azanian People's Organisation	-	1 seat
Afrikaner Eenheidsbeweging	-	1 seat
Minority Front	-	1 seat

The most notable aspect of the results was the poor performance of the New National Party (NNP) whose support dropped from 82 members in 1994 to 28 members. The Democratic Party on the other hand increased its representation substantially from seven members to 38, becoming the official opposition.

With the first municipal elections to be held under the 1996 Constitution, the New National Party, Democratic Party and Federal Alliance formed an alliance to fight the 2000 municipal elections under the banner of a new political party: the Democratic Alliance (DA). The new party did extremely well at the municipal elections of December 2000.<sup>313</sup> At national and provincial level the three alliance partners had to

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<sup>313</sup> It captured 22.12% of the vote and won 1306 seats.

retain their separate identities because of the anti-defection clause in Schedule 6 of the 1996 Constitution which was still effective for the duration of the lifespan of the 1999 Parliament and legislatures. However, effectively the alliance partners functioned as one and joint caucuses were held.<sup>314</sup> The relationship between the Democratic Party and the New National Party did not flourish and came to a break when the New National Party broke away from the DA towards the end of 2001 to form a new alliance with the ANC.<sup>315</sup>

As indicated above, the position of NNP members of Parliament and the provincial Legislatures was not affected by the alliance between the Democratic Party, New National Party and the Federal Alliance because of the anti-defection clause.

However, NNP councillors who were elected under the DA banner were now caught up in the DA and had to toe the DA line on peril of being expelled and thus losing their seats in terms of the anti-defection clause. The NNP's new alliance partner, the ANC, had the necessary majority in Parliament to make the required amendments to the constitution to enable NNP members of municipal councils who were trapped under the DA banner, to cross the floor without losing their seats. The enactments that followed and the subsequent constitutional court cases are dealt with in detail in chapter 6.3.2. Suffice to say at this stage that during the first window period a total of 23 members of the National Assembly changed their allegiance.<sup>316</sup> The second election under the 1996 Constitution was held on 14 April 2004 and eleven parties participated in the election. The results were as follows:

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<sup>314</sup> As informed by Dr EA Conroy MP, NNP.

<sup>315</sup> Statement by Tony Leon MP *Leader of the Official Opposition* Cape Town 26 October 2001.

<sup>316</sup> Please see chapter 6.4 for detail.

**Table 4**

African National Congress	-	279 members
Democratic Alliance	-	50 members
Inkatha Freedom Party	-	28 members
United Democratic Movement	-	8 members
New National Party	-	7 members
African Christian Democratic Party	-	7 members
Independent Democrats	-	7 members
Freedom Front Plus	-	4 members
United Christian Democratic Party	-	4 members
Pan African Congress	-	3 members
Minority Front	-	2 members
Azanian Peoples' Organisation	-	1 member <sup>317</sup>

## 2.8 CONCLUSION

It is clear that at least up to 1928 in Great Britain and up to 1994 in South Africa, a minority of the adult population elected Parliament. If it is taken into account that even those who had the vote abstained from using it, and that the elected members only represented a percentage of the votes cast, members were elected by a small percentage of the population. In a winner takes all system such as applied in South Africa before 1994, the result was even more unrepresentative of the people's wishes. Looking back at the biased systems by which members of Parliament were elected till the last reforms were introduced in the beginning of the 20<sup>th</sup> century in Great Britain and at the end of the 20<sup>th</sup> century in South Africa, it is close to a miracle that both countries escaped the revolutions that changed the political scene in Europe during the

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<sup>317</sup> Report on the National and Provincial Elections 2004 published by the Independent Electoral Commission 60.

last three centuries and in Africa during the last half of the twentieth century. As far as Great Britain is concerned, Howat<sup>318</sup> explains as follows:

“Although we might wonder at the way in which our ancestors of 200 years ago chose their Parliament, the system was not entirely bad. People on the Continent admired our form of Government and few British people found cause for complaint. Nearly everyone believed that it was right that Parliament should consist of the men of property and landed wealth, since they would have the country’s prosperity at heart...in the eighteenth century, those who lacked the vote were not necessarily disturbed by the fact nor by the type of members in Parliament. Some members were able men who found in politics a chance to be of service to their country. Others we have to admit were more concerned with preserving their own interests and were ready to oppose any sort of reforms. The hardships of daily living and the savagery of the law both needed the attention of a reformist. When things became very bad, men rose in revolt, as did silk weavers in 1765, or looked to their heroes for summary prayers. These included Pitt the Elder, Lord Chatham (1708-1778) who declared himself not unmindful to the sufferings of the poorer sort, Pitt the younger and John Wilkes”.

Maybe Lord Palmerston (1784-1865), who had little interest or sympathy for Parliamentary reform, summed the attitude of the ruling classes up best with the view that “a vote was a trust and not a right”.<sup>319</sup>

In the case of South Africa the Cape Colony started off in 1853 with a more liberal franchise than what existed in Britain at that time, and which was further remarkable for its lack of reference to race. In the Boer republics the franchise was, as far as Whites were concerned, democratic even to the point where it had traces of direct representation. However, the influx of immigrants after the discovery of gold in the Witwatersrand led to the first attempts at constitutional engineering in South Africa when a second chamber was introduced to accommodate the immigrants. A seemingly innocent clause in the Peace Treaty of Vereeniging at the time of signature<sup>320</sup> namely that the franchise would not be extended to Natives until after self-government, in the end had the result that for nearly a century the majority of the

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<sup>318</sup> Op cit 12.

<sup>319</sup> Howat op cit 76.

<sup>320</sup> 31 May 1902.



population in South Africa had no direct access to Parliament and could therefore not mandate political representatives through the Parliamentary process.<sup>321</sup>

The Parliaments of the four colonies that formed the Union of South Africa in 1910 as well as the subsequent Union Parliament were cast in the Westminster mould and as in Britain the South African Members of Parliament were seen to be the representatives of the people even though, *de facto*, they did not represent all the people.

Race issues dominated constitutional development in South Africa especially after 1948. Although the government that came to power in 1948 did not enjoy the support of the majority of the electorate, it gradually instituted constitutional changes that did not meet the approval of the population as a whole and for which they did not have a *de facto* mandate. The way in which the Coloureds were removed from the common voters roll caused indignation which hailed a period of *rule by law* rather than *rule of law*. The democratisation of the South African constitutional system became a vexing matter and a new constitution was adopted in 1983, extending voting rights to Coloureds and Indians but keeping *de facto* control in the hands of the White population. Ten years later the first completely democratic constitution was adopted which culminated in the 1996 Constitution, the fifth since the Union.

The 1996 Constitution may no longer be recognisable as the offspring of the Mother of all Parliaments, but as in the case of heredity, the family features of the Westminster mould are still visible and the present can only be fully appreciated if

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<sup>321</sup> In a way it is tragic that the democratic ideals with which the Boer republics were formed in the end fell by the wayside and that they in reality became oppressors.

seen in its historic context. However, it should be borne in mind that behind the formal legal text that now constitutes the Constitution of South Africa, lies a remarkable story of social and political conflict of three and a half centuries that need to be known in order to fully understand the present. That story unfortunately falls outside the scope of this study.

## CHAPTER 3

**REPRESENTATION: THE DEVELOPMENT OF THE PRINCIPLE IN  
PUBLIC LAW**

*“Our notion of representative government thus seems to incorporate both a very general, abstract, almost metaphorical idea -- that the people of a nation are present in the actions of its government in complex ways -- and some fairly concrete, practical, and historically traditional institutions intended to secure such an outcome.”*

HF Pitkin *The Concept of Representation* (1972) 235.

### 3.1 INTRODUCTION

Hearnshaw<sup>322</sup> points out that the characteristic feature that distinguishes the modern democracy from the Greek, Roman, Medieval, Civic and Cantonal democracies is that the modern democracy is representative and not direct. The principle that a large number of people may be represented in the process of government by a single person or persons is firmly entrenched in contemporary public law and is common to all modern legal systems.<sup>323</sup> However, representation as a public law concept is essentially a modern one and was unknown in ancient Greece and Rome.<sup>324</sup>

Although the ancient Greeks had a number of institutions that involved representation they had no corresponding word for the concept.<sup>325</sup> The word *representation* derives from the Latin *representare* but for the Romans it meant “the literal bringing into presence of something previously absent, or the embodiment of an abstraction in an

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<sup>322</sup> Hearnshaw FJC *Democracy at the Crossways* (1918) 101.

<sup>323</sup> Carpenter op cit 162 and Pitkin HF *The Concept of Representation* (1972) 2.

<sup>324</sup> All Roman citizens were members of the *comitia centuriata* during the republican period and although the national assembly was seen as representative of the entire population, the concept of any one member representing or voting for another had not yet developed. See Carpenter op cit 162.

<sup>325</sup> Pitkin op cit 241.

object.”<sup>326</sup> The modern concept of representation as employed in public law, developed in England “only by the purest chance”<sup>327</sup> to become one of the underlying principles, not only of the Westminster Parliamentary system but of all modern democracies.

### 3.2 REPRESENTATION IN GREAT BRITAIN

Maine<sup>328</sup> calls government by representation a virtually English discovery which caused Parliamentary institutions to be preserved in Britain from the destruction which overtook them everywhere else. He describes it as follows:

“under this system, when it was in its prime, an electoral body, never...extraordinarily large, chose a number of persons to represent it in Parliament, leaving them unfettered by express instructions, but having with them at most a general understanding, that they would strive to give a particular direction to public policy.”

Representation has its origins in the feudal system wherein the feudal lord represented his vassal *vis-à-vis* the king. It developed together with the rise of the parliamentary system<sup>329</sup> - although from different origins, the two systems eventually developed to fit together as hand in glove. The principle of representation developed from the principle of consent in that the representatives received *plena potestas* to agree to the payment of taxes on behalf of their communities.<sup>330</sup> It arose from practical considerations, as constant warfare made it dangerous for all the men of the tribe to leave their homes to attend meetings of the moot.<sup>331</sup>

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<sup>326</sup> Pitkin op cit 3.

<sup>327</sup> Carpenter op cit 29.

<sup>328</sup> Op cit 93.

<sup>329</sup> Basson DA *Grondslae van Verteenwoordiging in die Staatsreg (1982)* 45 THRHR 231.

<sup>330</sup> Basson op cit 241.

<sup>331</sup> Carpenter op cit 163.

Taswell-Longmead<sup>332</sup> put it as follows:

“The theoretical right of the individual to attend the assembly in person was exchanged for the practical right of electing representatives.”

However, feudal law did not recognize the principle that one man could represent another in the giving of his consent and it was through the king’s claiming the Roman private law principle of consent *quod omnes tangit ab omnibus approbetur* that forced subjects to be present with *plena potestas*, which resulted in the link between representation and consent.<sup>333</sup> Basson<sup>334</sup> put it as follows:

“It is therefore clear that the principle of representation, namely that representatives be elected by communities to consent on their behalf to taxes, developed from the doctrine of consent.”<sup>335</sup>

Once the principle of representation is established the question arises as to who or what is being represented. Cam argued that it is the “living communities”<sup>336</sup> that are being represented, i.e. a village, borough, legal corporation, shire etc (not individual subjects). From this developed the idea of the *community of the realm* which gave rise to the notion that the whole community was represented in one institution namely the House of Commons.<sup>337</sup> Representatives no longer represent the interests of their local communities who elected them, but have to act in the common good or general welfare of the community of the realm. In other words, representatives act in the national interest and not in the interests of a particular group.<sup>338</sup> This was made clear by the English Court of Appeal in the judgment of Farwell LJ.<sup>339</sup> The facts of the case in short were that the Plaintiffs sought an order against the defendant, a Labour Party Member of Parliament, to toe the Party line in Parliament in terms of a contract

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<sup>332</sup> Op cit 129.

<sup>333</sup> Basson op cit 237.

<sup>334</sup> Basson op cit 239.

<sup>335</sup> My translation.

<sup>336</sup> Basson op cit 239.

<sup>337</sup> Ibid.

<sup>338</sup> Basson op cit 241.

<sup>339</sup> *Osborne v Amalgamated Society of Railway Servants* 1909(1) Ch 163.

between the parties. The court quoted the following from a speech by Edmund Burke.<sup>340</sup>

“but authoritative instructions; mandates issued, which the Member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience; these are things utterly unknown to the laws of this land....you choose a member indeed; but when you have chosen him, he is not a Member of Bristol, but he is a Member of Parliament.”<sup>341</sup>

Pitkin<sup>342</sup> quotes the following exposition of representation as expressed by Lord

Brougham in his judgment:

“the essence of representation is that the power of the people should be parted with, and given over, for limited period, to the deputy chosen by the people, and that he should perform that part in the government, which, but for this transfer, would have been performed by the people themselves. It is not representation if the constituents so far retain control as to act for themselves. They may communicate with their delegate....but he is to act – not they; he is to act for them – not they for themselves.”

However, the most pronounced exponent of the free mandate was Edmund Burke<sup>343</sup>

who was quoted as follows by Sir Courtney Illbert.<sup>344</sup>

“Certainly, gentlemen, it ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion high respect; their business unremitting attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions, to theirs; and above all, ever, and in all cases, to prefer their interest to his own. But, his unbiased opinion, his mature judgement, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. These he does not derive from your pleasure; no, nor from the law and the constitution. They are a trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgement; and he betrays, instead of serving you, if he sacrifices it to your opinion.

My worthy colleague says his will ought to be subservient to yours. If that be all, the thing is innocent: if government were a matter of will upon my side, yours, without question, ought to be superior. But government and legislation are matters of reason and judgement, and not of inclination; and what sort of reason is that, in which the determination precedes the discussion; in which one set of men deliberate, and another decide; and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?

To deliver an opinion, is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear, and which he ought always

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<sup>340</sup> At 197.

<sup>341</sup> The judgment was approved by the House of Lords in *Amalgamated Society of Railway Servants v Osborne* 1910 AC 87 HL.

<sup>342</sup> Pitkin op cit 150.

<sup>343</sup> The Member of Parliament for Bristol from 1774-1780 and thereafter for the pocket-borough of Malton.

<sup>344</sup> Op cit 139 to 140.

most seriously to consider. But authoritative instructions, mandates issued, which the member is bound blindly and implicitly to obey, to vote and to argue for, though contrary to the clearest conviction of his judgement and conscience – these are things utterly unknown to the laws of the land, and which arise from a fundamental mistake of the whole order and tenor of our constitution.

Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent, and advocate, against other agents and advocates; but parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed: but when you have chosen him, he is not a member of Bristol, but he is a member of parliament.”

Illbert<sup>345</sup> points out that the principles laid down by Burke were not new and previously pronounced by Blackstone and others, but:

“...they had never been so eloquently or forcible expressed.”

However, it should be mentioned that Burke was not an exponent of universal suffrage but rather of virtual representation.<sup>346</sup> Burke had a lack of faith in the capacity of the ordinary person to think things out for himself as is evident from the preface to his book *A Vindication of Natural Society* published in 1756 in which he poses the question:

“What would become of the world if the practice of all moral duties, and the foundation of society, rested upon having their reasons made clear and demonstrative to every individual?”<sup>347</sup>

Nevertheless, the principles so eloquently enunciated by Burke, were still considered as sound in the twentieth century.<sup>348</sup> Illbert put it as follows:

“A Member of Parliament is elected by a local constituency, he has special duties towards it; but he is not a mere delegate or mouthpiece; he is a member of a body which is responsible for the interests of the country at large, and though he is influenced by the wishes and views of his constituents and by the action of his party, he does not surrender his right of independent judgement.”<sup>349</sup>

However, in the earliest days of Parliament, Members were more in the position of agents or delegates as is evident from the fact that in 1339 when the Commons were

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<sup>345</sup> Op cit 141.

<sup>346</sup> See Chapter 3.4.

<sup>347</sup> Ebenstein William *Great Political Thinkers Plato to Present* Third Ed (1966) 467.

<sup>348</sup> Illbert op cit 141.

<sup>349</sup> Ibid.

asked to grant an aid requested by the King, they replied that they could not do so without consulting the commons of the country and that a new Parliament had to be summoned for that purpose.<sup>350</sup> Up until the eighteenth century it was also common for members to receive instructions from their constituencies, but after the Reform Act of 1832 it was no longer practicable.<sup>351</sup> The Redistribution Act of 1885, which endeavoured to divide Britain into equal electoral districts, strengthened the view that a member represents the country as a whole. This development is described as follows by Birgh:<sup>352</sup>

“In earlier periods it had not been inappropriate to think of members as delegated representatives, charged with presenting the grievances of their counties or boroughs to the King’s Ministers and of giving consent to taxation on behalf of the propertied classes. If some Members of Parliament exercised more individual judgment than this model allowed for, in the fifteenth and sixteenth centuries the theory of Parliamentary representation nevertheless hinged on the idea of the representative as a delegate. But in the latter years of the seventeenth century, Algernon Sydney had declared that Members should put the interests of the nation as a whole before the interests of their particular areas and the argument was developed by other politicians of Whig sympathies before it was given its famous and eloquent expression by Edmund Burke in his speech to the electors of Bristol in 1774. It was a necessary development of ideas by a group who claimed that Parliament, rather than the King, was or should be the supreme authority in the government of the country.”

From this it followed that if Parliament was to be the centre of power; Members of Parliament had to be free to act according to their conscience in the best interests of the nation.<sup>353</sup> Birgh<sup>354</sup> points out that while Members of Parliament derive their authority from their election by their fellow citizens, they not only represent those who elect them but that they have a duty to also consider the interests of generations to come.

It is clear from the above that the position in positive English public law is:

*“That a representative is not bound by mandates issued to him, but, on the contrary, may act according to his own judgement and conscience.”*<sup>355</sup>

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<sup>350</sup> Ibid.

<sup>351</sup> Illbert op cit 143.

<sup>352</sup> Finer SE (Editor) *Adversary Politics and Electoral Reform – The Theory of Representation and British Practice* (1975) 58.

<sup>353</sup> Finer op cit.

<sup>354</sup> Op cit 59.

<sup>355</sup> Basson DA *Representation in South African Constitutional Law* (1984) SALJ 142 at 144-145.



### 3.3 THE AMERICAN REVOLUTION

In general the freedoms and rights of British subjects accompanied the colonists who went to the British Territories overseas as a part of the English common law.<sup>356</sup> The long established principle that the King could not levy taxes without his subjects' consent therefore also applied to the colonists.<sup>357</sup> When George III levied taxes on the colonists to pay for the war against France, the slogan *no taxation without representation* became the battle cry for the revolution that led to the independence of the United States of America.<sup>358</sup> According to Storey, the colonists were not demanding new rights but they were *pleading for the preservation of their own rights under the Crown*.<sup>359</sup> Their complaints culminated in specific charges included in the Declaration of Independence, namely that they fought "to preserve the freedom and rights as citizens of England."<sup>360</sup> It is interesting that the American colonists did not demand representation in the British Parliament but resented being taxed without their consent. The argument was that the King of England should tax only Englishmen and if money was to be raised from the colonists only a colonial legislature might authorise its raising.<sup>361</sup> Burke<sup>362</sup> supported the American colonists because they "had taken up arms for one motive only; that is, our attempting to tax them without their consent".<sup>363</sup> It therefore appears that Burke did not consider the American colonists to be virtually represented in the British Parliament, "because they were too far away to be considered part of the national community of Great Britain."<sup>364</sup>

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<sup>356</sup> Storey RG *Our Unalienable Rights* (1965) 22.

<sup>357</sup> Kuper A and J (Editors) *The Social Science Encyclopaedia* (1996) 59.

<sup>358</sup> Howat op cit 24.

<sup>359</sup> Ibid.

<sup>360</sup> Storey op cit 24.

<sup>361</sup> Howat op cit 23.

<sup>362</sup> Kuper A and J op cit 59.

<sup>363</sup> Burke 1855 Appeal Volume 3.

<sup>364</sup> Canavan FP *The Political Reason of Edmund Burke* (1960) 161.

### 3.4 VIRTUAL REPRESENTATION

It was pointed out in Chapter 2 that although Parliament was seen as representing the whole nation, universal suffrage was only introduced both in Britain and in South Africa during the Twentieth Century. In Britain it was essentially the unpropertied masses while in South Africa it was the black population that did not have the right to vote, even though in terms of public law, these groups were considered part of Parliament, as it was “that great body that comprehends the whole nation” and “Parliament’s consent is every man’s consent.”<sup>365</sup> To overcome this anomaly, Burke coined the term *virtual representation*. In a letter to Sir Hercules Longrishe dated 3 January 1792, he explained the concept as follows:

“There is a communion of interests, and a sympathy in feelings and desires between those who act in the name of any description of people, and the people in whose interest they act, though the trustees are not actually chosen by them. This is virtual representation. Such a representation I think to be, in many cases, even better than the actual.”<sup>366</sup>

To understand Burke one has to appreciate that he did not base political rights on philosophical theories as did Hobbes, Locke, Rousseau and others. He considered politics as “a matter of prudence, expediency, circumstance, utility, experience, history, loyalty and reverence and not of abstract speculation.”<sup>367</sup>

Burke did not see society in terms of equal individuals, but in terms of unequal groups and historically recognised interests.<sup>368</sup> Property, aristocracy and monarchy were such historical interests based on prescription rather than on natural law or abstract reasoning.<sup>369</sup> He consequently saw political rights not as universal human rights but

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<sup>365</sup> Wiechers op cit 18.

<sup>366</sup> Ebenstein op cit 470.

<sup>367</sup> Ebenstein op cit 472.

<sup>368</sup> Ebenstein op cit 470.

<sup>369</sup> Ibid.

as patrimonial rights. It is against this background that his distinction between the rights of Englishmen and the rights of men (i.e. human rights) should be seen. According to him the rights of Englishmen were not based on theories but were inherited “as a patrimony derived from their forefathers.”<sup>370</sup> He also quoted the Petition of Rights where it was stated that “your subjects have inherited this freedom.”

He furthermore argued that in the Declaration of Rights the primary object was to secure existing rights from being subverted again.<sup>371</sup> He postulated that:

“...from (the) Magna Charta to the Declaration of Right, it has been the uniform policy of our constitution to claim and assert our liberties, as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity.”<sup>372</sup>

Burke was indifferent to the fact that most Englishmen could not vote as he considered the smallest farmer as being virtually represented by the great landlords. Virtual representation was in many cases even better than actual representation because “people may err in their choice; but common interest and common sentiment are rarely mistaken”.<sup>373</sup> This explains Burke’s statement that “twenty-four millions ought to prevail over two-hundred thousands... if the constitution of a kingdom be a problem of arithmetic”.<sup>374</sup>

Basson<sup>375</sup> explains Burke’s theory as follows:

“...one should, however, always remember that Burke believed first and foremost in a government by an elite and that he did not want to give too great an influence to the populace or voters in the sphere of governmental power.”

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<sup>370</sup> Ebenstein op cit 474.

<sup>371</sup> Ebenstein op cit 475.

<sup>372</sup> Ebenstein op cit 475.

<sup>373</sup> Canavan FP op cit 160.

<sup>374</sup> Ebenstien op cit 481.

<sup>375</sup> Basson DA *The Independence of the Principles Underlining the Theory of Modern Conservatism in Positive Constitutional Law* unpublished LLD thesis University of Pretoria (1984) 35.

In retrospect, Burke's patrimonial approach may seem flawed but it is interesting that a liberal such as Voltaire stated in his *Letters to the English* in 1734, after spending three years in England, that England was a "land of freedom and common sense, secular in outlook, tolerant in religion, and respectful of the rule of law."<sup>376</sup> Montesquieu, who also visited England shortly after Voltaire stated in one of his publications that:

"...the government of England is wiser, because there is a body (Parliament?) which examines it continuously and continuously examines itself; its errors never last long, and are often useful because of the spirit of attention they give to people. In a word, a free government, that is, one that is always agitated, cannot be maintained if it is not capable of correction through its own laws."<sup>377</sup>

The question arises whether those citizens who did not possess the right to vote in South Africa pre-1994, were not virtually represented. Burke justified his support for the extension of the franchise to the Roman Catholics in Ireland on the principle that where a group is being oppressed by a government, such a group cannot be seen as being virtually represented.<sup>378</sup> It is trite that the black community in South Africa was oppressed prior to 1994 and for that reason it must be concluded that they were not virtually represented. However, notwithstanding the political rights contained in the present Constitution<sup>379</sup> there are persons who do not have the right to vote in South Africa and are therefore not directly represented. These persons are:

- Alien visitors
- Citizens under 18 at the time of the last election
- Citizens over 18 at the time of the last election but who were not registered on the Voters Rolls
- Certain prisoners

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<sup>376</sup> Ebenstein op cit 415.

<sup>377</sup> Ebenstein op cit 426.

<sup>378</sup> Canavan op cit 159.

<sup>379</sup> Especially Section 19.

- The mentally ill<sup>380</sup>

In addition, a large number of registered voters do not cast their votes and are therefore not directly represented.<sup>381</sup> As Parliament also has to act in the interest of these persons, it is submitted that although the concept of virtual representation may sound archaic and paternalistic in present day constitutional law, these persons are for all practical purposes virtually represented by the elected members. It can also be argued that the registered voters who abstained from voting are also virtually represented by the elected representatives.

### 3.5 SOUTH AFRICA PRE-1994

As far as South Africa is concerned, Basson<sup>382</sup> adopts a positive law approach and argues convincingly that because the British Parliamentary system was accepted as the system of Government in South Africa, the representative theory of a free mandate is part of South African Public Law.<sup>383</sup> This is confirmed by Southern African case law.

The first case was in Zimbabwe<sup>384</sup> where members of a political party who became Members of Parliament through nomination on the Party list in accordance with the proportional electoral system, had entered into an agreement with the Party in terms

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<sup>380</sup> Rautenbach and Malherbe op cit 44 and 103.

<sup>381</sup> The total population aged 20 and older is estimated at 26 659 000 but only 15 612 671 votes were cast in the 2004 general election. See Kane-Berman John *South African Survey 2004/2005* (2006) 530.

<sup>382</sup> Op cit 144.

<sup>383</sup> Also see Basson and Viljoen op cit 83 and further and Wiechers op cit 192.

<sup>384</sup> *Chikerema and Others v the United African National Council and Another* 1979 (4) SA 258 (ZA)- Where English constitutional law applies in the same way as in South Africa, see Basson and Viljoen op cit 84.

whereof they were obliged to vacate their seats if they no longer supported the Party's principles, policies or leadership or ceased to be members of the Party. Eight members subsequently resigned from the Party. The Speaker refused to recognise their seats as being vacant, whereupon the court was approached. The court found that neither a member of the public nor a political party had the right to apply for a declaratory order that a member had become disqualified.<sup>385</sup> Consequently the court found that it had no jurisdiction. Nevertheless important aspects of representation in public law<sup>386</sup> were discussed namely:

- Parliament must act in the best interests of the State.<sup>387</sup>
- Parliament is not concerned with contractual rights as between a particular party and Members of Parliament and Parliament cannot be influenced by any such contract.<sup>388</sup>
- Once Members of Parliament have been duly elected and sworn in as Members, Parliament alone has the power to decide whether they remain Members or not.<sup>389</sup>
- There may be good reasons for a Member to resign from a Party and a contract so widely worded as to bring about the obligation of a Member to vacate his seat in Parliament if his conscience compelled him to resign from the Party is contrary to public policy and unenforceable.<sup>390</sup>

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<sup>385</sup> 266 of the report.

<sup>386</sup> Basson and Viljoen op cit.

<sup>387</sup> 272.

<sup>388</sup> 272-273.

<sup>389</sup> 273.

<sup>390</sup> Ibid.

The next case was in South West Africa / Namibia<sup>391</sup> where the Court approved the last point mentioned above<sup>392</sup> and went on to state:

“A Party who nominates a representative at all times runs the risk that it may lose its confidence in the nominee.”<sup>393</sup>

It also stated that since the National Assembly could pass laws in the national interest, freedom of speech and the freedom to vote when deliberating such matters are necessarily presupposed.<sup>394</sup> The judgment was upheld on appeal<sup>395</sup> and the Chief Justice made the following important statement:

“The Members of the Legislative Assembly can, in my opinion, therefore not be seen as representatives of the nominating parties or societies, but only as representatives of the people of the Territory.”<sup>396</sup>

With reference to these cases, Wiechers<sup>397</sup> confirms that the common law rule that an individual Member of Parliament is not bound by a Party mandate, applied in South Africa and that should a Member enter into an agreement with a political party in terms whereof the Member undertakes to vacate his/her seat, should he/she break his/her party affiliation, the court will not enforce the agreement.<sup>398</sup> He points out, however, that an unruly member may soon find himself in the political wilderness if he cuts himself loose from party ties.<sup>399</sup>

Although Basson<sup>400</sup> confirms that the free mandate theory of representation was the *de jure* legal position in South Africa, he points out that a system of party government operated *de facto* whereby the political parties, through the reality of strong party

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<sup>391</sup> *Du Plessis NO v Skrywer and Another* 1980 (2) SA 52 (SWA).

<sup>392</sup> At 60 of the Report.

<sup>393</sup> At 62 A – my translation.

<sup>394</sup> Page 61 B.

<sup>395</sup> *Du Plessis NO v Skrywer and Another* 1980 (3) SA 863 (AD).

<sup>396</sup> 873 B – my translation.

<sup>397</sup> Wiechers op cit 192.

<sup>398</sup> In as far as Section 44 of the interim Constitution made membership of the nominating Party a specific requirement for a seat in the House, the common law position was changed. See Chapter 6.2 for a discussion of the position after 1994.

<sup>399</sup> Ibid.

<sup>400</sup> Op cit 80.

discipline, had a substantial influence in the sphere of government power and representatives usually toed the party line. This may have led Currie and de Waal<sup>401</sup> to state that in most modern democracies the type of mandate in force has little significance, as it is the political party concerned and not the representative or those who elected him, which dictates how the electorate is represented.

### **3.6 SOUTH AFRICA 1994 TO THE PRESENT**

The preamble to the interim Constitution, after acknowledging humble submission to Almighty God, continues in the first person plural: “We, the people of South Africa...” It is common cause that the interim Constitution was adopted by the last parliament under the 1983 Constitution which was not representative of all the people of South Africa<sup>402</sup>. However, since the interim Constitution endeavoured to create a new order in which there would be “equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms,” it clearly intended the general good and consequently, those who were not at its passing directly represented in Parliament can be regarded as having been virtually represented.

The preamble to the 1996 Constitution is similarly couched in the first person plural and also commences with “We the people of South Africa”. It further states that the Constitution is adopted by the people through their freely elected representatives.

Section 42(3) makes specific provision for the National Assembly to represent the

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<sup>401</sup> Currie Iain and de Waal Johan *The New Constitution and Administrative Law* Vol 1 (2001) 86.

<sup>402</sup> It was, however, the product of multi-party negotiations which, although it included delegations from the government, from eight political parties and from the ten Homelands, it was not representative of the populace as a whole. The “ratification” of the document by Parliament provided the continuity between the old regime and the new. See Thompson Leonard op cit 244-249.



people and to ensure government by the people under the Constitution. It is therefore clear that the Members of the National Assembly are considered the representatives of the people. It is put as follows by Currie and deWaal:<sup>403</sup>

“...the basic idea of representative democracy is that the people should participate in politics through their duly elected representatives.”

### 3.7 CONCLUSION

The legal value underlying the principle of representation in public law was instrumental in the historic development of representative government, as it is known today.<sup>404</sup> The absolute monarchies of medieval times were gradually transformed into representative governmental systems in which authority ceased to be exercised arbitrarily but came to be exercised on behalf of the subjects of the state.<sup>405</sup>

The development of the principle that a large number of people may be represented in the process of government by an elected representative is probably the most significant contribution that English Public Law made to the practical implementation of democracy. It is difficult to imagine how any community larger than a tribe or clan can function in any democratic way without a smaller group of people being given the right to decide on behalf of the whole group.

An interesting phenomenon in the development of representation is that it was originally not considered an inherent right to elect representatives and that it is by the purest chance that those men who were the first representatives acted in such a

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<sup>403</sup> Currie and de Waal op cit 83.

<sup>404</sup> Basson DA *Studente Handboek vir die Staatsreg* (1986) 118.

<sup>405</sup> Basson op cit.

manner that even those who did not participate in their election or appointment saw them as their representatives. This led to the concept of virtual representation in terms whereof the representative was deemed to act also on behalf of those who did not participate in his election as long as his actions were intended for the common good of the realm.

However, the underlying principle that taxes could not be levied without consent runs like a golden thread through the development of the public law concept of representation. This principle was voiced by the American colonists when they coined the slogan 'no taxation without representation.' This resulted in representation playing such an important role in the American Constitution and through it in many other modern Constitutions.

It is important to note that representation did not develop from a theoretical concept but from practical considerations. Much criticism may be levelled at the limitations of representation, but it should be borne in mind that the development of the concept is still in process and that it can never be more than a balance between the theoretical ideal and what can be achieved in practice.

## CHAPTER 4

### THE ADVENT OF POLITICAL PARTIES AND THEIR DEVELOPMENT FROM INFORMAL GROUPINGS TO GOVERNMENT<sup>406</sup>

*“Although party is often ‘extra constitutional’ it is an essential organ of every large-scale democracy ---- The organisation of opinion by parties inevitability followed the rise of democracy. The principle of representation had to be vitalised by the conflict of parties. When parties flourish we have in effect passed from a pre-democratic mode of representative government to a genuinely democratic one.”*

R M MacIver *The Webb of Government* (1947) 209-210.

#### 4.1 INTRODUCTION

It is difficult to imagine a Parliament in a democratic society without political parties, but the interesting fact is that Parliament pre-dates political parties by more than three hundred years.<sup>407</sup> “Party” is defined by the *Oxford English Dictionary*<sup>408</sup> as “a division of a whole: a part, portion or share; a company or body of persons; a number of persons united maintaining a cause, policy, opinion etc in opposition to others who maintain a different one”. In the *New Encyclopaedia Britannica*<sup>409</sup> a *political party* is defined as a group organised to achieve and exercise power within a political system. It is therefore implicit

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<sup>406</sup> It falls outside the scope of this study to give a detailed account of the development of political parties. The aim of this chapter is to show how political parties had their origins in Parliament but developed to become extra-Parliamentary power groups that affected the development of representation and the mandate of political representatives. The development and history of specific political parties will therefore not be discussed in detail.

<sup>407</sup> According to section 1 (d) of the 1996 Constitution a multi-party system is one of the founding values of the Republic of South Africa and political parties are therefore one of the essential elements of the South African democratic state. However, that political parties are a *sine qua non* for democracy is evident from the briefing of the High Commissioner for the Kingdom of Swaziland to the Portfolio Committee of Foreign Affairs of the South African Parliament in March 2005. In theory, political parties are, of course, not necessary in a constituency-based electoral system although practical problems will tend to force members to group together as happened in Britain. In a proportional electoral system as prescribed by Section 46 (1) (d) of the Constitution, political parties are, in my opinion a *sine qua non*.

<sup>408</sup> Volume XI 281.

<sup>409</sup> Volume 25 15<sup>th</sup> Edition 979.

that a party will be exclusive in that it only involves a part of society, as the word implies. Exclusiveness again implies tension and rivalry, which as will be seen, formed the cornerstone of the two-party system as it evolved in Britain from the seventeenth century.<sup>410</sup>

Political parties as we know them today developed in Britain during the seventeenth and eighteenth centuries as a result of ideological differences among members of Parliament.<sup>411</sup> Today political parties are the core institutions in a democratic society, because they are the key:

- vehicles for political representation;
- mechanism for the organisation of government;
- to maintaining democratic accountability.<sup>412</sup>

Although the primary aim of political parties is to gain power, party politics is not only about competition but is also expected to integrate and accommodate interests and to reconcile different opinions so as to offer a choice to the electorate.<sup>413</sup> It will now be endeavoured to trace the origin of political parties as manifested in Britain and their development in South Africa.

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<sup>410</sup> It is interesting to note that although the Westminster system is primarily still a two-party system, there were at the time of the 2005 General Elections in the UK, 350 registered political parties in Britain. However, the two major parties (Labour and Conservative) still dominate the parliamentary scene with the Liberal Democrats, the third biggest political party, not yet seen as a possible government. Out of a House of 645 Members only eight Members were elected as independents or from the smaller parties. The two-party system can, of course, only work in a winner-takes-all constituency-based electoral system as practised in the United Kingdom. See *Report to the Foreign Affairs Portfolio Committee of Parliament on the United Kingdom General Elections 2005* by LK Joubert MP dated May 2005.

<sup>411</sup> Rautenbach and Malherbe op cit 109.

<sup>412</sup> Chris Landsberg and Sean Mackay *Southern Africa past apartheid? A search for democratic governance (2004)* 42.

<sup>413</sup> Landsberg and MacKay op cit.

## 4.2 BRITAIN

It was shown in Chapter 2 above that although Parliament dates back to the thirteenth century, the Crown continued to exercise *de facto* control over Parliament through Royal patronage for a long time. The constitutional lesson learnt from the events of the latter half of the seventeenth century (the revolution and execution of Charles I) was that there had to be harmony between the Crown, the Ministers and the majority in Parliament.<sup>414</sup> During the reign of William III (1689-1702), Parliament took a critical attitude and the regular adherents of the Court were in a minority.<sup>415</sup> The King then reached agreement with politicians who had some debating talent and family connections and gave posts to a group of young Whig leaders.<sup>416 417</sup>

Political parties in Britain thus first developed from informal groupings of Members of Parliament that congealed into mainly two groups.<sup>418</sup> As Cabinet Government developed it became important for the Government to secure the support of the majority of Members. This led to the groupings becoming more formalised and committed to common policies. These were internal developments in Parliament.

The liberalisation of the franchise during the nineteenth and twentieth centuries led to a fuller democracy which required well organised structures for the mustering of support by a Party to gain political power. This heralded the extra-parliamentary

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<sup>414</sup> Mackintosh JP *The British Cabinet* Third edition (1977) 40.

<sup>415</sup> Mackintosh op cit 45.

<sup>416</sup> Ibid

<sup>417</sup> This is generally seen as the beginning of majority rule in the Commons. Macaulay TB *History of England* Vol 3 (1861) 248 – 250.

<sup>418</sup> Named Tories and Whigs.

period of political parties where the *de facto* power moved from Members of Parliament to political parties and more specifically to the political party in power. From this time forward Parliament can be seen “...as an organ of power put at the disposal of a political group to whom an electoral majority has for a term of years accorded its confidence in the expectation that election promises will be adequately redeemed.”<sup>419</sup>

The first political party in Parliament, the Tory Party,<sup>420</sup> was formed by the majority of the members of the 1661 Parliament, called the Cavalier Parliament.<sup>421</sup> The Party was “more Anglican and Squirearchical than Royalist; it kept the Crown on a short allowance of taxes, scouted the advice of Charles and Clarendon and remodelled the Corporations in the interests of their own Church and Party rather than in those of the Court. By Parliamentary Statute they set afoot a prosecution of Puritan non-conformists more cruel than any desired by the King and even by that stout Anglican, the Lord Chancellor.”<sup>422</sup> The founder of the Tory Party was Thomas Osborne, Earl of Danby “the first Royal Minister who owed his position by the throne to the goodwill of the House of Commons.”<sup>423</sup> The Cavalier Parliament sat for fifteen years and Danby “further secured his majority in the House by systematising the bribery of individual Members.....”<sup>424</sup>

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<sup>419</sup> Sir D Lindsay-Keir *The Constitutional History of Modern Britain 1485 – 1947* (1947) 460.

<sup>420</sup> The name Tory was originally a hostile nickname meaning an ‘Irish Catholic Bandit’ Trevelyan *GM History of England* (1926) 464 footnote 1.

<sup>421</sup> Trevelyan op cit 449.

<sup>422</sup> Ibid.

<sup>423</sup> Trevelyan op cit 460.

<sup>424</sup> Ibid.

The Whig Party<sup>425</sup> was founded by Shaftsbury in opposition to the Tories.<sup>426</sup> The Whig Party was the party of the “unprivileged dissenters and of the mercantile and middle classes arrayed under a section of the higher aristocracy.”<sup>427</sup> It was the Whig Party that organised the earliest Parliamentary opposition,<sup>428</sup> but according to Lees and Kimber<sup>429</sup> Edmund Burke was the first to acknowledge political parties in 1769. However, Ostrogorski and Weber<sup>430</sup> put it much later. They state that the origins of political parties are to be found in the effects of the 1832 and 1867 Reform Acts and the consequential rise of extra-parliamentary activity by political parties from that time. Prior to that time parties had not yet evolved into well-organised institutions and only existed in the sense that many members could be described as Whigs, Tories or Radicals by ideological association, although they did not like to be called “Party Men”. Mackintosh described parties at this stage as follows:

“The Leaders of a Party were those who entered the Cabinet and its adherents were such Members of Parliament as attended the meeting held at the start of the session and voted with the Government on most<sup>431</sup> occasions. Parties were thus loose entities that grew up around Cabinets rather than well-defined organisations which could produce them. Yet political feelings were clearly marked and it was usually evident that a given House of Commons was more likely to support Ministers of a certain political colour.”<sup>432</sup>

Towards the second half of the nineteenth century Members of Parliament, although supporting a party in general terms, still acted individually and the majority refused to carry a party banner.<sup>433</sup> Party membership did not yet exist and the parties still had no organisation to appoint candidates.<sup>434</sup> At the beginning of a Parliamentary session a meeting of those Members who

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<sup>425</sup> ‘Whig’ originally meant a Scottish covenanting zealot. Trevelyan op cit 464 footnote 1.

<sup>426</sup> Trevelyan op cit 465.

<sup>427</sup> Ibid.

<sup>428</sup> Fifth Sir Charles A *Commentary on Macaulay’s History of England* (1938) 259.

<sup>429</sup> Lees John D and Kimber Richard *Political Parties in Modern Britain* (1972) 1.

<sup>430</sup> Hanham HJ *The First Constituency Party* *Political Studies* (1961) 188 – 189.

<sup>431</sup> My underlining.

<sup>432</sup> Op cit 76 – 77.

<sup>433</sup> Wiechers op cit 102.

<sup>434</sup> Ibid.

supported the Government would be held to discuss Government policy broadly and to gain the support of backbenchers.<sup>435</sup> More or less at this point in time the idea took root that the Government should represent the majority Party in Parliament.<sup>436</sup> The freedom of Members of Parliament to vote in accordance to their own convictions and not necessarily according to Party policy made it difficult for Ministers to implement Government policy, as they could never be sure of gaining the necessary support.<sup>437</sup>

Parliament at this stage was still in the hands of the landed gentry and both the Tory Government and Whig opposition were convinced that it should remain in their hands.<sup>438</sup>

Ostrogoski<sup>439</sup> describes the development of political parties in England as follows:

“The parties, however, had laid hands on the very weapon which was being used against them, extra-parliamentary organisation. The movement had begun somewhat late. For a long time parties had no distinct life of their own save in Parliament; in the country they barely existed as moral entities independently of the personages or families which were the embodiment of them. The language of the day only testified to the facts in using, instead of “Tory” and “Whig,” such expressions as “the Rutland interest,” “the Bedford interest,” etc. The voters simply represented the personal following of the rivals who fought the electoral duel; they were their retainers or sold themselves to them on the polling-day for money. The operations of sale and purchase were often conducted through the agency of organised bodies, sometimes public bodies, such as municipalities, which made money out of their boroughs, sometimes voluntary organisations, which acted in the guise of non-political societies without any legal existence. Side by side with these juntas there sprang up occasionally, in a sporadic fashion and with an ephemeral existence, *bona fide* political organisations, in the form of clubs or committees, for supporting a particular candidate.

But whatever the organs of electoral action, secret or avowed, municipal corporations, clubs or private agents, they represented local divisions and rivalries more than anything else. The only party organisation on a basis approaching a national basis was in Parliament. Its efforts were felt essentially within the walls of Parliament itself.”

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<sup>435</sup> Ibid.

<sup>436</sup> Rautenbach and Malherbe op cit 108.

<sup>437</sup> Wiechers op cit 102.

<sup>438</sup> Howat op cit 73.

<sup>439</sup> Ostrogoski M *Democracy and the Organisation of Political Parties* Vol 1(1964) 70.



However, the Industrial Revolution changed Britain from a basically agricultural nation to an industrial one,<sup>440</sup> which resulted in the rise of a rich and influential middle class as well as the formation of Trade Unions, which became pressure groups for reform. The voters started to demand a more consistent and unanimous attitude from the Members of Parliament of the Parties they voted for, with the result that Party organisation and discipline became essential for effective government or opposition.<sup>441</sup>

As the power of the Crown declined due to the emergence of more political issues, greater political awareness and the process of administrative reform, all of which reduced the Crown's influence on politics, the Cabinet emerged as the real power.<sup>442</sup> The introduction of a Reform Bill in 1831 changed the relationship between Members of Parliament and their constituencies as Members were then, for the first time seen to be accountable to the electorate and fewer resources were available for patronage.<sup>443</sup> The Crown also came to realise that it was restricted in its appointment of a Prime Minister to a Member who was most likely to demand the largest measure of support in the House of Commons.<sup>444</sup>

However, it was under Gladstone and Disraeli that party solidarity was achieved and it was realised that a party leader and party followers were obliged to be loyal to the group.<sup>445</sup> The election of Members of Parliament became more

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<sup>440</sup> Howat op cit 46.

<sup>441</sup> Wiechers op cit 103.

<sup>442</sup> Mackintosh op cit 71.

<sup>443</sup> Mackintosh op cit 75 – 76.

<sup>444</sup> Mackintosh op cit 76.

<sup>445</sup> Carpenter op cit 49 – 50.

democratic as the twentieth century approached; it became increasingly important for politicians to gain the support of the electorate and formal political parties developed from the informal groupings that existed.

Kleynhans<sup>446</sup> writes that the most acceptable explanation for the rise of disciplined political parties was given by Ostrogorski who said that it was to be found in the extension of the franchise and redistribution of constituencies. These developments brought an end to the friendly and personal relationship between the member and his constituency as the caucus demanded total obedience from its members. From this point members ceased to be representatives and became delegates or subordinates of the party they belonged to.

It is interesting to note that the first political parties began within Parliament itself and over time deliberately developed into extra-parliamentary organisations “to recruit support and maintain a mass electoral base in the face of political and social change.”<sup>447</sup>

In conclusion it can be stated that the development of political parties in Britain went through three phases:

- The first phase came about when Members of Parliament started to assert themselves and became more independent as the Crown’s control of

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<sup>446</sup> Staatsleer (Honneurs) SAPOLI-A (1984) 313, referring to Ostrogoski op cit.

<sup>447</sup> Lees John D and Kimber Richard *Political Parties in Modern Britain: An organizational and functional guide* (1972) 2.

appointments diminished. This resulted in Members grouping together into two main groups.

- The second phase was brought about by the need of Cabinets to be able to rely on the support of the majority of Members to pass new laws to implement policy.
- The third phase was introduced by the reforms that resulted in more democratic elections and the resultant need to muster support for a Party in order to gain political power. This heralded the extra-parliamentary period of political parties as parliament from that time became representative of the people and at the same time responsible to the people.

### 4.3 SOUTH AFRICA PRE-UNION

When the parliamentary system of government was first introduced in South Africa in 1853,<sup>448</sup> political parties had not yet fully developed. In the Cape Colony the Cape Parliament remained a largely homogeneous body for the first quarter of a century and it appears that the prevailing sentiment was hostile to political parties.<sup>449</sup>

McCracken points out that when the Governor opened the second Cape Parliament in 1859 he attributed the success of the first Parliament to:

“The absence of factions or party passions and complimented the new members on having been returned when the electorate was unusually free from party influence.”<sup>450</sup>

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<sup>448</sup> See Chapter 2.2.

<sup>449</sup> McCracken JL *The Cape Parliament 1854-1910* (1967) 105.

<sup>450</sup> Ibid.

He further states that Namaqualand congratulated themselves on returning a member who was “untrammelled by any pledge to any political party”.<sup>451</sup> He quoted Scermbrucker as follows:

“I can honestly assure you that there are no political parties – at least there is no political organisation such as we have frequently been told there was....everyone is for himself and seems to act as the spirit may move him”.<sup>452</sup>

At this stage of political development, allegiance tended to be given on a personal basis and “instead of the majority creating a government, the government created a majority.”<sup>453</sup> This was confirmed by Neame who stated that politics during this time ran upon personal rather than upon party lines.<sup>454</sup>

It is therefore clear that political parties were slow to develop in the Cape Colony and it was only as a result of the Jameson Raid that the Cape split into clear party lines.<sup>455</sup>

The first political party established in the Cape Colony<sup>456</sup> was the Afrikaner Bond formed in 1880 by SJ du Toit.<sup>457</sup> Apart from the Bond there initially existed no other formal political party in the Cape Colony. The Bond never formed a Government but rather supported Governments led by outsiders such as Scalen, Upington, Sprigg, Rhodes, Schreiner and Merriman.<sup>458</sup> Bond members did however from time to time serve in the Cabinet and the withdrawal of Bond support usually caused Ministries to fall.<sup>459</sup> In the absence of formal

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<sup>451</sup> Op cit 106.

<sup>452</sup> Ibid.

<sup>453</sup> Ibid.

<sup>454</sup> Neame LE *Some South African Politicians* (1929) 88.

<sup>455</sup> McCracken op cit 105.

<sup>456</sup> Also the first in South Africa.

<sup>457</sup> *Standard Encyclopaedia of Southern Africa* Vol 1 185.

<sup>458</sup> Ibid.

<sup>459</sup> Ibid.

political party alignment, Members who did not have the support of the Bond were called “*Progressives*,” but the Progressive Party was only established in 1895.<sup>460</sup>

After the Anglo Boer War 10 500 so-called Cape rebels were disenfranchised, which led to the Progressive Party winning the 1903 elections by a narrow majority.<sup>461</sup> In the thirty-eight years of responsible government before Union, the Cape Colony had 12 Ministries.<sup>462</sup> Eight Members served as Prime Ministers during this period and in four cases a change of Government was caused by a defeat in the House, or because a motion of no confidence was passed.<sup>463</sup> Notwithstanding the frequent changes of Government,<sup>464</sup> there seems to have been quite a stable membership in both Parliament and the Cabinet.<sup>465</sup> Stable government without strong party discipline therefore seems to have prevailed during this period.

In the Orange Free State the first political party was the Orangia Unie formed in December 1905.<sup>466</sup> When responsible Government was granted in 1907 the Orangia Unie won 30 out of the 38 seats in the Legislative Assembly.<sup>467</sup>

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<sup>460</sup> *Standard Encyclopaedia of Southern Africa* Vol 9 150.

<sup>461</sup> *Standard Encyclopaedia of Southern Africa* Vol 6 178.

<sup>462</sup> The longest was that of Molteno, 1 December 1872 – 5 February 1878, who was dismissed by the Governor owing to the use of Imperial troops and control of colonial forces. Kilpin Ralph *The Old Cape House* (1918) 170.

<sup>463</sup> Kilpen op cit 170 – 174.

<sup>464</sup> On average the term of a Ministry was just over three years and the shortest period was that of Schreiner, from 14 October 1898 to 17 June 1900.

<sup>465</sup> During the 56 years existence of the Cape House of Assembly (1854-1910) there were altogether 560 Members and the average years of service was seven. Twenty eight Members sat for more than 20 years with John X Merriman leading with 42 years unbroken service. Kilpen op cit 175. Some Members also served in various Cabinets, such as John X Merriman – 5 Ministries, J Gordon Spriggs – 6 Ministries, PH Faure – 4 Ministries, Cecil John Rhodes – 3 Ministries, JW Sauer – 4 Ministries, TW Smart – 3 Ministries. Kilpen op cit 170-174.

<sup>466</sup> *Standard Encyclopaedia of Southern Africa* Vol 8 371.

<sup>467</sup> *Ibid.*

In the Transvaal there existed no formal political parties prior to 1904, although there were two political groupings, the supporters of Kruger and Joubert respectively.<sup>468</sup> The first political party formed in the Transvaal was Het Volk which adopted its Constitution on 6 July 1905. In the first elections held under British rule in 1907, Het Volk gained 37 seats out of a total of 69 seats.<sup>469</sup>

Until 1899 there were no party political activities in Natal and when Union was formed in 1910 there was still no political party activity worth mentioning.<sup>470</sup>

#### 4.4 SOUTH AFRICA 1910 – 1994

Although a large number of political parties were established since the formation of Union,<sup>471</sup> only three Parties governed South Africa from 1910 – 1994 namely:

- The South African Party (SAP) 1910 - 1924<sup>472</sup>
- The National Party (NP) 1924 – 1933
- The United Party (UP) 1934 – 1948
- The National Party 1948 - 1994<sup>473</sup>

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<sup>468</sup> *Standard Encyclopaedia of Southern Africa* Vol 8 645.

<sup>469</sup> *Standard Encyclopaedia of Southern Africa* Vol 5 515.

<sup>470</sup> *Standard Encyclopaedia of Southern Africa* Vol 8 645.

<sup>471</sup> See Schoeman BM *Parlementêre Verkiesings in Suid Afrika* 1910 – 1976 (1977) and Mostert JPC *Politieke Partye in Suid Afrika* (1986).

<sup>472</sup> Strictly speaking the SAP only governed from 1911 as it was only formed in that year but since it was the loosely formed *Governing Party* that became the SAP it is generally considered that the SAP was the first party to govern the Union. See below.

<sup>473</sup> Please see the *Parliamentary Register*. Until 1950 as the HNP.

All these parties were established by an intra-parliamentary process:

- The South African Party was formed on 21 November 1911 when the Governing Party was transformed into the South African Party and joined by independent Members.<sup>474</sup>
- The National Party was formed on 9 January 1914 by General JBM Hertzog and other Members of the South African Party.<sup>475</sup>
- The United Party was established on 5 December 1934 through the amalgamation of the South African Party and National Party.<sup>476</sup>
- Nineteen members of the National Party did not join the new party and when there came a split in the United Party because of differences over the war with Germany,<sup>477</sup> Malan and Hertzog formed the Herenigde Nasionale Party (Reunited National Party-HNP) but in 1951 the HNP and Afrikaner Party amalgamated and reverted to the name National Party.

A large number of other political parties were also established through an intra-parliamentary process, i.e. :

- The Afrikaner Party was formed by ten United Party Members of Parliament in January 1941.<sup>478</sup>
- The New Order was formed by seventeen Members of Parliament in August/September 1941.<sup>479</sup>

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<sup>474</sup> Mostert op cit 129.

<sup>475</sup> Schoeman op cit 39.

<sup>476</sup> Mostert op cit 160.

<sup>477</sup> See Hansard 3 September 1939 Vol 36 at 95.

<sup>478</sup> Mostert op cit pages 7-8 and Parliamentary Register page 310. These Members were Hertzog followers elected under the UP banner in 1938 but who did not wish to join the HNP.

- In November 1954 six members of the United Party formed the National Conservative Party.<sup>480</sup>
- On 13 November 1959 eleven members of the United Party formed the Progressive Party.<sup>481</sup>
- In April 1960 a former member of the National Party formed the National Union.<sup>482</sup>
- On 19 June 1962 the National Union amalgamated with the United Party.<sup>483</sup>
- On 25 October 1969 four members of the National Party formed the Herstigte Nasionale Party.<sup>484</sup>
- On 4 February 1975 four members of the United Party formed the Reformist Party.<sup>485</sup>
- On 25 July 1975 the Reformist and the Progressive Parties amalgamated as the Progressive Reform Party.<sup>486</sup>
- On 26 March 1977 six members of the United Party established the Independent United Party.<sup>487</sup>
- On 28 June 1977 the United Party was dissolved and a new party, the New Republic Party was established and all but six of the ex United Party Members joined the new party.<sup>488</sup>

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<sup>479</sup> Parliamentary Register 310.

<sup>480</sup> Mostert op cit 50.

<sup>481</sup> Mostert op cit 121.

<sup>482</sup> Mostert op cit 102.

<sup>483</sup> Parliamentary Register 313.

<sup>484</sup> Ibid.

<sup>485</sup> Mostert op cit 126.

<sup>486</sup> Mostert op cit 127.

<sup>487</sup> Parliamentary Register 315.

<sup>488</sup> Parliamentary Register 316.



- The six members who did not join the New Republic Party formed the Progressive Federal Party together with members of the Progressive Reform Party.<sup>489</sup>
- On 20 March 1982 seventeen members of the National Party formed the Conservative Party.<sup>490</sup>
- On 7 October 1987 one Independent member and two members of the Progressive Federal Party formed the National Democratic Movement.<sup>491</sup>
- In April 1989 the Progressive Federal Party was dissolved and a new party, the Democratic Party was formed and joined by sixteen Progressive Federal Party members and the three National Democratic Movement members.<sup>492</sup>
- On 13 August 1992 the Afrikaner Volks Unie was formed by five members of the Conservative Party.<sup>493</sup>
- On 16 March 1994 eight members of the Conservative Party formed the Freedom Front.<sup>494</sup>

From this it can therefore be concluded that from Union in 1910 to full democratisation in 1994 all political parties that played a significant role in Parliament were established through an intra-Parliamentary process and none of these developments would have been possible if an anti-defection clause had applied.

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<sup>489</sup> Ibid.

<sup>490</sup> Ibid.

<sup>491</sup> Parliamentary Register 2 118.

<sup>492</sup> Parliamentary Register 2 119.

<sup>493</sup> Parliamentary Register 2 124.

<sup>494</sup> Parliamentary Register 2 126.

There were of course political parties that did not participate in the Parliamentary process due to discriminatory and suppressive legislation. Of these the South African Communist Party, the African National Congress and the Pan African Congress are the most significant examples.

As stated in Chapter 2, non-whites were excluded from the negotiations that preceded the formation of the Union of South Africa and they were also subject to serious discriminatory laws and practices.<sup>495</sup> In reaction to the exclusion of blacks from the political process, a conference was held at Bloemfontein, on 4 January 1912 at which the African National Congress was established.<sup>496</sup>

It is interesting that the African National Congress was structured as a Congress with two Houses, an upper and lower house. The upper house consisted of seven paramount Chiefs appointed as honorary presidents, and the lower house had a National Executive Committee, which, amongst others, included the position of Speaker.<sup>497</sup> One gets the impression that as the founders of the African National Congress were excluded from the National Parliament, they created their own *Parliament*, but called it Congress. In March 1959 the *Africanists* group which supported a Pan Africanist ideology, broke away from the African National Congress to form the Pan African Congress (PAC).<sup>498</sup> Both Parties were declared illegal organisations on 8 April 1960.<sup>499</sup> After its banning, the African National Congress

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<sup>495</sup> See Meli, Francis A *History of the ANC South Africa belongs to us* (1989) 34 and further for examples of the discriminatory practices.

<sup>496</sup> Kotze H and Greyling R *Political Organisations in South Africa* (1994) 47. The original name was African Native Congress and membership was limited to blacks.

<sup>497</sup> Meli op cit 38.

<sup>498</sup> Kotze and Greyling op cit 53.

<sup>499</sup> In terms of Section 2 of Act 44 of 1950.

went underground and committed itself to an armed struggle.<sup>500</sup> The African National Congress, the South African Communist Party and the Pan Africanist Congress were all unbanned on 2 February 1990<sup>501</sup> and they participated in the first fully democratic elections on 27 April 1994.<sup>502</sup>

The South African Communist Party was established in 1915 when leftist members of the Union-based Labour Party broke away from the Labour Party because they saw the First World War as a conflict between Capitalists and Imperialists and believed that workers should not become involved in the War.<sup>503</sup> The Party never attained any significant political support, but was nevertheless banned in 1950 by the Suppression of Communism Act.<sup>504</sup> The Party, however, disbanded before the Act was officially put into practice, went underground and started working closely with the African National Congress.<sup>505</sup>

The South African Communist Party was unbanned in February 1990. The symbiotic relationship that had developed between the South African Communist Party and the African National Congress was evident from the fact that it was estimated that 25 out of the 50 National Executive Council Members elected in July 1991 held dual membership.<sup>506</sup> However, in the General Elections that followed its unbanning (1994, 1999 and 2004) the South African Communist Party did not participate under its own banner, but took part in the elections under the African National Congress banner as

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<sup>500</sup> Kotze and Greyling op cit.

<sup>501</sup> Hansard Vol 16 at 12.

<sup>502</sup> The SACP did not participate in the election under its own name but entered into an alliance with ANC. The results of the election and further developments were already discussed in Chapter 2.4 above.

<sup>503</sup> Kotze and Greyling op cit 249.

<sup>504</sup> Act No. 44 of 1950.

<sup>505</sup> Kotze and Greyling op cit 251.

<sup>506</sup> Kotze and Greyling op cit 254.

part of a tripartite alliance between the African National Congress, Congress of South African Trade Unions and the South African Communist Party.<sup>507</sup> Apparently 34 of the 200 names on the African National Congress' national list for the 1994 elections for the National Assembly were members of the South African Communist Party<sup>508</sup> and a number of South African Communist Party members were appointed to the Cabinet when the ANC came to power after the 1994 General Elections.

With the first fully democratic elections of 1994, South Africa entered a critical period of change and adaptation. Although the role of political parties was entrenched in the constitutions of 1993 and 1996, no law governs political parties except that registration is required.<sup>509</sup> However, it is submitted that since political parties are now entrenched by the Constitution as the cornerstone of democracy, political parties have developed from informal intra-Parliamentary groupings to *sui generis* institutions that are subject to the principles of democracy and the rules of natural justice.

#### 4.5 CONCLUSION

The proverb “birds of a feather flock together” implies that people of a kind will tend to group together. This is a natural human phenomenon that must have manifested itself amongst the Members of Parliament from its earliest days. However, it was the government's need to be able to count on Members' support for its policies which led to the formation of groupings into political parties towards the end of the seventeenth century. Originally political parties had very little extra-parliamentary activity and it was only after the electoral reforms in the

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<sup>507</sup> Kotze and Greyling op cit 256.

<sup>508</sup> Of these it is said that 27 were amongst the first 50. Kotze and Greyling op cit 257.

<sup>509</sup> Electoral Commission Act 51 of 1966.

nineteenth century that political parties developed into extra-parliamentary organisations to recruit support and maintain a sound electoral base with a view to forming the government.

In South Africa, political parties only began to emerge at the start of the twentieth century and more particularly after Union was formed in 1910. The results of the first Union elections showed a fairly balanced outcome with the governing party obtaining a comfortable majority but with a strong opposition. During the first fifty years of Union there was a healthy balance between the political parties in South Africa and a change of government occurred three times. Two major realignments between the big parties also occurred during this period<sup>510</sup> and up to 1958 a change of government was quite possible in any election.<sup>511</sup>

However, after 1960 the political scene was totally dominated by one political party to such an extent that a change in government no longer seemed probable.<sup>512</sup>

This was due to the fact that, for all practical purposes, the white electorate were the sole role players in South Africa. Party politics after 1960 and up to 1994 resulted in:

- A stagnation of political party development as a very large section of the population was excluded from mainstream politics and

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<sup>510</sup> The amalgamation of the Unionist Party and South African Party in 1921 and the amalgamation of the South African Party and the National Party in 1933.

<sup>511</sup> In 1958 the National Party received 642 006 votes against the United Party's 492 080. Standard Encyclopaedia of South Africa Vol 4 273.

<sup>512</sup> Except for 1970, the National Party increased its majority at every election since it again came to power in 1948 and only started losing support as from 1982. See Graaff Sir de Villiers *Div Looks Back* (1993) 151.

- A reluctance in accommodating the Black population in mainstream politics as developments in the rest of Africa since the independence of Ghana in 1957, scared whites from sharing political power with blacks.<sup>513</sup>

This also explains why the opposition could not succeed in reinventing itself.

This leads to the conclusion that when a society is politically not free, political parties cannot achieve the political balance required by a two-party dominated parliamentary system.

Political parties are extremely powerful under the post-1994 Constitutional regime and the fact that there are virtually no legal prescriptions concerning the internal functioning of political parties<sup>514</sup> is considered a serious *lacuna* that needs to be addressed. Although it has been submitted that political parties are at least subject to basic democratic principles, the courts seem to be reluctant to interfere with the internal functioning of political parties.<sup>515</sup>

As the ANC and other banned political organisations were precluded from participating in parliamentary elections before 1994, these parties could not play the role of a true political party until the first free elections in 1994 and their role up to then had been that of extra-parliamentary pressure groups.<sup>516</sup>

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<sup>513</sup> See Meredith Martin *The State of Africa* (2005).

<sup>514</sup> See paragraph 5.2.3.3.

<sup>515</sup> See *Dunne v The Inkatha Freedom Party* unreported case no. 02/2121WLD.

<sup>516</sup> See paragraph 5.3.

## CHAPTER 5

### THE FACTORS THAT INFLUENCE A MEMBER'S MANDATE<sup>517</sup>

*“Between elections, however, voters have no control over the conduct of their representatives. They cannot dictate to them how they must vote in Parliament, nor do they have any legal right to insist that they conduct themselves or refrain from conducting themselves in a particular manner.”*

Chaskalson CJ in *UDM v President of the Republic of South Africa & Others* op cit par 49.

#### 5.1 INTRODUCTION

In public law a free mandate means that the representatives who are elected to the legislature exercise a free mandate in national interest, while an imperative mandate means that the elected representatives are obliged to act in terms of the mandates given by the voters who elected them as their representatives.<sup>518</sup>

According to Sir Henry Sumner Maine<sup>519</sup> the word *mandate*, as used in constitutional law, does not have the ordinary meaning ascribed to it in English, French or Latin but “it is a fragment of a French phrase, *mandat impératif* which means an express direction from a constituency which its representative is not permitted to disobey.” Maine<sup>520</sup> poses the question whether a candidate, who in an election address declared himself in favour of a specific matter, if elected, has a mandate to vote for its implementation and if so, how many election addresses containing such references constitute a mandate? Assuming a mandate has been obtained, a further question arises namely “how long is it in force?” In the same

<sup>517</sup> As this is an historical study all the different theories of representation are not dealt with in this study and only those which have manifested in the development of representation in Great Britain and South Africa are studied. For a comprehensive study of the theories of representation see Basson DA *Verteenwoordiging in die Staatsreg* unpublished LLD thesis University of South Africa (1981).

<sup>518</sup> Basson DA *Studente Handboek vir die Staatsreg* op cit 120.

<sup>519</sup> *Popular Government* (2004) 118.

<sup>520</sup> Op cit 114.

vein it may be asked what the position of a party that fails to obtain a majority is, i.e. what is the mandate of an opposition representative? There are no clear answers to these questions.

Pitkin<sup>521</sup> identifies the relationship between representative and constituents as a vexing and seemingly endless controversy. He points out that although some theorists maintain that the representative's duty is to reflect accurately the wishes and opinions of those he represents, the majority have the view that "the representative must do best what is best for those in his charge, but that he must do what he thinks best, using his own judgement and wisdom, since he is chosen to make decisions for his constituents."

Kleynhans<sup>522</sup> says that representation is based on the presumption that the decisions of the representatives will be the same as those of the citizens, should the citizens be able to be present in person, discuss the matter personally and come to a vote.

According to Ilbert,<sup>523</sup> a Member of Parliament is "responsible" for all his constituents, whether they have voted for him or not. Again, this strengthens the notion that a Member, once elected, has a free mandate. In a proportional list system this would mean that every citizen could be viewed as part of a Member's constituency. Except for prominent party supporters there is no way by which a Member of Parliament would be able to tell with any certainty whether a particular voter who solicits his or her assistance indeed voted for the party concerned. In practice all enquiries are dealt with as if it came from party supporters.<sup>524</sup>

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<sup>521</sup> Op cit 4.

<sup>522</sup> SAPOLI-A (1984) 53.

<sup>523</sup> Op cit 147.

<sup>524</sup> As informed by Mr JH van der Merwe MP *Chief Whip of the IFP*.



Guizot<sup>525</sup> takes the matter back to the old principle that no one is bound to obey laws to which he has not given his consent. He states that the natural reply to why the electorate vote for a specific person is because in the consideration of public affairs such a person is believed to be more capable than any other of sustaining the cause to which personal opinions, feelings and interests are alive.<sup>526</sup>

Irrespective of the specific theory of mandate that may prevail in a political system, there are a number of factors that have an influence on the way in which a representative exercises or interprets his mandate. The most important factor in this regard is that a representative is only elected for a limited period.<sup>527</sup> Pitkin<sup>528</sup> states that it is a political fact that politicians want to be re-elected and that they therefore often pattern their actions on what they perceive as their constituents' wishes and not on what their constituents purport to want. The voters, who pass the final judgment, also make their decisions on perceptions. Re-election is therefore not absolute proof that a representative was a good representative,<sup>529</sup> just as a representative may lose his seat despite having been an excellent representative.<sup>530</sup> Notwithstanding, the standard by which a representative should be judged is whether he has promoted the objective interests of those he represented. Seen against this background there is a wide range of possibilities within the framework of the representative's basic obligations. The golden rule appears to be that the representative

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<sup>525</sup> Op cit 338.

<sup>526</sup> Op cit page 335.

<sup>527</sup> Presently for five years. See Section 49 (1) of the Constitution 1996.

<sup>528</sup> Op cit 164.

<sup>529</sup> Especially in a proportional representative list system.

<sup>530</sup> Ibid.

must avoid a conflict of interests between himself and his constituents. Pitkin<sup>531</sup> puts it as follows:

“The representative must act in such a way that, although he is independent, and his constituents are capable of action and judgment, no conflict arises between them. He must act in their interest, and this means that he must not normally come into conflict with their wishes.”

However, in practice, the political party to which a member belongs, selection criteria, extra-parliamentary pressure groups, funding, the influence of the elite and the way in which a member sees his allegiance, will to a great extent determine how the representative exercises his / her mandate.

## **5.2 POLITICAL PARTIES**

The political party under whose banner a member was elected will for obvious reasons have a big influence on how a member exercises his / her political rights, and the following are the most important aspects in this regard:

- The party's election manifesto
- Party discipline
- Caucus
- Party funding
- The selection of candidates.

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<sup>531</sup> Op cit 166.

### 5.2.1 ELECTION MANIFESTOS

As the electoral system became more democratised, party leaders started to appeal to the electorate as a whole as if one big constituency.<sup>532</sup> In their desire to win elections, parties state their policies and electoral promises in what has become known as the party's election manifesto. If a party is elected it undertakes to implement the election promises contained in the manifesto.<sup>533</sup> It is generally accepted that if elected, the manifesto confirms a mandate to the governing party to implement the policies contained in the manifesto.<sup>534</sup> There is a presumption that those who voted for a party in an election expressly or tacitly accepted its programmes and therefore are giving a mandate for the implementation thereof. Kavanagh<sup>535</sup> however, points out that the findings of election studies have thrown doubt on this presumption as voters' decision is influenced by factors such as a party's service record, competence, leadership, tradition and way of handling specific issues.

Under the constituency-based electoral system<sup>536</sup> candidates usually also issue their own manifestos, which apart from personal details, normally contain a commitment to serve the constituency and to endorse the policies of the political party concerned.<sup>537</sup> If elected such a personal manifesto constitutes a specific mandate. Under the proportional list electoral system no such personal manifestos are issued with the result that there is no direct mandate between the electorate and a particular candidate. Electoral promises made during campaign speeches can perhaps be seen as a direct mandate, but proof of their contents would be problematic.

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<sup>532</sup> Keir op cit 460.

<sup>533</sup> Kavanagh Dennis "The Political Manifesto" (1981) *Parliamentary Affairs* XXXIV 7.

<sup>534</sup> Kavanagh op cit 8 and Kleynhans WA *South African General Election Manifestos 1910-1981* (1987) 14.

<sup>535</sup> Op cit 7.

<sup>536</sup> Such as applied in South Africa before 1994.

<sup>537</sup> Kleynhans WA *Staatsleer Honours Study Guide* No 1 (1985) 355.

Manifestos have developed from relatively short specific documents to “Statements long on rhetoric and short on specific proposals” that contain something for everybody.<sup>538</sup> This, together with the notion of leaving options open, the use of ambiguous and vague language as well as conditional and even contradictory proposals, weakens the mandate value of manifestos.<sup>539</sup> However, elected members consider themselves bound by the programmes stated in the election manifesto and if not implemented will be open to attack at the next election.<sup>540</sup> It is interesting to note that it was official policy of the Progressive Party and its successor the Progressive Federal Party, not to publish traditional manifestos during general elections and that the Labour Party in 1933, the Afrikaner Party in 1948 and the National Party in 1961 did not publish manifestos of their own.<sup>541</sup> Manifestos nevertheless remain important policy statement documents.

### 5.2.2 PARTY DISCIPLINE

It was indicated earlier in this study that although Members *de jure* had a free mandate, the *de facto* position was that Members of Parliament normally toed the party line on peril of being expelled to a political desert.<sup>542</sup> Although a political party could not remove a member from his seat prior to 1994, expulsion from the party normally heralded the end of the Member’s political career in Parliament.<sup>543</sup> How difficult it is to survive in Parliament without the support of a political party is borne out by the fact that only one member, WC Malan in 1987,

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<sup>538</sup> Kavanagh op cit 8 & 9.

<sup>539</sup> Kavanagh op cit 9.

<sup>540</sup> Kleynhans op cit 12.

<sup>541</sup> Kleynhans op 17.

<sup>542</sup> Wiechers op cit 192.

<sup>543</sup> The Parliamentary Register shows a substantial number of expulsions.

succeeded in being re-elected as an independent member during the period 1948 – 1994.<sup>544</sup>

The anti-defection clause introduced by the 1993 Constitution together with the party list proportional electoral system put political parties in a very strong position to control members and there have been a number of cases where members have lost their seats due to loss of party membership. It may be apt to conclude this sub-chapter with the following quotation:

“Party loyalty has become the prime political virtue required of a Member of Parliament and the test of that loyalty is his willingness to support the official leadership when he knows it to be wrong.”<sup>545</sup>

Mangu put it as follows: “...to survive and secure a successful political career, the loyalty of politicians is to their parties first and not to the people.”<sup>546</sup>

### 5.2.3 THE CAUCUS

The word caucus is derived from the American Indian word *kaw-kaw-was* meaning *to talk*.<sup>547</sup>

The word was first used in the United States of America to describe the “intrigues and devices of unscrupulous electoral wire-pullers and political corruptions” but in England the word was coined by Lord Beaconsfield<sup>548</sup> in 1874 as a sarcastic attack on the Liberal Party’s organisational structure.<sup>549</sup> As political parties became better organised, the word caucus came to mean the collective body of a party’s members in Parliament. Although caucus is not recognised in formal public law it has become a Parliamentary institution through

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<sup>544</sup> Parliamentary Register 118.

<sup>545</sup> Berrington Hugh *Partisanship and Dissidents in the 19<sup>th</sup> Century House of Commons* reprinted from *Parliamentary Affairs* 1968 by Lees and Kimber op cit 113.

<sup>546</sup> Mangu Andre Mbata B *Who really governs in South Africa’s constitutional democracy: parties or “we, the people”?* Codicillus XLIV No 2 22.

<sup>547</sup> Kleyhans op cit 317.

<sup>548</sup> Benjamin Disraeli who was Prime Minister in Britain during the 19<sup>th</sup> century - Hibbert Christopher *Disraeli A Personal History* (2004).

<sup>549</sup> Ostrogowski op cit 89.

convention.<sup>550</sup> In South Africa the Parliamentary programme specifically makes provision for Party Caucus meetings on Thursday mornings and each party is allocated a caucus room. The rules applicable to caucus meetings differ from party to party but they all have three principles in common:

- Absolute confidentiality of discussions
- Freedom of expression
- Consensus of opinion

This entails that a member is free to voice his or her opinion on a matter but once the caucus has reached a decision, all members have to abide by that decision irrespective of their own views.<sup>551</sup> Although Members of Parliament had a free mandate before 1994 and since 1994 enjoy specific political rights in terms of the Bill of Rights,<sup>552</sup> responsible party government requires discipline, loyalty, solidarity and unity from the elected members.<sup>553</sup> This led to the development of the convention that parties discuss their business at caucus meetings which are closed and confidential. Members have the right to express their views freely and without fear in a caucus meeting but once the caucus has taken a decision all members are collectively bound to support the decision taken by caucus even if they hold a different opinion privately. This rule is very strictly applied by all parties and non-compliance normally leads to the expulsion of a member from the party.<sup>554</sup>

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<sup>550</sup> Kleynhans op cit 317.

<sup>551</sup> For a description of the practical working of the National Party caucus in the 1960s and 1970s see MC Botha *Politiek en Parlement* (1982) 61 to 68.

<sup>552</sup> Section 19 of the 1996 Constitution.

<sup>553</sup> Kleynhans op cit 317.

<sup>554</sup> Before 1994 an expelled member normally joined another party or formed a new party but since 1994 expulsion would result in a member automatically losing his seat.

Although the caucus system promotes orderly government it no doubt limits the mandate of a political representative. The British politician Aneurin Bevan put it as follows:

“We make speeches, and if they do not accord with what has just been decided in private upstairs, we are threatened with expulsion. Is that democracy? It is conspiracy. The caucus is getting more powerful than the electorate itself.”<sup>555</sup>

The political correspondent of *The Argus* also criticised the strong grip that the caucus system has over Members of Parliament and he put it as follows:

“The caucus system...has become an accepted principle of political life. Few, if any, of those actively engaged in politics argue that the business of parliament could now be conducted without it....Accepting that it would be futile for practical reasons to argue for the removal of the caucus system there is still a strong case to be made out for its radical reform especially in South Africa, where it is even more rigid than in Britain.”<sup>556</sup>

Sir James Rose-Innes<sup>557</sup> was also critical of the caucus system and had the following to say in this regard:

“Parties fulfil their purpose through the caucus system but at what great cost? The more effectively it operates the greater menace to free constitutional government does it become.”<sup>558</sup>

In conclusion it can therefore be stated that irrespective of whether a free mandate or imperative mandate theory of representation applies, the caucus system, even more so after 1994, forces Members of Parliament to toe the party line.

## 5.2.4 FUNDING OF POLITICAL PARTIES

Funding of political parties has become the lifeline of political parties throughout the democratic world.<sup>559</sup> In South Africa substantial public funding is provided to political

<sup>555</sup> As quoted by Kleynhans op cit 318 to 319.

<sup>556</sup> *The Argus* (20 May 1963) as quoted by Kleynhans op cit 318.

<sup>557</sup> Member of the Cape Parliament from 1884-1890, Chief Justice of the Transvaal Colony from 1902-1910 and Chief Justice of the Union of South Africa from 1914-1927.

<sup>558</sup> As quoted by Kleynhans op cit 319.

<sup>559</sup> Tshitereke Clarence *Securing Democracy: Party Finance and Party Donations The South African Challenge* 2 Institute of Security Studies (2002).

parties represented in Parliament.<sup>560</sup> Private funding with no limits and no requirement as to disclosure is, however, also allowed.<sup>561</sup> Although many donations are made to political parties with no strings attached, it is generally acknowledged that there is an element of reciprocity in the private funding of political parties.<sup>562</sup> Tshitereke<sup>563</sup> puts it as follows:

“The problem is that donors, whether corporate or individual, often make contributions not out of goodness of their hearts or for reasons of political idealism, but in expectation of a return.”

This, it is submitted, is especially true in the case of large donations which are not disclosed. Because of the confidential nature of undisclosed donations it is of course difficult to determine their effect on a representative’s mandate, but the absence of rules and the lack of transparency leave political parties exposed to potential influence peddling.<sup>564,565</sup> The saying that there is no free lunch is very apt in this regard and it is submitted that the reluctance to pass strict laws to regulate funding is detrimental to transparent democracy and unbiased decision making.<sup>566</sup>

### 5.2.5 THE SELECTION AND NOMINATION OF CANDIDATES

How candidates are elected has a direct bearing on their accountability and mandate. Before 1994 South Africa had a constituency-based electoral system and for the sake of completeness a brief overview of how candidates were selected in a constituency-based

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<sup>560</sup> Sec 236 of the Constitution provides for national legislation for the funding of political parties participating in national or provincial legislatures and the funding of such parties is regulated by the Public Funding of Represented Political Parties Act, 103 of 1997. See IEC Annual Report on *Represented Political Parties’ Fund* for the actual amounts paid to political parties.

<sup>561</sup> Please see *IDASA & Others v ANC and Others* 2005(5) SA 39 CPD.

<sup>562</sup> Tshitereke op cit 1.

<sup>563</sup> Op cit 2.

<sup>564</sup> Tshitereke op cit 5.

<sup>565</sup> Writer was informed by a Member of Parliament, who preferred not to be named, that he was removed from the Parliamentary Portfolio Committee of Finance because he was seen as being critical of institutions that funded his party.

<sup>566</sup> A Private Member’s Bill to regulate the funding of political parties was tabled by Mr Douglas Gibson MP *Chief Whip of the Opposition* during the Second Session of the Second Parliament but it remained under the line of the Parliamentary Order Paper and lapsed with the dissolution of Parliament for the 2004 election.



electoral system will be given before the compilation of party lists in the post-1994 proportional list system is discussed.

### **5.2.5.1 CONSTITUENCY BASED ELECTORAL SYSTEM: PRE- 1994<sup>567</sup>**

South Africa was divided into 165 electoral divisions (constituencies).<sup>568</sup> The delimitation of constituencies was made by a delimitation commission consisting of three judges at intervals of at least five years.<sup>569</sup> Each constituency was entitled to elect a Member of Parliament for that constituency in general elections or a by-election. Candidates had to be nominated as representatives of a political party or as independent candidates. Independent candidates or candidates of a political party not represented in Parliament had to be nominated by 300 registered voters in the constituency.<sup>570</sup> Originally only the candidate's name, address and occupation was printed on the ballot paper but later the candidate's political affiliation was also printed on the ballot paper.

In discussing the party organisation in Great Britain between the World Wars, Seldom and Ball describe the process of selecting a candidate as follows: "Important matters such as the selection of.....the parliamentary candidate were often settled amongst a small group of leaders of a higher social status, many of whom served long periods on Executive Committees."<sup>571</sup> Lees and Kimber<sup>572</sup> give a detailed account of the selection process of a candidate for a safe Tory seat in a by-election in 1969, which

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<sup>567</sup> For the sake of brevity the changes introduced by the 1983 Constitution are not dealt with here.

<sup>568</sup> With the formation of the Union in 1910 it was 121 but this number was gradually increased to 165 in 1973. See Wiechers op cit 269.

<sup>569</sup> See Wiechers op cit 301.

<sup>570</sup> Section 41(4) of the Electoral Act 45 of 1979.

<sup>571</sup> Seldom and Ball (Editors) *Conservative Century* (1994) 264.

<sup>572</sup> Op cit 99 to 105.

gives insight into the way parties in constituency based electoral election systems nominate candidates. In that particular case there were 124 candidates (excluding six candidates who applied too late) from which the selection committee eventually had to select one candidate. Although it is clear from their report that due process was followed, it is equally clear that the eventual outcome was biased in favour of the candidate who was eventually nominated. This case study confirms the notion that political parties go through the motions of democracy to justify decisions that have been taken before the process even began.

The situation in South Africa was very similar and a study of the nomination procedures followed by the two political parties that dominated politics in South Africa from 1914 to 1977<sup>573</sup> revealed the following principles:

- The election of a candidate to Parliament is in reality a ratification of the choice of the political party concerned.
- With few exceptions candidates were nominated by the registered party members in a particular constituency.<sup>574</sup>
- Where more than one nomination was made a nomination election was held amongst registered party members in the constituency concerned to appoint the candidate by majority vote.

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<sup>573</sup> The United Party and the National Party.

<sup>574</sup> Where it happened that party leadership overruled the constituency's choice, as in the case of the National Party candidate for Ermelo in 1977, the Party ran the risk of losing support. In the case of Ermelo which was a safe NP seat as from 1948, the NP lost the seat at the subsequent election in 1981. See *Beeld* (5 November 1977) and Parliamentary Register 257. Another example is the case of the constituency of Florida in 1966 where the Prime Minister insisted on an outside candidate for the National Party and then lost the seat to the United Party in the next election in 1970, as told by HJ Bekker MP and confirmed by JJM Stephens MP.

- The party leadership had the right to veto a candidate who was not acceptable to the party leadership.
- Candidates had to give a written undertaking to honour party principles.
- Once the nomination of a candidate was endorsed by the party such a candidate was the only candidate for that party in the constituency.<sup>575</sup>

Kleynhans<sup>576</sup> sees this procedure as confirming a double mandate on the candidate elected; one by the party and one by the electorate.

A road map for aspirant politicians under the constituency based electoral system is given by MC Botha.<sup>577</sup> According to Botha the proven road to the country's chambers of power was through diligent and loyal party work. He called it an open road but a long and weary one. Candidates were nominated by party structures but the head office had to approve the candidate. If more than one candidate was nominated, the enrolled party members in the constituency concerned appointed the candidate by ballot. A member therefore had a closer relationship with his constituents and he was approached on a regular basis to assist constituents on a wide range of topics.<sup>578</sup> An important point made by Botha<sup>579</sup> is that since a Member of Parliament also represents those who are not members of his party, he or she should also be available to supporters of opposition parties. Kleynhans<sup>580</sup> states that if participation in an election is a quest for power, then the nomination process is the

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<sup>575</sup> See Kleynhans *WA SAPOLIA* (1984) 119 to 191 for a full exposition of the nomination and selection procedure by political parties in South Africa.

<sup>576</sup> *Op cit* 120.

<sup>577</sup> *Op cit* 1 to 23.

<sup>578</sup> *Op cit* 26.

<sup>579</sup> *Op cit* 29.

<sup>580</sup> *SAPOLIA* 119.

most important party activity. He explained the power of political parties in this regard as follows:

“The hold that South African political parties have on the officially elected Members in Parliament, stems from the important role that party organisation play outside Parliament to fully control the nomination and election processes of candidates from the moment that party members begin to be interested to participate as party candidates up to the election itself and the announcement of the results”.<sup>581</sup>

He calls it “the control of the party outside Parliament over the party inside Parliament”.<sup>582</sup>

### **5.2.5.2 THE PROPORTIONAL LIST ELECTORAL SYSTEM POST 1994**

One of the constitutional principles adopted at Codesa was that there shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll and proportional representation.<sup>583</sup>

The Constitution of 1993 consequently introduced a proportional list electoral system into South Africa which required political parties to be registered in terms of the Electoral Act.<sup>584</sup>

Parties wishing to contest an election of the National Assembly had to nominate candidates for such election on lists of candidates in accordance with Schedule 2 and the Electoral Act. However, there is no constitutional requirement of intra-party democratic decision-making and the Constitution is also silent on how candidates are to be selected to appear on party lists. The fact that this matter is not addressed in the Constitution strengthens the party leadership’s control over representatives and

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<sup>581</sup> Op cit 85.

<sup>582</sup> Ibit.

<sup>583</sup> Chapter VIII Schedule 4 to the Constitution of South Africa Act 200 of 1993-my underlining.

<sup>584</sup> Act 201 of 1993.

according to Chaskalson<sup>585</sup> the system may result in a shift of loyalty of candidates and representatives from the voting public to the party leadership. It has been stated that the proportional list system increases the scope for political parties to act in an oligarchic manner in regard to nominations and that the control shifts from the constituency level as in the Westminster system, to the upper reaches of a party.<sup>586</sup>

In terms of the South African electoral system the electorate has no choice between candidates, only between parties. In view of the democratic principles embedded in the Constitution and specifically the political rights to:

- Participate in the activities of a political party<sup>587</sup> and
- Stand for public office,<sup>588</sup>

it can be argued that the selection of candidates by parties should by implication be through a democratic and transparent process. It would be ironic to have a democratic constitution while the candidates selected for election to public office in terms of that Constitution were selected arbitrarily. The danger that ordinary party supporters will have little power to affect the selection process of party candidates was foreseen by Fredericks in 1993.<sup>589</sup> It was also foreseen that although the process would be subject to the administrative principles of regularity and fairness, it would, however, be scant comfort to the excluded potential candidate. In *Bushbuckridge Border Committee v*

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<sup>585</sup> Op cit.

<sup>586</sup> Fredericks Izak *The Legal Regulation of Political Parties and their Participation in Elections. Free and Fair Elections* (1993) 73-96.

<sup>587</sup> Section 19 (1) (v).

<sup>588</sup> Section 19 (3) (b).

<sup>589</sup> Op cit 90.

*Government of the Northern Province*<sup>590</sup> it was held that a political party is not an administrative body or organ of state and is not subject to the rules of administrative justice. Accordingly, political promises can not form the basis of a legitimate expectation.<sup>591</sup> In *Marais v Democratic Alliance*,<sup>592</sup> the court also held that the decisions of the national management council of a political party did not constitute “administrative action” as such decisions could not be regarded as the exercise of a “public power” or the performance of a “public function” in terms of the political party’s constitution.

In a proportional list electoral system, a candidate’s position on the party’s candidate list is of utmost importance as that position, combined with the support the party receives at the polls, determines the candidate’s chances of becoming an elected representative. With the exception of the ANC, the NP in 1994 and the DA in 2004, no other political party obtained 50 or more seats in the National Assembly during a general election since 1994. It is therefore clear that apart from these exceptions, only the cream of a party’s members had a chance of being elected and in the case of the smaller parties, only the top hierarchy had any prospects of being elected.

The methodology whereby the parties compile their candidate lists is therefore of paramount importance and if not done in a transparent and democratic manner, the system could become nothing better than an oligarchy. The system will also have relevance to an elected member’s allegiance and mandate. As indicated above, the Constitution does not dictate how candidates are to be selected to appear on the party list and it appears that parties are indeed using very different methods to compile their

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<sup>590</sup> 1999 (2) BCLR 193 (T).

<sup>591</sup> At 200 C-E of the Report.

<sup>592</sup> 2002 (2) BCLR 171 (C) at 193E.

party lists.<sup>593</sup> The compilation of party lists has not yet been challenged in court, but the changing of a candidate's position on a list was challenged in *Finbar Dunne v The Inkatha Freedom Party and Others*.<sup>594</sup> In rejecting the Plaintiff's case the court made the following statements relevant to this study:

- The essence of the system of proportional representation is that voters vote for parties and not for particular candidates.<sup>595</sup>
- The vacancy that occurs vests in the party concerned.<sup>596</sup>
- Parties may change the order of names on their list at their own discretion.<sup>597</sup>
- The emphasis falls on the party and its rights and interests and not on the names appearing on the party lists or the alleged *right* of any person whose name happens to appear on such a list.<sup>598</sup>
- The very essence of the closed list system of proportional representation lies in the fact that the voters vote for the list as a whole; that the list is drawn up by the political party and that a voter cannot make changes to the order of candidates on the list. A voter thus has no voice in the selection of the person who is to represent him or her.
- The compilation of party lists is an internal matter relating to each party and does not constitute an exercise in public power nor does it constitute administrative conduct, which is susceptible to judicial review.
- The doctrine of legitimate expectation accordingly finds no application in the compilation of lists.

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<sup>593</sup> Pierre de Vos *South Africa's Experience with Proportional Representation* in J de Ville and N Steytler *Voting in 1999: Choosing an Electoral System* (1996) 55-78.

<sup>594</sup> Unreported case no 02/2121 WLD.

<sup>595</sup> Paragraph 18.1.

<sup>596</sup> Paragraph 18.2.

<sup>597</sup> Paragraph 18.3.

<sup>598</sup> Paragraph 19.

It is therefore important to consider the methodology applied by the major political parties in compiling their candidate lists.

#### **5.2.5.2.1 AFRICAN NATIONAL CONGRESS (ANC)**

The constitution of the ANC<sup>599</sup> makes provision for the appointment of a national list committee by the National Executive Committee for the selection and adoption of candidates for the National Parliament.<sup>600</sup> A national list committee is defined in the glossary of the ANC's constitution as a committee appointed annually by the National Executive Committee and which is responsible for drawing up regulations and procedures to be used in the selection of candidates for national parliament. It shall consist of at least five and not more than nine members. A provincial list and candidate's committee is appointed in each province responsible for the compilation of election lists and ward candidates. It is submitted that the following principles and rules embodied in the ANC's constitution are relevant to the compilation of party lists:

- In the preamble, the fundamental goal of the party is stated as the construction of a non-discriminatory democratic society.
- All forms of discrimination should be eradicated.<sup>601</sup>
- The government should be freely chosen by the people according to the principles of universal suffrage on a common voters roll.<sup>602</sup>

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<sup>599</sup> As amended by and adopted at the 51<sup>st</sup> National Conference in December 2002, available on the internet at [www.anc.gov.za](http://www.anc.gov.za). It is also filed at the IEC.

<sup>600</sup> Rule 12.2(k).

<sup>601</sup> Rule 2.1.



- The party's policies are determined by the membership and its leaders are accountable to the members.<sup>603</sup>
- The party shall be non-racial, anti-racist and non-sexist and against any form of tribalistic exclusivism or ethnic chauvinism in its composition and functioning.<sup>604</sup>
- Women are to be properly represented at all levels.<sup>605</sup>
- Membership of all bodies of the party will be open to men and women in the organisation without regard to race, colour or creed.<sup>606</sup>

- On being accepted as a member of the ANC, a new member shall make the following solemn declaration:

"I, AB, solemnly declare that I will abide by the aims and objectives of the African National Congress as set out in the Constitution, the Freedom Charter and other duly adopted policy positions, that I am joining the organisation voluntarily and without motives of material advantage or personal gain, that I agree to respect the Constitution and the structures and to work as a loyal member of the organisation, that I will place my energies and skills at the disposal of the organisation and carry out tasks given to me, that I will work towards making the ANC an even more effective instrument of liberation in the hands of the people, and that I will defend the unity and integrity of the organisation and its principles and combat any tendency towards disruption and factionalism".<sup>607</sup>

- A member has the specific right to take part in elections and to be elected or appointed to any committee, structure, commission or delegation.<sup>608</sup>
- A member shall observe discipline, behave honestly and carry out loyally decisions of the majority and decisions of higher bodies.<sup>609</sup>
- At least one-third of the members in all structures have to be women.<sup>610</sup>
- The national general council has the right to alter or rescind any decision taken by any of the constituent bodies, units or officials of the ANC.<sup>611</sup>

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<sup>602</sup> Rule 2.3.

<sup>603</sup> Rule 3.2.

<sup>604</sup> Rule 3.4.

<sup>605</sup> Rule 3.6.

<sup>606</sup> Rule 3.8.

<sup>607</sup> Rule 4.15.

<sup>608</sup> Rule 5.1(d).

<sup>609</sup> Rule 5.2(g).

<sup>610</sup> Rule 6.2.

- The national conference also has the power to review, ratify, alter or rescind any decision taken by any of the constituent bodies, units or officials of the party.
- All candidates representing the party at any level during an election of government must undertake in writing, prior to the elections, to abide by the constitution of the party and the relevant code of conduct for elected representatives and to submit to and abide by any disciplinary proceedings instituted against her or him in terms of the constitution or code of conduct.<sup>612</sup>

In preparation for the 1994 elections, the ANC held a candidate's election conference in Johannesburg to compile its National Candidate List.<sup>613</sup> The conference consisted of delegates from the branches in each region along with delegates from special interest groups such as COSATU, the Women's League and the Youth League. Any member was eligible for nomination and the nomination had to be supported by at least two branches of the ANC. The provinces each first compiled a regional list through elections and thereafter a national list of 200 names was compiled. There were more than 1,000 nominees and every delegate could vote for 200 names. The 200 nominees with the highest number of votes were selected. Adjustments were made to the lists pertaining to gender equality where after the list had to be cleared by the National Executive Committee of the ANC who apparently did make certain changes to the list.<sup>614</sup>

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<sup>611</sup> Rule 10.7(c).

<sup>612</sup> Rule 25.1(b).

<sup>613</sup> Pierre de Vos *South Africa's experience with proportional representation* de Ville Jacque and Steytler Nico (ed) *Voting in 1999 Choosing an Electoral System* (1996) 39.

<sup>614</sup> Op cit 40.

According to Fèbè Potgieter, coordinator of the National Working Committee and the National Executive Council of the ANC,<sup>615</sup> much the same procedure was followed in compiling the 1999 lists.

However, for the 2004 elections, the National Executive Council of the ANC adopted<sup>616</sup> guidelines for the compilation of its lists based on the following considerations:

- The process must combine democracy and transparency as well as allow for strategic political intervention.
- The process and final list has to have legitimacy and broad acceptance.
- The process must be clear and simple.

The guidelines were published in an information sheet of the National Working Committee on 6 June 2003 containing 56 numbered paragraphs of which the following are the most important:

- All powers and final discussions about lists, quotas and ordering lies with the National Executive Committee.<sup>617</sup>
- Specific criteria are set for candidates.<sup>618</sup>
- Procedure for the nomination of candidates is set out.<sup>619</sup>
- Provision is made for the screening of initial lists.<sup>620</sup>

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<sup>615</sup> E-mail dated 25 September 2003.

<sup>616</sup> 22 to 24 May 2003.

<sup>617</sup> Paragraph 20.

<sup>618</sup> Paragraph 29.

<sup>619</sup> Paragraphs 30 to 35.

<sup>620</sup> Paragraphs 36 to 40.

- Provision is made for provincial list conferences<sup>621</sup> and a national list conference.<sup>622</sup>
- Provision is also made for appeals or objections.<sup>623</sup>
- The National Executive Committee may approve final alterations.<sup>624</sup>
- The person designated by the President as premier candidate will be number one on the relevant province's list.

It is therefore clear that in theory, the ANC methodology allows for a free and democratic procedure while the National Executive Committee still maintains control. Criticism against the procedure is that it takes far too long to be finalised. According to the timeframe set for the 2004 candidate list, the process started in June 2003 and was scheduled to be finalised in December 2003. As the very nature of electing and listing people is a potentially explosive one, less tension will build up if the process is shortened.

#### **5.2.5.2.2 DEMOCRATIC PARTY AND DEMOCRATIC ALLIANCE**

In 1994, The Democratic Party (DP) initially decided to use a single transferable vote system (STV System) for the election of candidate lists. But after finding that it was, in practice, a very complicated way of compiling lists, it was only used in the compilation of the national list. An Electoral College was constituted on the basis of one representative for every 1,000 members of the party in each province. The

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<sup>621</sup> Paragraphs 44 to 46.

<sup>622</sup> Paragraphs 47 to 51.

<sup>623</sup> Paragraph 52.

<sup>624</sup> Paragraph 53.

members of the Electoral College were elected at the annual provincial conferences where after the Electoral College voted in terms of the STV System by ranking candidates in batches of eight. The first 24 positions on the national lists were selected in this way, but from number 25 onwards, candidates were ranked according to the number of votes obtained. Two independent scrutinisers monitored voting and except for the reservation of the first position on the list for the party leader, no changes were made to the list. Each region independently compiled regional lists. Each region could choose its own method for the compilation of its list provided that it adhered to the basic principles of democracy. No changes were made to the list. Although the DP list was criticised for not being fully representative of the Party's constituents, the methodology followed complies with the principles of free and fair elections.<sup>625</sup>

The constitution of the Democratic Alliance (DA)<sup>626</sup> makes provision for the adoption of suitable regulations for the selection of candidates.<sup>627</sup> Certain minimum requirements are set for such regulations<sup>628</sup> amongst others:

- All candidates are to be selected by democratically elected electoral colleges, the members of which are to be selected through a proportional voting system.<sup>629</sup>
- All potential candidates are to be vetted by an Electoral College or committee of the Electoral College.<sup>630</sup>

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<sup>625</sup> De Vos op cit 32.

<sup>626</sup> The constitution is available on the internet at [www.da.gov.za](http://www.da.gov.za) and it is also filed at the IEC.

<sup>627</sup> Paragraph 2.2.1. Regulations were adopted by the Federal Council on 2 August 2003. The DA has since adopted new regulations at its Federal Council meeting of 29- 30 July 2006 which regulations differ substantially from the regulations discussed here and appear to be an effort to strike a fairer balance between the rights of the candidate, the party and members.

<sup>628</sup> Paragraph 2.2.2.

<sup>629</sup> Paragraph 2.2.2.1.

- Candidates must have an equal opportunity to address the Electoral College or committee of the Electoral College.<sup>631</sup>
- Voting will be by secret ballot.<sup>632</sup>
- Once finalised the lists are to be submitted to the leader of the party before ranking.<sup>633</sup>
- The leader of the party is entitled to address an electoral college and express his views on any candidate.<sup>634</sup>
- The Electoral College, thereafter, proceeds with the ranking process leaving positions 3, 7, 14, 21 and every seventh position thereafter unfilled.<sup>635</sup>
- The leader of the party may fill any or all of the unfilled positions by promoting any person in a lower position.<sup>636</sup>
- In exceptional and justifiable circumstances, the leader of the party may nominate persons not previously considered by an Electoral College after consultation with the Electoral College.<sup>637</sup>
- Such a decision by the leader of the party may be vetoed by a two-third majority of the Electoral College.<sup>638</sup>

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<sup>630</sup> Paragraph 2.2.2.2.

<sup>631</sup> Paragraph 2.2.2.4.

<sup>632</sup> Paragraph 2.2.2.5.

<sup>633</sup> Paragraph 2.2.5.2.

<sup>634</sup> Paragraph 2.2.5.3.

<sup>635</sup> Paragraph 2.2.5.4.

<sup>636</sup> Paragraph 2.2.5.5.

<sup>637</sup> Ibid.

<sup>638</sup> Paragraph 2.2.5.6.

- The leader of the party may not demote a person from his or her position or remove a person from the list.<sup>639</sup>
- Should the leader of the party not fill the unfilled positions on the list, the persons in lower positions will move up accordingly.<sup>640</sup>

The federal council of the Democratic Alliance approved pro forma candidate selection regulations on 2 August 2003 and according to these regulations, the Provincial Executive, in consultation with the Federal Executive, has to determine dates for the nomination of potential candidates.<sup>641</sup> Once the dates have been determined, the Provincial Executive of each province must advise all its party formations, including branch committees, of the dates and invite nominations for potential candidates.<sup>642</sup>

A potential candidate must be:

- A member of the Party; and
- Nominated by a minimum of two party members who are members in the electoral area for which the potential candidate is nominated.<sup>643</sup>

Each province must elect an Electoral College but the bigger provinces may elect more than one Electoral College, termed “regional electoral colleges.”<sup>644</sup> The size of an electoral college is prescribed and it may not consist of fewer than 20 members in the case of smaller provinces or more than 100 members in the case of the bigger provinces. Public

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<sup>639</sup> Paragraph 2.2.5.7.

<sup>640</sup> Paragraph 2.2.5.8.

<sup>641</sup> Regulation 7.2.

<sup>642</sup> Regulation 2.1.

<sup>643</sup> Regulation 2.2.

<sup>644</sup> Regulation 3.1.

representatives may not exceed 50% of the Electoral College membership.<sup>645</sup> Members are to be elected from each region in proportion to the number of votes received by the party in that region in the most recent elections of a national nature.<sup>646</sup> A provincial Electoral College elects a Provincial Electoral Executive Committee, which must consist of not less than 10 and not more than 80 members with the same proviso that not more than 50% may be public representatives.<sup>647</sup> The following persons are not eligible as members of an electoral college:

- Party staff members.
- A parent, parent-in-law, son or daughter, sibling or partner of a potential candidate or aspirant candidate.
- Persons who were not members of the party on or before 15 August 2003 or have not been members for at least two years, whichever is the shorter period, and
- Potential candidates and aspirant candidates.<sup>648</sup>

All nominations of potential candidates must be submitted to the relevant Electoral College Executive Committee<sup>649</sup> who may reject nominations that are defective or irregular for any material reason, or that do not comply with the requirements set out in the Constitution of the Republic of South Africa, the law or the Constitution of the party.<sup>650</sup> Thereafter, the nominations are considered by the relevant Electoral College

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<sup>645</sup> Regulation 3.2.

<sup>646</sup> Regulation 3.4.

<sup>647</sup> Regulation 3.8.

<sup>648</sup> Regulation 3.14.

<sup>649</sup> Regulation 4.1.

<sup>650</sup> Regulation 4.3.



Executive Committee in terms of certain criteria<sup>651</sup> and three times the seat target number is invited for interviews.<sup>652</sup>

After the interviews have been concluded, the Electoral College Executive Committee has to select aspirant candidates equal to twice the seat target.<sup>653</sup> The chairperson of an Electoral College Executive Committee then presents a list of names of aspirant candidates in alphabetical order, unranked and where necessary, with a summary of comment.

According to the Constitution of the Democratic Alliance, the leader of the party is a member of any Electoral College.<sup>654</sup> Prior to the ranking process, the full list is submitted to the leader who is entitled to address the Electoral College and express a view about any candidate under consideration.<sup>655</sup> Once the list of candidates has been submitted to the Independent Electoral Commission, it is considered official and complete.<sup>656</sup>

The regulations for the selection and placement of candidates have been drawn up with the overall objective to recruit and select suitable candidates who:

- meet the key requirements of merit, representivity and diversity; and
- have a commitment to and are able to effectively promote the vision, principles, policy and programme of action of the party.

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<sup>651</sup> Regulation 4.4.1.

<sup>652</sup> Regulation 4.4.2.

<sup>653</sup> Regulation 4.7.1.

<sup>654</sup> Section 2.2.5.1.

<sup>655</sup> Section 2.2.5.2 – 3.

<sup>656</sup> Regulation 5.11.

It is acknowledged that there is no “perfect” system and that one has to settle for compromises based on logic, experience and arithmetic, but the following key objectives have been spelled out:

- The majority must have a say.
- Significant minorities must not be excluded.
- The “tail must not wag the dog”.
- Insignificant minorities / lunatic fringes must not be encouraged to attempt to disproportionate the representation.
- Wasted votes to be minimised.
- The chances of tactical voting must be minimised.
- Enable the Electoral College to monitor representivity; and
- Aim for as much simplicity, speed and clarity as far as possible.

Although the qualification for nomination is very low (any member of the party nominated by at least two members) the Electoral College executive committees have virtually unrestrained power in deciding who will become candidates and what their positions would be on the lists. Nevertheless, the election of the Electoral College complies with general democratic principles and the exclusion of officials and any person with a possible conflict of interest meet with accepted standards as far as indirect election is concerned.

By having the right to fill positions 3, 7, 14, 21 etc on the list, the leader of the party is in a strong position to ensure the election of at least a number of members of his

choice. The number of members eventually appointed by the leader will, of course, depend on the number of seats gained, but the percentage will diminish with an increase in seats won. For example, if only seven seats are won, the leader determines three of the members (42.86% of the seats), being the first position filled by him, the third position and the seventh position. If 14 seats are won, the leader-appointed members decrease to four or 28.57%. If 21 seats are won, the leader-appointed members decrease to 23.8%. If the results of the 1999 election are taken as a norm, the leader would have controlled the appointment of seven of the 38 members (18.42%). The DA system of nominating and listing candidates can therefore be summed up as an indirect, but democratically transparent system that allows for a limited leader's prerogative.

#### **5.2.5.2.3 THE INKATHA FREEDOM PARTY (IFP)**

As the IFP initially decided not to participate in the 1994 elections, no provision was made for the compilation of party lists. When it eventually decided to participate in the election, it was too late to go through any nomination process and Arthur Koningkramer, who ran the IFP election office, is quoted as follows:

“It was chaotic. People were randomly put on the list and no democratic procedure was used at all. We simply didn't have the time.”<sup>657</sup>

The IFP, since then, adopted in principle the idea that future candidates would be democratically elected through provincial electoral colleges but these were not yet in place by the 1999 elections and the lists were again compiled by the National

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<sup>657</sup> Pierre de Vos op cit 35.

Executive Council and deployed leaders in the provinces other than KwaZulu-Natal.<sup>658</sup>

However, at the Annual General Conference held in July 2003, a candidate selection policy was adopted. As far as personal circumstances are concerned, the following requirements were laid down: <sup>659</sup>Every candidate must-

- be legally permitted to stand as a candidate
- comply with any required candidate nominations procedure
- be a current paid-up member of the IFP
- be a registered voter
- have experience and expertise that will enable the candidate to hold his or her own constructively in the relevant legislature
- have no history of involvement in fostering divisions and conflicts in the party
- be of appropriate social standing in the community
- have no history of ill discipline or corruption.

Further issues that were to be taken into account are geographical representivity, gender, age and disability, racial / ethnic representivity, skills and the position of traditional leaders. It is specifically stated that a track record of membership and loyalty to the party are necessary preconditions to be honoured with representing the party in a legislature. As far as the nomination of candidates is concerned, a 30/70

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<sup>658</sup> As informed by the Party's Chief Whip Mr JH van der Merwe MP.

<sup>659</sup> Information supplied by Mr Albert Mncwango MP, National Organiser of the IFP by letter dated 14 November 2003.

formula was adopted in terms whereof 70% of the candidates come through a party structure route while 30% is nominated by the National Council.

In KwaZulu-Natal, the 11 districts of the province are each entitled to one initial candidate and based on the support during the previous elections, districts are entitled to additional candidates up to a maximum of eight per district.

In the other provinces, the province is taken as a whole and districts are not taken into account. As far as candidates for the National Assembly are concerned, the formula is premised on the regional quota of seats and weighted based on past election results.

A ratio between the National Council and district / provincial candidates, is determined.

Each district or province convenes a candidate committee chaired by a National Council appointee to elect the required number of candidates. The lists are prioritised and submitted to the National Executive Council for processing. The National Council, at the same time, nominates its lists, which are also prioritised and submitted to the National Executive Council. The National Executive Council merges the various lists to create:

- the provincial lists
- the regional lists; and
- the national lists

In theory the methodology devised by the IFP appears to be transparent and democratic. However, in practise the final lists are compiled by the Secretary General of the Party and approved by the President of the Party before submission to the

National Council<sup>660</sup> for consent.<sup>661</sup> It can therefore not be said that the IFP candidate lists are compiled either democratically or transparently.

#### 5.2.5.2.4 COMMENT

Irrespective of the methodology applied by the parties studied, it is clear that those who eventually make it to the candidate lists must at least have some degree of support at branch level in their parties or be held in very high esteem by the party hierarchy. To achieve such a position would, in most cases, entail dedication, sacrifice and hard work over many years with no guarantee of success. It is not possible to quantify the efforts put in by individual members, but there are examples of huge monetary contributions<sup>662</sup>, thousands of kilometres travelled, many weekends and leisure time spent in attending meetings and canvassing with the only carrot being a *spes* of eventually being placed high enough on the list for election.

Such extra-ordinary contributions do not stop once a member has been elected.

Because of the nature of Parliamentary work, members with professional interests outside Cape Town and environment find it difficult to continue with their professions or businesses in more than an advisory or consulting capacity with resultant pecuniary loss. Those who were in employment before appointment inevitably have to resign their positions with very little or any hope of returning should they lose their seat.<sup>663</sup>

Demands on financial contributions continue at an increased level and, depending on a member's home base, his or her non-refundable travelling and out of pocket

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<sup>660</sup> Which is a non-democratic body appointed by the President of the Party.

<sup>661</sup> Personal observation confirmed by Mr JH van der Merwe MP *Chief Whip of the IFP*.

<sup>662</sup> According to an article by Eugene Gunning in *Rapport* (16 May 2004), Members of Parliament have to contribute between R600 and R3400 per month from their parliamentary salaries to their respective parties. In the case of one party elected members had to pay R20 000 to the party after their election. This could be seen as monetary qualifications, which is unconstitutional.

<sup>663</sup> The contributions made by a Member in his election and thereafter, can therefore not be left out of the equation.

expenses could be much more than the annual representation allowance paid by Parliament.<sup>664</sup> Time spent on travelling between a Member's home base and Cape Town as well as to and from meetings can also be very taxing.<sup>665</sup>

### 5.3 PRESSURE GROUPS

In positive public law the authority of the state is legitimised by the process through which the subjects of the state influence the composition of the government as well as government policy so that the power of the state is not exercised arbitrarily but on behalf of the subjects of the state.<sup>666</sup> Elections form the most important part of the process by which a representative system of government is created, but pressure groups such as labour unions also play an important role. However, the difference between political parties and pressure groups is that pressure groups intend to influence government policy whereas political parties aim at gaining control of the government through elections.

In a non-democratic society citizens manifest their displeasure with government policy by visible means such as violence, strikes, demonstrations etc. However, in a democratic society it is axiomatic that the people express their wishes through the ballot box and that the minority tolerate the rule of the majority until the next round.

Basson<sup>667</sup> identified the following pressure groups in South Africa:

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<sup>664</sup> Presently R40 000-00.

<sup>665</sup> According to the writer's records he spent 376 hours in travelling during his first year as a Member of Parliament.

<sup>666</sup> Basson DA "Vakbonde in Politieke Verteenwoordiging" (1983) *De Jure* 147.

<sup>667</sup> *Op cit* 150.

- Commercial pressure groups such as the Chambers of Commerce, Chambers of Mines etc;
- Agricultural pressure groups such as Agri SA, National Wool Growers Association, Transvaal Agricultural Union etc;
- Professional pressure groups such as Association of Civil Servants, Law Societies, Teacher Associations etc;
- Ethnic and Cultural pressure groups such as the Broederbond, Black Sash, Women's Federations etc;
- Organised Labour such as trade unions;
- Reformist Organisations such as the SPCA, Aksie Morele Standaard, Treatment Action Campaign, Religious organisations etc.

The importance of extra-parliamentary politics is illustrated by the fact that the Leader of the Opposition in 1986, Dr van Zyl Slabbert, resigned because he believed after seven years as Leader of the Opposition that he could achieve more through extra-Parliamentary politics. After resigning he formed the Institute for a Democratic Alternative for South Africa (IDASA), which indeed did much to prepare South Africa for a political settlement in 1993.<sup>668</sup> However, it should be pointed out that Slabbert conceded that his frustration was with Parliament under the 1983 Constitution and not with the abstract concept of Parliamentary Government, to which he was unreservedly committed.<sup>669</sup>

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<sup>668</sup> Suzman Helen *In No Uncertain Terms* (1993) 254.

<sup>669</sup> Slabbert F van Zyl *The System and the Struggle, Reform, Revolt and Action in South African* (1989) 92.



It therefore seems that one has to distinguish between the position of a properly constituted, fully represented Parliament such as the South African Parliaments under the 1993 and 1996 Constitutions and a Parliament that is not fully representative such as those before 1994. If a Parliament is not fully representative, those not represented will demand power and since they are not represented in Parliament, they will have to make use of extra-Parliamentary means. There will also be extra-Parliamentary groups who on moral grounds will take it upon themselves to promote the cause of those not represented, such as religious organisations (i.e. the Christian Institute) and moral organisations (i.e. the Black Sash).<sup>670</sup>

There is less justification for extra-Parliamentary pressure groups in the case of a democratically elected representative Parliament, but since such groups form part of a political party's larger constituency, it is to be expected that such groups will have an influence on the behaviour of political parties and thus on their mandate.

The most influential pressure group in South African history was no doubt the Broederbond. It was described as follows in 1978:<sup>671</sup>

“Although it has only 12,000 scrupulously elected members, it plots and influences the destiny of all 25 million South Africans, black and white....the South African Government today is the Broederbond and the Broederbond is the Government. No government can rule without the support of the Broederbond and no Afrikaner can become Prime Minister unless he comes from the Organisation's select ranks.”

At the fiftieth anniversary of the Broederbond in 1968 the first Chairman of the organisation, HJ Klopper<sup>672</sup> said the following in a celebratory speech:<sup>673</sup>

“Since the Afrikaner Broederbond got into its stride it has given the country its governments. It has given the country every Nationalist Prime Minister since 1948. Its efforts gave our Republic to our

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<sup>670</sup> Please see Naude Beyers *My Land van Hoop* (1995) 73 to 140 for the motivations of the Christian Institute in participating in extra-Parliamentary activity.

<sup>671</sup> Wilkens Ivor and Strydom Hans *The Super Afrikaners* (1978) 1.

<sup>672</sup> Who also was the Speaker of the National Assembly from 20 January 1961 to 1 August 1974 Parliamentary Register 130.

<sup>673</sup> Wilkens and Strydom op cit 345

Nation. It has given the country two State Presidents.<sup>674</sup> Do you realise what a powerful force is gathered here tonight between these four walls? Show me a greater power on the whole Continent of Africa! Show me a greater power anywhere even in your so-called civilised countries! We are part of the State, we are part of the Church, we are part of every big momentum that has been born of the nation. And we make our contributions unseen.<sup>675</sup> We carried them through to the point that our nation has reached today.”

What distinguishes the Broederbond from other pressure groups is that it was a secret society<sup>676</sup> and that its members were recruited through a long and complicated secret process.<sup>677</sup> The fact that such a society dominated the government to the extent that it did, shows how dangerous it is for extra-parliamentary groups to gain too much control over a political party.

#### **5.4 THE ALLEGIANCE OF MEMBERS OF PARLIAMENT**

It was pointed out in Chapter 2 that an Oath of Allegiance formed a cornerstone of the constitutional process that eventually developed into the parliamentary system.

Members of Parliament in Britain were required to swear allegiance to the monarch and this principle was also introduced in South Africa.

The Oath of Allegiance in South Africa was first introduced by proclamation on 7 October 1795 at the first surrender of the Cape to the British.<sup>678</sup> According to the Oath of Allegiance required of residents, all persons residing in the Cape were considered to have taken the Oath unless notice of the contrary was given, in which

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<sup>674</sup> At that time CR Swart and JJ Fouche. The subsequent State Presidents until 1994, N Diederichs, M Viljoen, BJ Vorster, PW Botha and FW de Klerk were also members according to the list published by Wilkins and Strydom op cit A21 to A139.

<sup>675</sup> My underlining.

<sup>676</sup> Wilkins and Strydom op cit 383.

<sup>677</sup> Wilkins and Strydom op cit 372 to 382.

<sup>678</sup> Eybers op cit page 4.

case a reasonable time to settle one's affairs to withdraw from the Colony was granted.<sup>679</sup>

The principle of an Oath of Allegiance was also introduced in the Voortrekker Republics and from August 1840, all residents of 15 years or above were compelled to take an Oath of Allegiance "*Voor land en volk*".<sup>680</sup> Those who refused to take the Oath remained without any civil rights<sup>681</sup> and it was later decided to banish them from Natal.<sup>682</sup> The Members of the Council of Representatives<sup>683</sup> also had to take the following Oath:

"We the undersigned representatives of the people, promise and solemnly swear, that we in our relationship in all matters give our votes in all fairness, without favour, fear or regard of persons and to our best knowledge and ability. That we will not, from nobody accept or give gifts or favours if it is suspected that it is done with the purpose to gain our votes for advantage; not to have any other purpose than to advance the common good and welfare according to the instructions adopted in this regard."<sup>684</sup>

The Oath of Allegiance for Members of Parliament was constitutionalised in the Constitution of the Cape Colony, which read as follows:

"I do sincerely promise and swear, that I will be faithful and bear true Allegiance to Her Majesty, Queen Victoria, as lawful Sovereign of the United Kingdom of Great Britain and Ireland, and of this Colony of this Cape of Good Hope; and that I will defend Her to the utmost of my Power against all traitorous-Conspiracies and attempts whatever, which shall be made against Her Person, Crown and Dignity; and that I will do my utmost endeavours to disclose and make known to Her Majesty, Her Heirs and Successors, all Treasons, and traitorous Conspiracies and Attempts, which I shall know to be against Her Majesty, or any of them;-And all this I do swear without any Equivocation, and renouncing all Pardons and Dispensations from any Person or Persons whatever to the contrary."<sup>685</sup>

Subsequent Constitutions re-enacted the principle of an Oath of Allegiance to the Crown, State or Constitution. According to the Oath Members took when sworn in as

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<sup>679</sup> Ibid.

<sup>680</sup> Preller Gustav S *Voortrekker Wetgewing* (1924) vi.

<sup>681</sup> Ibid .

<sup>682</sup> Preller op cit vii

<sup>683</sup> *Raad van representanten van het volk* which was the equivalent of their Parliament.

<sup>684</sup> Preller op cit xiii. My translation from the Dutch of Article 16 Voortrekker legislation.

<sup>685</sup> *Cape of Good Hope Standing Rules and Orders and Forms of Proceeding of the House of Assembly* (1883) 112.

Members of the Union Parliament, their allegiance was not to the Party or the electorate, but to the Crown.<sup>686</sup> The following Oath was administered:

“I, AB, do swear that I will be faithful and bear true allegiance to His Majesty the King (or Queen as the case may be) of the United Kingdom of Great Britain and Ireland, his or her heirs and successors, according to law, so help me God.”

The words of “the United Kingdom of Great Britain and Ireland” were deleted by Section 7 of the Status of the Union Act 69 of 1934 and replaced by the name of the then King or Queen for the time being. Provision was also made for an affirmation for those who had an objection to taking the Oath.

When the Constitution of the Republic of South Africa was adopted in 1961 the Oath was changed to one of faithfulness to the Republic.<sup>687</sup> The Oath read as follows:

“I, AB, do swear to be faithful to the Republic of South Africa and solemnly promise to perform my duties as a Member of the Senate / House of Assembly to the best of my ability. So help me God.”<sup>688</sup>

The Oath prescribed by the 1983 Constitution was the same as that prescribed by the 1961 Constitution except that it made provision for the House of Representatives and the House of Delegates, while omitting the Senate which had been abolished in 1980.<sup>689</sup> With the adoption of the interim Constitution in 1993, the Oath was slightly adapted and read as follows:

“I, AB, do hereby swear / solemnly affirm to be faithful to the Republic of South Africa and solemnly promise to perform my functions as a Member of the National Assembly / Senate / Provincial Legislature to the best of my ability.”<sup>690</sup>

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<sup>686</sup> Section 51 of the South Africa Act.

<sup>687</sup> Section 52.

<sup>688</sup> No provision was made for an affirmation.

<sup>689</sup> Section 57.

<sup>690</sup> Section 123.

However, when the 1996 Constitution was adopted, the Oath was expanded to include obedience and respect to the Constitution and all other law. The new Oath read as follows:

“I, AB, do hereby swear / solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I solemnly promise to perform my functions as a Member of the National Assembly / permanent delegate to the National Council of Provinces / Member of the Legislature of the Province of CD to the best of my ability.”<sup>691</sup>

While the allegiance of Members of Parliament up to the end of Union (1961) was to the Head of State (the Crown), the Republican Constitution provided for:

- Faithfulness to the State (the Republic); and
- A promise to perform the duties of a Member to best ability.

The Oath in terms of the interim Constitution of 1993 was for all practical purposes the same but the 1996 Constitution added the undertaking to “obey, respect and uphold the Constitution and / or other law”. From a constitutional law point of view, the Crown was replaced by the State (and not by the President) when the Republican Government was introduced. The changes up to the 1983 Constitution did not change the principle of the Oath in any material way.

The Oath up to the 1996 Constitution was therefore for all practical purposes the same in content and implied that the Member was to act in the best interest of the people as a whole, irrespective of who elected him or her. The question arises whether the addition of the undertaking to “obey, respect and uphold the Constitution and all other law” changed the purport of the Oath?

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<sup>691</sup>Schedule 2 Section 4(1) of the 1996 Constitution.

One argument is that being faithful to the State automatically implies that one would obey, respect and uphold the Constitution and all other law and that the wider wording in the 1996 Oath does not materially change the situation. However, as in the case of the change in constitutional regime from the Union Constitution to the Republican Constitution, the 1996 Constitution also introduced a fundamental change in the sense that Parliamentary sovereignty was replaced by Constitutional sovereignty.<sup>692</sup> It is therefore submitted that the addition of the undertakings was done to emphasise the supremacy of the Constitution and not to broaden the purport of the Oath. This conclusion is supported by the wording of the Oath of the President and the Deputy President.

The Oath prescribed for the President and the Deputy President is in essence the same as that of Members, except that it contains the following additional promises:<sup>693</sup>

- (to) promote all that will advance the Republic, and oppose all that may harm it;
- protect and promote the rights of all South Africans;
- discharge his duties with all his strength and talents to the best of his knowledge and ability and true to the dictates of his conscience;
- do justice to all and
- devote himself to the well-being of the Republic and all of its people.

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<sup>692</sup>Please see Chapter 5.3.2.

<sup>693</sup>Schedule 2 sections 1 and 2.

It is submitted that as in the case of Members, the promises are examples of the commitment inherent to the Oath of being faithful to the Republic and to obey, observe, uphold and maintain all law. It therefore seems that the promises are more *ex consequentibus* to the purport of the Oath rather than having been included *ex abundanti cautela*. It is submitted that the promises were added to the Oath to define the liability of the taker of the Oath.<sup>694</sup> The central theme of these promises is to act in the general good of all, subject only to the dictates of conscience. As no other dictates are mentioned it can in terms of the *inclusio unius* rule<sup>695</sup> be construed as authority for a free mandate subject only to the law.<sup>696</sup>

It can therefore be concluded that the various changes effected to the wording of the Oath were primarily made to provide for the constitutional changes that occurred over time and that the underlying principle of allegiance has not changed. Allegiance or faithfulness is therefore pledged to the State in the wide sense of the word and although a Member of Parliament may owe his position in Parliament to a specific group of people, his Oath is to act in the interests of the public at large.<sup>697</sup>

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<sup>694</sup> Steyn LC *Die Uitleg van Wette* Third ed (1963) 17.

<sup>695</sup> Steyn op cit 196.

<sup>696</sup> Such an interpretation would also comply with Section 39 (2) of the 1996 Constitution that requires a mode of statutory interpretation that promotes the spirit, purport and objects of the Bill of Rights. In this context particularly sections 15, 16, 17, 18 and 19. It is also in line with the principles of the original Oath between the Sovereign and his subjects.

<sup>697</sup> An apparent lacuna is, however, that there is no sanction for Members who break the Oath if the transgression is not punished with at least twelve months imprisonment without the option of a fine. (Section 47(1) (e) of the 1996 Constitution). In the so-called Travelgate scandal, for example, Members were given stiff sentences of up to four years for fraud, but as fines were imposed as an option, Parliament could not take any action against these Members, notwithstanding the seriousness of the transgressions. (*The Cape Times* of 18 March 2005 and *Mail and Guardian* of 20 June 2005). That it is left to Political Parties to discipline their Members under these circumstances (please see statement issued by the *Chief Whip of the Opposition* dated 11 August 2004) is not satisfactory as the Oath is made in Parliament before the President of the Constitutional Court or a Judge designated by the President of the Constitutional Court (Schedule 2 section 4(1)). Persons filling a vacancy are sworn in by the Presiding Officer of the Assembly in terms of Schedule 2 Section 4(2). The possibility of Parliament itself taking action against Members in these circumstances on the grounds of breaking the terms of the Oath needs further attention.

## 5.5 THE INFLUENCE OF THE ELITE

In all democratic societies there are people who by virtue of their special position in society exercise an influence over the development of events. These people are known as the elite.<sup>698</sup> The word *elite* is derived from the French word *élire*, which means to *choose*.<sup>699</sup> The *elite* then refers to the *chosen* and is “a collective term for people with status, education, wealth and those compelling qualities which can influence the course of politics.”<sup>700</sup> Kotze<sup>701</sup> defines *elites* as follows:

“Elites are those persons who, individually, regularly and seriously have the power to affect organisational outcomes.”

Although politicians and Members of Parliament, in particular, are considered part of the elite<sup>702</sup> van Niekerk identifies four other categories of the elite, namely the bureaucracy (senior civil servants), business leaders (captains of industry), leaders of organised labour and military leaders.<sup>703</sup> To this can be added members of the academia, media, judiciary, religious leaders, diplomatic corps, agricultural leaders, leaders of national organisations and NGOs. The total number of the national elite is not very high and Kotze puts the figure for a large country like the United States of America between 5,000 and 10,000 people and for a middle-range country like Australia between 1,000 and 5,000 people.<sup>704</sup> South Africa would probably also fall in the 1,000 to 5,000 category.

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<sup>698</sup> van Niekerk CPJ *Rol van die Elite in die Demokrasie in Suid-Afrika en die Demokrasie* Fourie, Kriek, Labuschagne, Louw and Venter (Editors) (1988) 179.

<sup>699</sup> Kotze Hennie *Elites and Democratisation* (1991) 3.

<sup>700</sup> Ibid.

<sup>701</sup> Op cit 3.

<sup>702</sup> Kotze op cit 9.

<sup>703</sup> Op cit 195 to 196.

<sup>704</sup> Op cit 4.



It is of course not possible to ascertain with any accuracy what influence the elite have on the way a Member of Parliament sees his mandate, but it can be accepted that the influence is substantial. Examples are briefings by senior civil servants and academics to Parliamentary Committees, Editorials and other publications, judgments (especially by the Constitutional Court), statements by Church leaders and personal interactions.<sup>705</sup>

## 5.5 REFERENDA AND PLEBISCITES

Basson<sup>706</sup> defines referendum as that form of direct law making whereby the government is bound in law by the result of the referendum. A plebiscite on the other hand is a mere test of voters' feelings on a particular issue. The result of a plebiscite is not considered binding *de jure* but the government will in most cases feel morally obliged to honour the result. In practice therefore both systems have the same result in as far as they curtail the representatives' free mandate, as the representative is bound by such a mandate issued by the voters. Basson<sup>707</sup> is of the opinion that a referendum cannot be held where a free mandate theory of representation applies.

South Africa has had three referenda in its constitutional history. The first was in 1960 to decide whether the country should become a Republic. The second was on 2 November 1983 concerning the constitutional changes embodied in the 1983 Constitution and the third was on 17 March 1992 concerning the constitutional changes that led to the "new" South Africa. In all three cases the voters voted in

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<sup>705</sup> A very recent example is the discussion between President Mbeki and the so-called Afrikaans elite led by Prof Willie Esterhuysen of Stellenbosch. See the *Sunday Times* editorial (20 November 2005).

<sup>706</sup> Second LLD thesis op cit 167.

<sup>707</sup> Op cit 168 and further.

favour of the proposed changes and they were implemented. The question that arises is whether a convention was not created by these three referenda in terms whereof any substantial constitutional change should first be put to the test by a referendum?

## 5.6 THE SUPREMACY OF THE CONSTITUTION

In Chapter 2 reference was made to the fact that in terms of the new constitutional regime in South Africa the Constitution and not Parliament is sovereign.<sup>708</sup> Section 44(4) of the 1996 Constitution provides that “When exercising legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.” The Constitutional Court is empowered to decide on the constitutionality of any Parliamentary Bill,<sup>709</sup> amendment to the Constitution,<sup>710</sup> whether Parliament has failed to fulfil a constitutional obligation<sup>711</sup> and whether an Act of Parliament is constitutional.<sup>712</sup> In positive public law this is referred to as the “Supremacy of the Constitution”. The Constitutional Court has ruled<sup>713</sup> that one of the constraints that this imposes on Parliament, apart from the dictates of the Constitution, is that there must be a rational relationship between the scheme which it adopts and the achievement of legitimate government purpose<sup>714</sup>. That rationality is a minimum requirement for the exercise of power was confirmed in a later judgement of the Constitutional Court.<sup>715</sup> In as much as this limits the power

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<sup>708</sup> See Chapter 2.7.

<sup>709</sup> Section 167(4) (b).

<sup>710</sup> Section 167(4) (d).

<sup>711</sup> Section 167(4) (e).

<sup>712</sup> Section 167(5).

<sup>713</sup> *New National Party of South Africa v Government of Republic of South Africa and Another* 1999 (3) SA 191 (CC).

<sup>714</sup> *Op cit* 206 and further.

<sup>715</sup> *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the RSA* 2000 (2) SA 674 at 708 D-F; 2000 (3) BCLR 241 (CC) at 84-85.

of Parliament to legislate freely it, of course, limits the scope of a representative's mandate accordingly.

However, as the Constitution is not cast in stone<sup>716</sup> a mandate to change any matter regulated by the Constitution can still be legal but its implementation will, of course, be conditional to the necessary majority to amend the Constitution be obtained<sup>717</sup>.

## 5.7 CONCLUSION

There are both intra- and extra-parliamentary factors that have an influence on the actions of a Member of Parliament. Of these, the political party to which a member belongs has the strongest influence. The intra-parliamentary influence is exercised through the Caucus whose decisions are binding on individual members. Extra-parliamentarily, the party has control over a member through the party's manifesto, policies, disciplinary action, funding and the selection of candidates. The fact that a member loses his or her seat through the loss of party membership makes the party's hold over a member absolute. In this sense the party outside parliament controls the party inside parliament.

After political parties, extra-parliamentary pressure groups have the strongest influence. The difference between political parties and pressure groups is that while pressure groups tend to influence government policy, political parties aim at gaining control of the government through elections. However, political parties in opposition also act as pressure groups. In a democratic society, the role of pressure groups is not

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<sup>716</sup> It may be amended in terms of Section 74.

<sup>717</sup> Section 1 and subsection 74(1) may only be amended by a supporting vote of at least 75 per cent in the National Assembly and six of the provinces in the NCOP.

as important as in non-democratic societies, as in a democracy the people express their wishes at the ballot box and it is axiomatic that the minority tolerate the rule of the majority until the next election.

As far as the allegiance of members is concerned, it is submitted that although members swear / confirm their allegiance to the constitution, the concept of allegiance no longer plays an important role in practical politics and is only of theoretical interest. However, the content of the oath implies a free mandate.

That the elite have a definite influence on the activity of a member is without doubt, but since the influence is exercised on a more subtle level, it is difficult to determine its effect with any accuracy.

Referenda and plebiscites are a form of direct democracy. In practice, a representative is therefore mandated to adhere to the outcome of a referendum or plebiscite and consequently has no discretion in this regard.

The transfer of sovereignty from Parliament to the Constitution has the potential to create tension between the judiciary and Parliament as illustrated by the reaction by the judiciary to the Fourteenth Amendment Bill<sup>718</sup> proposed by the Minister of Justice<sup>719</sup>. The fact that the Bill was put on hold illustrates the influence of the judiciary on the legislative process and this may result in a blur between the basically political approach of a legislature and the judicial function of the courts. However, in a certain sense it is reminiscent of the time of the old witemagenot when laws could not be made at will but had to be “found” by the wise of the tribe<sup>720</sup>. It there for seems that at least in this regard constitutional law has made a full circle. The danger

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<sup>718</sup> See press release by Sheila Camerer MP *Spokesperson for the Opposition on Justice and Constitutional Affairs* (22 April 2005).

<sup>719</sup> As a result of the reaction by the judiciary the Bill was put on ice and will most probably not be passed in its present form.

<sup>720</sup> See chapter 2.1.

of course lies therein that just as the monarchs tried to manipulate the decisions of the wise, there may develop a temptation to influence the judiciary.<sup>721</sup> This subject falls outside the scope of this study but it certainly needs to be studied further.

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<sup>721</sup> The Fourteenth Amendment Bill is seen by some as precisely that. See statement by Ms Sheila Camerer MP *op cit.* and the criticism of the International Bar Association as reported by Rickard Carmel in the *Sunday Times* (23 April 2006).

## CHAPTER 6

### FLOOR-CROSSING

*“Some men change their party for the sake of their principles; others change their principles for the sake of their party.”*

Winston S Churchill <sup>722</sup>

*“Floor-crossing has an impact on the original electoral balance, but it does not necessarily mean a shift in defectors ideologies and electoral support --- South African politics requires this type of manoeuvring because if Parliamentarians are disaffected with internal party anarchy, --- they can change to other parties to uphold the needs of voters, not just party interests.”*

Selby L Matlogu Letter to Mail & Guardian 16-22 September 2005

*“It is unconscionable that we have a political system whereby politicians can, on personal whim or on the basis of political favour, cross the floor to join other parties without having to make themselves accountable to the voters or to a constituency.”*

Michael Cassidy Letter to Mail & Guardian 16-22 September 2005

#### 6.1 INTRODUCTION

As indicated above a free mandate theory of representation existed in South Africa up to the implementation of the interim Constitution in 1994. Floor-crossing occurred regularly during this period. For convenience, this period has been divided into three periods, namely 1910 – 1948; 1948 – 1983 and 1983 - 1994. The period after 1994 is dealt with after a discussion of the relevant legislation and ensuing court cases, under the headings “Floor-crossing 2003” and “Floor-crossing 2005” respectively.<sup>723</sup> The private members’ bills to re-introduce an imperative system of representation and subsequent developments are discussed and finally the advantages and disadvantages of floor-crossing are weighed.

<sup>722</sup> As quoted by Dominique Enright *The Wicked Wit of Winston Churchill* (2001) 23.

<sup>723</sup> Chapters 6.4 and 6.5.

### 6.1.1. FLOOR-CROSSING 1910 – 1948

During the period 1910 – 1948 three major floor-crossing events can be identified:

- The first was when General Hertzog broke away from the South African Party in 1913 to form the National Party in 1914 because of differences Hertzog had with the policy of the South African Party as stated in its political manifesto.<sup>724</sup>
- The second was the coalition between the National Party and the South African Party which led to the formation of the United Party in 1934.<sup>725</sup>
- The third was the split in the United Party with the outbreak of the Second World War in 1939.<sup>726</sup> The Central Head Committee of the United Party endorsed the decision to declare war on Germany at a meeting held on 3 November 1939 with an overwhelming majority whereafter Hertzog and his followers resigned from the Party.<sup>727</sup>

### 6.1.2 FLOOR-CROSSING 1948 – 1983

Less dramatic moves occurred during this period, but the following is noteworthy:

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<sup>724</sup> See open letter by General Louis Botha to members of the South African Party dated 5 February 1913 and published in the *Volkstem* (7 February 1913). It is interesting that Hertzog first tried to gain control of the South African Party at the annual general conference in Cape Town in November 1913 and only went over to establish his own party when he was defeated in the challenge for control over the party by 131 to 90 votes. (See Crafford FS *Jan Smuts* (1945) 99 to 100, *Standard Encyclopaedia of Southern Africa* volume 10 103, and *Dictionary of South African Biography* Volume 1 370).

<sup>725</sup> Please see *Die Hertzog Toesprake Deel 6* edited by Spies, Kruger and Oberholzer (1977).

<sup>726</sup> See Hansard 4 September 1939.

<sup>727</sup> Smuts JC *Groter Suid-Afrika* (1941) 123.

- The coalition between the Herenigde Nasionale Party and Afrikaner Party that formed the government in 1948 led to the amalgamation of the two parties into the National Party in 1950.<sup>728</sup>
- In November 1954, six members of the United Party broke away to form the National Conservative Party.<sup>729</sup> The new party was dissolved in 1957 and three members returned to the United Party while three joined the National Party.<sup>730</sup>
- In November 1959, eleven members of the United Party formed the Progressive Party.<sup>731</sup>

The period from 1961 to 1983 can be considered the golden period of the National Party. It increased its representation from 103 to 142 members in the National Assembly. However, it only gained 3 members from floor-crossing.<sup>732</sup>

There were two outstanding occurrences during this period:

- The first was the reshuffling of the opposition and the demise of the United Party. Four members expelled from the United Party in 1975 formed the Reformist Party which amalgamated with the Progressive Party to form the Progressive Reform Party.<sup>733</sup> Six further members expelled from the United Party in 1977 formed the Independent United Party. Shortly thereafter the United Party was dissolved and a new party, the New Republican Party was established. Twenty-five of the United Party members joined the new party.

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<sup>728</sup> *Standard Encyclopaedia of Southern Africa* (SESA) Volume 1 192.

<sup>729</sup> Parliamentary Register 311.

<sup>730</sup> Parliamentary Register 312.

<sup>731</sup> Mostert op cit 121.

<sup>732</sup> HGO Odell United Party member for Pietermaritzburg City in 1962, HM Lewis United Party member for Umlazi in 1969 and SJM Steyn United Party member for Yeoville in 1973.

<sup>733</sup> Mostert op cit 126.



The six members who did not join the New Republican Party joined the Progressive Reform Party and formed the Progressive Federal Party.

- The second was the break-away that occurred from the National Party's right wing, of which there were two events. The first was in 1969 when four National Party members formed the Herstigte Nasionale Party (HNP) and the second was in 1982 when eighteen members formed the Conservative Party (CP).

### 6.1.3 FLOOR-CROSSING 1983 – 1994

There were three significant movements during this period, namely:

- The demise of the New Republican Party. Five of its members defected to the National Party and only one member was returned after the 1987 elections.<sup>734</sup>
- The establishment of the Democratic Party in 1989 by members of the Progressive Federal Party and the National Democratic Movement.<sup>735</sup>
- The rush to new or extra-parliamentary parties towards the end of this period.

Floor-crossing during this stage can be divided into two main groups, viz

- Those who crossed to existing extra-parliamentary parties, such as the ANC<sup>736</sup> and the IFP.<sup>737,738</sup>
- Those who crossed to a new political party.<sup>739</sup>

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<sup>734</sup> See Parliamentary Register.

<sup>735</sup> Formed earlier by an Independent member and two members of the Progressive Federal Party-see Parliamentary Register.

<sup>736</sup> By this time it was obvious that the ANC would play a dominant role in post-apartheid South Africa. Seven members of the Democratic Party joined the ANC but sat as Independent Members, while five members joined the IFP.

<sup>737</sup> Five Members, one from the DP, two from the CP and two from the NP joined the IFP.

<sup>738</sup> At that point in time the NP and the IFP were locked in negotiations and it was expected by some that a NP/IFP combination would form the first democratic government in South Africa. As informed by Mr JH van der Merwe MP, Chief Whip of the IFP.

## 6.2 SOUTH AFRICA POST- 1994 : THE INTERIM CONSTITUTION, ACT 200 OF 1993

The principle of the free mandate theory of representation was destroyed by Section 43(b) of the interim Constitution which came into effect on 27 April 1994.<sup>740</sup> Section 43(b), the so-called anti-defection clause, stipulated that a member of the National Assembly had to vacate his or her seat if he or she ceased to be a member of the party that nominated him or her as a member of the National Assembly. This introduced the so-called imperative mandate theory of representation in terms whereof a representative is bound by mandates issued by the political party which nominated him or her.<sup>741</sup> Basson<sup>742</sup> criticised the introduction of the anti-defection clause and pointed out that the free mandate was the universally accepted principle of representation in constitutional law. He also queried the bolstering of the already significant influence of political parties and suggested that an imperative mandate may contravene the protected fundamental rights contained in Chapter 3 of the interim Constitution, such as the right of freedom of expression,<sup>743</sup> freedom of association<sup>744</sup> and the right to freely make political choices.<sup>745</sup> He submits that the limitation of these rights is not justifiable in an open and democratic society.<sup>746</sup>

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<sup>739</sup> Eleven members of the CP eventually formed the Freedom Front. The reason was that the CP refused to participate in the 1994 General Election and had members stayed on in the CP it would have meant the end of their political careers.

<sup>740</sup> Basson DA *South African's Interim Constitution Text and Notes* (1994) 79.

<sup>741</sup> Basson op cit. It is interesting to note that in the case of the Pan-African Parliament specific provision is made for a free mandate in Art. 6 of the Protocol to the Treaty Establishing the African Economic Committee Relating to the Pan-African Parliament signed at Sirte Libya on 2 March 2001, which states that Members shall vote in their personal and independent capacity. The Rules of Procedure adopted on 21 September 2005 state that "in the exercise of their mandate, Members...shall be independent and not be bound by any instructions or orders from any authority." Rule 7(4).

<sup>742</sup> Basson op cit 80.

<sup>743</sup> Section 15.

<sup>744</sup> Section 17.

<sup>745</sup> Section 21(c).

<sup>746</sup> Op cit 32.

Albert Venter<sup>747</sup> is also of the opinion that a free mandate for each member of the National Assembly should be allowed and he points out that the free mandate is more democratic and compatible with the general tenor of a free and open society. A free mandate also loosens the power grip that party leaders have over representatives and makes parliamentary representation of the voters a greater reality. He also points out that leading democracies such as France, Germany and The Netherlands are well known examples of States which prohibit an imperative mandate.

According to Steytler,<sup>748</sup> the anti-defection clause was one of the most contested and debated elements of the system of representative democracy under the interim Constitution. On the one hand, it was decried as being undemocratic as it allegedly stifles freedom of speech and association, but on the other hand it was staunchly supported as an integral component of the party list system. The reason for the anti-defection clause in the 1993 Constitution was to preserve political stability during the initial period of transition, but its retention in the 1996 Constitution was strongly criticised.<sup>749</sup>

### 6.3 THE 1996 CONSTITUTION

The provision in the interim Constitution that a member who loses membership of the party that nominated him/her, had to vacate his/her seat was initially not included in

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<sup>747</sup> “Proportional representation and *ex post facto* accreditation of members of Parliament” De Ville and Steytler op cit 78.

<sup>748</sup> Steytler N “Parliamentary Democracy-The Anti-Defection Clause” (1997) *Law Democracy and Development* 221-231.

<sup>749</sup> Devenish GE *A Commentary on the South African Bill of Rights* (1999) 119.

the body of the 1996 Constitution.<sup>750</sup> According to Rautenbach and Malherbe<sup>751</sup> this repealed the imperative mandate that applied in terms of the interim Constitution and restored the concept of a free mandate. However, the anti-defection clause was retained in Schedule 6 of the 1996 Constitution which made provision for transitional arrangements.<sup>752</sup> At the same time, it made provision for an Act of Parliament to be passed within a reasonable period after the new Constitution took effect, to provide for the retention of membership of a member who ceases to be a member of the party which nominated him/her.<sup>753</sup> The fact that the anti-defection clause was not included in the body of the 1996 Constitution, but put in the Annexure to the Constitution, is an indication that it was the intention to return to a free mandate.<sup>754</sup> The retention of the anti-defection clause was made under transitional arrangements<sup>755</sup> which *inter alia* stated that despite the repeal of the interim Constitution, Schedule 2 of that Constitution as Amended by Annexure A to the 1996 Constitution would still apply, amongst others to:

- The loss of membership and
- The filling of vacancies and review of party lists until the second election of the Assembly under the New Constitution.<sup>756</sup>

The amended Schedule 2 stipulated that a person loses membership of a Legislature if that person ceases to be a member of the party which nominated him or her as a member of the Legislature.<sup>757</sup> Although the 1996 Constitution itself was silent on the question of floor-crossing, it did in effect prohibit floor-crossing through Schedule 2

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<sup>750</sup> See Section 47.

<sup>751</sup> Op cit 113.

<sup>752</sup> Item 13 Annexure A.

<sup>753</sup> Item 13(3).

<sup>754</sup> Devenish op cit 226.

<sup>755</sup> Schedule 6.

<sup>756</sup> Schedule 6 Item 3(b) (c). This would refer to the second elections under the New Constitution i.e. the 2004 election.

<sup>757</sup> Item 23 A (i).

of the interim Constitution which prohibition, if no new legislation was to be passed, would have ceased at the time of the second election after 1996, i.e. 2004.

Glenda Fick<sup>758</sup> discussed the anti-defection clause as it appeared in Item 23A of Annexure A2, Schedule 6 of the 1996 Constitution and came to the conclusion that the South African Constitution makes provision for representation in the form of delegation.<sup>759</sup> She emphasises the concept of “government by the people” and the fact that Section 57(1) (b) of the Constitution “envisages participatory democracy and public involvement in the business of the National Assembly.”<sup>760</sup> She also interprets Section 59 as granting the electorate “a forum to articulate its mandate, and the constitutional assurance that its political will will be taken into account, and that the mandate it gives to the National Assembly is given effect to.”<sup>761</sup> She comes to the conclusion that the constitutional text, in making provision for the active involvement of the electorate, does not favour the representative as one who may be “guided by his own opinions, judgment and enlightened conscience” and that consequently the members of the National Assembly do not have a free mandate.

It is submitted that Fick read more in the Constitution than what was intended. The provisions made in the Constitution to ensure accountability are “universal adult suffrage, a national common voters’ roll, regular elections and a multi-party system of democratic government.”<sup>762</sup> Section 57(1) is not imperative but gives the National Assembly the discretion to “give due regard to representative and participatory democracy, accountability, transparency and public involvement” when making rules

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<sup>758</sup> “The Anti-Defection Clause in the South African Constitution” (1999) 14 *SA Public Law* 46.

<sup>759</sup> *Op cit* 54.

<sup>760</sup> *Ibid.*

<sup>761</sup> *Op cit* 55.

<sup>762</sup> Section 1(d).

and orders concerning its business. Section 59(1) is imperative but in practice it is applied to mean that public hearings have to be held when necessary and that written comments must be tabled in Parliament. The presenters at the public hearings do not participate in any debate and their opinions are but part of the many matters that Members have to consider in their deliberations. No input at a public hearing or written comment can therefore be seen as a mandate.

However, the Supreme Court of Appeal<sup>763</sup> has held that Section 59 (1) imposes an obligation on Parliament to facilitate public involvement in its legislative processes and the Constitutional Court has subsequently ruled in two separate judgments<sup>764</sup> that laws were unconstitutional because of insufficient public participation. In the *Doctors for Life* case the Court investigated the nature and scope of a legislature's constitutional obligation to facilitate public involvement in the law-making process and came to the conclusion that "The obligation to facilitate public involvement is a material part of the law-making process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid".<sup>765</sup> In his dissenting judgment Yacoob J<sup>766</sup> pointed out that public involvement in the legislative process is not mentioned at all as an essential principle of the Constitution.<sup>767</sup> He stated that the place of public involvement in South Africa's democracy had to be ascertained by looking at the relationship between representative and participatory elements in the country's constitutional democracy. Government by the people is not achieved by public involvement in law-making but by providing a

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<sup>763</sup> *King and Others v Attorneys Fidelity Fund Board of Control and Another* 2006 (1) SA 474 (SCA); BCLR 462 (SCA) at par 19.

<sup>764</sup> *Doctors for Life International v Speaker of the National Assembly and Others* CCT 12/05 and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* CCT 73/05.

<sup>765</sup> Op cit par 209.

<sup>766</sup> Op cit par 246-339.

<sup>767</sup> Op cit par 274.

national forum for the public consideration of issues.<sup>768</sup> However, “this does not mean that the public must be allowed to participate in debates in the National Assembly and that the National Assembly must provide a forum for members of the public to consider issues.”<sup>769</sup> Government by the people means government by the people’s elected representatives. This was explained as follows:<sup>770</sup>

*When matters are debated in the National Assembly, in public, amongst members of the Assembly they represent the people and ensure government by the people. The National Assembly is the forum for those debates.*

*Of great importance is the fact that the National Assembly, by passing laws, also represents the people and ensures government by the people. In our constitutional scheme, laws passed by representatives of the people must be regarded as government by the people and as laws passed by the people. This is a vital contextual factor in determining what ‘public involvement’ in the Constitution means.*

After considering the meaning of the term *public involvement* the learned judge came to the following conclusion:<sup>771</sup>

*It is impermissible to conclude that the term ‘public involvement’ at the level of interpretation postulates as a minimum that the public must be given an opportunity to comment on draft legislation. The term is not capable of that construction. To interpret the phrase in that way would amount to re-drafting the Constitution.*

Van der Westhuizen J<sup>772</sup> concurred with the judgment of Yacoob and pointed out that if the constitutional purpose was to include a specific requirement of public involvement as part of the legislative process, it would have been built into the legislative process. He poses the question: “Why would all other steps in the legislative process be clearly set out in detailed provisions under the appropriate heading, but not this one?” He concludes that:

*If the will of the Parliamentary majority will in the end mostly prevail in any event, and all that is required is to ‘involve’ the public by for example mechanically holding public hearings for every piece of legislation - or to make sure that hearings are not promised as in this case-participatory democracy would appear to be quite cosmetic and empty, in spite of any idealistic and romantic motivation for promoting it.*

It is submitted that the minority judgment is not only based upon a more plausible interpretation of the Constitution, but is also preferable as far as the doctrine of the

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<sup>768</sup> Op cit par 283.

<sup>769</sup> Ibid.

<sup>770</sup> Op cit par 283 and 284.

<sup>771</sup> Op cit par 312.

<sup>772</sup> Op cit par 241-245.

separation of powers is concerned. However, the present position is that Parliament will in future have to invite public participation when new legislation is considered. This will impact on a public representative's mandate but not necessarily more than any of the factors discussed in chapter 5. It should also be pointed out that even if the majority judgment is accepted as correct, it does not necessarily follow that an imperative mandate is the only system that is compatible with the Constitution's emphasis on public participation in the legislative process. Greater consideration on the inputs of the public can enable members of parliament to make up their own minds of what is in the public interest, independently of the official party line. In this way public participation can serve as a counter weight to the hold of political parties over their members.

### **6.3.1. CERTIFICATION OF THE 1996 CONSTITUTION<sup>773</sup>**

The interim Constitution made provision for a Constitutional Assembly, consisting of the National Assembly and the Senate, to draft and adopt a new constitutional text<sup>774</sup> that would comply with the Constitutional Principles laid down in Schedule 4 of the Constitution.<sup>775</sup> It further provided that the new Constitutional text passed by the Constitutional Assembly would be of no force and effect unless the Constitutional Court certified that the provisions of the new text complied with the Constitutional Principles contained in Schedule 4 of the interim Constitution. The Constitutional

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<sup>773</sup> Prof Andre Mbata B Mangu is of the opinion that what the Constitutional Court certified was not the will of the people but rather that of their undemocratically elected representatives and that it is a strange paradox that our democracy lies on undemocratic foundations. "Who really governs in South Africa's constitutional democracy: parties or 'we the people'?" *Codicilius* XLIV 21. It is submitted that although the interim Constitution was enacted by an undemocratically elected parliament, the Constitutional Assembly was democratically elected.

<sup>774</sup> Section 68 (1) and (2).

<sup>775</sup> Section 71 (1).



Assembly adopted a new constitutional text in May 1996 and it was transmitted to the Constitutional Court for certification. The Court emphasised that it had a judicial and not a political mandate<sup>776</sup> and that its functions were clearly spelled out in Section 71(2) of the interim Constitution, namely to certify that all the provisions of the Constitutional text comply with the Constitutional Principles, which was a judicial function, a legal exercise. The Court went to pains to underline that it had no power, no mandate and no right to express any view on the political choices made by the Constitutional Assembly in drafting the Constitutional text apart from considering its compliance or non-compliance with the Constitutional Principles.

Objections to the anti-defection clause were the following:<sup>777</sup>

- It creates an imperative form of representation which subjects legislators to the authority of their parties in a manner that is not consistent with accountable, responsible, open, representative and democratic government.
- Universally accepted rights and freedoms such as freedom of expression, freedom of association, the freedom to make political choices and the right to stand for public office and if elected to hold office, are undermined.
- It militates against the principles of “representative government, appropriate checks and balances to ensure accountability, responsiveness, openness and democratic representation”.

The Court considered the objections with reference to the relevant Constitutional Principles and came to the conclusion that the anti-defection clause was not

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<sup>776</sup> *Ex parte Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996(4) SA 744 (CC).

<sup>777</sup> See 829 to 831 of the Report.

inconsistent with the principles concerned. It therefore approved the anti-defection clause, although other provisions were found to be inconsistent with the Constitutional Principles. In the subsequent certification judgment<sup>778</sup> the constitutional text was duly certified. The following are the salient aspects of the Court's reasoning:

- The anti-defection clause obliges members of a party who were elected by virtue of the inclusion of their names on the party's list, to remain loyal to the party which meets the expectations of voters who supported the party.
- Anti-defection clauses exist in the Constitutions of other democracies, such as India and Namibia and are therefore accepted in the democratic world.
- Political representatives enjoy freedom of speech in the legislatures and committees subject to the applicable rules and orders and as citizens they enjoy freedom of association and participation in politics. In as far as any of these rights are limited by the anti-defection clause "they are not aspects of rights which are universally accepted as fundamental."
- In a democracy the electoral system and the elections in accordance with that system provide the most important check on the legislature and its members.
- Parties face the voters during the succeeding election and have to justify their acts during the previous legislative period. Members who wish to be re-elected have to follow party discipline.
- Under a list system of proportional representation, it is parties that the electorate vote for and parties which must be accountable to the electorate.
- An anti-defection clause can prevent defection and ensures that elected members continue to support the party under whose aegis they were elected.

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<sup>778</sup> *In re Certification of the Amended Text of the Constitution of Republic of South Africa 1996, 1997 (2) SA 97 (CC).*

- An anti-defection clause prevents the party in power from trying to get members of small parties to defect to the governing party enabling the governing party to obtain a special majority which is not a reflection of the views of the electorate.

However, as far as the certification was concerned, the Court found that although the Constitutional text complied with the overwhelming majority of the requirements of the Constitutional Principles, some of the provisions of the text did not comply with the Constitutional Principles and certification was therefore withheld. The Constitutional Assembly reconvened and a revised text of the new Constitution was passed on 11 October 1996. The revised text was transmitted to the Constitutional Court for certification and in terms of Section 73A (1) (2) and (3) of the 1993 Constitution, the Court had to examine afresh whether the amended text complied with the Constitutional Principles. The court's function was therefore not reduced to consider only those parts of the amended text that were affected by its earlier order, but it was open to an objector to raise an issue not considered before or to contend that the Court erred in approving some of the previous provisions. In other words, the text as a whole had to be measured again against the Constitutional Principles.<sup>779</sup> No new objections were raised as far as the anti-defection issue or related issues were concerned and no further reference to these issues was made in the judgment. The revised text was consequently certified by the Constitutional Court on 4 December 1996 and the New Constitution was enacted on 18 December 1996 as Act 108 of 1996<sup>780</sup> and it commenced on 4 February 1997.

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<sup>779</sup> At 109 of the report.

<sup>780</sup> In terms of the Citation of Constitutional Laws Act No 5 of 2005, the Constitution and amendments to the Constitution are treated differently from other Acts by not being allocated an Act number and from 27 June 2005 no act number is to be associated with the Constitution of South Africa.

The Constitutional Court therefore found in two separate judgments that a prohibition on floor-crossing was not inconsistent with the Constitutional Principles laid down by the interim Constitution. Although this implied that political representatives under a proportional party list electoral system had no free mandate, the Court did recognise a political representative's freedom of speech as contained in Section 58(1), Section 71(1), Section 117(1) and Section 161 of the 1996 Constitution.<sup>781</sup>

### 6.3.2 FLOOR-CROSSING LEGISLATION

For reasons not relevant here, FW de Klerk led the National Party out of the Government of National Unity in 1996 and he and other prominent National Party members subsequently retired from active politics. The National Party changed its name to the New National Party (NNP) and when South Africa went to the polls in June 1999 in the first general elections under the 1996 Constitution, the NNP suffered badly, falling back from being the official opposition prior to the elections, to fourth place after the ANC, DP and IFP. The results were as follows:

ANC	266
DP	38
IFP	34
NNP	28

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<sup>781</sup> The issue again came under the consideration of the Constitutional Court in the case of *United Democratic Movement v President of the Republic of South Africa and Others* 2003 (1) BCLR 25 (CC), fully discussed later in this chapter. In its judgment the Court found that floor-crossing *per se* was not inconsistent with the Founding Principles and the Bill of Rights, but it appears that the Court shied away from the reasons given in the first *Certification* judgment as no direct reference is made to the reasons given in that judgment for rejecting all the objections to the anti-defection provisions in the 1996 Constitution.

UDM	13
ACDP	6
PAC	3
UCDP	3
FF	3
FA	2
AZAPO	1
MF	1
AEB	1

With the Municipal Elections looming, the NNP formed an alliance with the DP and FA to fight the 2000 Municipal Elections under the banner of a new political party, the Democratic Alliance (DA). The new political party did exceptionally well at the municipal elections of December 2000.<sup>782</sup> At national and provincial level the three alliance partners had to retain their separate identities because of the anti-defection clause, although joint caucuses were held and there was even reference to the Alliance as the Democratic Alliance in the National Assembly.<sup>783</sup> However, the relationship between the DP and the NNP did not flourish and came to a break when the NNP broke away from the DA towards the end of 2001 to form a new alliance with the ANC. Because of the anti-defection clause the position of NNP Members of Parliament and the Provincial Legislatures were not affected by the alliance between the DP, NNP and FA but the NNP councillors who were elected under the DA banner,

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<sup>782</sup> The new party obtained 1306 councillors countrywide and 22.12% of the vote. See IEC election results.

<sup>783</sup> As informed by Dr EA Conroy MP NNP.

were now caught up in the DA and had to toe the DA line on peril of being expelled and losing their seats in terms of anti-defection legislation.

To release these “captured” councillors and to gain from the benefits of the new alliance between the ANC and the NNP, the government removed Schedule 2 of the interim Constitution from a dusty cupboard and four Acts of Parliament were signed into law on 19 June 2002, namely the Constitution of the Republic of South Africa Second Amendment Act numbers 18 and 21 of 2002, The Loss of Retention of Membership of National and Provincial Legislatures Act 22 of 2002 and the Local Government Municipal Structures Amendment Act 20 of 2002. The first Amendment Act<sup>784</sup> and the Local Government Municipal Structures Amendment Act<sup>785</sup> both relate to floor-crossing in the Local Government sphere and are therefore not directly relevant to this study. The Second Amendment Act<sup>786</sup> and the Membership Act related to floor-crossing in the National Assembly and Provincial Legislatures. The Membership Act removed the prohibition on floor-crossing and provided for a limited system of floor-crossing that made provision for a 15 day window period in the second and fourth year after an election. During these window periods, members could change their party allegiances without losing their seats subject to the requirement that at least 10% of the representatives of a party in a Legislature had to leave the party. It also made provision for a once-off 15-day window period immediately following the commencement of the legislation where the 10% requirement would not apply. The Second Amendment Act made provision for the alteration of the composition of Provincial delegations to the National Council of Provinces in the event of a change in the composition of a provincial legislature as a

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<sup>784</sup> Act 18 of 2002.

<sup>785</sup> Act 20 of 2002.

<sup>786</sup> Act 21 of 2002.

result of floor-crossing, party splits or party mergers provided for in the new Legislation.

The four Acts mentioned above were published in the Government Gazette dated 20 June 2002 and the United Democratic Movement brought an urgent application in the High Court praying for the suspension of the commencement of the so-called *impugned* legislation pending a decision of the full Court. Interim relief was granted by the Court and on 24 June 2002 the full Court confirmed the order pending the outcome of a Constitutional Court application filed by the President of the Republic of South Africa, the Minister of Justice and Constitutional Development and the Minister of Provincial and Local Government as appellants.<sup>787</sup> The African Christian Democratic Party, Inkatha Freedom Party, Pan Africanist Congress of Azania, the Premier of the Province of KwaZulu-Natal and the South African Local Government Association joined the action as intervening parties whereas the Institute for Democracy in South Africa and the Research Unit for Legal and Constitutional Interpretation submitted arguments as *amici curiae*. Argument was heard from 6 to 8 August 2002 and the Court delivered its judgment on 4 October 2002. In its judgment the Court emphasised that the case was not about the merits or demerits of the provisions of the disputed legislation, which was a political question of no concern to the Court.<sup>788</sup> The Court further pointed out that what had to be decided was not whether the disputed provisions were appropriate or inappropriate but whether they were constitutional or unconstitutional.<sup>789</sup> The following considerations by the Court are relevant to this study:

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<sup>787</sup> *United Democratic Movement v President of the Republic of South Africa and Others* 2002 (11) BCLR 1179 (CC).

<sup>788</sup> See paragraph 11 of the Report.

<sup>789</sup> *Op cit.*

- Whether the right to vote and proportional representation are part of the basic structure of the South African Constitution and as such not subject to amendment at all.<sup>790</sup> The Court found that the electoral system adopted in the Constitution was one of many that are consistent with democracy. Some such systems contained anti-defection clauses, while others did not. Some were proportional and others not. The Court therefore came to the conclusion that “it cannot be said that proportional representation, and the anti-defection provisions which support it, are so fundamental to our Constitutional order as to preclude any amendments of their provisions.”<sup>791</sup>
- The Court next considered whether the disputed legislation was inconsistent with the founding values of the Constitution and specifically the contention that an anti-defection provision is an essential component of an electoral system based on proportional representation.<sup>792</sup> The Court pointed out that there exists a tension between the expectation of voters and the conduct of Members elected to represent them. However, “once elected, Members of the Legislature are free to take decisions and are not ordinarily liable to be recalled by voters if the decisions taken are contrary to commitments made during the election campaign.”<sup>793</sup> The Court referred to its decision in the first Certification Judgment where it found that:

“Under a list system of proportional representation, it is parties that the electorate vote for, and parties which must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election. In such a system an anti-defection clause is not inappropriate to ensure that the will of the electorate is honoured. An individual member remains free to follow the dictates of personal conscience. This is not inconsistent with democracy...An anti-defection clause enables a political party to prevent defections of its elected members, thus ensuring that they continue to support the party under whose aegis they were elected. It also prevents parties in power from enticing members of small parties to defect from

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<sup>790</sup> Paragraph 15.

<sup>791</sup> Paragraph 17.

<sup>792</sup> Paragraph 30.

<sup>793</sup> Paragraph 31.



the party upon whose list they were elected to join the governing party. If this were permitted it could enable the governing party to obtain a special majority which it might not otherwise be able to muster and which is not a reflection of the views of the electorate.”<sup>794</sup>

However, the Court cautioned that it did not follow from that judgment that a proportional representation system without an anti-defection clause would be inconsistent with democracy, although it was possible that in a proportional representation electoral system the link between voter and party was closer compared to a constituency-based electoral system.<sup>795</sup> The Court concluded that although an anti-defection clause could possibly be desirable in a proportional electoral system, it was not an essential component of multi-party democracy “...and cannot be implied as a necessary adjunct to a proportional representation system.” In the end the Court decided that it was a matter of what the law stated: “...where the law prohibits defection that is a lawful prohibition, which must be enforced by the Courts. But where it does not do so, Courts cannot prohibit such conduct where the legislature has chosen not to do so.”<sup>796</sup> The Court concluded that accordingly floor-crossing is a matter on which Parliament is free to legislate within the confines of the Constitution.

- The Court also made the point that although the electorate may be influenced by the names of candidates and their positions on a party list, “...they voted for Parties and not for particular candidates.”<sup>797</sup>
- The Court also pointed out that unlike the interim Constitution, which specifically made provision for an anti-defection clause in the body of the Constitutional Text,<sup>798</sup> the main text of the final Constitution did not prescribe

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<sup>794</sup> Paragraph 33.

<sup>795</sup> Paragraph 34.

<sup>796</sup> Paragraph 35.

<sup>797</sup> Paragraph 37.

<sup>798</sup> Section 43(b).

that membership will be lost if a member ceases to belong to the party on whose list he or she gained membership. The anti-defection provision was contained in Schedule 6 to the Constitution which dealt with transitional arrangements.<sup>799</sup> Consequently the Court came to the conclusion that the Constitution did not demand an anti-defection provision but only made provision for anti-defection for a limited transitional period and allowed for the amendment thereof during the transition period by an Act of Parliament.

- The Court then considered the constitutionality of the ten percent threshold and conceded that it made it easier to defect from smaller parties than from larger parties.<sup>800</sup> However, the Court came to the conclusion that the fact that a particular system operated to the disadvantage of particular parties did not necessarily mean that it was unconstitutional.<sup>801</sup> It again concluded that if the defection was permissible, the details of the legislation had to be left to Parliament, subject to the constraints of the Constitution. That a threshold was decided upon was considered not to be inconsistent with the Constitution.<sup>802</sup>
- The Court also considered the objection that changing the anti-defection provisions during the term of a legislature resulted in an infringement of voters' rights as it might have affected the way voters cast their votes had they known the provision could have been lifted.<sup>803</sup> The Court rejected this objection and stated that the rights entrenched under Section 19 are directed to elections, to voting and participation in political activities. The Court concluded that "between elections, however, voters have no control over the conduct of their representatives. They cannot dictate to them how they must

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<sup>799</sup> Paragraphs 40 & 41.

<sup>800</sup> Paragraph 46.

<sup>801</sup> Paragraph 47.

<sup>802</sup> Ibid.

<sup>803</sup> Paragraph 48.

vote in Parliament, nor do they have any legal right to insist that they conduct themselves or refrain from conducting themselves in a particular manner.”<sup>804</sup>

- The Court then made a very important statement as far as the free mandate theory of representation is concerned: “The fact that political representatives may act inconsistently with their mandates is a risk in all electoral systems.”<sup>805</sup> Should a party change its mind after an election and deviate from its election promises the voters who voted for that party may feel betrayed but their rights under Section 19 were not infringed. “Their remedy comes at the time of the next election when they decide how to cast their votes.”<sup>806</sup>
- The Court further stated that as the Constitution made provision for the amendment of the anti-defection provisions it could be presumed that voters knew this and that voting on the assumption that it would not happen was a political decision, the consequence of which has no reference to the Constitution.<sup>807</sup>
- The Court also considered the contention that floor-crossing would be inconsistent with one of the founding provisions in the Constitution, namely “a multi-party system of democratic government.”<sup>808</sup> The Court noticed that the legislation was supported by 280 of the 324 Members who voted and found that it was within the power of Parliament to deal with matters related to elections and membership of the legislature if the power is exercised subject to the provisions of the Constitution itself.<sup>809</sup>

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<sup>804</sup> Paragraph 49.

<sup>805</sup> Paragraph 50.

<sup>806</sup> Ibid.

<sup>807</sup> Paragraph 51.

<sup>808</sup> Paragraphs 54 to 57.

<sup>809</sup> Paragraphs 57 & 58.

- The Court next considered the legality of the limitation of floor-crossing to two window-periods in the life of a legislature.<sup>810</sup> The Court pointed out that floor-crossing had been subject to debate within South Africa since the negotiations that preceded the adoption of the interim Constitution and referred to the Ad Hoc Committee appointed by Parliament within a week of the coming into force of the 1996 Constitution on 7 February 1997 “to consider the drafting of legislation which gives effect to Item 23A(3) of the amended Schedule 2 to the Constitution, 1993, as provided for in Item 13 of Annexure A of Schedule 6 to the Constitution, 1996”.<sup>811</sup> The Court dealt with the different views expressed in the Committee and came to the conclusion that “viewed objectively in the light of the debates and the expert opinions that had been obtained a decision to limit floor-crossing to two window-periods in our view is a rational decision.”<sup>812</sup>
- The Court then considered the filling of the seat of a floor-crosser in the event that it became vacant<sup>813</sup> and came to the conclusion that “bearing in mind that the purpose of the legislation was to accommodate mid-term shifts in political allegiances and the limited term for which a defecting member would remain a member of the legislature it seems to us to be neither irrational nor inconsistent with multi-party democracy to provide that the seat should be regarded as the seat of the new party for the remainder of that member’s term.”<sup>814</sup>

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<sup>810</sup> Paragraphs 60 to 70.

<sup>811</sup> Paragraph 61.

<sup>812</sup> Paragraph 69.

<sup>813</sup> Paragraphs 71 to 74.

<sup>814</sup> Paragraph 74.

- The Court then proceeded to consider the constitutionality of the contested legislation<sup>815</sup> and came to the conclusion that although item 23A vested a special power in Parliament to amend the transitional provisions of the Constitution by an Act of Parliament rather than by a Constitutional Amendment, that power had to be exercised within a reasonable period after the Constitution came into force and that five years was not a reasonable period. It consequently found the Membership Act to be unconstitutional.<sup>816</sup>

As a result Parliament amended the Constitution<sup>817</sup> by inserting a new Schedule 6A that provided for the retention of Membership of the National Assembly or a Provincial Legislature after a change of party membership, mergers between parties, subdivisions of parties and subdivisions and mergers of parties.<sup>818</sup> Section 47(3) of the Constitution was also amended<sup>819</sup> by reintroducing an anti-defection clause subject to the window periods mentioned in Schedule 6A. The amendments provided for a window period of 15 days immediately following the amendments during which period members could cross the floor without a threshold<sup>820</sup> as well as for two 15-day periods from the first to the fifteenth day of September in the second and fourth year following an election,<sup>821</sup> provided that members who leave the party for which they held a seat, represent not less than ten percent of the total number of seats held by such a party in the legislature concerned.<sup>822</sup>

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<sup>815</sup> Paragraphs 85 to 114.

<sup>816</sup> Paragraph 114. For a concise discussion of the judgment see Budhu SR *Codicillus* XLIV ( October 2003) 134-139.

<sup>817</sup> Act No 2 of 2003.

<sup>818</sup> Section 6.

<sup>819</sup> Section 2 of Act No 2 of 2003.

<sup>820</sup> Section 6(1).

<sup>821</sup> Section 4(1).

<sup>822</sup> Section 2(1).

It is interesting to note that a Cabinet Committee was appointed in March 2002 to investigate alternative electoral systems under the chairmanship of Dr Frederik van Zyl Slabbert.<sup>823</sup> A lack or perceived lack of accountability was identified as a problem of the existing system and this gave rise to more discussion and debate than any of the other matters discussed.<sup>824</sup> The majority report of the Committee proposed a multi-member constituency electoral system but the recommendations of the Committee were not accepted by the cabinet and the status quo continued.<sup>825</sup>

#### **6.4 FLOOR-CROSSING 2003**

The legislation referred to above in terms whereof members could cross the floor without loss of seat commenced on 21 March 2003 and terminated on 4 April 2003. In what was described as the worst kind of political malfeasance, a total of 23 members of the National Assembly changed their allegiance.<sup>826</sup> Expressed as a percentage, the floor-crossers constituted 5.75%, which is quite a significant change. Expressed in the number of votes negated by the defections, it would amount to more than one million votes. The UDM and NNP suffered the heaviest losses while the ANC and the DA gained the most seats. The UDM lost ten of its 14 Members of Parliament (i.e. 71.4%) while the NNP lost eight of its 28 Members (28.6%).

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<sup>823</sup> See report of the Electoral Task Team dated January 2003.

<sup>824</sup> Paragraph 4 3 5 of the report at 17.

<sup>825</sup> Please see Slabbert F van Zyl *The Other Side of History (2006) 105-108*. Subsequently the Minister of Home Affairs stated that the matter would be reviewed before the 2009 elections. Hansard 16 August 2006.

<sup>826</sup> City Press (27 April 2003).

Proportionally, however, the DA with eight new members improved its representation with 21% to 46 members, the significance of which is clear if it is taken into account that it only had seven members prior to the 1999 elections.<sup>827</sup> The stand of the parties in the National Assembly was as follows after the floor-crossing:

**Table: 5**

<b>PARTY</b>	<b>BEFORE</b>	<b>AFTER</b>	<b>DIFFERENCE</b>
ANC	266	275*	+9
DA	38	46	+8
IFP	34	31	-3
NNP	28	20	-8
UDM	14	4	-10
ACDP	6	7	+1
PAC	3	2	-1
MINORITY PARTIES	11	10	-1
NEW PARTIES	0	5	+5
<b>TOTALS</b>	<b>400</b>	<b>400</b>	

The first general elections after the first floor-crossing period were held on 14 April 2004.<sup>828</sup> It is clear from the results that except for the UDM who regained half of the seats lost during the first floor-crossing period, the trend set by the floor-crossers was confirmed by the election results. The ANC did not only retain the nine seats it

<sup>827</sup> As the Democratic Party.

\* The ANC now had a two-thirds majority in Parliament.

<sup>828</sup> For the results please see Table 4 page 62.

gained during the previous window period, it added four more. The DA also improved on the seats gained by floor-crossing while the ACDP retained the seat gained. The slide away from the NNP increased dramatically as it lost a further 13 seats. The ID was the only party that had its origins in the 2003 floor-crossing that succeeded in being re-elected. The Party not only retained its seat but it gained six more seats. It is also interesting to note that none of the parties that suffered losses during the 2003 floor-crossing period could repeat their performance of the 1999 elections. Notwithstanding the outcry in the press it therefore appears that the floor-crossers had read the shift in the allegiance of the electorate correctly as confirmed by the results of the 2004 elections, 13 months later.

## **6.5 FLOOR-CROSSING 2005**

The window period for the second opportunity for members of the legislatures to cross the floor commenced on 1 September 2005 and terminated on 15 September 2005. This time the ten percent threshold applied, which meant that there had to be a significant shift in the larger parties such as the ANC, DA and IFP. In the case of the other political parties the requirement of at least ten percent did not have any effect as a single member already constituted more than ten percent and was therefore free to leave without loss of his or her seat. The Act was silent on the date on which a party's membership had to be taken to calculate the ten percent threshold and as the DA gained two members on 6 September 2005 its membership was 52 on 15 September 2005 when five members defected. The DA therefore argued that a minimum of ten percent of its membership was six and that the ten percent threshold



had therefore not been met. The Speaker argued that the membership at the start of the window period was the figure that had to be used to calculate the ten percent. In the ensuing court case the High Court upheld the Speaker's interpretation.<sup>829</sup> However, it can be argued that the two members that the DA gained at the beginning of the window period set a trend and that the increased membership should therefore have been taken into account. This argument was not submitted and was not considered by the Court.

A total of 25 members (6.25%) changed their allegiance in very much the same pattern as in 2003. As in 2003 the ANC suffered no loss but gained a total of 14 members.<sup>830</sup> The only other existing party that received new members was the DA that got one member from the IFP and one member from the UDM. Four new parties were formed while the National Democratic Conference (NADECO), formed earlier by the former chairperson of the IFP, gained four members that defected from the IFP. The United Independent Front (UIF) was formed by two members who defected from the UDM. The United Party of South Africa (UPSA) is a one-member party formed by a former NNP member, while the Federation of Democrats (FD) and the Progressive Independent Movement (PIM) are one member parties formed respectively by former members of the ACDP and DA.<sup>831</sup>

The state of the parties in Parliament after the close of the window period was as follows:

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<sup>829</sup> See *Julies and Others v Speaker of the National Assembly & Others* 2006 (4) SA 13 CPD .

<sup>830</sup> Six from the NNP, four from the DA, two from the ID and two from the ACDP.

<sup>831</sup> It is of historical interest to note that 15 September 2005 was the first day in more than 90 years that the National Party/New National Party had no representation in the National Assembly.

**Table: 6**

<b>PARTY</b>	<b>NO OF SEATS</b>	<b>CHANGE</b>	<b>PERCENTAGE</b>
ANC	293	+14	+5.02
DA	47	-3	-6.38
IFP	23	-5	-17.86
UDM	6	-3	-37.5
NNP	0	-7	-100
ID	5	-2	-28.57
ACDP	4	-3	-42.86
FF+	4	0	0
UCDP	3	0	0
PAC	3	0	0
MF	2	0	0
AZAPO	1	0	0
NADECO	4	+4	+100
UIF	2	+2	+100
UPSA	1	+1	+100
PIM	1	+1	+100
FD	1	+1	+100
<b>TOTAL</b>	<b>400</b>		

Except for the new parties in Parliament of which NADECO is the only one that appears to have a constituency,<sup>832</sup> the DA was the only opposition party that received new members. It also appears that floor-crossing favours big parties, especially the ruling party who is in a position to lure opposition members with attractive offers of executive positions.<sup>833</sup> A big party has the further advantage that the ten percent threshold makes it very difficult for a large number of members to arrange to

<sup>832</sup> It is the only new party that gained seats during the March 2006 Municipal elections.

<sup>833</sup> See article in City Press (18 September 2005) in which the ANC Chairperson and Minister of Defence Mosiuoa Lekota was quoted saying job opportunities were “almost inexhaustible” for opposition Members of Parliament who crossed to the ANC. However, to date no Members who crossed to the ANC have been promoted.

defect.<sup>834</sup> The ruling party is on record that the floor-crossing legislation is not going to be repealed<sup>835</sup> and although it is conceded that a free mandate theory of representation is preferable to an imperative mandate, the hybrid system as applied at present needs to be revised, especially the ten percent threshold.

## 6.6 PRIVATE MEMBERS' BILLS AND SUBSEQUENT DEVELOPMENTS

In April 2006, two separate private members' bills<sup>836</sup> aimed at amending the Constitution by reintroducing an anti-defection clause so as to prohibit floor crossing or the merger of political parties while members retain their seats, were tabled in Parliament. Although no private member bill has been adopted by Parliament since 1994, these bills are dealt with here for the sake of completeness.

The motivation for the bills can be summarized as follows:<sup>837</sup>

- The original intention of floor-crossing legislation was to allow elected public representatives to change party membership on the basis of individual conscience and principle but successive floor crossing “window periods” have demonstrated that this does not happen in practice.
- There is conflict between the principle of accountability to the electorate and the proportional list (PR) electoral system. Representatives who “cross the floor” in the

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<sup>834</sup> With the ANC's new membership of 293 it will require 30 members to break away at the next window period which is highly unlikely. Notwithstanding the division in the ANC during the September 2005 window period there were no defections. See the article by Mondle Makhanye *A House Split Asunder* in the Sunday Times (28 August 2005).

<sup>835</sup> Minister Charles Nqakula *Hansard* 12 September 2005.

<sup>836</sup> Introduced by Dr JT Delpport of the DA and Mr JH van der Merwe of the IFP respectively. As the bills have the same objective they were grouped together and appear on the Order Paper as the Constitution Fifteenth Amendment Bill.

<sup>837</sup> The first five bullets concern the motivation by Dr Delpport while the rest is that of Mr van der Merwe.

current PR system are not answerable to their voters, and this undermines the democratic principle of accountability.<sup>838</sup>

- Defection periods have also revealed the prevalence of bribery and corruption to induce floor crossing, and this has elicited a negative reaction from members of the public.
- Given the so-called “ten percent clause”, by virtue of which ten percent of a party’s caucus must cross the floor for any one member to be able to cross, floor crossing has also had a disproportionately beneficial impact on the larger parties.
- The original intention of floor crossing legislation has been subverted and the legislation should therefore be revised.
- Floor crossing contradicts the provisions of the Constitution that-
  - a) Provide for the right to vote for a political party and to be represented in the legislature in accordance with the votes so cast;
  - b) Allow for the design of a representational system aimed at allowing entry into parliament of smaller and bigger political parties alike.
- The system of floor crossing has given rise to abuse and the protection of self-interest by individual politicians directly in conflict with the wishes expressed by the people and has effectively reduced the inclusive function of the South African electoral system.
- The system has led to a feeling amongst voters that they have been sold out when their properly elected public representatives, based on a self-serving unilateral decision, nullified their votes.

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<sup>838</sup> According to a public opinion survey conducted by the Electoral Task Team appointed by the Minister of Home Affairs in 2002, 68% of the respondents felt that the electoral system helped voters to hold political parties accountable while 60% were satisfied with the accountability of individual political representatives. Paragraph 4.3.5.2 of the report.

- Through the conduct of certain individual politicians, voters' constitutional rights are infringed upon and political stability is undermined and threatened.
- It is averred that since 2003 statistics have shown that not one of the politicians who crossed over and formed their own political parties received any support from the voters in the next election.
- Given South Africa's list system of proportional representation, floor-crossing contradicts the will of the voters who vote for a political party and not a particular politician.
- Floor-crossing is based on political greed and merely concerned with short-term interests, rather than the long term interests of the voters.
- Public perception is that politicians defect from their parties as a result of disagreement with policies voters have originally voted for, or because they desire senior public office and they believe they are more likely to acquire it by joining another party.
- The prohibition of floor-crossing will give full effect to the principle and practice that the people shall govern and the inclusion of minorities.
- An anti-defection clause will prevent parties from having a disproportionately larger or smaller representation.
- The prohibition of floor-crossing will maintain a political system of as inclusive a character as possible that fully accords with the wishes of the electorate.

Both presenters seem to have forgotten the guiding principle of representative government, namely that once elected, a public representative represents the public at large and the interests of the country as a whole; not only that of the political party

under whose banner the representative was elected. Seen from this perspective, specific party membership becomes less important after an election.

However, as far as the specific motivation is concerned the following comments are offered:

- None of the arguments advanced detracts from the importance of providing for elected representatives to change party membership on the basis of individual conscience and principle. That successive floor crossing periods have demonstrated that those who crossed the floor did not do so on grounds of individual conscience or principle is an unsupported and sweeping statement, especially since there have only been two window periods so far.<sup>839</sup> It may very well be that certain individual public representatives had less than noble intentions but laws are made for general instances and no law can dictate an individual's conscience or principles. If all laws that are not strictly adhered to were to be reviewed, there would have been no need for law enforcement.

- As far as accountability is concerned it should be borne in mind that it is a founding principle of the Constitution that there shall be regular elections and it is ultimately through regular elections that the electorate holds public representatives accountable. It is true that in a proportional list electoral system the individual public representative is not as exposed to the electorate as in a constituency based system, but in a proportional list electoral system political parties have a much stronger hold over individual public representatives than in a constituency based system where a member has a proven personal support base. However, in municipal elections where the

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<sup>839</sup> 2003 and 2005.

electorate votes for both ward candidates and a political party on separate ballot papers in the same election, the difference between party votes and votes for the ward candidate of the same party is insignificant, indicating that the party and not the candidate is the decisive factor. This also applied to the constituency based electoral system where exceptional candidates have often lost against relatively unknown opponents. Examples are Alfred G Robertson, Administrator of the Transvaal, who lost against a relatively unknown farmer in 1924 in a by-election in his home constituency, Wakkerstroom and general JC Smuts who lost against Wennie du Plessis in Standerton in 1948 in a contest that was described as David v Goliath.<sup>840</sup> It is therefore difficult to see how floor-crossing as such undermines the democratic principle of accountability.

- Apart from accusations that were not elaborated on any further, there are no known cases of bribery and corruption as alleged. None of the members that defected to the ANC, for example, has been promoted to higher office at the time of writing.<sup>841</sup> However, if there is a prevalence of bribery and corruption as alleged, the remedy should be directed at the bribery and corruption itself. Inaction against perceived bribery and corruption may just as much be a cause for negative public reaction. It is writer's submission that the negative public reaction is to a great extent also the result of political parties' own propaganda, aided and abetted by the media. Instead of facing up to the real reasons for defections and their own shortcomings, political parties seem to find it more convenient to accuse, without evidence, opponents and erstwhile trusted colleagues for lack of moral fibre. They have fallen prey to the trap

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<sup>840</sup> *The Star* (19 May 1948) quoted by Piet Meiring in *Jan Smuts the Afrikaner* (1974) 188.

<sup>841</sup> In a speech delivered at the University of Pretoria on 9 May 2006, Tony Leon, Leader of the Opposition, mentioned the case of Dan Maluleke who had instantly been made a whip when he crossed to the ANC as an example. However, Maluleke was a whip in the DA at the time of his defection and was therefore strictly speaking not promoted.

of blaming others for their own misfortunes, rather than facing up to personal responsibility through introspection.

- As far as the ten percent threshold is concerned, it is agreed that a threshold by definition will always protect the bigger parties but this is an aspect of the existing legislation that can be amended without affecting the aim of the floor-crossing legislation as such. As it is the ten percent clause does not accord with the intention of allowing elected representatives to change party membership on the basis of individual conscience and principles. By definition it cannot be an individual decision if its execution requires a number larger than one.

- As far as the right to vote for a political party and the right to be represented in accordance with the votes so cast is concerned, it should be borne in mind that the Constitution also provides for free political choices, including the right to form a political party and to participate in the activities of a political party and to campaign for a political party or its cause.<sup>842</sup> It further provides that every adult citizen has the right to stand for public office and if elected to hold office.<sup>843</sup> The electorate only exercises its right to vote once in five years but people are free to change their political views between elections and they do, as is clear from the changes in election results from one election to the other. The election result therefore only reflects the electorate's wishes at a particular point in time and where public representatives sense a change in the public mood, they should be permitted to act accordingly. Public representatives are not mere place holders on a party political score chart. They are leaders in their own communities and are not simply required to follow the perceived

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<sup>842</sup> Section 19 (1).

<sup>843</sup> Section 19 (3) (b).



wishes of the voters, but to give leadership as circumstances may dictate from time to time.

- As far as the averment that floor-crossing contradicts the provisions in the Constitution that allow for the design of a representational system aimed at allowing entry into parliament of smaller and bigger parties alike is concerned, it is not clear how floor-crossing negatively affects the entry into parliament of any party, small or big.
- Concerning the allegation that floor-crossing gave rise to abuse and the protection of self-interest, it should be pointed out that floor-crossing is only permitted during the second and penultimate year of the life of a parliament. Those public representatives who abuse the system by pursuing self-interest will therefore not have long before they have to present themselves for re-election. Since all political parties have a system for screening party candidates for high office and the road to public office is a long one, it can be expected that only a small number of public representatives would fall into this category. The solution to this problem, if it indeed exists, is for each political party to better scrutinize those they put on their lists. Prohibiting floor-crossing will not cure the problem - public representatives such as those described, should never have been on party lists in the first place.
- As far as the sell out allegation is concerned, it is conceded that where an opposition member defects to the ruling party it may lead to a feeling amongst voters that their votes have been nullified. However, movement from one opposition party to another should be seen differently since opposing the ruling party would still be

within the broad mandate of opposition. That floor-crossers are self-serving is a sweeping statement and the comments above equally apply here. It is also interesting to note that none of the members that defected from the IFP,<sup>844</sup> crossed to the ruling party. With the 2004 crossing, the members that left the IFP were described in an editorial in *Beeld* as politicians of caliber.<sup>845</sup>

- As far as the allegations concerning the conduct of certain individual politicians is concerned, it is suggested that if only certain individual politicians are involved the remedy surely lies in introducing mechanisms to act against those involved and not to prohibit floor crossing totally. It is not clear how political stability can or has been affected by floor-crossing.
- The statement that statistics have shown that politicians who have crossed the floor to form their own parties have no support is not factually correct. The ID which was formed in 2003 by a member who defected from the PAC returned to Parliament with seven seats after the 2004 general election.
- Concerning the argument that the voters vote for a party and not for a politician, it should be pointed out that a party comprises individual politicians who play an important role in the party in general and in campaigning in particular. These individual politicians can therefore not be left out of the equation. A political party's public representatives are normally known to the public and they play an important role in attracting and repelling votes.

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<sup>844</sup> From which party Mr van der Merwe received his mandate to submit the bill.

<sup>845</sup> Editorial (9 September 2005).

- As far as the allegation of greed is concerned it should be kept in mind that since a member's term of office is not affected by floor-crossing, political greed, as alleged, can only be a motivation if the public representatives concerned gain an advantage that sounds in money or position in return. As already indicated, there are no known cases of floor-crossers being compensated in one way or the other.

As far as the alleged public perception concerning disagreement with policy is concerned it should be borne in mind that since floor-crossing, in the sense it is discussed here, has only occurred from opposition parties, it is doubted whether this statement is correct since the policies of opposition parties are not really at issue after elections. The period in between elections is rather used to reflect on and adjust policies to meet new challenges and changed circumstances etc. so as to improve support at the next election. It is normally the ruling party's prerogative to make senior political appointments and if public representatives believe they are more likely to acquire promotion by joining another party, it reflects on the confidence that such members have in the parties concerned.

- Concerning the principle that the people shall govern it is not clear how an anti-defection clause would give more effect to the principle. The people can only govern through their freely elected representatives and this criterion is met as long as representatives are freely elected. Crossing the floor does not alter a public representative's function as a representative of the people.

- The argument that an anti-defection clause would prevent parties from having a disproportionately larger or smaller representation does not appear to be sound. The trend set by the 2003 floor-crossing was confirmed by the following general elections in 2004 and it can therefore not be said that those parties which gained or lost

members during the 2003 floor crossing period, enjoyed disproportionately larger or smaller representation during the remainder of the term.

- The argument that an anti-defection clause would maintain a political system that fully accords with the wishes of the electorate, endeavors to perpetuate the result of an election for five years while it is generally accepted that the electorate's views are not static and change over time. Allowing floor-crossing permits public representatives to anticipate changes in the electorate's political sentiments and adjust for the changes so as to comply with the wishes of the electorate.

- The argument that a prohibition on floor-crossing would maintain a political system of as inclusive a character as possible is not convincing since floor-crossing does not change the composition of parliament, it only affects the number of seats parties hold. As stated above, any distortion that floor crossing may bring about will be corrected at the next election.

In conclusion it is therefore submitted that the arguments presented by the proposers are not convincing. However, as indicated elsewhere in this study,<sup>846</sup> there is indeed a need to improve on the present situation, especially as far as the power of political parties over public representatives is concerned as well as the lack of constitutional guidelines for political parties and the ten percent threshold.

This matter was also raised in Parliament during questions to the President<sup>847</sup> when the Leader of the Opposition asked the President whether the government considered

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<sup>846</sup> Please see Chapter 7.

<sup>847</sup> Hansard 18 May 2006.

abolishing or amending floor-crossing legislation. In his reply the President repeated the basic argument that “...during the term of a legislature there can be significant shifts in public opinion which do not warrant fresh elections but which have to be represented in the legislature.” He also referred to the overwhelming majority with which Parliament approved the floor-crossing legislation<sup>848</sup> and the fact that no submissions were made to the Constitutional Review Committee in this regard,<sup>849</sup> but concluded that should there be “sufficient passion” about the matter, Parliament and not the executive should review it.

## 6.7 STATISTICAL COMPARISONS

Excluding the floor-crossing that occurred with the amalgamation of the National Party and the South African Party into the South African United National Party (UP) in 1934, when 56 National Party members and 61 South African Party members joined forces to form the new party and the changes that occurred with the outbreak of the second world war in 1939, a total of 142 members crossed the floor between 1910 and 1994, some more than once. Of these, only 12 crossed from opposition parties to the governing party while 23 crossed from governing parties to opposition parties. The largest shuffle occurred amongst the opposition parties where 107 members changed from one opposition party to another. There were eleven Parliaments between 1948 and 1994 and 109 members crossed the floor during this period. The

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<sup>848</sup> 84%.

<sup>849</sup> IDASA subsequently made a submission to the Joint Constitutional Review Committee in June 2006 in which it requested a review of floor-crossing legislation and/or the electoral system “to realise an optimal institutional arrangement that mitigates the systemic contradictions and problems perpetuated by the current structural and legislative regime.” Please see *Joint Constitutional Review Committee Submissions* (2006) C 24.

lowest number was zero during the life of the 1948 Parliament.<sup>850</sup> The highest number was 24, which occurred three times in a row during the life of the last three Parliaments. There were 16 floor-crossings during the life of the 1974 Parliament and 15 during the life of the 1958 Parliament. There were six in the 1953 Parliament and five in the 1966 Parliament while the 1970 and 1977 Parliaments only had one each. As a percentage the higher cases constituted between 13.6% and 9.2% of the members. Related to the number of seats in the present National Assembly (400) and divided equally between two *window periods* it would amount to between 27 and 18 members per window period which compares favourably with the 23 and 25 members that actually crossed in 2003 and 2005 respectively. It is also interesting that the threshold of ten percent that operated for the first time in 2005 did not make any material difference compared to 2003 when there was no threshold. However, two marked differences between the pre-1994 and post-1994 floor-crossing statistics are:

- In the 1948 to 1994 era, even though the governing party steadily increased its seats election after election,<sup>851</sup> it lost much more seats through floor-crossing than it gained from floor-crossing.<sup>852</sup>
- In the post-1994 era the governing party had no losses and gained 9 and 14 seats respectively in 2003 and 2005.

In the pre-1994 era the majority of floor-crossings were between opposition parties while in the post-1994 era, movement between opposition parties seem to favour new parties. As there have been only two window periods post-1994, it may be too early to

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<sup>850</sup>The amalgamation of the HNP and AP as the NP is not counted as floor-crossing as the parties contested the election as a coalition.

<sup>851</sup> With the exception of the 1970 election.

<sup>852</sup> 23 losses against 12 gains.

make a meaningful comparison between the two eras but the following tendencies seem to prevail:

- Pre-1994 the governing parties did not appear to woo members of the opposition while the post-1994 government seems to have gone out of its way to entice members to cross.<sup>853</sup>
- Principles appear to have played a more important role in pre-1994 floor-crossing with the exception of the crossings since 1992 which appear to have been expedient.<sup>854</sup>

## **6.8 AN EVALUATION OF THE ADVANTAGES AND DISADVANTAGES OF FLOOR-CROSSING**

Floor-crossing and a free mandate of representation go hand in hand although there are constitutions that appear to contain a free mandate but at the same time have an anti-defection clause.<sup>855</sup> However, in this discussion a free mandate implies *inter alia* the right to cross the floor. Ever since the first floor-crossing legislation was introduced in 2002 and the subsequent Constitutional Court cases, the matter received wide press coverage. Since the window periods for the legislatures and municipal

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<sup>853</sup> According to a Notice of Motion by Mr Douglas Gibson MP, Chief Whip of the Opposition, the Deputy Speaker while acting as Speaker was actively involved in canvassing members of the opposition to cross over to the ANC. Hansard 13 September 2005.

<sup>854</sup> Morally there is a very big difference between a member crossing from one opposition party to another and an opposition member crossing to the governing party according to Mr Tony Leon MP, leader of the opposition. Personal observation to writer in September 2005.

<sup>855</sup> The Namibian Constitution is an example. Article 45 of the Namibian Constitution stipulates that “Members of the National Assembly shall be representative of all the people and shall in the performance of their duties be guided by the objectives of this Constitution, by the public interest and by their conscience”. This creates the impression of a free mandate but article 48(b) contains an anti-defection measure. Similarly, the Constitution of Mozambique states in article 168 (1) that the National Assembly represents all citizens and in article 168 (2) that representatives represent the whole country and not only those who elected them but in article 178 (2) (b) it is stated that a member vacates his seat if he accepts a position in a political party other than the one under whose banner he was elected.

councils do not coincide the matter comes up every year and is greeted with a barrage of media accusation. The question therefore arises whether floor-crossing is such an evil thing as pictured by the media? In one of the rare articles defending floor-crossing, Anthony Butler<sup>856</sup> stated the following:

“These critics confuse floor-crossing, a symptom, with its underlying causes. Many of the pathologies attributed to floor-crossing – MP’s lack of moral backbone, their cynical opportunism and their deference to Party Whips - are facets of our electoral system and not products of floor-crossing. The closed list system protects MPs from constituency pressure and entrenches the power of party bosses. This pragmatic compromise is unlikely to be discarded because it is broadly inclusive and allows parties to reign in careerists and ethnic entrepreneurs. It is pointless to blame floor-crossing for its incidental ills.”

The disadvantages and advantages of floor-crossing are therefore compared with a view to come to a conclusion as to which is the preferable theory in South African public law.

### **6.8.1 THE CASE FOR AN ANTI-DEFECTION CLAUSE**

This matter was dealt with by the Constitutional Court in the *Certification* case and what follows is a summary of the Court’s judgment on the issue.<sup>857</sup>

- An anti-defection clause strengthens party discipline and secures a more stable government.
- An anti-defection provision obliges members elected on a party list to remain loyal to that party as the party can easily replace dissident members.<sup>858</sup>
- An anti-defection clause prevents the ruling party from enticing opposition members to cross to the government and thereby obtaining a special majority not granted by the electorate.

<sup>856</sup> *Business Day* (11 October 2005).

<sup>857</sup> Please see pages 829 to 831 of the Report op cit.

<sup>858</sup> However, Mangu op cit 23 points out that “... ‘(e)nsaving’ a member of a legislature to the party that nominated such member does not necessarily serve or promote a free and democratic society.”



- An anti-defection clause honours the outcome of an election and meets the expectations of the voters.
- An anti-defection clause bars opportunistic members from crossing for self-serving reasons.
- In a proportional list electoral system the voters vote for a party and not for individual members. An individual member should therefore not have the right to retain his or her seat if he or she leaves the party under whose banner he or she was elected.

### **6.8.2 THE CASE FOR FLOOR-CROSSING**

The occurrence and the role of floor-crossing in South African constitutional history are recurring themes in previous chapters and what follows here is a summary of what is considered to be the advantages of floor-crossing.

- A free mandate theory of representation was the positive constitutional legal position in South Africa up to 1994. The fact that Members of Parliament were free to cross the floor at any time had a positive influence on the political development of the country as demonstrated by the fact that all political parties that played a role in Parliament during this period had their origins in floor-crossing. Had discontented members such as General Hertzog in 1913 not been able to voice their discontent from within the system, there would have been much more political tension and the evolutionary development of the Constitutional process would have been very different.
- The free mandate theory of representation allowed for the flexibility needed to address crucial matters which were unforeseen at the time of an election such

as the Great Depression in the 1930s and the outbreak of the Second World War in 1939.

- Freedom to cross the floor lessens the rigid control political parties have over their members which is advantageous for democracy.<sup>859</sup>
- Freedom to cross the floor provides an escape for members who are caught up in a party which does not live up to expectations. It is much better for a politician to cross the floor and live to fight another day than to jump ship or wait for the next election.<sup>860</sup>
- A free mandate theory of representation complies with the generally accepted theory of representation in positive public law as applied in great democracies such as the UK, USA, Germany, The Netherlands and France.

### **6.8.3 WEIGHING THE ARGUMENTS FOR AND AGAINST FLOOR-CROSSING**

As indicated above a free mandate theory of representation was the positive constitutional legal position in South Africa up to 1994 and Members of Parliament were therefore free to cross the floor at any time. Although floor crossing did occur on a regular basis<sup>861</sup> it did not have the effect of destabilising the government. During the eighty four years preceding the 1993 Constitution a change of government occurred once because of the free mandate members enjoyed.<sup>862</sup> It therefore appears that the absence of an anti-defection clause does not necessarily result in unstable

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<sup>859</sup> Mangu op cit put it as follows: “As far as floor-crossing is concerned it frees the members of legislatures from the imperative party mandate and dictatorship and is likely to promote democracy and foster loyalty to the people.”

<sup>860</sup> Butler op cit.

<sup>861</sup> See paragraph 6.1.1, 6.1.2 and 6.1.3.

<sup>862</sup> That was with the outbreak of the Second World War in September 1939 when the Prime Minister’s motion was defeated.

government. The limited free mandate introduced in 2003 also did not result in any destabilisation of government. It did, however, *destabilise* the opposition. The opposition was further fragmented with a number of new political parties joining its ranks and members defecting to the ruling party.<sup>863</sup> After the 2005 window period the Democratic Alliance was the only opposition party left with enough seats to function as an effective opposition party. None of the other fourteen opposition parties, sharing sixty seats, remained with enough members to attend all the Portfolio Committees.<sup>864</sup>

- Floor-crossing in its present form therefore seems to have a negative effect on the opposition.
- It is true that an anti-defection clause prevents members from defecting but whether it promotes loyalty is debatable. The fact that members are forced to vacate their seats if party membership is changed has not deterred members from resigning their seats.<sup>865</sup>
- Loyalty is a personal quality based on reciprocity and cannot be forced.<sup>866</sup> Tim Hughes<sup>867</sup> is of the opinion that the present electoral system results in party loyalty at the cost of the interest of the constituents. It is therefore questionable whether it is a good thing to strengthen the already strong hold parties have over their members.
- The argument that an anti-defection clause prevents the ruling party from enticing members of smaller parties is more valid. Although this did not

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<sup>863</sup> Five new political parties were formed in 2003 and five again in 2005 while nine opposition members defected to the ruling party in 2003 and fourteen in 2005.

<sup>864</sup> There are 27 portfolio committees in Parliament and since the committees mostly sit at the same time it follows that a party with less than 27 members cannot adequately attend committee meetings.

<sup>865</sup> Examples are Dr Manie Schoeman, former leader of the NP in the Eastern Cape, who resigned his seat as a NP member and later returned as a member for the ANC, Mr Bantu Holomisa who left the ANC and later returned as leader of a new party, the UDM and Mr Roelf Meyer, former leader of the NP in the Transvaal and Director General of the party, who also resigned from the NP and later returned as co-leader of the UDM.

<sup>866</sup> Butler op cit.

<sup>867</sup> Die Burger 21 March 2005.

present a problem in the pre-1994 era, there are accusations that it was the case in both 2003 and 2005. However, this problem can easily be addressed by a sunset clause that prohibits a member who crossed the floor from being appointed to a more senior position for the remainder of his or her term or for a specified period.<sup>868</sup>

- Although it is theoretically true that an anti-defection clause prevents a member from “stealing” the electorate’s votes, the argument that it honours the outcome of an election does not take into account that the electorate also changes its position over time as evidenced by the differences in election results from election to election. It also appears that both before 1994 and since 2003, the floor-crossers anticipated the changing mood of the electorate since subsequent elections followed the same trend.
- As far as the argument that an anti-defection clause bars opportunistic members from crossing for self-serving interests is concerned, the problem is that it also bars those who may have truly noble motives. It is like prohibiting everybody from driving on a public road because some drivers cause accidents. It is a fact that some members do cross for self-serving purposes, especially those who cross from smaller opposition parties to the ruling party. However, it is submitted that such members are only acting true to their character and most probably became politicians for the wrong reasons. There is no reason to protect such members against themselves and the public is quick to identify and reject those politicians who have self-serving agendas.<sup>869</sup>

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<sup>868</sup> See speech by Mrs Sheila Camerer MP Hansard 23 August 2005.

<sup>869</sup> It is submitted that the demise of the NNP is directly related to its leader’s personal ambition for high public office.

- As far as the argument that the seat belongs to the party and not to individual members is concerned, it should be borne in mind that the names of members who were elected appeared on party lists and that they also canvassed as candidates. Although difficult to quantify it is presumed that all candidates attract votes.<sup>870</sup> The argument raised above about the changing mood of the electorate is also valid here.

## 6.9 CONCLUSION

Before the anti-defection clause introduced by the 1993 Constitution came into effect, floor-crossing was a regular feature of the South African political scene and it played an important part in the formation of new political parties through an intra-parliamentary process. It also played a major role in forging the Country's future, as South Africa would not have been able to participate in the Second World War if an imperative mandate theory of representation had existed at the time. Notwithstanding the free mandate of representatives, floor-crossing did not occur on a great scale except when there were exceptional circumstances, such as the Great Depression in the 1930s and the outbreak of the Second World War. It also appears that where floor-crossing occurred in any large numbers, it started a trend that was confirmed by subsequent elections. An interesting fact is that throughout the pre-1994 era, with the exception of the amalgamation of the South African Party and the National Party in 1934, the governing party lost more seats than it gained through floor-crossing.

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<sup>870</sup> Elected MP's whose names were on Party lists presumably also attracted voters.

It is accepted that the introduction of an anti-defection clause in the interim Constitution was justified in the light of the necessity of a stable government during the initial stages of the Government of National Unity. That the anti-defection clause was not included in the body of the 1996 Constitution is a clear indication that it was the intention to re-introduce the free mandate theory of representation within a reasonable time. The fact that it was only re-introduced at the time that the governing party stood to gain from the change, seems to have been expedient. The Constitutional Court judgments in the *Certification* case and the *UDM* case are also not totally reconcilable and leave room for criticism.

The hybrid form of the reintroduced quasi free mandate of 2002/2003 has the advantage of regulating floor-crossing by minimising the disruptive effect it may have<sup>871</sup> to only two periods during the life of a parliament but the introduction of the ten percent threshold favours the larger parties unfairly. By definition the governing party will always be the largest party. Historically larger parties have always lost more members through floor-crossing but the threshold of ten percent effectively protects the governing party against defections since the size of the change of allegiance necessary to meet the ten percent threshold puts it in the category of a major shift.<sup>872</sup> It is writer's submission that if a threshold is necessary at all, an equal threshold of three to five members, irrespective of the size of the party, would have been preferable.

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<sup>871</sup> The financing of political parties is done quarterly in advance and changes in membership affect a party's allocation but not its expenses.

<sup>872</sup> A group that meets the requirement to break away from the ANC at the next window period will be the second largest opposition party with at least 30 members. However, they need not all join the same party.

It is also interesting that while during the pre-1994 period the governing party lost more seats than it gained, the opposite is true for the post-1994 period. Although the threshold has an inhibiting effect as indicated above, it seems that the fear expressed by the Constitutional Court in the certification judgment, namely that a free mandate may result in the governing party enticing members of smaller parties to cross, has proved to be real.

As far as the private members' bills aimed at abolishing floor-crossing is concerned, it is submitted that although opposition parties in general were adversely affected by floor-crossing in 2003 and 2005, in the long term a free mandate would be to their advantage. The present situation where the ruling party has nearly 75% of the Members in Parliament is abnormal in a proportional list electoral system and cannot last indefinitely. It is a fact that the bigger a party's caucus, the better the chances for the development of factions that can lead to the formation of new alliances.<sup>873</sup>

Without floor-crossing such developments will not be possible.

As far as the advantages and disadvantages of a free mandate of representation is concerned, i.e. should floor-crossing be allowed or not, it is submitted that the arguments in favour of a free mandate are more convincing and more in line with positive constitutional law. Nevertheless, the hybrid system presently applicable in South Africa needs refinement, especially as far as the threshold is concerned. The origin of new one-member political parties through floor-crossing also gives rise for concern. To eliminate such fragmentation of the opposition it is proposed that the registration of new political parties be made more difficult. At present the

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<sup>873</sup> See front page article in the *Cape Times* of 15 June 2006 "Cosatu may quit alliance" by Moshoeshoe Monare.

requirement is only the support of fifty registered voters<sup>874</sup> while a seat in Parliament represents between 40 and 50 000 votes. It is suggested that the minimum requirement for the registration of new political party be increased to at least 500 registered voters.

Seen from an historical perspective floor-crossing has had more positive than negative results and in its present form it has a tempering effect on the stronghold political parties have over their members.

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<sup>874</sup> Section 15(2)(b) Electoral Commission Act 51 of 1996.



## CHAPTER 7

### FINAL CONCLUSION

*“Democracy is the most just and benevolent form of government devised by man, but it is by no means the most efficient. Its nature makes it difficult for leaders to face problems until they have become a crisis. Because of the process required for election in a democracy, those who are best qualified to either lead or manage seldom get involved. Historically we have been blessed with enough leadership that was just in time to save us from oblivion when crisis exploded upon us.”*

Rick Joyner

### 7.1 GENERAL

Crick<sup>875</sup> stated that “If one is to reform the world, one had better understand it first.”

It is trusted that this study contributed to the understanding of how parliamentary representation and the emotional issue of floor-crossing developed into the system prevailing in South Africa at present. This study has shown that although there were times when development was slow, the process never came to a stop and both in Britain and South Africa the devastation of revolution was prevented by making the necessary adjustments, sometimes in the nick of time. The advantage of evolutionary progress is that the golden thread of history is never severed and the past remains linked to the present which enriches the constitutional heritage. The difference between a constitutional system that developed over time<sup>876</sup> and that of a system introduced by a revolutionary process<sup>877</sup> is that in the first mentioned case the experience of the past is a living part of the constitutional heritage of such a country.

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<sup>875</sup> Crick B *The Reform of Parliament* (1970) xi.

<sup>876</sup> Which writer contends is the case in South Africa.

<sup>877</sup> Such as Mozambique, for example.

Burke put it aptly that the political rights of Englishmen were not based on theories but were inherited as a patrimony derived from their forefathers.<sup>878</sup>

Parliament was from the earliest times seen as representative of the population as a whole, although universal adult suffrage was only introduced in Britain in 1928 and in South Africa in 1994. There was no representative government in South Africa before 1853 when the first Parliament was introduced in the Cape. The Cape Parliament was cast in the Westminster parliamentary mould but was even more democratic than the British Parliament. What was remarkable about the Cape Parliament was that it was colour blind. However, race and colour did play an important role in the former Boer Republics and the representation of people of colour became a vexing problem in South African politics from the formation of the Union in 1910. Various systems to accommodate the political rights of non-whites were introduced from 1910 to 1984, which varied from indirect representation, homeland rule to the Tricameral Parliament, none of which met the principles of representation in contemporary public law. It could be argued that those who were not directly represented were represented virtually, but if it is accepted that *boni mores* is a precondition for virtual representation it must be concluded that those citizens who did not enjoy the franchise were also not virtually represented because racial discrimination is *per se contra bono mores*.

The concept of representation in public law developed in Britain and to a great extent contributed to the preservation of its Parliamentary institutions and saving them from the destruction which overtook such institutions everywhere else. The body of voters

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<sup>878</sup> Please see Chapter 3.4 of this study.

who chose the representatives was in the beginning not extraordinarily large and also not representative of the population as a whole in the modern sense of the word. However, through the doctrine of consent the whole community was considered to be represented in Parliament and it was only in the Twentieth Century that universal suffrage became the underlying principle of representation. These developments occurred gradually and were not so much the result of political ideology but were seen as acquired patrimonial rights. Although representatives originally received express instructions they were later left unfettered by direct instructions and were expected to strive to promote the general welfare of the realm. This led to the development of the free mandate theory of representation which became the accepted theory of representation in positive public law and the prevailing theory of representation in South Africa up to 1994.

Political parties originated in Parliament as informal groupings of members that congealed into mainly two groupings, government and opposition. The advent of Cabinet Government created a need to secure the support of the majority of members which led to the groupings becoming more formalised. As the election of members of Parliament became more democratic it became increasingly important for politicians to gain the support of the electorate and formal political parties developed from the informal intra-parliamentary groupings. From this point in time political parties developed from intra-parliamentary groupings to extra-parliamentary organisations designed to achieve and exercise power. In South Africa the first political party was established in 1880 but it was only after Union was formed in 1910 that political parties started to play a significant role. Only three parties governed South Africa between 1910 and 1994 and all three parties were established by intra-

parliamentary processes which would not have been possible had a free mandate theory of representation not applied. In addition 17 other political parties were formed by an intra-parliamentary process during the above mentioned period of which none remains in Parliament in its pre-1994 form.<sup>879</sup> Since 1990 parties previously banned from participating in national politics returned to the political arena and in 1994, a previously extra-parliamentary party won the first fully democratic elections. Since the part repeal of the anti-defection legislation in 2003, ten new political parties were established through intra-parliamentary processes.

In Britain sovereignty gradually moved from the Monarchy to Parliament and thus to the people. This development was taken further in South Africa in 1994 when the Constitution became sovereign. This resulted in some power being removed from political representatives and placed in the hands of the Courts, particularly the Constitutional Court, which introduced a new dimension to the function of judges and led to the question who really governs the country.<sup>880</sup> The limited scope of this study did not permit to go into this topic in any detail but it is submitted that the supremacy of the Constitution results in the judiciary becoming involved in what used to be exclusively the domain of Parliament. The Courts are getting more and more involved with policy matters and there is a real danger of politics becoming settled in the Courts.<sup>881</sup> This will inevitably lead to tension between Parliament and the Judiciary over the application of the Constitution and the independence of the bench.<sup>882</sup>

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<sup>879</sup> The only parties presently represented in Parliament that can be directly traced to parties represented in Parliament before 1994 are the DA and the FF+.

<sup>880</sup> See Chapter 5.7

<sup>881</sup> See interview of Wiechers by Eugene Gunning in *Die Wêreld* 22 May 2005.

<sup>882</sup> See Jeffery Anthea "A Threat all Round" *Fast Facts* no 6/2005.

The transfer of sovereignty from Parliament to the Constitution has a direct bearing on the mandate of political representatives since it places the Constitutional Court in the position of “supervisor” over certain functions of Parliament. The problem of the supremacy of the Constitution is that its implementation blurs the doctrine of the separation of powers. The new role of the Judiciary does not only call for the absolute independence of the Judiciary but at the same time necessitates a system in terms whereof the Judiciary can be held accountable. The appointment of judges will also have to be reviewed to ensure that the rule of law does not become a remote control lever of the executive.<sup>883</sup>

It was shown in Chapter 6 that floor-crossing has both advantages and disadvantages but the conclusion was reached that the free mandate theory of representation is the preferable theory of representation in public law. Not only because it was the historically accepted theory in positive South African public law but also because it is better suited to stimulate further developments in democracy. It was also shown that while the free mandate theory applied in South Africa it did not have any disruptive effects on South African politics. It is accepted that an anti-defection clause was justified to preserve stability during the initial period of transition but the protection can no longer be justified and is a restraint on democratic development. The part return to a free mandate in 2002/3 is welcomed but the current hybrid system favours big parties and need to be reviewed.<sup>884</sup>

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<sup>883</sup> It is significant that the first president of the Constitutional Court and later Chief Justice was the law adviser to the ANC at Codesa and personally drafted large portions of the interim Constitution.

<sup>884</sup> See paragraph 7.2.4.

## 7.2 RECOMMENDATIONS

In the course of this study a number of aspects that need to be addressed were identified and the following recommendations are made:

1. *The nomination of candidates by political parties and their recourse to the courts.*

It was shown in Chapter 5.2.5 that although the larger political parties do have a democratic system of selecting candidates there are no legal requirements in this regard. The *Dunne* judgment also indicates that a bereaved candidate has no recourse to the courts. To protect the rights of candidates and in the interest of democracy it is recommended that political parties be obliged to have and implement democratic and transparent procedures for the nomination of candidates and that candidates have recourse to the courts in this regard.

2. *Membership requirement for the registration of political parties.*

In Chapters 6.4 and 6.5 it was pointed out that the intra-parliamentary formation of new one member parties through floor-crossing became a peculiarity of the new system. It is submitted that it is too easy to form a political party and it is suggested that the membership requirement be increased to at least 500 registered voters, which is not too high a standard if it is considered that a seat in Parliament represents more than 40,000 votes.

3. *The appointment of and control over the Judiciary.*

Although the appointment of judges and the control over the judiciary were not the subject of this study the matter is related in view of the *supervisor* role that the courts have under the 1996 Constitution. However, as indicated in Chapter 5.7 and also pointed out in the final conclusion, the transfer of

sovereignty from Parliament to the Constitution has the potential to create tension between Parliament and the Judiciary and it is recommended that preemptive measures be taken to completely de-politicise the appointment of judges and to create a purely judicial body to control the judiciary.

*4. Repeal of anti-defection measures.*

The final conclusion of this study was that a free mandate of representation is the preferable theory of representation in public law and it follows from such a finding that it be recommended that the remaining anti-defection measures also be repealed. It is submitted that South Africa has reached a stage of political maturity in which the protection of the anti-defection measures is no longer needed and its repeal will undoubtedly stimulate democratic development and freedom of expression.



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