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Q1:

1.1

1] At first, policy is formulated via various channels, including through Nedlac, through internal party discussions as well as consultation with affected/interested parties.
2] The proposed legislation is then discussed in a Green Paper. Public hearings are held on the matter.
3] A White Paper is prepared and public hearings are held concerning the proposed legislation.
4] A draft of the Bill as well as an explanatory memorandum is prepared by the Minister responsible for the issue. This is submitted to Cabinet for approval.
5] Once Cabinet has approved the draft Bill, the state law advisers certify that the law is constitutional before it can be submitted to Parliament.
6] The Cabinet Minister responsible for the Bill (eg: education) usually first introduces the Bill in the National Assembly (or the National Council of Provinces). This is the first reading.
7] The Bill is referred to the appropriate portfolio committee for review and amendment after facilitation of public involvement. This is the second reading.
8] If the National Assembly passes the Bill, it is forwarded to the National Council of Provinces for its assent.
9] If the Bill was approved by the National Council of Provinces, it is forwarded to the National Assembly for its assent.
10] Once both Houses of Parliament have passed the Bill, it is presented to the President for signature.
1.2

The action has been instituted in the High Court because section 170 as read with section 172(2)(a) of the Constitution provides that a High Court (or a court of similar or higher status) may make an order concerning the constitutional validity of an Act of Parliament or the conduct of the President. A non-exhaustive list of cases could be cited as authority for the fact that in the large majority of instances a matter will first be heard in the High Court.

The matter may go on appeal to the Supreme Court of Appeal if either of the parties to the litigation are not satisfied with the decision. Even if the matter is heard a second time (i.e.: on appeal), since it is a constitutional matter, that is not where the matter ends. Indeed, section 172(2)(a) continues by stating that an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court, thus it must also be heard and decided by the Constitutional Court. Again, any case that has been heard in the Constitutional Court after having been heard in the High Court and Supreme Court of Appeal would be appropriate.
1.3

The relationship between a supreme constitution and the court's testing power is that when a constitution is supreme, ALL law and ALL conduct must comply with it and if it does not comply, it MUST be declared invalid. We, the South African people, chose to give our courts this testing power when our representatives drafted the Interim and Final Constitutions in the early 1990s and provisions were included such as section 172 which obliges the courts to declare law invalid. Accordingly, the testing power of the courts reinforces the supremacy of the Constitution and ensures that it remains supreme and that all laws are compatible with it.

The case of *De Lange v Smuts NO* is very important for our understanding of the unique and special form that the separation of powers doctrine takes in South Africa. What the court held is as follows:

... over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa’s history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measure in the public interest.

What this essentially means is that the Constitution itself does not prescribe a specific, fixed form of the separation of powers doctrine. Instead, each case must be assessed on its own merits and guidelines can be developed over time as to the best method of ensuring that each of the 3 principal organs of state (legislature, executive, judiciary) retain their particular areas of power and expertise, but at the same time (as the counter-majoritarian dilemma has taught us), the judiciary is entitled and empowered to declare law or conduct invalid if it does not comply with the Constitution. Essentially, the counter-majoritarian dilemma is where 11 judges (that is the number of judges in the Constitutional Court, but it may even be as little as a single judge in the High Court) have declared a law invalid, but that law that they have declared invalid is a law that was passed by 400 Parliamentarians who had all assumed their positions in Parliament because we, the people had voted for the political party to which they belong, and they represent that political party and thus, they represent us and have been mandated by us to pass laws in our interests. Thus, on the face of it, it appears undemocratic but it is not undemocratic because it is specifically permitted in section 172 of the Constitution.

The *Treatment Action Campaign* case is a good example. We know that the Department of Health (part of the executive) has specialised knowledge about how much money they have to provide health care, and how many doctors and nurses are employed to cater to the health care needs of the people of South Africa, and it is composed of experts who engage in research about the
effectiveness of certain medicines. The judiciary definitely does not have all of this information at its disposal and can’t even begin to start trying to decide cases that impact on the sensitive areas, such as budgetary allocations or the effectiveness of certain medicines without receiving sufficient information. In general, in cases like the Treatment Action Campaign case where HIV positive pregnant were not receiving nevirapine even though there were various studies showing the immense benefits of nevirapine as far are prevent the transmission of HIV to unborn children, the court will defer to the knowledge and expertise of the executive if the executive says that they do not have the money to provide the drug and do not have enough medical staff to administer the drug and have reservations about the effectiveness of the drug and not declare that the executive has acted unconstitutionally. But, if the court comes to the conclusion that the excuses being made by the executive are weak and that there is sufficient evidence to prove that nevirapine will save millions of lives and that in fact, millions of the nevirapine tablet had been donated to the
South African government by India, then in order to uphold the Constitution, the court will - and must - intervene and order the executive to make sure that it immediately begins to administer the drug. It appears as though the judiciary is intruding too deeply into the domain of the executive when doing this, which is undemocratic, but in fact, it is done with the purpose of ensuring that real constitutional democracy is realised. As such, the court in the TAC case took timely measures to protect the public interest.

Similarly, if a law appears invalid, a court has the right to declare that law invalid, but (to quote the *De Lange v Smuts* case) must retain the delicate balance between what the judiciary is permitted to do and what the legislature does, so when the court declares a law invalid, it will only say that the law must be rectified. The court definitely does not re-write the law, because that is the proper role of the legislature. *Glenister* case and the *Fourie* case are good examples. Likewise, when declaring executive conduct unconstitutional, the court will also leave it up to the executive to rectify the unconstitutional conduct; it will not tell the executive what to do, unless it is absolutely necessary.
Yes, this is a direct violation of section 165 of the Constitution. In terms of section 165(2), the judicial authority of the republic is vested in the courts who are independent and subject only to the constitution and the law which they must apply impartially, and without fear, favor or prejudice. Significantly, section 165(3) then states that ‘no person may interfere with the functioning of the courts’. Moreover, when that judge assumed office, he was required to swear an oath in terms of Section 6 of schedule 2 of the Constitution that he would uphold and protect the Constitution and will administer justice without fear, favor of prejudice.

Compounding matters is the fact that section 2 of the Constitution obliges the judge to act strictly in accordance with section 165 and section 6 of Schedule 2, failing which his conduct is invalid and unconstitutional.

It therefore also constitutes an infringement of the rule of law. The epitome of the rule of law is that no one is above the law and the law applies equally to everyone. In addition, if the law gives an indication that things should be a certain way, then that is precisely what should happen.

The situation is directly analogous to the situation which occurred in May 2008, when it was alleged that the judge president of the Cape High Court, Judge John Hlophe, approached some of the judges of the Constitutional Court in an improper attempt to influence this Court’s pending judgment in favor of Mr Zuma in the Zuma/Thint matter by stating “you are our last hope; you must find in favor of our comrade”.
Yes, the Judicial Service Commission is the relevant body, in terms of section 178 of the Constitution. The JSC’s mandate is to ensure that the judiciary remains independent and impartial and for that reason it has the additional mandate of deciding whether or not judges should be removed from office because they no longer have the requisite integrity or have brought the judiciary into disrepute, etc.

At the time that the complaint against Judge John Hlophe was lodged, the commission did not have the jurisdiction to hear a matter where a judge was accused of conduct not amounting to gross misconduct, as the provisions of the Judicial Service Commission Amendment Act, whose object, inter alia, is to allow for inquiries into and sanctions for alleged misconduct by judges which does not constitute gross misconduct leading to the removal of the judge from office, were yet to come into effect.

On 15 August 2009, after considering the matter and taking into account the limits of its powers, the commission, by a majority, reached the conclusion that the evidence in respect of the complaint did not justify a finding that Hlophe JP was guilty of gross misconduct and should accordingly be removed from office. Various courts have found that the JSC is obliged to reinstitute this hearing. However, we are now exactly 9 years down the line since Judge Hlophe allegedly tried to improperly influence the Constitutional Court judges, yet to date, nothing has happened, despite the fact that every few months the JSC says that it “is about to open the matter once again, using the procedure that has now been created by the Judicial Service Commission Amendment Act”, which is that a judicial misconduct tribunal has been set up.

Even the matter against Judge Motata who was accused of using racist language and driving under the influence of alcohol serves to prove that the Judicial Service Commission has not been able to properly execute its mandate to maintain the integrity and good reputation of the judiciary. Similarly, the JSC never dealt decisively with Judge Mabel Jansen and she resigned prior to the JSC conducting any investigation or hearing.
Decisions or motions are carried in parliament by a majority vote. So the majority party having a vote of more than 50% can within the parameters of our National Constitution take decisions in parliament without the support of other parties. Legally and politically though we are a multi party democracy. The majority party in our National Government is the ANC. Remember we gave 3 tiers of Government local government, provincial government and national government. Many provinces are controlled by opposition parties like the Western Cape for example in some cases opposition parties have formed a coalition to unseat the ANC in that province. Arguably in a democracy delegates are supposed to vote as individuals. But if you don’t vote with the party mandate then those delegates are fired like on the 27th of August 2018 when a South African member abstained a DA member.

A dominant party democracy is a democracy whose constitutional design is liberal democratic, which provides an entrenched framework for multiparty democracy through universal suffrage and regular elections, and which contemplates political competition and the alternation of political parties in power, but in which one party enjoys electoral dominance and continues to win free and fair elections that are not tainted by force or fraud. South Africa is emerging as a leading example of a dominant party democracy, with the ANC winning every election since 1993, now in power, and with no clue of a reasonable rival on the horizon.

I commence by locating a distinctive set of pathologies for dominant party democracies: the handling of community assets by dominant political parties as political to alter electoral competition; deliberate bids by dominant parties to adjust the rules of electoral competition to piece opposition parties and lower their capability to pass a reasonable alternative: the erosion of federalism to undermine the capacity of opposition parties to shape governments at the sub-national level and move the political assets provided by office to increase their competitiveness at the national level; the inferiority of the parliamentary wing of a ruling political party to its non-parliamentary wing, thereby moving politics into the party and out of the legislature, lowering the main part of the legislature in national political life. The existence of a dominant political party has predictive worth – if these pathologies do not yet exist, they are likely to eventually appear. Furthermore, although these pathologies are distinct, they are linked. Where one sees one, others are likely present as well, or will soon follow. Finally, these pathologies do not solely arise as a consequence of party dominance; they are components that contribute to its maintenance.

Turn to the case-law of the Constitutional Court, and prove that the various pathologies of dominant party democracies are at play in a distributed and different disconnected set of cases across a span of substantive areas which have been cleared by, and which could soon come before, the Court. The first set appears out of the connection between the plan of the electoral system and the connection between elected representatives and their parties – in particular, the
connection between proportional representation, floor-crossing and constitutional amendment. The second set appears from the connection between independent institutions and the elected government, and raises for consideration the force on the constitutional guarantees of institutional independence created by the occurrence of team deployment by the ANC.

A third set of cases includes those emerging out of the constitutional imbroglio concerning cross-border districts. Although these appeals turn on the constitutional duty of provincial legislatures to ease public involvement in the legislative process, as well as claims of irrationality, they serve to highlight the way in which the authority applied by unelected ANC party officials over democratically elected ANC politicians has undermined the form of representative democracy and federalism in South Africa. This set of cases also incorporates the constitutional challenge to the termination of the Directorate of Special Operations, the special investigatory unit that carried out the investigation that led to criminal charges being set against President Zuma.

A strong conception of dominant party democracy can help the Constitutional Court. The task is both systematic and dictatorial, and brings to bear the perceptions of comparative politics on constitutional doctrine. This work is of pressing significance. On the occasions when the dominant status of the ANC has been elevated before the Constitutional Court, it rapidly dismissed the importance of ANC domination to the Constitutional challenge. This reflects the Court’s insufficient understanding of the notion of a dominant party democracy, its pathologies, the pressure it puts on what it otherwise a formally liberal democratic system because of the lack of variation of power between political parties, and how this pressure is creating constitutional challenges.

If the present-day Constitutional Court takes on the idea of ANC domination seriously, this yields a set of constitutional doctrines, some of which appear from a change of the present jurisprudence. These doctrines will not ensure that South African democracy functions as it would were the ANC to lack political dominance. Rather, they serve to check the misery that flows from the ANC’s dominant status, and that function to strengthen its dominance.
Sources.

https://constitutionallyspeaking.co.za/new-article-by-sujit-choudry-on-dominant-party-democracy-in-sa
Good day.

Dear Sir/Madam.

I tried sending my assignment 2 on the 31st of August 2018, on the 1st, 2nd and 3rd of September 2018 it was not going through the myunisa page kept on saying server unavailable.

Thank you.