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Equality and freedom in South Africa: creating a democratic paradox?

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South Africa's democratic transformation from authoritarian rule to a constitutional democracy was a dramatic legal revolution that signalled the end of parliamentary sovereignty and its replacement by a supreme constitution. This adoption of a supreme constitution, including a bill of rights to protect individual rights, for the first time formally indicated the presence of a constitutional state in South Africa. The "legal revolution" had a direct influence on the way democracy would be defined and applied in the future. However, the emphasis in the Constitution on equality and freedom, in direct relation to democracy, may have created a potential paradox in the understanding and application of the concept in South Africa. This article investigates this potential paradox between equality and freedom in the application of democracy in South Africa.

Gelykheid en vryheid in Suid-Afrika: die skepping van 'n demokratiese paradoks?

Suid-Afrika se demokratiese transformasie van 'n outoritêre regering na 'n konstitusionele demokrasie was 'n dramatiese staatsregtelike rewolusie wat 'n einde aan parlementêre soewereiniteit en die vervanging met 'n oppermagtige grondwet gemaak het. Die aanvaarding van 'n oppermagtige grondwet, met 'n handves van menseregte om individuele regte te beskerm, het vir die eerste keer in Suid-Afrika die teenwoordigheid van 'n konstitusionele staat bevestig. Hierdie "staatsregtelike rewolusie" het 'n direkte invloed op die wyse waarop demokrasie in die toekoms omskryf en toegepas sou word, uitgeoefen. Die klem wat egter in die grondwet op die waardes van gelykheid en vryheid in 'n demokrasie geplaas is, het egter 'n potensiele paradoks in die verstaan en toepassing van dié konsep geskep. Hierdie artikel ondersoek die potensiele paradoks tussen gelykheid en vryheid in die toepassing van demokrasie in Suid-Afrika.

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The United States Supreme Court's ruling in *Marbury vs Madison* (hereafter referred to as *Marbury*) was not only one of the earliest, but also one of the greatest constitutional law cases ever.¹ *Marbury* was produced at the time of one of the first great political crises of the new order, and the ruling not only strengthened the political order in the USA, but also made a critically important contribution in globally strengthening the notion of a constitutional democracy. In *Marbury*, the supremacy of the constitution, and the system of judicially reviewing the constitutionality of any legislation, was established – before it was put into effect anywhere else in the world (Troper 2005: 24). Marshall J reaffirmed in *Marbury* the “new” status of the judiciary by declaring that the “government (of the United States) has been termed a government of laws, and not (a government) of men” (Kahn 1997: 1-21).

Marbury also affirms that a system of political order that only expresses the self-interest of the majority that holds power (government of men) cannot be equated with the rule of law in a country. The court reiterated that, if democracy in a country is merely the self-interest of those in power, then the application of the rule of law, which degrades the effectiveness of a constitutional state, has failed (Kahn 1997: 1-21). Applying these values to South Africa's constitutional position, after nearly a decade and a half of democracy, the question can be rightfully asked whether our new constitutional dispensation has followed the *Marbury* example and created “a government of laws and not a government of men?” In its definition of the supreme Constitution, the South African Constitutional Court specifically reiterated “that a constitution defines the right and duties of citizens and the devices that keep those in power in check” (Devenish 2000: 12-3).

To address the question meaningfully will require an investigation into and an analysis of the relevant sections of the Constitution and the intra-relationship between politics

1 5 US (1 Cranch) 137, 163 (1803).

(government of men) and law (government of laws) in South Africa. The investigation will also have to take cognisance of the definition of the concept of democracy and its juxtaposition with equality and freedom as it is encapsulated in the Constitution. However, in order to contextualise the discussion attention will have to be paid to the global rise of constitutionalism and the salient features of democracy.

1. The rise of constitutionalism

It is an undeniable fact that constitutional democracy in the form of the “government of laws” has been a dominant factor in the democratisation of states. The recent global “wave” of constitutionalism bears testimony to the renewed trust in the value of written constitutions and a bill of rights in newly democratised states. This renewed trust in written constitutions proves that many politicians regard constitutions as a *sine qua non* for a viable democracy and state stability.

It was therefore no surprise that South Africa also followed the constitutional “route” to guide its political transformation from authoritarian rule to an all-inclusive democracy. Teitel (1997: 97) refers to this constitutional transfer of authority as transitional justice, where the law fulfils a dual role – by providing order and stability, while simultaneously enabling democratic and political transformation to take its course.

Scholars in the political sciences have always focused on the perpetual challenge to explain state stability in an environment of instability and change. Early political scientists in the field, such as Almond & Verba (1963: 267), have emphasised the complementary role of political culture to create a stable democracy.

However, in the modern era a significant shift has taken place in respect of the democratisation of former unstable states. The transformation to democracy has progressively been associated with the concepts of rule of law and broader legal reforms which were not restricted to public law. This broader

legalistic approach to political reconstruction has progressively gained favour and underpinned the majority of the more recent democratic transformations in the world. Klüg (2000: 7) points out that in 1999 of the 197 single-document constitutions in effect, only twenty pre-dated 1950. From 1989 to 1999 over 65% of the member states of the United Nations had made major substantial amendments to their constitutions, and at least one quarter of these states included a bill of rights and made provision for some form of constitutional review.

South Africa's political and constitutional reconstruction was part of this new global wave of constitutionalism, and its adoption of a supreme constitution in 1994 formally completed its constitutional and democratic revolution, which hallmarked a new chapter in the country's constitutional history. From 1910 to 1994 authoritarian rule and a system of parliament supremacy translated into a restrictive and selective application of democracy in South Africa. However, the substantive constitutional changes effected by adopting a supreme constitution have drastically impacted on how the concept democracy would be articulated, defined and applied in the future.

An investigation into democracy in South Africa to establish whether a government of laws or a government of men has been created will require an analysis of the concept of democracy. The investigation will require, first, a textual analysis of the Constitution, including the preamble, the bill of rights and other relevant provisions. However, democracy should also be defined in a non-institutional and affirmative context, which requires a much more comprehensive and broader analysis of its dynamics within its contextual environment. Before embarking on an investigation of democracy in the Constitution, it will be useful to outline what we mean by "democracy".

2. Democracy, defining the elusive

Although the concept of democracy is widely used, it remains an elusive concept to define, both in the political sciences and in other related disciplines in the social sciences. The continued broad and opportunistic application of democracy over the years has partly diluted its original intent and meaning and degraded its values, at least to a certain extent. Bernard Crick's observation that "democracy is perhaps the most promiscuous word in public affairs" is therefore hardly surprising because of this wide application and broad understanding (Heywood 2005: 68).

2.1 Democracy is a relationship

The notion of democracy has fundamentally encapsulated itself in the relationship between the rulers and the ruled. All non-democratic regimes, in particular those that pretend to be democratic, form a relationship between the ruler and the ruled by creating an abstraction (church, state or a political party) as a subject and people as an object that could be manipulated. In a democratic system, the people are the subjects and the state or party an (the) object that can, through participation and elections, be manipulated. It is therefore important to establish a balance between what (state, political party, government of men) and who (the rights of individuals, government of laws) is right.

2.2 Democracy has two broad categories

An investigation into the nature of democracy reveals two broad categories that differ in degree from each other, namely procedural and substantive democracy. The difference is that procedural democracy is usually measured in terms of the occurrence of regular elections and other formal appearances of democracy. By contrast, substantive democracy emphasises that democracy is only possible when a country's impoverished and

powerless people are empowered to participate in political and societal affairs as full-fledged members.

2.3 Differences of degree in the concept of democracy

The difference in degree could be described with reference to the difference between democratic and authoritarian systems as the amount and quality of participation that rulers allow their citizens in the determination of public policy (Jackson & Jackson 2004: 17). In this construct, authoritarian regimes impose one dominant interest of a small elite group on the broad community while, in the democratic system, the aim is to accommodate and conciliate competing interests within one system and, through competitive elections, allow for participation in public policy-making.

2.4 The term majoritarianism does not capture the contemporary understanding of democracy

The literary meaning and etymological origin of democracy as the “rule by the people”, as in ancient Greece, created the image that defining the concept is a simple task. In contemporary terms (and the problem of equating democracy in this manner), this procedural perception of democracy as the rule of the majority, as expressed through free and fair elections (Plattner 2010: 84), has serious limitations. This presents a very strong procedural understanding of democracy, which does not capture the essence of the contemporary understanding of the concept. Plattner (2010: 84) cites Kolakowski who states that the principle of majority does not by itself constitute democracy and refers to many tyrannical regimes that enjoyed the support of the majority, including Nazi Germany and the Iranian theocracy.

South Africa’s (final) Constitution unambiguously reveals that the original intent of the constitution framers was to establish a substantive democracy, and concerted efforts were made to ensure the empowerment of impoverished and powerless people to allow them to participate meaningfully and

with dignity in the democratic process, augmented by the important values of equality and liberty.² In the constitutional text, the values of equality and liberty are used throughout the constitution in a strong contextual relationship with the concept of democracy. The original intent was certainly not that democracy should degrade into a procedural process and a preoccupation with the mechanics and procedures of electing a new government on a regular basis. The intention was certainly from a viewpoint that for a regime to be democratic it has to protect the rights of individuals and minorities against the encroachment of majority rule in the form of majoritarianism.

The most effective way to protect the rights of individuals and minorities to enable them to effectively engage government is to embed their rights in a rigid constitution which also makes reservation for a fully functional rule of law. In addition, it is important for the presence of a liberal democracy to ensure that individual and minority rights are substantive and not procedural, an aspect which was clearly the goal of the constitution framers in South Africa.

3. (Political) equality, freedom

In the Constitution the concept of equality, in its juxtaposition to democracy, represents foremost the democratic value of “equality before the law” and “one man one vote” which entails (political) freedom and self-determination to take part, on an equal basis, in the democratic processes of the country.

The value of political equality in the Constitution therefore rests mainly on the principle that all people, as moral subjects, are equally embedded in the notion of “one man one vote” in a representative democracy. It is noteworthy that in the constitutional text, the concept of dignity is used in a specific, prescriptive relation to both equality and freedom. Dignity is used as a guiding and defying principle to ensure that past injustices of political discrimination will be rectified and to

2 Republic of South Africa Constitution Act 108 of 1996.

allow all people to participate freely (with dignity) on an equal basis within the new democratic system.

Section 16(1) of the Bill of Rights stipulates that “everyone has the right to the freedom of expression”, which includes the freedom of speech, assembly, conscience, religion, belief, thought and the press. If any of these rights are curtailed, it will certainly endanger the status of democracy. If an individual’s right of factual self-determination, which makes provision for a meaningful political interaction within a democratic environment, is eroded, it will certainly damage a country’s status of democracy.

The balance, emphasis and assigned weight in a democracy on either equality or freedom are of crucial importance and any overemphasis of either could easily disturb the delicate balance within the system. It was emphasised in *Marbury* that, although equal participation has often been hailed as an essential element of democracy to ensure that all citizens can (equally) take part in the democratic processes of a country, this should not be the sole focus in a constitutional democracy. If a political order only expresses the self-interest of those (the majority) that hold power, it will not only damage democracy but also the application of the rule of law:

The rule of law cannot be an expression of a group or a class [...] if the content of the legal rules is nothing more than the self-interest of those in power, then there has been a failure in the rule of law (Kahn 1997: 1-21).

The “conflict” or potential “contradiction” between the goals of majority rule and individual liberty could result in that either or both goals may ultimately not materialise. The intrinsic conflict or paradox between the two concepts could also develop into a stalemate that may hamper any progress or development into a mature democracy. The majority may feel that their popular will is constantly being thwarted and that their interests, such as economic equality, are being manipulated to serve private needs and not the public good. On the other end of the scale, minorities may feel that they are not

getting the necessary attention from government to participate meaningfully in the political processes and that their interests and concerns are constantly being neglected or overridden by the majority and by politicians who only feel responsible to the majority who have voted them into power. The delicate balance between the interests of these two divergent groups could develop into a tendency which leaves both “majorities and minorities” discontented (Plattner 2010: 83).

4. From an organic to a constitutional state

The preceding sections have introduced the important values of (political) equality and freedom within their contextual relationship with democracy. It was emphasised that the balance between the two values is clearly a prerequisite for a functioning democracy, because an overemphasis of the one could easily disturb the equilibrium within a democratic state. The danger of equating political equality with unchecked majority rule could harm political freedom, whereas suppressing the will of the majority party (political equality) could create tension and instability in a state.

However, as Vincent (2000: 13) indicates, protecting individual rights is chiefly the task of a constitutional state, which is a specific form of representative democracy, because it is *foremost a non-majoritarian mechanism that entrenched fundamental individual rights out of the reach of majorities* [my emphasis, PL].

This contractarian view of the state gained ascendancy over the salient features of the organic state because historically a state was increasingly conceived during the Era of Enlightenment as a mechanistic structure that human beings could construct and adapt for the purpose of defending their individual rights. The pinnacle of the mechanistic or synthetic nature of the modern state was ultimately reflected in a highly regulated constitutional state, where every institutional and functional arrangement is embedded and entrenched in a rigid constitution. The rationale behind the constitutional state was

to provide checks and balances as a buffer against the overbearing power of majority will, especially if it encroaches on the rights of individuals and minorities. The “will of the people” represents a very basic challenge to the founding principles of a constitutional democracy which fundamentally differs from parliamentary sovereignty (which makes reservations for numerical dominance).

The supremacy of a constitution was created to dilute majority will by putting rationally created restrictions in its path and to safeguard individual rights in a rigid constitution. The classical case of *Marbury* set the global precedent for constitutional supremacy by invalidating congressional legislation in conflict with the constitution.

In addition, the constitutional state is institutionally and functionally strengthened by separating political power into three institutions, namely the legislative, the executive and the judiciary, each with its own powers and internal built-in checks and balances. In South Africa, the judiciary’s role to act as a buffer against majority rule was illustrated in the death penalty case, one of the first important decisions by the Constitutional Court. Didcott J, in his deliberation, referred to the USA Supreme Court who argued, in deliberation, that the

... assessment of popular opinion is essentially a legislative, not a judicial function, and that the very purpose of a Bill of Rights is to *withdraw certain subjects from the vicissitudes of political controversy and to place them beyond the reach of majorities* [my emphasis, PL].

Didcott J followed this precedent and argued that the decision in the case is not a populist, legislative or executive decision, but the prerogative and duty of the judiciary “and not of representative institutions” (Klüg 2000: 145).

It is therefore conceivable that South Africa’s constitutional state will, in specific circumstances, “frustrate” majority will, in particular when individual rights are at stake. The constitutional state, with a liberal constitution, was institutionally and functionally created to foster and protect the principles of

differentiation, diversity, minority rights and individual freedom against unchecked majority will.

However, the setting aside of a decision of democratically elected legislature by an (unelected) judiciary is highly contentious and could potentially be a source of systemic stress. The constitutional state's intrinsic "counter-majoritarian" mechanism has an adverse effect on democratically elected legislature which institutionalised the value of equality and depends on majoritarianism by using the majority will to effect changes (Devenish 2000: 16).

As Plattner (2010: 84) emphasised, the balance and the relationship between individual rights and majority rights is not only a very delicate, but also a very complex enterprise, and the rulers have to perform a delicate balancing act to maintain an equilibrium within the political system. Modern constitutional democracies do not refer specifically to the rule of the people, but rather to liberal or constitutional democracy. The two components of liberal democracy (individual rights versus majority rule) have a long history of mutual interaction dating back to classical times. Pre-modern democratic city states were the first examples of (direct) democracy, but they were not regarded as liberal democracies because individual rights were subservient to the will of the majority. This pre-modern democratic view of the state was a reflection of the nature of socio-political entities and reveals a holistic interpretation and understanding of the state.

Cross & Wozzley (1979) refer to Plato's view of the city state as an organic unit in which the individuals' main goals are to lead lives which contribute to the total life of the entire state, much as the human brain, limbs and muscles each have their function to maintain life of the body as a whole (*cf* Goggans 2005: 533). In this regard Mayhew (1997: 115) refers to Aristotle's political philosophy of the state as a whole and a part within the political community that acts as a natural entity, like an animal or a person. The individual partly exists for the sake of the whole organism (the state), with the latter more important

than the constituent parts. In an organic state no reservation is made for the realm of privacy and the personal rights of freedom, because the good of the individual is inseparable from that of society. In other words, as Vincent (1994: 13) reiterates, there was no or little recognition of individualism or individual rights, because the *polis* (city state) was seen to embrace the entire existence of its citizens.

The formation of a natural whole, as envisaged by an organic view of the state, therefore rests on three assumptions: each part is physically connected to the organism and cannot be separated and still remain part of the organism; the parts exist solely for the organism of which they are a part and are identified only by the function they perform for the organism, and the various parts cannot act independently in any real sense – they belong to the entity and are not themselves entities, they only exist potentially.

Goggans (2005: 531) also emphasised the autonomy of the organic state as a social institution and the fact that it forms a moral being, created and sustained by itself, with a character of its own. Each member of the political community is part of a rounded whole, and the natural balance in the system is based on the natural balance of nature.

According to Aristotle and other classical writers, the *polis* (organic state) was viewed as the place where politics were conducted. In their reasoning, the city state encapsulated political activity as the home of politics, articulated in the expression “... deliberation, whether it is about policy or about questions of justice, are at the heart of the polis” (Stanton 1990: 144).

However, the biological, organic state underwent fundamental changes during the Middle Ages and with the rise of centralised monarchies when political power was usurped by a few (aristocracy) or by the monarch himself. The shortcoming of the organic state was that little or no restriction could be placed on the dominance or prevalence of the whole over

the constituent units.³ The emphasis that the organic state placed on the dominance of the whole (majority) over the parts (individuals) illustrates the disharmony or disparity that existed in the first or earlier forms of the state. The emphasis that the liberal state placed on freedom and liberty turned this initial equation on its head and illustrates the fundamental and philosophical difference between the organic and the constitutional views of the state, because the constitutional theory of the state is *a theory first and foremost of limitation*, especially against the dominance of the whole (majority) over the minority (Vincent 2000: 3) [my emphasis, PL]

In a well-balanced democratic system, the balance between the values of equality (embodied as the will of the people) and individual freedom (protection by the judiciary) interacts in a mutually reinforcing manner. Parliament should ensure, through legislation, that adaptability and movement can express the majority will, while the judiciary should provide objectivity and stability to the process in order to ensure the necessary balance in the state (Kriek 1982: 97).

The harmonious functioning of equality and freedom, within a democracy, translates to the phenomenon that a modern democracy has a dual character, embodying both important prerequisites of a modern liberal democracy. In a successful political system the formation of a hybrid regime harmoniously tempers popular rule with anti-majoritarian principles that allow both to function properly. A regime should ensure the ultimate sovereignty of the people in the legislative and executive domains, but through the judiciary that the bill of rights restricts the day-to-day rule of the majority in such a manner that it does not infringe upon the rights of individuals and minority groups. In the organic state the emphasis was on the right of the majority with less regard to the rights of individuals. By contrast, in the modern state

3 During the modern era Hong Kong under British rule was liberal, although the former colony was not democratic in the sense that the citizens or residents had very little input in the way they were governed.

the challenge is not to pursue a single goal that the state has to maximise, but two “contrasting goals” that are intrinsically in competition with each other.

In this regard a liberal democracy forms an intrinsic paradox or tension with itself in an effort to harmonise these two divergent goals “which are pulling in their own direction”. Plattner (2010: 85) refers to the *Federalist* which has endorsed popular sovereignty in a republican government that derives all its power directly or indirectly from the great body of people. However, simultaneously the preoccupation was to safeguard a government against any apparent danger presented by the superior force of an interested and overbearing majority. James Madison acknowledged the challenge to protect public good and private rights against majority faction and to conduct this function without departing from “the spirit and form of popular government” (Plattner 2010: 85).

In light of the theoretical outline, the emphasis will now shift to an institutional and a “non-institutional” analysis of the 1996 (final) Constitution in order to shed light on the definition and application of democracy in South Africa. The aim is to understand how a country that has suppressed majority will for a prolonged period (1910-94) is able in a new liberal constitution to reconcile the “demand” to implement majority will, but at the same time ensure that individual and minority rights are being protected against majoritarianism.

5. An analysis of democracy in South Africa’s constitutional state

5.1 An institutional perspective of democracy as encapsulated in the 1996 Constitution

The obvious starting point to analyse and understand how democracy will be defined and applied within the new democratised South African constitutional state is to examine the (final) 1996 Constitution which could provide an insight into

and understanding of the fundamental objectives of the framers of the constitution.

It is logic to use the founding provisions as a starting point, because it normally serves as the guiding principle towards understanding the underpinning goals and values of a constitution.

In relation to democracy the founding provisions (section 1) stipulate (that):

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Universal adult suffrage, a national common voters' roll, regular elections and multi-party system of democratic government, to ensure accountability, responsiveness and openness.

It is obvious from the wording of the founding provisions 1(a) and (d) that representative government is unequivocally established. Roux (2008: 80) points out the importance of the comma after government in subsection (b), which pertains to the fact that the values are not a commitment to the institutions themselves, but to the relationship between the government and the governed. In fact, the founding provisions lay a positive obligation on governmental institutions to fulfil the set conditions, including the values of accountability, responsiveness and openness.

The founding provisions (subsection (b)) specify universal adult suffrage and a national common voters' role and are supported by the second part of the preamble that stipulates:

[to] lay the foundations for a democratic and open society in which government is *based on the will of the people* and every citizen is equally protected by the law [my emphasis, PL].

In this institutional outline (political) equality is viewed as a necessary condition for the kind of relationship that government had wished to establish. The preamble is supported by section 7(1) of the Bill of Rights, which stipulates:

The Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

In Article 36, where the limitations of rights are discussed, the reference to democracy is “... in an open and democratic society based on human rights, equality and freedom.”

Article 39(1) places a positive obligation on government when interpreting the Bill of Rights:

When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

In this context, equality has a political thrust that should ensure equal participation in the democratic processes and equal value of one's vote on a common voters' role. As indicated earlier, the underlying values and sentiment of the Constitution are supported by the preamble, in particular the second part thereof:

Lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.

The importance of the preamble in relation to the values and objectives it enumerates lies in the fact that it underpins the Constitution as a whole, in particular in Chapter 1 (founding principles) and Chapter 2, which outline the bill of rights (Devenish 2000: 30). The importance of the preamble was reiterated by Sachs J, who observed in *S v Mhlungu*:

The preamble in particular should not be dismissed as a mere aspirational and throat clearing exercise of little interpretative value. It connects up, reinforces and underlies all the text that follows. It helps to establish the basic design of the Constitution and indicates its fundamental purpose.

The importance of the preamble means that the constitutional text is underpinned by the values in the preamble and should be read, understood and interpreted as such.

The references to the principle of democracy in the Constitution – sections 1(a), 7(1), 36 and 39(1) – are loaded with a positive obligation of openness, responsiveness and accountability of democracy. These obligations mean that the government (ruler) must be accessible and responsive to those he rules and that the emphasis of “the will of the people” is linked to an obligation that government should “respond” to the will of the people (De Waal 2001: 18).

The problem, however, is that this obligation could be interpreted broadly and equated with the majoritarian principle, which will result in overemphasising and favouring (political) equality over (individual) freedom. However, Roux (Woolman & Bishop 2008: 80) reiterates that the relationship between (political) equality and freedom is not compatible with any attempt to equate the principle of democracy with that of majority rule.

Despite this sentiment, a broader contextual and institutional analysis of the Constitution reveals its susceptibility to rule by the self-interests of the majority (government of men), which could erode the status of the constitutional state (government of law).

The interim Constitution of the Republic of South Africa 1993 (Act 200 of 1993) was an attempt to form a unity government that was not solely based on a majority principle. The framers hampered unbridled majority rule with various sections which made provision for an institutionalised form of coalition or a consociational government at both the national and provincial levels. For example, section 84(1) of the interim Constitution entitled every party holding at least 80 seats in the National Assembly to designate an executive deputy president, and if no party held more than 80 seats, the party with the most seats in the National Assembly. Section 88(2) made provision for a party that holds 20 seats in the National Assembly and wished to be part of the government of national unity to occupy one or more cabinet portfolios (Basson 1995: 129).

The final Constitution, in a distinctive departure from the interim Constitution, made no such provision for an inclusive executive government, but instead opted for exclusive rule by the strongest party. The Constitution stipulates that the political party that wins the general election will constitute the government of the day, and is not legally obliged to invite the defeated minority parties to participate in government. This arrangement duplicates the British parliamentary system, where the majority party forms the government and the leader of the strongest party becomes prime minister and forms a cabinet from its own members. The South African Constitution deviates from the British parliamentary system in that the President is head of the state and of the national executive (section 83(a)) and is elected from the members of the National Assembly during the first sitting (section 86(1)). The election of the President in South Africa is therefore a mere formality, because the leader of the majority party is designated to be the executive head of government, and he forms a cabinet (section 91) from the senior members of his party (Rautenbach & Malherbe 1999: 135).

5.2 A non-institutional perceptive of democracy

Democracy should also be understood within a broader “non-institutional” environment, as expressed in the deliberations of the Constitutional Court, and in the opinions of experts in the field.

Unfortunately, the Constitutional Court’s reluctance in its analysis of democracy in *United Democratic Movement & Others v President of the Republic of South Africa*⁴ (UDM case) to attach a value-laden perspective to democracy has influenced the way in which democracy in the future would be defined in other cases in South Africa. The reference in the UDM case was merely to democracy’s procedural and institutional aspects, and did

4 1995 7 BCLR 793 (CC); 1995 4 867 (CC) 1995 SACR 277 (CC).

not specifically emphasise its substantive values in the new democracy.

However, as Brand points out, a collection of (democratic) institutions is not a democracy, but merely a structure in which democracy may take place (Woolman & Bishop 2008: 80). It is therefore preferable that a democracy should reflect a substantive value system, a discursive practice, a custom, a mode of political action that is substantially encapsulated in a democratic culture. When a government strives to establish and enhance democracy, it should realise that “democratic” institutions will achieve little without the accompanying creation and fostering of a democratic culture. This point was emphasised as early as the nineteenth century by Alexis de Tocqueville, who stressed that America’s democratic system was strongly reinforced by the presence of a democratic culture (De Tocqueville 1955: 298-432). Almond & Verba (1963: 267) elaborated on this issue later.

However, a democratic culture is undermined when democracy is equated with the notion of popular sovereignty, when the majority exercises ultimate control over the government. One should bear in mind that democracy is a normative idea that encapsulates substantive political values, whereas popular sovereignty and majoritarianism are descriptive terms dealing with particular decision-making procedures, and do not measure the qualitative aspects of democracy (Post 2006: 25).

A non-institutional explanation of democracy should also take cognisance of the personal or individual level or entry point in a democracy, because the threshold or test for substantive democracy will also be a qualitative judgement. A valuable test that could be used to gauge the quality and level of democracy in a country is to establish whether all the citizens experience government in a consultative or participatory manner that is responding in a meaningful manner to their individual values and ideas. This non-institutional aspect of democracy represents a shift in emphasis from centralised governmental decisions to an all-inclusive consultative and

participative process, whereby public policies are formulated by taking cognisance of all its citizens' articulated inputs which represent their values and ideas (Post 2006: 25).

Kelsen (1961: 115) also defines democratic values insofar as the individual will is in harmony with the general will in the social order. In this context, social order means the determination of the will of the individual, and political freedom is the individual's self-determination (freedom of speech) that allows participation in the creation of a democratic social order and a political culture. This dimension of participative democracy demonstrates why majority rule and majoritarianism run contrary to these values because, in majoritarianism, the participation of an individual or minority groups is excluded and alienated from a participative role by a majority decision.

In this personalised, participative context, democracy is a value-laden approach that explains the difference between (political) equality (as a principle), which will lead to majority will, and equality (as a value) which, ultimately, equates with freedom and substantive democracy. As Post (2006: 25) emphasises, equality in voting (political equality as a quantitative judgement) could result in majority rule whereas equal participation in public discourse (freedom) makes reservations for participatory input from individuals and minorities and is a value-laden process. Equality in this equation is achieved on the basis that government is open and responsive to all its citizens' values and ideas.

The problem is that the quantitative political equation of (political) equality as majority rule could translate into majoritarianism, which is in direct conflict with the individual right of freedom (such as the freedom of the press and the freedom of speech). This matter is vividly illustrated in recent ongoing developments in South Africa, with the government attempting to gag the press which will, by implication, degrade the democratic values of the freedom of expression. The Vienna-based International Press Institute (IPI) – a global network of publishers, editors and leading journalists – sent an open letter

to President Zuma concerning the freedom of the press. The IPL echoed the concern of the local media that the move will endanger the independence and vitality of the local media: “We believe that plans for a government-appointed media appeals tribunal [...] will endanger the South African media and thereby threaten the people’s right to information and rigorous political debate” (*Mail and Guardian* on line 26 August: 1).

One of the fundamental aspects of a value-laden individual/minority interaction with its government is the freedom of speech, coupled with a legitimate expectation that the government will be responsive to ideas, criticism and suggestions of all its citizens. This stifling of the freedom of expression is a “counter-majoritarian principle” against individuals and minorities and is in conflict with section 16(1) that stipulates that “everyone has the right to the freedom of expression”.

The only provision for limiting the right (freedom of speech) is outlined in section 36(1), which stipulates that whenever the will of the majority runs counter to a Bill of Rights (limits the right), it should promote the values of human dignity, equality and freedom.’ The values of dignity, equality and freedom are emphasised; the majority should not (be allowed to) undermine the right of an individual(s) to participate with dignity and freedom in the political process *and that individuals and minority groups should* have a reasonable and legitimate expectation that their inputs should be acted on by government *with openness and responsiveness* (as “demanded” by the founding provisions in section 1(d)).

6. Democracy in South Africa: the acid test

The task in South Africa to reconcile majority popular rule with individual and minority rights in a liberal constitution was a daunting challenge. The country’s long protracted history of denying the majority of its citizens the basic right to vote and not to adhere to popular rule presented a major obstacle

to the framers of the constitution. The apparent danger was that frustration may build up within the majority party that enjoys popular support if they are (again) denied the right to materialise the implementation of policies. The legitimate expectation of the majority has to be measured up against the right of minorities to enjoy basic freedoms and not to be dominated by a system of majority rule, which has the potential to undermine the fabric of a democracy.

It was observed earlier that the substantive aspect of democracy can be assessed by the governing party's degree of responsiveness towards an individual, group of individuals or a minority party's values and ideas. When a government therefore displays little or no responsiveness to minorities and instead over-emphasises equality as unrestricted majority rule, it will degrade participative democracy and, in the longer term, endanger democracy.

In South Africa, the government's response to the criticism against the proposed Act of the Protection of Information illustrates this point. The national ANC spokesperson, Jackson Mthembu, responded to the criticism levelled at the envisaged Act stating that: "this is democracy, the majority of the South Africans have voted for the ANC" (*Rapport* 2010: 14).

It is a known phenomenon that, traditionally, former liberation movements have strong associations with the strategy of majoritarianism and used their numerical strength in the past to "get what they want". This thus explains the liberation movements' inability in the past, such as ZANU (PF) in Zimbabwe and, to a lesser extent, the ANC in South Africa, to act within a restrictive constitutional state.

Gwede Mantashe, secretary-general of the ANC, continues to refer to political opponents and public institutions that frustrate the will of the majority as "anti-revolutionary". The leader of the youth league, Julius Malema, often labels opponents of the ANC as "anti-revolutionary". President Zuma has similarly declared, on numerous occasions, and in

a pseudoreligious manner, that he is a mere peon, a servant of the majority will of the mass movement (Rossouw 2009: 5).

It is undeniable that South Africa's Constitution is based on a liberal westernised model, and that this may explain why this "outlandish" Constitution has little appeal to the majority of the citizens – who visualise the Constitution as a compromise between the country's elites and not as representative of the will of the people (Rossouw 2009: 5).

Unfortunately, this approach to majority will can potentially endanger the development of a democratic culture, because it displays strong material tendencies towards majoritarianism and will therefore attack any restrictions in its path, such as the watchdog role of the judiciary. This reaction will, in turn, undoubtedly create systemic stress within the restrictive nature of a constitutional state.

In each of the three examples under discussion this intrinsic paradoxical tension between political equality (as a quantitative value) versus freedom (as a qualitative value) is noticeable. This tension created by pitching the majority will against minority rights has the potential to erode a participatory relationship and will degrade substantive democracy in South Africa, as will be briefly outlined in the three examples below.

6.1 Status of the judiciary and the separation of powers

As a result of the democratic paradox between equality and freedom, as institutionalised in the definition of democracy in the Constitution, the (non-democratic elected) judiciary is increasingly caught in an ongoing crossfire between majority will and individual rights. The judiciary's constitutional restriction of unbridled majority rule has, as a result, led to repeated attempts to dilute judicial authority, such as the deliberate attempt with the 2005 Constitution Fourteenth Amendment Bill (Bertelsman 2005: 5).

This attempt was followed by political tampering with the status of the Judicial Service Commission (JSC), an independent judicial guard dog body, a move that evoked angry responses from serving and retired experts in the law fraternity. Former Constitutional Court Judge, Johann Kriegler, legally challenged the JSC's decision not to proceed with the misconduct probe into Cape Judge President John Hlope (*Mail & Guardian* 2011).

A more recent example of the diluting of the separation of powers was the controversial appointment of a loyal cadre, Menzi Simelane, as head of the National Prosecution Authority (NPA). This was clearly intended to bring it closer to the fray of the executive (ruling party) and dilute its status as an institutional watchdog (*Die Beeld* 2009: 15).

6.2 Majoritarianism and the will of the people

In South Africa, a clear shift of emphasis towards stronger populist tendencies, in tandem with the dilution of the separation of powers principle, has taken place. The ANC's reliance on their numerical majority, and the fact that hardly any separation exists between party and state, is increasingly endangering substantive democracy in South Africa.

During the apartheid era, the ANC relied heavily on its numerical advantage to exert pressure on the government. This strategy popularised a version of democratic politics in which the masses could enforce their will on government. This strategy thus remains a natural inclination against any obstacle in the path of majorities. Many ANC supporters believe that their strongest weapon (mass participation) was replaced, fifteen years ago, by a pact between elites that resulted in the protection of minorities against the majority will in a constitutional state, and this pact frustrates their own political agenda.

6.3 Freedom of expression

Dahl (2005: 15) proposed a number of prerequisites to identify a functional democracy, such as the right to vote

and the presence of a parliamentary opposition in a country. However, these pre-requisites are predominantly parameters for a procedural democracy, a form of democracy that could easily disregard substantive democratic values.

A substantive democratic system should instead be based on a broader 'opposition's' role to oversee and constructively criticise government's policies or lack thereof to create a political culture. This includes a parliament that could fulfil its control function efficiently, a free press, an auditor-general that could guard national expenditure, annual reports of government departments, an independent and fully functional judiciary and a vocal participative, well-organised civil society that enjoys unrestricted freedom of speech.

However, the substance of these mechanisms could also be watered down if government does not take their inputs seriously. The ideal way in which such inputs could reinforce a democracy would be for the public discourse to result in a participative relationship with government. A government should empower citizens to participate through public opinion in such a manner that they have a share in the policies of their country. If a state regulates the freedom to speak too closely, such as "when and how a person may or should speak", it may lose its ability to mediate between individual and collective self-determination (Post 2006: 30).

If majority rule introduces restrictions on the freedom of speech and restrictive measures to regulate the media (such as a tribunal, as provided for in the proposed Law on the Protection of Information), then individual rights and freedom will definitely be under threat. In fact, this would amount to a transgression of sections 16 and 32 of the Constitution which in the past guaranteed the right of individuals to information.

The status of South Africa's democracy is already on the decline. The 2007 World Bank Governance Indicators Report graded openness and free speech in South Africa (public opinion and accountability) as 68.3 out of a possible 100 points (Australia scored 93.8 out of 100), which represents a drop from

the 1996 figure of 74.6 (Berman 2009: 725). In addition, the rule of law status dropped from a value in 1998 of 60.5 (out of 100) to a level of 57.1 in 2008 (World Bank).

7. Conclusion

There are clear signs that the South African state has developed a conflicting democratic personality which has led to the generation of systemic stress and the degradation of its democratic status. The effect of an overemphasis on majority will, at the expense of individual rights, such as the freedom to speak, is likely to create further conflict and threaten the presence of a substantive democracy.

South Africa's constitutional state, built on strong group and individual values, is for the majority of citizens clearly incompatible with their ideals of equality and democratic transformation. A large section of the political community views the Constitution as a pact formed between the elites of the various negotiators and therefore as little more than an agreement that has "betrayed" the masses. The battle lines have already been drawn up between the will of the majority, on the one hand, and the ideals and values of the constitutional state, on the other.

The South African state's centralising tendencies and its gravitational pull to absorb the judiciary within the fold of the executive/legislature is a dangerous development towards centralisation. It is important for establishing a constitutional state that the ideals of equality and the will of the people be married more harmoniously in order to establish a well-balanced democracy.

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