

Striking a balance between majority rule and minority protection – a constitutional analysis of the South African democracy

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I would like to thank my husband and my parents for supporting me during the writing of this mini-dissertation and the entire endeavour of obtaining my master's degree. I would especially like to thank my daughter for putting up with a distracted and preoccupied mother.

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INTRODUCTION

27 April 2014 marked the 20th anniversary of a constitutional democracy in South Africa. This milestone, together with current events in South Africa, pose good reasons to ponder the development of the South African democratic order over the past twenty years and the current state of democracy in South Africa.

The Constitution of the Republic of South Africa, 1996 pronounces South Africa to be a representative and participatory democracy.

It is clear from the founding values of the Constitution, set out in section 1 of the Constitution, as well as the arrangement of government, as set out in chapters 4 to 10 of the Constitution, that South Africa is a representative democracy.

That South Africa is also a participatory democracy can be inferred from the preamble to the Constitution declares South Africa to be “a democratic and open society in which government is based on the will of the people.” Various sections in the Constitution also allude more specifically to the fact that the Constitution of South Africa envisages a participatory democracy in addition to a representative democracy. Sections 118, 57, 59 and 72 of the Constitution are clear examples, as these sections demand public involvement in the legislative processes mentioned therein and section 57 also directly refers to the concept of a participatory democracy.

In 2006 the Constitutional Court also unequivocally pronounced the South African democracy to be both representative and participatory in nature and thereby expelling any doubt regarding the participatory nature of the country’s democracy.

Before the present South African constitutional order came into existence the vast majority of South Africans were subject to severe discrimination owing to their segregation along racial lines to the detriment of the majority and the benefit of the white minority. Discrimination against the non-white majority was most starkly evident in the education system and the system of designated residential areas for each racial group.

The new constitutional order heralded a system of human rights¹ that accorded equal rights to all South Africa's citizens².

Mindful of the debilitating legacy of apartheid, the Constitution clearly seeks to right the wrongs of the past³.

The question to entertain here is the extent to which the South African democracy can be considered authentic and in conformity with the ideals and values inscribed in its Constitution. As noted above, for instance, South Africa has been declared a representative and participatory democracy that is essentially ruled by the will of the people, by which is naturally meant all its inhabitants, regardless of the size of groupings involved.

The basic characteristics of a democracy obviously have to be spelled out before an investigation can begin into the state of the South African democracy and the degree to which the system of government complies with the essential characteristics of a democracy.

Chapter one will therefore be given over to defining what an authentic democracy should look like, the object being to describe a democracy of substance.

Chapter two will be devoted to a discussion of the courts' perception of the criteria to which the South African democracy must conform in terms of the Constitution and how they perceive its actual nature. The writer intends to examine the state of the South African democracy, viewed through the lens of the relevant recent case law, to determine whether the South African democracy constitutes a democracy of substance.

Chapter three will conclude with an exploration of the degree to which the South African democracy conforms to the criteria describing the nature of an authentic democracy.

¹ The Bill of Rights in Chapter two of the Constitution of the Republic of South Africa, 1996 details the human rights all individuals are entitled to.

² Section 3 of the Constitution of the Republic of South Africa, 1996.

³ The Preamble of the Constitution of the Republic of South Africa, 1996.

CHAPTER ONE

DEFINING DEMOCRACY

1. Introduction.

Contrary to popular belief, the term democracy is not easily defined, nor is it effortlessly achieved. This is because the term democracy seems to be capable of an infinite amount of interpretations and the definition of what an authentic democracy entails seems to be a varied as the authors on the subject.

George Orwell seems to say it best when he declares “In the case of a word like democracy not only is there no agreed definition, but the attempt to make one is resisted from all sides.... The defenders of any kind of regime claim that it is a democracy, and fear they might have to stop using the word if it were tied down to one meaning.”⁴

Ronald Dworkin confirms that there is no ‘explicit definition of democracy’ contained in the dictionary or agreed upon by political theorists. In fact, he contends that “it is a matter of deep controversy what democracy really is.”⁵

However, there seems to be agreement in general, at least, that democracy means power or government by the people. How such government is best achieved is where the various techniques, definitions and theories truly begin. The idea of government by the people is strongly reminiscent of Abraham Lincoln’s Gettysburg address when he declared that “government of the people, by the people, for the people shall not perish from the earth.”⁶

Giovanni Sartori argues that democracy exists when the relationship between the governed and its government is built on the premise that the state endeavours to serve the citizens and not the citizens the state, because government exists for the people and not the people for government.⁷

⁴ Quoted from Sartori G (1965) *Democratic Theory* at 3.

⁵ Dworkin R (1996) *Freedom’s Law The moral reading of the American Constitution* at 15.

⁶ Beare E (ed) (2005) *Speeches that changed the world*; Sartori G (1965) *Democratic Theory* at 26.

⁷ Sartori G (1987) *The theory of democracy revisited. Part one: The contemporary debate* at 34.

2. The origins of democracy

The word 'democracy' is derived from two Greek elements: *demos* – people, and *kratos* – power or rule⁸ (cf. Ger. *Gewalt*, or *Verwaltung*, which mean more or less the same thing but are perhaps more explicitly recognisable as the power of government).

Democracy therefore means, quite literally – power asserted by the people⁹, or government by the people.¹⁰

Democracy was first practised in ancient Greece and more specifically Athens, where all male Athenian citizens had sitting in the *ecclesia* (popular assembly) and all these citizens could take part in the decisions of the *ecclesia*. All citizens therefore had a say in the decisions taken by the entire body. It was therefore a direct form of democracy in which every qualified¹¹ citizen had a say in every decision that was taken. The people therefore made all the decisions affecting their fortunes and well-being and were therefore ruling themselves collectively.¹²

Athenian citizenship was however restricted, as it was exclusively acquired through birth and it was reserved only for adult men. Women, foreigners and slaves were excluded¹³ and could therefore not take part in decision-making. As a result of their restrictive citizenship the Athenians had a common fatherland, culture and history and the people were homogenous.¹⁴ Save for a few exceptions, Athenian citizenship could only be acquired by birth.

3. Democracy today: Democratic structures and procedures

Contemporary democracy is vastly different from the classical Athenian democracy.

⁸ www.oxforddictionary.com/definition/democracy on 17 July 2014.

⁹ Sartori G (1965) *Democratic Theory* at 3.

¹⁰ Supra 5.

¹¹ Women and non-citizens of Athens were excluded from the *ecclesia* and could therefore not take part in the democratic process, but this obvious flaw in the system is not debated herein as it is not relevant for purposes of the writer's contemplation of democracy.

¹² Malan K (2012) *Politocracy An assessment of the coercive logic of the territorial state and ideas around a response to it* at 197 to 200.

¹³ Mayo H.B (1960) *An introduction to Democratic Theory* at 43.

¹⁴ De Benoist A 'Democracy revisited' (1993) *95 Telos* at 71.

Unlike the direct democracy prevailing in Athens, modern democracies are representative in nature.¹⁵

Further differences are mainly that Athenian democracy was practiced in a very limited territorial area with a limited number of citizens who were part of a cohesive community, while today the modern democratic states are enormous with vast territories inhabited by millions of people where the cohesive community has been replaced by a diverse, often fragmented society. As noted, the Athenian population was culturally, ethnically and linguistically homogeneous because citizenship was acquired almost exclusively by birth, whereas democratic states today are to varying degrees heterogeneous and in some instances (such as South Africa) comprised of deeply divided societies of different races and cultures.¹⁶ A homogeneous and close-knit community (eg. Athens) would naturally have many interests and goals in common because the overriding interest of such a community would be centred on the community as a whole rather than the will of (some) individuals; unlike modern heterogeneous states with their divergent cultures and races and their divergent interests and priorities.¹⁷

Deeply divided and heterogeneous states contain, what Harry Eckstein calls ‘segmental cleavages’, and these states exist where ‘political divisions follow very closely, and especially concern lines of objective social differentiation...’¹⁸ These cleavages ‘may be of a religious, ideological, linguistic, regional, cultural, racial or ethnic nature’ and political parties, associations and schools are normally organised along these lines.¹⁹ In these complex modern-day societies, and especially in heterogeneous societies with established majority and minority groups (the typical segmental cleavages described above), the classical Athenian and so-called direct form of democracy would not necessarily lead to a situation where all ‘the people’ govern. Such an outcome seems inevitable because in all likelihood the specific interests of minority communities and peoples would probably be overwhelmed and swept aside by majority decisions, with the result that minorities would be left floundering in the wake of the majority and could be left voiceless and even

¹⁵ Supra 12 at 199.

¹⁶ Giliomee H and Simkins C (eds) (1999) *The awkward embrace One party domination and democracy* at xvi, xvii and 110.

¹⁷ Supra 12.

¹⁸ Lijphart A (1977) *Democracy in Plural Societies A Comparative Exploration* at 3 and 4.

¹⁹ Ibid at 4.

oppressed, which would defeat the object of maintaining a democratic dispensation (see below).

The reality is that, when having regard to the vast territorial areas of the modern states, the millions of people residing in such states, the plurality of most societies and the voluminous decisions it requires for such large states to function, it is simply not possible for everybody to vote individually on every decision, nor is it desirable for that matter.

Malan recognises that political systems today are generally defined and accepted as democratic if the following features are present in such a system:

- i) Effective public control over political decision makers, especially those in government;
- ii) Political equality which is reflected in universal suffrage. This principle means that every person can have only one vote of equal weight to all others and can vote only once in any one election since non-adherence to this rule would defeat the democratic principle.
- iii) A multiparty dispensation, which means elections contested by several parties in free, fair and regular elections.
- iv) Majority rule, whereby the majority party forms the government.²⁰

Further constitutional mechanisms may be added to these requirements, which are also important for democracy in a state, such as the acknowledgement of human rights for all, constitutionalism, *trias politica* and an independent judiciary.²¹

With all these characteristics present in a territorial state it is generally presumed acceptably democratic; however, the procedural-structural nature of the qualifying characteristics is increasingly considered inadequate as a test for true democracy.²² The writer agrees that satisfaction of the said criteria cannot guarantee equal representation for the country's population a whole, but as noted earlier, a 'true' democracy is an elusive concept rather than a quantifiable reality. As noted by Sartori: "democracy could be defined as a high-flown name for something which does not exist."²³ However, the lack of

²⁰ Supra 12 at 180 to 183; Malan K 'Factional rule, (natural) justice and democracy' (2006) 21 *SAPR/PL* at 144 and 145.

²¹ Ibid.

²² Malan K 'Factional rule, (natural) justice and democracy' (2006) 21 *SAPR/PL* at 146.

²³ Supra 9.

precision encapsulated in the term does not mean that ‘democracy’ should be exchanged for designations referring to other types of political dispensations (eg. oligarchy²⁴ or polyarchy²⁵). After all, the term is not devoid of content but refers to an ideal that is irreplaceable.²⁶

Whether or not a true democracy is in existence is ultimately a question of substance and a question of whether or not all the people and all societies in a state truly have a meaningful say in the decisions affecting them.

Malan concurs with Sartori that the essence of an authentic democracy essentially rests on three principles, namely majority rule, the equality of all citizens and the principle of self-government for all people in the state in question, including minority groups.²⁷

A balanced democracy of substance would therefore essentially require the majority to rule with a respect and concern for minority groups in such a fashion that these minorities would have a say in all decisions of specific importance to them and in decisions which affect them.

4. Democracy and representation

The system of government most commonly referred to as a democracy today is representative in the sense that the electorate vote for political parties of their choice. The party with the most votes is the winner that forms the government.

Universal suffrage that goes no further than a vote at intervals of several years constitutes a tremendously tenuous form of democracy. This is the view held by Ettiene Mureinik, who refers to such a proposition as ‘snapshot democracy’. Such snapshot democracy is empty in its promise, as it only gives the people the opportunity to “pass judgment, in a single act,

²⁴ www.oxforddictionary.com/definition/english/oligarchy on 17 July 2014: An oligarchy is a system in which power vests with a small number of people.

²⁵ www.thefreedictionary.com/polyarchy on 17 July 2014: A polyarchy is a system in which power is vested in three or more persons.

²⁶ Supra 9 at 4.

²⁷ Supra 12 at 195; Supra 9 at 239.

upon hundreds of thousands of decisions made by the government since the last election”²⁸ and effectively deprives the electorate of any real say in the affairs of state.

The writer shares Mureinik’s perception of the inadequacy of a democracy characterised by representation alone, as it does not allow for the population to exert any real influence upon government or the decisions that affect the people.

Mureinik argues that a ‘pure democracy’ and thereby government by the people, is all but impossible to achieve in the modern age due to the ‘myriad of decisions’ that modern governments have to take and so he posits that the best feasible democracy is a system where government responds to the governed. Such a responsive government, he argues, is achieved through participation by the people in the decision-making of government and through accountability.²⁹ Participation allows the opportunity for the people to influence the outcome of the decisions that affect them and should not be reserved for the rich and powerful to control the participatory process, but must allow all ordinary citizens to have their say in decisions affecting them.³⁰ Accountability is the other essential tier to attain such a responsive government, where government has to justify its decisions to the people. This, Mureinik contends, will inevitably lead to better decision-making due to the fact that the decision-makers will be mindful that their decisions should be able to withstand judicial review.³¹

Constitutional Court Justice Sachs shares the view of Mureinik when he remarked as follows in *Doctors For Life International v Speaker Of The National Assembly And Others*: “Thus it would be a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years.”³²

The rationale behind a representative democracy is that the electorate can replace the majority party in the next election by voting contrarily to register dissatisfaction with the choices or performance of their chosen representatives. However, a democracy solely premised on representation, which allows no further participation by the population in government between elections, relegates the population to the side-lines of their own

²⁸ Bennet (ed) (1993) *Administrative Law reform* at 35.

²⁹ Ibid at 36.

³⁰ Ibid at 36 to 39.

³¹ Ibid at 41 and 42.

³² 2006 (6) SA 416 (CC) at 496.

destiny for the entire period between elections, which is hardly an impressive safeguard to protect democratic values – in fact it is asking to be subverted.

The concept of representation is, however, necessary for democratic governments today, as a better system for attaining democracy is not conceivable in the enormous states of today. Sartori summarises the dilemma as follows: “Elections and representation are necessary instruments of democracy, but they are at the same time its Achilles’ heel.”³³ This is because elections may not always be free and fair, but also more commonly that “representation is not necessarily genuine.”³⁴

In the writer’s view the problem with representation is twofold. First, the notion that representatives will always truly act according to the mandate given to them by their constituents is overly optimistic. The reality is that these representatives are in positions of great power, and that power attracts great temptation and the possibility of corruption, a danger identified by Lord Acton when he stated that “power corrupts and absolute power corrupts absolutely.” These representatives may, for example, act in their own interests and not in the best interests of the citizenry, a problem also identified by Sartori.³⁵ The second problem is that the system of representation may lead to majority domination, as described below.

5. Democracy and majority rule versus majority domination

A democracy premised essentially and entirely on the majority principle, that is to say where all the decisions made and the laws enacted are those the majority of citizens would approve of, is what Dworkin refers to as a majoritarian premise of democracy.³⁶ Majoritarian democracy has in recent times been the subject of mounting criticism, as illustrated by Dworkin, who argues as follows:

“A political system with equal suffrage, in which the majority distributes everything to itself with no concern whatever for the fate of some racial or other minority, will not count as an unjust democracy on the communal conception, but as no democracy at all.”³⁷

³³ Supra 9 at 25.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Supra 5 at 17.

³⁷ Dworkin R ‘Equality, democracy and constitution: We the people in court’ *1989 28 Alberta Law Review* 338.

Dworkin argues that everyone, minority communities included, should have a say and a part to play in government.

Dworkin advocates a constitutional democracy as a genuine democracy where the decisions of government seek to satisfy not only the interests of the majority or plurality of citizens, but it takes the aim of democracy to be “that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect.”³⁸ While this form of democracy would basically have the same structure of government as the majoritarian premise (in other words a representative system of government), it would require the day-to-day political decisions to be made by the chosen representatives who act “out of a concern for the equal status of citizens, and not out of any commitment to the goals of majority rule.”³⁹ Majoritarian institutions should therefore cater for and respect certain democratic conditions which ensure equal status for all citizens when taking its decisions.

A system whereby the majority forces their will upon all citizens is not a true democracy and is more reminiscent of a monarchy, as Dworkin strikingly observes that:

“We think we are free when we accept a majority’s will in place of our own, but not when we bow before the doom of a monarch or the ukase of any aristocracy of blood or faith or skill.”⁴⁰

Malan shares Dworkin’s position to the effect that the mere presence of the procedural-structural characteristics of a democracy is not conclusive proof that a democracy has been established. In fact, a constitutional order may very well have all the structural and procedural features present, but at the same time also have systems of domination in place that render such an order completely undemocratic. In this regard Malan voices particular concern over the overwhelming power of the majority and the risk (and reality) that it will abuse its power and ride roughshod over the interests of less dominant communities; in fact, he considers it a lasting problem of democratic theory.⁴¹ He therefore advocates a substantive approach to democracy because it sets a higher and more suitable standard of equality as a requirement for democracy than a procedural-structural approach.⁴²

³⁸ Supra 5 at 17.

³⁹ Ibid.

⁴⁰ Supra 5 at 22.

⁴¹ Supra 12 at 190 and 191.

⁴² Supra 22 at 148.

After all, democracy requires government by the people and, as Malan states, not “government by some people for (the benefit of) only some people... political power must be equitably distributed among all segments of society.”⁴³

Sartori also identifies one of the biggest problems of democracy as the concept of the “people” as it relates to the ideal of democracy as being “power of the people”, given that the small territorial community of the Athenian society has been replaced by the “entire scattered and plural collectivity of the nation-state”⁴⁴ with its many conflicting interests. The conflicting interests of the various groupings or communities in a heterogeneous state issue a daunting challenge to endeavours to make fair and equitable decisions.

Democracy is therefore not as simple as the majority taking all the decisions without restriction and without regard to minorities. In fact, as shown above, majority domination stands in stark contrast to democracy. The substantive question of whether a government is truly democratic and therefore the real litmus test for the presence of an authentic democracy is whether there is “an equitable distribution of substantive political power amongst all segments of society... (and) ... whether all interests of the various segments of society receive due regard.”⁴⁵

Although majority rule is a foundational principle of democracy, such majority rule also runs the risk of deteriorating into majority domination, which is entirely undemocratic and unjust, as it promotes inequality.⁴⁶ After all, the dominated can never be on an equal footing with the party asserting dominance. Hence Sartori argues that a democracy is a system of “majority rule limited by minority rights” and democracy should therefore be premised on a “limited majority principle” where the majority does not rule absolutely and where the majority is restrained by a respect for the rights minorities.⁴⁷

Minority communities must therefore be afforded the right to have a say in all decisions which affect them specifically and also in the decisions in which they have a particular

⁴³ Ibid.

⁴⁴ Supra 9 at 25.

⁴⁵ Supra 22 at 145.

⁴⁶ Ibid at 149 and 150.

⁴⁷ Supra 7 at 31 to 34.

interest. The majority must also not be able to decide on issues that relate to the distinctive interests of minority groups.⁴⁸

Especially in societies comprising multiple distinctive communal identities⁴⁹ (eg. religious, linguistic, cultural etcetera), minority communities can be extensively marginalised by majority dominance, with the result that although they have the right to vote, their vote serves no other purpose than to register their powerlessness and the violation of their human dignity.⁵⁰ Malan compares these minorities to minors who lack the full capacity to act and to make decisions “intimately concerning themselves.”⁵¹

Malan asserts that the overwhelming power of the majority over the minority is one of the biggest challenges and a lasting problem confronting democratic theory, as the good intentions of the democratic order is forever thwarted by the “tyranny of the majority.”⁵²

A system of government where the majority dominates the minority under the guise of democracy reminds one of a popular quote often attributed to Benjamin Franklin that “democracy is two wolves and a lamb voting on what to have for dinner”,⁵³ where the majority is the powerful and therefore in the position to simply dominate the powerless minority to the detriment of the minority. Clearly such a position is not democratic at all.

According to Malan the achievement of justice should be the aim of democracy and justice cannot exist where there is domination, as domination infringes on the human dignity, equality and the freedom to make decisions of the dominated. Justice should be achieved through compromise so that the interests of everyone should equally be taken care of.⁵⁴ The aim should therefore be for government to make right, fair and balanced decisions and not to merely follow the wishes of the majority.

Malan affirms the view of Dworkin in rejecting a majoritarian democracy and contends that, especially in heterogeneous societies, a pluralist democracy is required that prohibits

⁴⁸ Malan K ‘Observations of representivity, democracy and homogenisation’ *2010 TSAR (3)* at 445.

⁴⁹ Described by Lijphart on page 5 above.

⁵⁰ *Supra* 22 at 151 and 152.

⁵¹ *Supra* 12 at 194.

⁵² *Ibid* at 191.

⁵³ www.freakonomics.com/2010/08/12/quotes-uncovered-if-wolves-and-sheep-could-vote on 10 July 2014. Although this quote is commonly credited to Benjamin Franklin, there is no record or evidence of him ever having said so. According to Garson O’Toole who investigated the origins of the quote, it could positively be traced back to the Los Angeles Times, 25 November 1990.

⁵⁴ *Supra* 22 at 148 and 149.

the majority from making decisions on matters of overriding concern to minorities and empowers the latter to take complete charge of such concerns and even veto attempts to interfere in such matters. This pluralist form of democracy ‘strikes a balance between majority rule and minority protection.’⁵⁵ A pluralist democracy recognises the right of the majority to govern while also recognising and allowing the rights of minorities to survive and flourish.

Malan takes his critique of a majoritarian democracy one step further by contending that it militates against the tenets of natural justice and specifically the principle of *nemo iudex in sua causa*, which transliterated means “don’t judge your own case”.⁵⁶ This long-standing principle of natural justice has served without fail as a safeguard against bias, and therefore an assurance that the objective facts will triumph. Malan’s position that the assertion of dominant influence by a majority party offends the principles of natural justice seems unassailable. If the pursuit of justice is the aim of democracy it follows that government’s decisions must be correct and fair to all, but dominance by one party will compromise decision making because that party’s interests will be promoted regardless, and probably at the cost, of minority parties; hence Malan’s advocacy of a pluralist democracy that empowers minorities to take care of affairs of importance to them.⁵⁷ The minority communities will therefore have a crucial say in the decisions which are of importance to them, which includes decisions which only influence the specific minority and also decisions which influence other communities but which affect the particular minority community in a substantial manner.

As noted, democracy is especially difficult to attain in plural and divided societies, as the social divisions and political differences promote instability and the breakdown of democracy. Lijphart’s solution is a consociational democracy as the form of democracy to best achieve a ‘stable and democratic government in plural society’, as this type of democracy is based upon ‘cooperative attitudes and behaviour’ of the leaders of the various sections of the population.⁵⁸

⁵⁵ Supra 48 at 436 to 438.

⁵⁶ Supra 22 at 154 to 157.

⁵⁷ Supra 48 at 436.

⁵⁸ Supra 18 at 1.

The consociational democracy proposed by Lijphart for plural societies has four characteristics: firstly a government by grand coalition of political leaders from all significant segments of the plural society; secondly, the mutual veto to protect minority interests; thirdly, proportionality of political representation, civil service appointments and allocation of public funds and fourthly, a high degree of autonomy for each segment to run its own internal affairs.⁵⁹ This form of democracy would require all parties to co-operate with one another in good faith through compromise and mutual respect. Such a spirit of compromise, co-operation and respect is also deemed essential to the vision of an authentic democracy by both Malan and Dworkin, as described above.

6. Democracy and minority rights

The protection of minority rights have gained increasing international attention in recent times and these rights have been acknowledged and protected in various international law instruments and reports.

Article 27 of the International Covenant in Civil and political Rights (1996) (ICCPR)⁶⁰ and the General Assembly's Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992)⁶¹ are two of the most prominent examples of such international law instruments which serve to advance the protection of minority rights and illuminates what should be done by states to adhere to their obligations to protect minority rights.⁶²

Strydom stresses that the rights of minorities are strengthened if they are allowed to participate effectively in their cultural, religious, social, economic and public life and in decisions on national or regional level in matters concerning the minority, as long as it is not incompatible with national legislation. A participatory democracy is therefore proposed where "diversity should find resonance in the outcome of government policies

⁵⁹ Ibid at 25.

⁶⁰ Article 27 of ICCPR determines as follows: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their religion or to use their language."

⁶¹ Article 1 provides that states shall protect the existence and the identity of minorities and encourage the conditions for the promotion of such identities through legislative and other means.

⁶² Strydom, HA 'Minority Rights Protection: Implementing International Standards' (1998) *SALJ* 14 at 374 and 375.

and planning, especially in matters that may affect the lives and interests of a specific community, as opposed to a mere recognition of diversity.”⁶³

Strydom argues that the state should be the guardian of all groups in society and all such groups should therefore have an “equitable claim to the care and protection of the state.”⁶⁴ This argument is supported by Malan who advocates a pluralist democracy where the majority is barred from deciding matters of particular importance to a minority, while the minority, in turn, is specifically empowered to handle such specific matters without fear or prejudice.⁶⁵

Equal justice for all in a pluralist society requires a differentiated approach, and enforcement of rules for different groups in society to ensure justice for everyone. A universal and crude liberal approach where one set of rules, normally fashioned by the dominant component of society, is implemented indiscriminately over everyone could ironically lead to discrimination against certain groups or segments in society. What both Strydom and Malan propose is that each group in society be treated with the necessary respect, that their various customs, beliefs, language and cultures be accommodated and protected, and that they receive special treatment that distinguishes them from the majority grouping of society by recognising that they must not be homogenised with the rest, thereby protecting them against discrimination.⁶⁶

The protection of minority rights also relates closely to the condemnation of a majoritarian democracy, as it recognises that “democracy within nations requires ... a deeper understanding and respect for the rights of minorities.”⁶⁷

⁶³ Ibid at 378.

⁶⁴ Ibid at 381.

⁶⁵ Supra 48 at 436.

⁶⁶ Supra 62 at 378; Malan K ‘Oor gelykheid en minderheidsbeskerming na aanleiding van Ryland v Edros en Fraser v Children’s Court, Pretoria North’ 1998 (61) *THRHR* 304 to 309.

⁶⁷ Supra 62 at 373 where Strydom quotes from the Agenda for Peace report, presented by Mr Boutros-Ghali at the 1992 meeting of the Security Council.

7. Democracy and the right to self-determination

The right to self-determination is wedded to and reinforces minority rights as this right is also concerned with the protection of the interests of all communities and with the protection of the right of these communities to decide on the issues affecting them.

The right to self-determination has become ingrained in political discourse across the globe and attempts to promote and protect it are exemplified in international law instruments. Article I of the ICCPR acknowledges the right to self-determination as the right of all peoples to freely determine their political status and to freely pursue their 'economic, social and cultural development.' Self-determination allows all peoples to fully participate in decisions affecting their political, economic, social and cultural rights and the rules by which their society operates.⁶⁸ The right to self-determination is therefore an inherently democratic notion, as it requires and allows for 'government by the people.' This right has been declared in treaties and other international law instruments⁶⁹ and it is part of customary international law.⁷⁰ The purpose of the right is to "enable groups to prosper and transmit their culture as well as to participate fully in the political process and so be protected from being subject to oppression."⁷¹

The right to self-determination is a hallmark of democracy and is indissolubly tied to the protection of minority rights and with the notion that majority domination is undemocratic. It implicates and engages the principle that all groups in a given state should be allowed to prosper equally and to decide their political, economic, social and cultural destiny. This right is infringed when a people are subject to "subjugation, domination and exploitation by others."⁷²

The right to self-determination, quite logically, is not absolute as the rights of all peoples must be in balance with the rights of other peoples. No exercise of the right to self-determination can occur with disregard to the rights of other peoples and the right to self-

⁶⁸ McCorquondale 'South Africa and the right to self-determination' (1994) 10 *SALJHR* at 4 and 5.

⁶⁹ For example the ICCPR; The International Covenant on Economic, Social and Cultural rights 1966; Article 20 African Charter on Human and Peoples' Rights 1981.

⁷⁰ *Supra* 68.

⁷¹ *Supra* 68 at 11.

⁷² *Ibid.*

determination can therefore not lead to the impairment or destruction of all individual rights, the right to self-determination of another people or the territorial integrity or political unity of a state.⁷³ Again, as with the rights of minorities, this right requires balance, proportionality and reasonableness from all sectors and communities concerned, so that the rights of all communities are balanced against one another and that the interests of all the communities are protected.

8. Conclusion and final thoughts on the definition of democracy

In summation of my view of democracy I conclude as follows:

- Most, if not all, states which are generally accepted to be democratic today are representative systems of government based on the structural-procedural notion of democracy where the basic tenets and procedures of democracy are present, namely general and equal suffrage for all adult citizens, regular free and fair elections, a multiparty dispensation and majority rule.
- Whether a government qualifies as a genuine democracy is a question of substance rather than of manner and form, as democracy requires government by the people. A democracy would be authentic when there is an equitable distribution of power amongst all segments of society. Such distribution is attained when there is equality for all individuals, majority rule and self-governance for all, including all minorities.
- States where the public have no say in the decisions affecting them, other than through casting a vote every few years during elections, constitute a very tenuous and false form of democracy.
- The democratic credentials of states where decisions and policy are made by and for a political majority to the exclusion of minority interests in a 'winner takes all' mode are inherently flawed.

⁷³ Ibid at 8, 9 and 18.

- A democracy of substance would require protection of minority rights and allow minorities the opportunity to have a say in decisions affecting them. This would be even of more consequence in plural and deeply divided societies.
- A democracy of substance would require the right to self-determination for the peoples within the relevant territorial domain where all groups participate equally in determining their own economic, social and cultural destiny.
- The concept of democracy is not readily accommodated under the rubric of a particular formula or definition as finality in this matter would foreclose on the idealistic element implied in its purview merely so that it can be conveniently cut and dried as a standard ‘off-the-shelf’ model for all and sundry. The question whether a state conforms to the vital criteria that justify and establish its credentials as a democracy is of the essence and depends on the nature of societies within the relevant territorial borders and their interests; moreover whether they have an equal say in affairs of state.
- Democracy is always a matter of degree, depending critically on the dissemination of power to all communities within the territorial borders of a state.
- The writer’s ultimate conclusion is that a democracy of substance is critically dependent on two equally decisive polar values: majority rule at one end of the scale and protection of minority rights at the other. Democracy in South Africa will be judged in light of these polar values.

CHAPTER TWO

DEMOCRACY IN CONTEMPORARY SOUTH AFRICA

1. Introduction

Having determined what the requirements and characteristics of a a democracy of substance are, democracy in South Africa will be critically reviewed to assess the extent of its conformity to essential criteria defining democracy, with particular reference to the polarities of majority rule versus the protection of minority rights.

As noted above in chapter two, the writer's contention is that genuine democracy is achieved when majority rule and the protection of minority rights are in equilibrium. The proposed assessment of the state of equilibrium between majority rule and minority rights in South Africa will start with an examination of relevant case law to determine whether the interests of the majority are served in the decisions made by government.

A balancing review of case law and the status of minority rights in light of current events will follow, with particular reference to minorities' capacity for self-governance on an equal footing with the governing majority.

The state of equilibrium in South Africa between majority rule and assertion of minority rights will be examined in the next chapter with a view to determine whether the relationship between the opposites mentioned is sufficiently in balance to classify the political dispensation as a democracy of substance.

2. Majority rule through representation and public participation

The founding values of the Constitution, as set out in section 1, confirms that South Africa is a "democratic state" which is founded on, amongst others the following values: "(d) Universal adult suffrage, a national common voters roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness."

It is clear that the South African Constitution demands and sets in place a representative democratic system and that this system of government complies with the present day procedural-structural characteristics of a democracy, as described in the previous chapter.

Although it is clear from the Constitution that the South African democracy is a representative democracy, the Constitution also requires the people of the land to participate in government and the decisions that affect them. Various sections in the Constitution affirm specifically that the Constitution of South Africa envisages a participatory democracy in addition to a representative democracy. Sections 118, 57, 59 and 72 of the Constitution are clear examples, as these sections specifically demand public involvement in the legislative processes mentioned therein. Section 57 of the Constitution also directly refers to the concept of a participatory democracy. The participation called for and demanded by the Constitution furthers the ideal of a government “based on the will of the people,” as clearly referred to in the preamble of the Constitution. The notion of government by the people is a necessary condition for a political dispensation to be classified as a democracy of substance that allows people to have a say in decisions that affect them.

Nearly a decade after the advent of a constitutional democracy in South Africa the Constitutional Court finally eliminated all uncertainty about the participatory nature of democracy in South Africa by calling for public participation in legislative processes and asserting the existence of a constitutional duty on legislatures to facilitate such participation. The judiciary therefore proclaimed that South Africa is not simply a representative democracy but also a participatory democracy. The importance of this proclamation cannot be overstated since the participatory principle gives substance to the constitutional ideal of ‘government by the people’, a principle that is essential to guarantee good (ie. duly democratic) governance and that precludes the possibility of a purely representative government in which decisions devolve onto the hands of a few chosen representatives. As noted in the previous chapter, a solely representative government cannot produce a democracy of substance.

The contemporary status of majority rule in relation to the protection of minority rights will also be considered with reference to relevant Constitutional Court cases in order to

establish what the courts regard as necessary to establish a ‘government by the people’ as discussed above.

2.1 *Doctors for Life International v Speaker of the National Assembly and Others*⁷⁴

Doctors for Life was the first case in which the court made the formal announcement that the South African dispensation was a representative and participatory democracy. This announcement was a watershed event that put to rest any doubt about the participatory nature of the democracy prevailing in South Africa.

The case in point concerned an application to have four health-related acts of Parliament declared invalid and unconstitutional in light of the failure of the National Council of Provinces (NCOP) to facilitate public involvement in the law-making process. The complaint was specifically that the NCOP, in passing the impugned bills, failed to invite written submissions or to conduct public hearings on the bills, as required by its duty to facilitate public involvement in terms of Sections 72(1)(a) and 118(1)(a) of the Constitution.

Section 72(1)(a) of the Constitution requires that the National Council of Provinces ‘facilitate public involvement’ in its legislative and other processes, while Section 118(1)(a) requires that a provincial legislature ‘facilitate public involvement’ in its legislative and other processes.

The court found that the NCOP failed to facilitate the required public involvement in the passing of two of the impugned bills since six of the nine provinces did not hold public hearings on the bills. The statutes in question were accordingly declared invalid.

The judgment was delivered by the former Ngcobo J for the majority. His judgement read as follows:

“In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of

⁷⁴ 2006 (6) SA 416 (CC).

government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character, it acts as a counterweight to secret lobbying and influence-peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.”⁷⁵

The Court clearly recognised the dangers of a purely representative democracy and emphasised that the voices of all ordinary citizens should be heard in decisions that affect them, thereby protecting communities against untoward decisions that could harm their interests. The Court affirmed the point by stating that the democratic dispensation in South Africa “includes, as one of its basic and fundamental principles, the principle of participatory democracy.”⁷⁶ It then held in further corroboration that it was incumbent on Parliament to ensure that its actions would duly accord with and promote the principle of participatory democracy in South Africa, the actual measures implemented to that end to be decided within reason by Parliament and the provincial legislatures.

Whether the legislature acted reasonably would depend on various factors, including the nature and importance of the legislation, the impact on the public, and practical factors such as the amount of time available and the costs involved in facilitating public participation. It should be noted that the Court declared in this regard that “however great the leeway given to the legislature, the Courts could, and in appropriate cases would, determine whether there has been the degree of public involvement that was required by the Constitution.”⁷⁷

While Malherbe clearly supports the court’s finding that in terms of the relevant constitutional provisions it is incumbent on the legislature to facilitate public participation in the legislative process, he also theorizes that the Court gave the requirement of public involvement in the legislative process more prominence than the writers of the Constitution could have envisaged.⁷⁸

The writer contends that the court reached its decision with due regard to the purport of the relevant constitutional provisions, the demands of a substantive democracy, the

⁷⁵ Ibid at 464.

⁷⁶ Ibid.

⁷⁷ Ibid at 467.

⁷⁸ Malherbe R ‘Openbare betrokkenheid by die wetgewende proses kry oplaas tande’ 2009 *TSAR* (3) at 597.

discriminatory history of South Africa and international and foreign law which gives credence to and encourages public participation in government.⁷⁹ In light of these considerations the court found that the Constitution envisages a representative and participatory democracy for South Africa, and that law-making should therefore be assisted by public participation to give credence to the principle of ‘government by the people.’

2.2 *Matatiele Municipality And Others v President of the Republic of South Africa and Others (No 2)*⁸⁰

The day after the *Doctors for life* judgment was delivered the Constitutional Court gave judgment in the *Matatiele Municipality* case, which concerned the validity of the Constitution Twelfth Amendment Act of 2005 (the Twelfth Amendment) and the Cross-Boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005 (the Repeal Act).

In much the same vein as the *Doctors for life* case, this case basically centred around whether the provincial legislatures were obliged to facilitate public involvement, as required by Section 118(1)(a) of the Constitution, in considering a proposed amendment to the Constitution. If the court found in the affirmative it had to decide whether the relevant provincial legislatures had complied with their duties in this regard.

In *Matatiele* the legislature wanted to alter the basis for determining provincial boundaries by invoking the Twelfth Amendment, which would lead to the boundaries being determined on the basis of municipal areas instead of magisterial districts. The legislature also wanted to do away with cross-border municipalities by means of the Repeal Act, because these types of municipalities were deemed undesirable for a number of reasons, such as the difficulties experienced in the administration of these municipalities. The passing of the Twelfth Amendment altered the basis for determining provincial boundaries and had the effect, amongst others, of transferring the local municipality of Matatiele from the province of KwaZulu-Natal to the province of the Eastern Cape.

⁷⁹ *Supra* 74 at 454 to 456 where the foreign and international law was considered by the court.

⁸⁰ 2007 (6) SA 477 (CC).

While the Eastern Cape Provincial Legislature held public hearings before passing the proposed Bills in the National Council of Provinces (NCOP), the KwaZulu-Natal Provincial Legislature failed to hold public hearings or to invite written representations from the public. The Court concluded that in neglecting this requirement the KwaZulu-Natal legislature had violated Sections 74(8) and 118(1)(a) of the Constitution and had therefore acted unreasonably. Consequently, that part of the Twelfth Amendment which transferred the Matatiele municipal area from KwaZulu-Natal to the Eastern Cape was adopted in a manner that was inconsistent with the Constitution and was therefore declared invalid.

The Court reiterated its position in *Doctors for Life* by confirming that the Constitution demands a representative and participatory democracy, and that

“our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves.”⁸¹

Ngcobo J, as he then was, declared that the “representative and participative elements of our democracy should not be seen as being in tension with each other. They are mutually supportive.”⁸²

The government in this case firstly contended that its only duty was to create space for the public to be involved, but the Court rejected this view as narrow. Instead the Court found that government actually has a duty to facilitate and encourage public involvement in the legislative processes.⁸³

The government also submitted that the provincial legislature, consisting of representatives elected by the citizens of each province, would be within the ambit of their terms of reference to speak and act on behalf of the people of the province; however, the court also rejected this “austere” (cf. Mureinik) view of the South African democratic system and Ngcobo J noted that “this submission would render meaningless the public involvement

⁸¹ Ibid at 494.

⁸² Ibid.

⁸³ Ibid at 492.

provisions and reduce our democracy to a representative democracy only. The government has misconceived the nature of our democracy.”⁸⁴

Ngcobo J commented further that to “uphold the government's submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process.”⁸⁵

Ngcobo J also commented that the right to public participation in governmental decision-making is not only important because the accuracy of the decisions is improved when people are allowed to have their say and to state their case, but such participation is also “necessary to preserve human dignity and self-respect.”⁸⁶

The right of the people to take part in the legislative and decision-making processes in instances where it affects them is therefore protected by the court.

Malan lauds the Court’s decisions in the *Doctors for Life* and *Matatiele Municipality* cases, as it attributes “a meaningful and significant content to the notion of participatory democracy.”⁸⁷

The Court’s rejection of a democracy that is solely representative endorses the notion of a democracy of substance as ‘government by the people’ and the ‘austere democracy’ Mureinik warns against is thereby rejected.⁸⁸

⁸⁴ Ibid at 494.

⁸⁵ Ibid at 496.

⁸⁶ Ibid at 497.

⁸⁷ Malan K ‘Democratic legislation and administrative action in view of recent case law’ (2007) 22 SAPR/PL at 77.

⁸⁸ Bennet (ed) (1993) *Administrative Law reform* at 35.

3. Majority rule and majority interests

3.1 *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others*⁸⁹

Little more than a year after the *Matatiele Municipality* case, the Constitutional Court delivered judgment in the *Merafong* case, which also had to decide whether the acts concerned in the *Matatiele Municipality* case were valid.

In the writer's view this case did much to undo the constructive climate fostered by the outcomes of the *Doctors for Life* and *Matatiele Municipality* cases.

The essential question that the Court had to consider was firstly whether the Gauteng Provincial Legislature had been remiss in facilitating public involvement in deliberations on the Twelfth Amendment Bill. If the Court found that the public involvement was sufficient the second question to consider was whether the provincial legislature acted irrationally in supporting the Bill.

In the *Merafong* case the municipality concerned (Merafong) straddled two provinces, namely Gauteng and North West. The passing of the Twelfth Amendment Act in this instance transferred the Gauteng part of Merafong to the North West Province so that the entire Merafong was situated in North West. The facts of this case are distinct from the *Matatiele Municipality* case in that both provinces did initially hold public hearings about the proposed relocation to North West. There was overwhelming public resistance against the proposed transfer.

The Portfolio Committee of the Gauteng Provincial Legislature therefore adopted a 'negotiating mandate' to support the Bill on condition that the municipal area of Merafong would be included in Gauteng and the legislature therefore undertook to propose an amendment to the Bill in the National Council of Provinces (NCOP) to enable the proposed relocation.⁹⁰ The Gauteng legislature was, however, informed by the legal adviser of the Department of Provincial and Local Government, as well as the State Law Adviser, that a provincial legislature could not make an alternative proposal or propose an amendment to the Bill, and that the legislature could only vote for or against the Bill. The

⁸⁹ 2008 (5) SA 171 (CC).

⁹⁰ Ibid at 184.

ANC-dominated Gauteng legislature, in line with national policy, then voted in support of the Bill, thereby reneging on its original undertaking.⁹¹

Van der Westhuizen J for the majority dismissed the application and held firstly that sufficient public participation was provided for by the Gauteng legislature, and secondly that the decision of the Gauteng legislature was not irrational.⁹²

Van der Westhuizen J concluded that the aim of the facilitation of public involvement when considering bills is for the legislature to be informed of the public's views on the bill and that from “the perspective of respectful dialogue and the accountability of political representatives it might well have been desirable to report to the people of Merafong that it was impossible to adhere to the position taken by the Portfolio Committee in the negotiating mandate,”⁹³ but that the failure to do so was not unreasonable.

In short, the Court found that the people had been given an opportunity to be heard, but that the legislatures were not bound by their inputs, and that at the outset the government had therefore acted reasonably in facilitating public involvement in the legislative process.

The writer agrees with minority judgement delivered by Sachs J to the effect that the Gauteng legislature had acted unreasonably by not involving the community when they found that adherence to the negotiating mandate was not feasible. Sachs J quoted from the judgment of Ngcobo J in *Doctors for Life* with regard to the virtues of a participatory and representative democracy, followed by a summation that captures the essence of the matter (in the writer's opinion) as follows:

“In the present matter the failure of the legislature to go back to the community and explain its abrupt about-turn violated each and every one of these constitutional goals. It diminished the civic dignity of the majority. It denied any spirit of accommodation and produced a total lack of legitimacy for the process and its outcome in the eyes of the people. And finally, it gave rise to a strong perception - reflected in the papers - that the legislative process had been a sham because an irreversible deal had already been struck at a political level outside the confines of the legislative process in terms of which, come what may, Merafong was going to go to North West.”⁹⁴

Although Sachs J accepted that a participatory democracy does not require constant and prolonged consultation by the legislature with the public, nor requires the views of the

⁹¹ Ibid at 185.

⁹² Ibid at 208.

⁹³ Ibid at 190.

⁹⁴ Ibid at 264.

affected communities to be binding on the legislature, he nevertheless held unequivocally that an appropriate civic relationship should be pursued and he concludes accordingly:

“given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising proposals that would have allowed for future compromise and taken some of the sting out of the situation.”⁹⁵

Van der Westhuizen J in *Doctors for Life* also alluded to the problem that public participation does not guarantee that the views of the public will receive due consideration in government decision-making. He argued that government seemed capable of allowing public participation in its decision-making while nevertheless casually ignoring the will and inputs of the people. The mere presence of procedures enabling public involvement does not ensure that the affected communities’ views will be considered in decision-making (*vide* Van der Westhuizen’s remark that “apartheid rulers could still afford to have imbizos, lekgotlas, bosberade and indabas with traditional leaders and interest groups and, in fact, had some. They could, after all, ignore the inputs made.”)⁹⁶ This is why Malan champions a substantive approach to democracy to determine whether the people are truly part of the decision-making process and whether the interests of the people and the communities are served by the decisions of government.⁹⁷

Malherbe considers that what happened in Merafong exemplifies central government’s dominance over the provinces,⁹⁸ an observation leading to the writer’s view that the degree of central dominance is directly dependent on the degree of centralisation of government, and that the more so the less power will diffuse to minorities. It follows, therefore, that centralisation is a distinct hindrance to the project of establishing a democracy of substance.

Clarie Benit-Gbaffou also shows that governments’ decisions at local government level are dominated by the agenda of the ruling party, as ward councillors “try and please their ANC hierarchy more than their constituency: the party’s, not the voters’, satisfaction will lead to a councillor’s re-election.” She refers, for example, to a Sowetan councillor who expressed

⁹⁵ Ibid at 266.

⁹⁶ Supra 74 at 503.

⁹⁷ Malan K ‘Factional rule, (natural) justice and democracy’ (2006) 21 *SAPR/PL* at 148.

⁹⁸ Malherbe R ‘Openbare betrokkenheid by die wetgewende proses: Met ‘n ligte stampie terug aarde toe... of nie?’ 2009 *TSAR* 3 at 597.

his opposition to a council decision on the privatisation of water and electricity services and who was subsequently expelled from the ruling party. Another executive member from the ruling party admitted that he did not support a council decision to implement a prepaid electricity system: “Personally, I am not favourable to (the pre-paid system), but politically I am supporting it.”⁹⁹ This situation does not bode well for proper majority rule as demanded by a democracy of substance, which requires that decisions should be based on the will and interests of the majority, duly tempered by the interests of minority communities.

Steven Friedman also refers to the “strong centralism” in the national leadership of the ruling party which has been in power since 1996, and he warns that this centralism may weaken the links of the party with its support base. He further contends that the national leadership of the ruling party is known for its prominent tendency to neglect provinces whereas this is where its support base gains its most formative impression of the party. The upshot of this unfortunate tendency is a growing gulf between the majority leadership and its people¹⁰⁰ and an increasingly urgent question: If the majority leadership is not even in touch with its own majority support base, how could it possibly consider and protect the interests of minority communities? The answer prompted by the question with equal urgency, and therefore calling for an urgent response, seems to be: The ruling party is inherently incapable of entertaining the question to any meaningful extent, nor is it really interested in doing so since it is centripetally drawn towards the big centres for reasons such as the imperative: ‘Follow the money’.

Political scientist Maxi Schoeman recently delivered a lecture during which she commented that “The ‘who’ that gets the ‘what’ of politics is a small elite – with the large majority having to settle for much less.” Although she recognised the strides made by South Africa in the 20 years since the establishment of its constitutional democracy, she also shared Habib’s view that the ruling party had become “a grubby instrument of enrichment that speaks the language of empowerment and democracy, while its leadership

⁹⁹ Benit-Gbaffou C ‘Local councillors: Scapegoats for a dysfunctional participatory democratic system? Lessons from practices of local democracy in Johannesburg’ <http://hdl.handle.net/10539/12155> on 22 September 2014.

¹⁰⁰ Giliomee H & Simkins C (eds) (1999) *The Awkward Embrace One-Party Domination And Democracy* at 108.

and cadres plunder the nation's resources.”¹⁰¹ These comments are a further affirmation of the centralised nature of the South African democracy where the important decisions (and wealth) vest with the political elite.

Despite Malherbe's criticism of the dominance of national government over provincial government, he concludes that in this case the court made the correct decision in finding that the Gauteng legislature did adequately facilitate public involvement in the legislative process, as too much consultation could lead to the possibility that the decision-making process would grind to a halt.¹⁰² The writer sets no store by this opinion as it does not take proper cognisance of the specific circumstances of the case. As Sachs J noted, one more consultation with the Merafong community might have led to a compromise that could have offered tempering solutions.

4. Majority rule versus the protection of minority rights

4.1 *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly*¹⁰³

During October 2012 the Constitutional Court delivered an important judgment on the question whether the National Assembly may effectively deny its members the opportunity to introduce a Bill in the National Assembly.

The applicant sought to appeal a High Court decision that held that individual members of Parliament did not have the power to initiate or prepare legislation, as these powers vest in the National Assembly. The High Court further held that the National Assembly had the authority to permit or refuse the progression of an individual member's legislative proposal, to the stage of being introduced as a Bill. The High Court also accepted as democratic the possibility that a majority party in the National Assembly may not allow a legislative proposal to go beyond the initiation or preparation stage, because it constitutes majority decision-making, which is a legitimate democratic principle.

¹⁰¹ “A crises of leadership? Reflections on 20 years of democracy” quoted in Tukkies Winter 2014 Volume 20 Number 1 at page 17.

¹⁰² *Supra* 98 at 599.

¹⁰³ 2012 (6) SA 588 (CC).

After its unsuccessful High Court bid the applicant launched an unsuccessful application for leave to appeal to the Supreme Court of Appeal, whereupon the applicant sought leave to appeal to the Constitutional Court.

The facts of the case are briefly that the applicant was a member of a minority party and also a member of the National Assembly. The applicant complained to the Speaker of the National Assembly that certain rules of parliament relating to the introduction of a bill in the National Assembly were unconstitutional. The disputed rules of the National Assembly provided that a member of the National Assembly could only introduce a bill in the Assembly, in accordance with Section 73(2) of the Constitution, if the Assembly approved his or her initiation of such legislation. For a member to obtain the necessary permission he or she had to submit a memorandum to the Speaker which set out the details of the proposed legislation. The Speaker then had to refer the memorandum to the Committee on Private Members' Legislative Proposals and Special Petitions (Private Members' Committee). After considering the memorandum the Private Members' Committee would recommend to the Assembly whether permission should be granted to proceed with the legislative process. On permission being granted the member would be free to prepare a draft bill.

The Constitutional Court essentially had to consider whether an individual member of the National Assembly could initiate and prepare legislation in terms of Section 55(1)(b)¹⁰⁴ of the Constitution and the Court had to consider and determine the scope and meaning of Section 73(2)¹⁰⁵ and Section 57¹⁰⁶ of the Constitution.¹⁰⁷

Mogoeng J for the majority found Section 55(1)(b) to be capable of being interpreted as vesting the power created in the Section in the Assembly as a collective, or in members of the Assembly, acting as individuals or as part of larger groups.

Mogoeng J remarked that South Africa was a constitutional democracy that was designed “to ensure that the voiceless are heard, and that even those of us who would, given a

¹⁰⁴ Section 55(1)(b): In exercising its legislative power, the National Assembly may initiate or prepare legislation, except money Bills.

¹⁰⁵ Section 73(2): “Only a Cabinet minister or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly...”

¹⁰⁶ Section 57: “The National Assembly may- (a) determine and control its internal arrangements, proceedings and procedures; and (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.”

¹⁰⁷ Supra 103 at 495.

choice, have preferred not to entertain the views of the marginalised or the powerless minorities, listen.”¹⁰⁸

The Court recognised that “an individual competence to initiate or prepare legislation not only accords with the textual meaning of the section but also with the principles of multi-party democracy, representative and participatory democracy, responsiveness, accountability and openness.”¹⁰⁹

The applicant was therefore successful and the Court held that an individual member of the National Assembly could initiate and prepare legislation in terms of Section 55(I)(b) of the Constitution, and an individual member of the National Assembly could also introduce a Bill in the National Assembly in accordance with section 73(2) of the Constitution.¹¹⁰

The Court also held that the power of the National Assembly to make its own rules is important and should be respected, but that such rules are subject to the Constitution, and that the Constitution does not allow the Assembly to impose substantive or content-based limitations on the exercise of the constitutional powers of its members.

The Court in this case clearly recognised and acknowledged that a democracy of substance does not allow domination by the majority, and that the minority voices must be heard and respected to legitimise a genuine democracy. The court recognised that:

“By its very nature, representative and participatory democracy requires that a genuine platform be created, even for members of minority parties in the Assembly, to give practical expression to the aspirations of their constituencies by playing a more meaningful role in the law-making processes.”¹¹¹

Thus the Court recognised that majority rule is essential to a democracy, but that majority domination is not democratic, nevertheless, and that minorities must be allowed to participate in the democratic process (ie. their voices must be heard and law-making must be intrinsic to their function) .

¹⁰⁸ Supra 103 at 601.

¹⁰⁹ Ibid.

¹¹⁰ Ibid at 604.

¹¹¹ Ibid at 607.

Mogoeng J commented in this regard that the

“Constitution does not envisage a mathematical form of democracy, where the winner takes all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered.”¹¹²

Malan spells out the need for balance between majority rule and the protection of minority rights succinctly when he argues:

“Every time a properly elected legislature takes a decision on the basis of the majority vote but without allowing the affected sections of the population effective opportunities to state views and interests and without taking these into consideration, ensuring that they are reflected in the content of ensuing decisions, democracy (and the self-respect and dignity of those affected) is sacrificed at the altar of domination.”¹¹³

The ultimate goal of a democracy should be to ensure that the correct and just decision is taken, to which end a healthy balance must be struck between majority rule and minority interests. All sections of society should be allowed a say in the decisions affecting them in a government by the people.

4.2 *Mazibuko No v Sisulu and Others NNO*¹¹⁴

The constitutionality of National Assembly rules was again at the centre in the *Mazibuko* case.

The facts at issue were that the leader of the main opposition party in the National Assembly had given notice of a motion of no confidence in the President of South Africa. The motion was initiated in terms of the rules of the National Assembly and the right to bring such a motion of no confidence is derived from Section 102(2) of the Constitution.¹¹⁵

In accordance with normal practice in the Assembly, the motion was first discussed by the chief whip's forum, which provides a platform for possible political agreement among the various political parties on issues for which whips of the various parties are responsible. The forum was unable to reach consensus on the scheduling of the motion for debate and

¹¹² Ibid at 603.

¹¹³ Supra 87 at 78.

¹¹⁴ 2013 (6) SA 249 (CC).

¹¹⁵ Section 102(2): “If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the members of the Cabinet and any Deputy Ministers must resign.”

vote in the Assembly. It therefore referred the motion to the programme committee of the Assembly for its consideration.¹¹⁶

The programme committee is chaired by the Speaker and consists of 11 other office bearers of the Assembly, including the chief whip and whips from minority parties. Its functions and powers include preparation of the annual Assembly programme, implementation of rules affecting scheduling or programming concerning Assembly business, including decisions regarding prioritising or deferral of Assembly business.¹¹⁷

The programme committee met to consider the proposed motion of no confidence, but its deliberations on the motion were deadlocked. The Speaker, who chaired the meeting, concluded that the lack of consensus precluded scheduling of the motion.¹¹⁸

After unsuccessful demands by the applicant that the Speaker of the National Assembly schedule the motion for debate and a vote the applicant approached the High Court with an urgent application for an order directing the Speaker to take whatever steps were necessary to comply with the applicant's request before the last day of the Assembly's annual sitting, as the motion would lapse thereafter.

The High Court dismissed the application with no order as to costs, but it also held that the applicant had the right to move for a motion of no confidence and to have it debated.¹¹⁹ The High Court noted that "it cannot be within the gift of the majority party to decide upon the issue of the timing of this kind of motion."¹²⁰ The High Court, however, also found that the Speaker did not have the residual power under the Rules to break the deadlock or schedule the debate of the motion on his own. The High Court therefore held that there was a lacuna in the rules that prevented the vindication of the constitutional right to bring a motion of no confidence in the President.¹²¹ The High Court did, however, not have the power to decide whether Parliament had failed to fulfil a constitutional obligation as, according to Section 167(4)(e) of the Constitution, such power vested with the exclusive jurisdiction of the Constitutional Court.

¹¹⁶ Supra 114 at 254.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Mazibuko NO v Sisulu and Others NNO 2013 (4) SA 243 (WCC) at 262.

¹²⁰ Ibid at 255.

¹²¹ Ibid at 261.

The applicant thereafter launched an application to the Constitutional Court for, amongst others, leave to appeal directly to it and in the alternative for direct access to the Constitutional Court for a declaratory order that the relevant rules of the National Assembly are inconsistent with the Constitution and therefore invalid.

Moseneke J for the majority found that the application for direct access should succeed, and the Court held that chapter 12 of the National Assembly's rules was inconsistent with Section 102(2) of the Constitution to the extent that it failed to provide for an unhindered exercise by a member of the National Assembly, acting alone or in concert with other members, of the right to have the Assembly schedule and deliberate and vote on a motion of no confidence in the President. The declaration of invalidity was suspended for six months in order to afford the Assembly the opportunity to remedy the defect.¹²²

In reaching its decision the Court referred to Section 42(2) of the Constitution, which provides that the National Assembly "is elected to represent the people and to ensure government by the people under the Constitution". The Court therefore concluded that a "motion of no confidence in the President is a vital tool to advance our democratic hygiene. It affords the Assembly a vital power and duty to scrutinise and oversee executive action."¹²³

Although Section 102(2) of the Constitution does not clarify the source of a motion of no confidence the Court found that, given the wording and purpose of the provision, the "right to initiate a motion of no confidence is accorded to every member of the Assembly who is entitled to seek, by a motion of no confidence, to garner support for a majority vote of the Assembly."¹²⁴

The Court referred to the stance of the chief whip of the majority party, who submitted that the scheduling of motions for debate was part of the political process, and that if no political agreement could be reached regarding the scheduling of a motion, the motion in question would not be scheduled or debated. The chief whip thus contended that the power to determine whether or not a motion should be debated should always vest with the National Assembly, and therefore, in effect, with the majority. As might be expected in light of the Court's duty to the Constitution, the Court rejected the chief whip's argument

¹²² Supra 114 at 272.

¹²³ Ibid at 262.

¹²⁴ Ibid at 263.

that “the decision to schedule a motion and the time when it may be debated are both within the gift of the majority party.”¹²⁵

The ruling party’s dominance in the National Assembly would clearly not be acceptable in an authentic democracy, and it was duly turned down, earning the Court’s comment that “a vital constitutional entitlement to move a motion of no confidence in the President cannot be left to the whim of the majority or minority.”¹²⁶

The Court’s refusal of the chief whip’s stance as indicated thus established another bastion against majority-party dominance in the National Assembly, thereby shoring up South Africa’s constitutional democracy against inroads such as those proposed by the chief whip.

It should be noted, however, that the victories scored for minority rights in the *Oriani-Ambrosini* and *Mazibuko* cases were certainly not decisive since they were bound to be overturned by the majority when it came to final decisions. However, they were important reminders to the majority that minorities could not simply be ignored, and showed besides that the courts gave credence to the need to protect minorities and reject majority dominance, thereby effectively advancing the political dispensation in South Africa towards a democracy of substance.

4.3 Representivity - minority interests under attack from majoritarian domination?

Whilst the *Oriani-Amrosini* and the *Mazibuko* cases constitute victories for the procedural rights of minority parties and members of such parties in the parliamentary processes, threats and attacks on minority interests and rights, specifically those of cultural minority communities, remain a present threat to the equilibrium between majority rule and minority rights protection in South Africa.

Probably the biggest impact on minority rights, which affect the minority communities most profoundly, is the principle of representivity as it is implemented by the South African government. Representivity is the norm which requires the composition of state institutions and organised spheres of society to reflect the national population profile,

¹²⁵ Ibid at 266.

¹²⁶ Ibid.

particularly as it relates to race.¹²⁷ Section 174(2) of the Constitution requires the judiciary to “reflect broadly the racial and gender composition of South Africa” and Section 195(1)(i) requires the public administration to be “broadly representative of the South African people.”

There are also a vast number of acts with representivity provisions which require public entities to represent a broad cross-section of the South African population. The most important of these acts is the Employment Equity Act¹²⁸ which seeks to ensure through affirmative action that, in racial terms, all levels of the workforce with 50 or more employees alternatively with a qualifying yearly turn-over (designated employers) must consist of approximately 76.1% African (black) people, 10.5% coloureds, 2.8% Indians and 10.6% whites.

The provisions in Sections 174(2) and 195(1)(i) of the Constitution, supported by numerous legislative provisions and common practice, have been morphed into a new principle of representivity driven by the majority government through which numerical representation is sought in the workforce of all designated employers. This numerical representation effectively arguably boils down to the achievement and maintenance of quotas in the workforce.¹²⁹ Quotas in sport and the composition in teams have also been implemented for quite some time and has been pursued in such a manner that the factors of fairness and proportionality have fallen by the way-side.¹³⁰

Malan observes that the representivity principle, unlike any other, is “virulently and unrelentingly pursued” in South Africa, in token whereof he quotes former justice Kriegler of the Constitutional Court as follows:

“But, from where I look at the judiciary today, and the way I have been watching the Judicial Services Commission, this ethnic/gender balance in section 174 of the Constitution has become the be-all and the end-all when the JSC makes its selections. And if it is not the be-all and end-all, at the very least it has been elevated to the overriding fundamental requirement.”¹³¹

¹²⁷Malan K ‘Observations of representivity, democracy and homogenisation’ *2010 TSAR* (3) at 427.

¹²⁸ Act 55 of 1998.

¹²⁹ *Supra* 127 at 430 and 431.

¹³⁰ Louw A.M ‘Should the playing field be levelled? Revisiting affirmative action in professional sport (part three)’ *2004 Stellenbosch Law Review* (15) at 419.

¹³¹ *Supra* 127 at 432.

Malan argues that the constitutional order must allow for each community to be itself and to exercise its identity by freely expressing itself; it must allow for diversity and for each community to flourish. Homogenisation threatens this diversity and the rights of all minority communities, as it requires individuals to change their cultural, linguistic and religious identities to conform to the so-called national identity.¹³² Malan criticises the representivity principle essentially on grounds that it homogenises society in favour of the majority¹³³ and thereby marginalises minority groups and denies them equality and equal protection.

The writer agrees and submits that the representivity principle skews the picture of South Africa's regional population make-up in favour of the majority population component, naturally to the disadvantage of minority groups.

While transformation is an important and completely justified agenda, a more balanced and fair approach to representivity that takes account of the population make-up at regional level should be adopted to improve representation for all communities, for example in the workplace, where proportionalities occurring as living realities should be maintained. For example, the Indian population of South Africa amounts to 2.8% of the country's population nationwide, but certain areas of the country have a far greater concentration of this minority group, such as Kwa-Zulu Natal. If the national figure was then applied in determining the permissible Indian component of employees in the Durban area the true proportionalities of that area's population would be seriously misrepresented in the workplace because the Indian population in that area would be seriously underrepresented.

The same principle applies to the white and coloured groups in the Western Cape, where a greater concentration of these minorities live than reflected in the national population demographic. These groups are being marginalised and prejudiced by the staunch adherence to the principle of representivity based on the national population composition.

The following hypothetical example can be utilised to explain the situation. Based on regional demographics, a state institution or an employer operating a business enterprise in the Western Cape would have a workforce that is 29.9% African, 51.5% coloured, 0.6%

¹³² Ibid at 435.

¹³³ Ibid at 439.

Indian and 15.6% white. Since staff proportionalities would have to conform to national demographics the staff complement would have to comprise 76.1% African, 10.5% coloured, 2.8% Indian and 10.6% white employees.¹³⁴ Out of a workforce of 1000 regional demographics would require a staff complement consisting of 299 African, 515 coloured people, and 156 white people, but national demographics would override this requirement by dictating a complement consisting of 105 coloured employees, 106 white employees, and 761 African people. This hypothetical scenario based on regional proportionalities versus those applied in principle clearly indicates how representivity as a concept applied by government unfairly marginalises coloured and white groups in the Western Cape and not only makes inroads on these minorities' economic freedoms but encroaches on the efficacy of the institutions and enterprises concerned, and therefore on the amenities to which the communities they serve are entitled.

Malan uses the example of a police station in Piketberg in the Western Cape, where the community (who would in all probability be complainants and witnesses in respect of crimes committed in the area) would mainly be Afrikaans speaking. If the national demographic and the quotas relating¹³⁵ to the majority government objective of representivity are utilised the police force would not mirror the make-up of this Afrikaans-speaking community and the service to the community would therefore suffer when complaints are made to the police, emergency calls are made, witness statements are taken down and so forth.

Malan captured the essence of the representivity problem as follows:

“If an organised sphere is to mirror the profile of the national population, instead of the distinct community from which it emanates and for whose benefit it was formed, it obviously no longer reflects the composition of that distinct community and can no longer promote and serve the interests of that community.”¹³⁶

Malan further comments that representivity “obliterates all minority protection and expands and entrenches majority domination in all spheres of society.”¹³⁷

¹³⁴ Van der Walt C ‘Verplasing geweier weens oorkonsentrasie’ *Solidariteit Tydskrif* 02 2014 at 16.

¹³⁵ *Supra* 127 at 440.

¹³⁶ *Ibid* at 445.

¹³⁷ *Ibid*.

Malan highlights another consequence of the representivity principle, which severely impacts on the cultural and linguistic rights of minority groups in South Africa. As an example, he argues that the future of Afrikaans tuition at universities is severely threatened by the representivity principle, which naturally impacts negatively on minority Afrikaans communities. Malan posits that representivity will “spell the end of Afrikaans university education and all universities will therefore become monolingual English institutions” and he continues by contending that “it is either Afrikaans or representivity.”¹³⁸ The reality is that, if the representivity principle is enforced with the appointment of university personnel, Afrikaans speaking lecturers, who are mostly white, would have to make way for black staff members, very few of which would be proficient enough in Afrikaans to provide the necessary tuition. On the same basis further cultural and linguistic rights of minority groups are under threat by the enforcement of the representivity principle at radio and television stations, as continued broadcasting of programmes in Afrikaans would no longer be feasible if representivity dictates staff appointments. The language and culture of a community are the cornerstones of a community’s identity and writer submits that an attack on these rights naturally have a profoundly negative affect on these communities.

The writer therefore contends that the representivity principle as applied at present precludes any possibility of a successful balance between majority rule and the protection of minority rights, as the scales are tipped heavily in favour of the majority to the detriment of the minority groups. This is incompatible with the notion of democracy of substance as discussed in this dissertation. It unduly enlists democracy to the exclusive benefit of the majority and to the unjustifiable exclusion and detriment of minorities.

¹³⁸ Supra 127 at 442.

CHAPTER 3

CONCLUSION AND REFLECTION

Although much has been achieved by substituting a constitutional democracy for the minority government of the past, the present state of democracy in South Africa nevertheless cannot be given a clean bill of health as it stands.

To revert to chapter one, the writer's contention is that democracy is a matter of degree. The more political power is distributed to all peoples and communities in a state, the more creditworthy it will be as a democracy; and conversely, the more political power is centralised the more its democratic credentials will be undermined.

The true test for a democracy of substance is whether all communities of whatever stripe have an equal say in decisions that affect them. As noted in chapter one, a democracy of substance depends on two equipoised counterweights with majority rule at one end and the protection of minority rights at the other. The achievement and maintenance of such equipoise depends on the adoption of a pluralistic approach that allows minorities to take charge of their own affairs without interference from the majority, that is to say, majority rule must be balanced by due recognition of minority rights.

On balance the writer concludes that despite the establishment of a democratically elected government that meets the broad characteristics, generally speaking, of a democracy, the political dispensation in South Africa nevertheless falls significantly short of achieving the status of a democracy of substance where proper majority rule based on the will of the people is duly tempered by the protection of minority rights, with particular reference to issues of direct relevance to such minorities.

In South Africa the centralised government emanating from a thus far entrenched ruling party seems to have lost touch with the population at large, judging from its elitist decision-making that tends to promote and shore up the interests of the ruling party at the cost of the general electorate, and especially the minority groups included in the overall population.

As shown in the cases of *Doctors for Life* and *Matatiele Municipality*, the courts have generally been willing to protect and even enhance the quality of the democratic dispensation in South Africa by reminding government to heed the voices of the people, especially where government decision-making was concerned. In the *Oriani-Abrosini* and *Mazibuko* cases the court adopted the firm position (as it has been doing generally) that minority communities had to be respected and afforded the opportunity to participate in government functions.

More should be done, however, to ensure proper majority rule in South Africa and to distribute power to the various communities. The centralisation of government allows the ruling party to dominate the formation of policy and national decision-making (eg. the *Merafong* case), with the result that ordinary citizens and communities are subjected to a diminution of power in the sense that political power is currently not distributed to the population at large (*vide* implementation of representivity principle).

The balance of majority rule and minority rights protection is skewed in favour of the majority, as the minority groups are often at the mercy of the majority decisions and the majority representatives seem to labour under the misapprehension, by and large, that they are naturally entitled to make blanket decisions (eg. the *Matatiele*¹³⁹, *Oriani-Ambrossini*¹⁴⁰ and *Mazibuko*¹⁴¹ cases).

It is the writer's considered opinion that the democratic dispensation in South Africa is not amenable to quick-fix solutions, but that on balance a federal type of dispensation seems required in order to disseminate power to the regional and cultural communities, thus rendering them more autonomous and moving a step closer to a democracy of substance.

¹³⁹ See page 25.

¹⁴⁰ See page 32.

¹⁴¹ See page 35.

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