

DEFINITIONS OF DEMOCRACY – THE IMPORTANCE OF BALANCING MAJORITY RULE AND MINORITY RIGHTS

Paul Hoffman SC

Director

Centre for Constitutional Rights

1. Introduction and Definitions

The big question under consideration at this conference is: “What makes constitutions work?” The short answer to that question, if there is one, is “accountability.” The purpose of this paper is to examine some aspects of the notion of democratic constitutionalism that are now in vogue in Africa so as to stimulate dialogue and reflection on what works and what does not.

Democracy in its classical Greek form meant exactly the same as what the liberation struggles of Africa claimed so many thousands of years later: “Power to the people” or in local parlance “Amandla awetu!” The Greek words “demos” – people and “kratia” – power are combined into “people power” or what the Concise Oxford dictionary now calls “a system of government by the whole population, usually through elected representatives” or by way of secondary meaning “a classless and tolerant form of society.”

The problem with the liberation movements of Africa is that what starts out as the peoples’ struggle for freedom transmogrifies along the way into the politicians’ or ruling elite’s struggle for power. In essence, this is where constitutional theory and practical politics part company. The yearnings for freedom from the yoke of colonialism, racism and ethnic dominance become subjugated to the naked power plays of factions within the ruling elite and the ordinary people often find themselves worse off, as in Zimbabwe now and Rwanda in 1994, or not much better off as seen elsewhere in Africa, than they were before receiving the blessing of their liberation. Nevertheless, a national debt of gratitude is felt towards liberation movements by ordinary voters. These movements continue to draw electoral support (both real and gerrymandered) in the most perplexing of circumstances and often well after their sell-by date has long passed. Robert Mugabe only just lost a general election earlier this year, 28 years after “liberating” his country. He is not exceptional, many of the so called “big men” of Africa continue to rule their grateful but oppressed followers long after the stated purpose of the liberation struggle has been achieved. The promotion of human dignity, the achievement of equality and the advancement of the various freedoms for which ordinary Africans have struggled are the main casualties of this unfortunate process.

It is however universally true that without the establishment of the rule of law and respect for property rights no country has prospered fairly in the increasingly globalized conditions under which most of the population of the planet is now living. It is through the acceptance and application of the rule of law and respect for property rights that foreign investment is attracted, jobs are created and the wealth of nations is augmented. And make no mistake about it; wealth is the objective of all too many of our liberators. The notion that entry into politics is for the noble purpose of service to the people is almost, but not quite, unknown in Africa. The specters of careerism and corruption haunt the corridors of power. A culture of impunity is abroad and promotion of human rights and responsibilities is a neglected field of endeavour.

The cure to all this is perceived to be constitutionalism. There can be little doubt that if the tenets of constitutionalism are universally embraced and accountably applied in Africa, or anywhere else, true democracy or “people-power” would flourish, and with it peace and prosperity.

The notion of constitutionalism is identified according to three inter-related yardsticks:

Firstly, does the Constitution impose limitations on the powers of the government?
Secondly, does the Constitution enjoy domestic legitimacy or acceptance by the people?
Thirdly, does it protect promote and enforce human and peoples’ rights?

It is appropriate to consider each of these in a little more detail, using South Africa as an example.

2. Limitations on government power.

The Constitution places limitations on the powers of the government by:

Making its supremacy and that of the rule of law founding cornerstones,

Establishing an independent judiciary whose judgments bind all organs of state and all to whom they apply,

Separating power between the three branches of government: the Executive, the Legislature and the Judiciary, and by

Establishing independent state institutions supporting multi-party democracy.

The Constitution expressly states that any conduct or legislation inconsistent with the Constitution is invalid, and that obligations imposed by the Constitution must be fulfilled.

The ANC has committed itself to “the fundamental provisions of the basic law of the land”, which it states in its Strategy and Tactics documents accords with its own vision of a democratic and just society. However, it stresses that its commitment to the Constitution should be viewed “within the context of correcting the historical injustices of apartheid”. In other words, the ANC interprets the Constitution within the framework of its own National Democratic Revolution - whose central proposition is the elimination of what it regards as the continuing inequalities arising from apartheid.

The independent judiciary represents the most important limitation on the power of government. The Judiciary is answerable only to the law and the Constitution. The requirements of section 2 of the Constitution in effect mean that all conduct by anyone and all legislation emanating from whatsoever source can be scrutinized on the basis of its compatibility or consistency with the standards of the Constitution and, if found wanting, can be struck down as invalid.

In general, the Government accepts and implements the decisions of the courts - even where they conflict with its policies. However, there are numerous examples of the failure of government departments - particularly in less developed provinces - to carry out court orders.

There are also some serious concerns regarding moves to “transform” the judiciary. A constitutional amendment and a batch of bills containing amending legislation aimed at making the judiciary “more responsive to the aspirations of the people” (earlier called “the masses”) were first gazetted in December 2005. After a huge outcry in which all living Chief Justices participated, they were withdrawn in July 2006. However, at its Polokwane conference last December, the ANC once again called for the implementation of far-reaching

reforms of the judiciary before the end of the present government's term of office. This is not going to happen, the controversial reforms are being held over for the next parliament. The reforms would include

- the establishment of the Constitutional Court as the single apex court - thus removing the status of the Supreme Court of Appeal as the final arbiter of all non-constitutional issues;
- a warning that the courts should not unduly encroach on areas that are the "responsibility of other arms of the state" (thus limiting their power to require government to take practical steps to assure constitutional rights through the provision of anti-retroviral drugs and basic housing?);
- the transfer to the Minister of Justice of ultimate responsibility for "the administration of courts, including any allocation of resources, financial management and policy matters"; and
- the establishment of "a single rule-making mechanism for all courts, in terms of which rules drawn up by the Rules Board would be subject to the approval of the Minister and Parliament.

Another limitation of the power of government is the separation of powers. However, the reality is that the borders dividing the executive and the legislature are becoming increasingly blurred. Parliament is firmly under the control of the executive and of the ruling movement and often fails to carry out its oversight duties in the manner envisaged by the Constitution. As Andrew Feinstein recently pointed out, this was particularly the case with regard to the manner in which it dealt with questions arising from the notorious arms deal.

The Government is also encroaching into areas of civil society that should be the preserve of the citizens involved. In terms of the recent legislation, the Minister of Health will now appoint the board of the association that represents the medical profession. The members of the association will not have the ability to do so themselves.

The lines between the ruling movement and the State are becoming increasingly indistinct. The Polokwane conference adopted a resolution requiring "all senior deployed cadres in various centres of power" (presumably including the public service and the security forces?) "to go through political classes to understand the vision, programme and ethos of the movement." The incoming NEC was instructed "to give strategic leadership to cadres deployed in the state and to improve capacity to hold cadres deployed accountable".

In addition to the checks and balances inherent in the separation of powers, Chapter Nine of the constitution creates a phalanx of institutions to uphold constitutional democracy. The most important of these are the Human Rights Commission, the Public Protector and the Auditor-General. All are enjoined to act impartially and to perform their functions without fear, favour or prejudice. Jointly and severally they constitute a means of limiting the exercise of power by government, of holding it to account and of dealing with improprieties as they arise.

However, some of these institutions are under pressure. Although the HRC often plays a constructive and independent role in the protection of fundamental rights the Public Protector is perceived to be executive minded and crippled by inefficiency. The Auditor-General has been accused by Andrew Feinstein, a former ANC parliamentarian, of permitting government interference with regard to the arms scandal. In addition, the Asmal Commission last year recommended the abolition of several of the other institutions involved - including the Pan

South African Languages Board and the Commission for the Protection of Cultural, Religious and Linguistic Minorities.

The most serious erosion of the powers of the independent institutions has, however, centred on the Polokwane resolution to dissolve the National Prosecution Authority's Directorate of Special Operations - otherwise known as the 'Scorpions'. It has been argued in the Constitutional Court that this decision is illegal for want of compliance with the requirements of rationality in all government actions; unconstitutional for its emasculation of the NPA; unreasonable because it would disband a highly successful crime-fighting unit; unfair because the labour rights of individual Scorpions would be violated; and unresponsive to the needs of the people at a time when crime is rampant in the country.

The challenge that the abolition of the Scorpions poses to constitutionalism cannot be overstressed. The fear is that if the unit is disbanded, the government itself will be left with the final decision as to who should, and who should not be prosecuted for corruption. This would constitute a major restriction of the ability of our constitutional dispensation to limit the power of the Government.

3. Domestic legitimacy of the Constitution

Internal features of the Constitution which ensure domestic legitimacy include provision for:-

- Regular elections
- Freedom of expression
- Freedom of political activity, the rights to assemble, protest and to picket.

There can be little doubt that our Constitutional dispensation enjoys domestic legitimacy and acceptance by the people. We measure this legitimacy in free and regular elections presided over by an independent Electoral Commission. We have free and outspoken media with no limitation on the expression of political opinion. There is no limitation on the ability of people to organize, form political parties, to assemble, or to protest publicly.

There are, however, some reasons for concern:

The Polokwane conference resolved that the media should "contribute towards the building of a new society and be accountable for its actions". It also expressed the belief that the arts and culture should "serve the purposes of its National Democratic Revolution" and that the media needed to "take on a specific responsibility in this regard."

The resolution on the media warned that "the right to freedom of expression should not be elevated above other equally important rights such as the right to privacy and more important rights and values such as human dignity". It called ominously for an investigation into the establishment of a Media Appeals Tribunal to "strengthen, complement and support the current self-regulatory institutions".

It is also disturbing that the ANC does not view itself as a political party 'in the bourgeois sense' but as a revolutionary liberation movement with an uncompleted mandate. It describes itself as a "hegemonic organization" that is not just the "leader of itself, nor just of its

supporters”. It believes that “History has bequeathed on it the mission to lead South African society as a whole in the quest for a truly non-racial, non-sexist and democratic nation.”

In constitutional democracies it is the voters and not history that give parties the mandate to govern.

4. The protection, promotion and enforcement of human and peoples’ rights.

In terms of section 7 (2) of the Constitution, the state is obliged to respect, protect, promote and fulfill the rights contained in the Bill of Rights. On paper therefore, it can be said that our constitutional dispensation complies with the third test of constitutionalism.

Unfortunately, this has not been the experience of many South Africans. Whether the deficiencies arise from lack of capacity or resources, or from inadequate policies and administration, is a question for a more political debate. However, there is little doubt that our people do not, in practice, enjoy many of the key rights guaranteed by the Constitution:

- According to the UNDP we are the 12th most unequal society in the world - despite the assurance of our right to equality. And we have been getting more unequal since 1994;
- Our right to life is seriously threatened by rampant crime and the murders of more than 250 000 people since 1994;
- The right to choose a trade, occupation or profession is undermined by the reality that almost 40% of South Africans are unemployed;
- Our property rights were, until its withdrawal, under unprecedented threat arising from the Expropriation Bill, which may or may not have been consigned to oblivion;
- Our right to health care has been seriously prejudiced by a failure to provide adequate medical services and by the inadequate and late response to the HIV pandemic;
- The rights of children are abused on a daily basis by violence, rape and exploitation;
- We have failed dismally to ensure the right to education. According to recent estimates, only 42 000 of the 1.19 million children who entered the school system in 1996 and who matriculated last year, were functionally literate and ready for skilled work or proper university education; and

The constitutional assurance that all languages would enjoy parity of esteem is just not being realized - not only for Afrikaans-speaking South Africans but by speakers of all our other indigenous languages as well.

5. Conclusion

Throughout Africa the notion of protecting minority rights by way of group entitlements and privileges has been eschewed in favour of giving each and every individual equal rights under the Constitutions in place, subject to such limitations of general application as may be in place. This is theoretically effective but does not stop xenophobia and did not prevent the genocide in Rwanda in 1994. That country has made a remarkable recovery and probably takes the inculcation of a human rights and responsibilities culture more seriously than anywhere else in Africa. It seems that the shock to the nation of the genocide has had this positive consequence. Although it is claimed that since 1994 some 150 Rwandans have died in ongoing genocidal violence, most Rwandans today do not identify themselves as anything

other than just that – Rwandans. There are no longer Tutsi and Hutu divisions. South Africa has a long way to go to reach a similar embrace of broad South Africanism and in the same period, as already pointed out, some 250,000 murders have taken place in the country.

South Africa does have an exemplary Constitution which can be used as a template for measuring any other for its compliance with the tenets of constitutionalism. Any constitution that does not pass the three tests identified may be regarded as suspect. The South African Constitution is not perfect: its proportional representation system and the control of party bosses over parliamentary representatives could easily be improved upon so as to make public representatives more accountable to the people and less beholden to their parties. Also the Judicial Service Commission could be improved upon as it has not, thus far, answered the vexed “who judges the judges?” question satisfactorily and is experiencing what have been described as its “affirmative action chickens” coming home to roost.

It is apparent that while the structures of the South African Constitution remain in place and theoretically comply with the three tests posited, there is much work to be done before it can be said that the Constitution has taken root and is flourishing in South Africa. While the courts and the press remain free and independent there is still hope that this can be achieved.

Fortunately, it is not only politicians who determine the fate of nations. Religious and traditional groupings, civil society organizations, the business sector and the international community, all have a role to play in promoting constitutionalism in Africa. While the politicians are at least paying lip service to the values of constitutionalism and to the rule of law it is incumbent upon all persons of goodwill to join in promoting constitutionalism as the best means available for achieving a prosperous and peaceful future for all who live in this vast continent of unfulfilled potential.

Paul Hoffman SC

Director

Centre for Constitutional Rights

Cape Town

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