

EDITORIAL: THE CURRENT STATE OF DEMOCRACY IN SOUTH AFRICA

South African voters went to the polls on 7 May 2014 to vote in national and provincial elections. Despite widespread popular discontent, which manifested inter alia in high incidences of service delivery and other protests, the ruling African National Congress (ANC) retained its electoral dominance: it won just over 62% of the national vote and held onto its majority in eight of South Africa's nine provinces. The election results, nevertheless, showed a drop in the ANC's support levels. They also signalled a realignment of opposition politics with a significant increase in support for the Democratic Alliance and a strong showing by the newly formed Economic Freedom Fighters (EFF).

Against this background, a conference titled "**The End of the Representative State – Democracy at the Crossroads**" was held at Freie Universität Berlin on 11-12 July 2014. About 80 participants from diverse backgrounds attended the conference, which was organized by Henk Botha (Stellenbosch University), Nils Schaks (now Universität Mannheim) and Dominik Steiger (Freie Universität Berlin) and generously supported by the Fritz Thyssen Stiftung, Konrad Adenauer Stiftung, Center for International Cooperation of Freie Universität Berlin, Faculty of Law and Executive Board of Freie Universität Berlin, Ernst-Reuter-Gesellschaft, German-South African Lawyers Association and the publishing houses "Nomos" and "C. H. Beck". The conference approached the challenges facing representative democracy through a comparative lens and was structured in the form of a dialogue between South African and German constitutional scholars. Four lead papers focused on the South African experience, with responses to each of them from a German – and European – perspective, while four lead papers explored the position in Germany, with an equal number of South African responses. These contributions will appear soon in an open-access edited collection to be published by Nomos. In this issue of "Verfassung und Recht in Übersee", three of the South African lead papers are published. These three contributions reflect on the current state of democracy in South Africa, against the background of a series of tensions and difficulties that have characterised South Africa's transition to democracy and that have once again been highlighted in the wake of the 2014 elections.

The national and provincial elections in 2014 introduced a period of heightened contestation and confrontation. Opposition parties became bolder in their **demands for democratic openness**, accountability and responsiveness, and the EFF in particular resorted to tactics that were disruptive of parliamentary procedures where they felt that these demands were obstructed by the ruling party. At the same time, the ANC tightened its resolve to shield the President from criminal prosecution on charges of corruption and from having to pay back some of the money spent on the upgrades to his private homestead in Nkandla. The ensuing tensions resulted in unprecedented scenes, in which police forcefully removed members of Parliament from the parliamentary precinct. Public protests also remained a regular occurrence. The violence accompanying many protests is a concern, as is police

brutality in the face of popular dissent. Attacks on foreigners further attest to the frustrations created by poverty, poor service delivery and general feelings of powerlessness. Crude nationalist notions of belonging appear to provide some compensation for the exclusion of significant sections of the nation from real social and political membership.

These conflicts are indicative of deeper tensions and contradictions. In the first place, the **accountability of democratic representatives to the electorate** is undermined by the closed list system of proportional representation that is used in South Africa, in terms of which voters vote for political parties rather than individual representatives. The power of a political party to discipline members, who do not toe the party line or to demote them on the party list for the next election, also compromises their capacity to exercise independent judgement. The executive's ability to determine the legislative and policy agenda raises further questions over the institutional independence of elected legislatures and the integrity of their processes. What happens to democratic accountability if it is ultimately the ruling party and the executive that call the shots? Doesn't that erode the very basis of democratic legitimacy?

Secondly, it is often claimed that the electoral dominance of the ANC endangers party-political competition and threatens to undermine the independence of democratic institutions. In a dominant party democracy, the ruling party can use its legislative majority to change the rules of political engagement **to stifle dissent and suppress information** that can put it in a bad light. It can also deflect challenges to its power through its control of state resources and through the manipulation of independent state institutions. While the exact extent to which the dominant party democracy thesis sheds light on the challenges facing democracy in South Africa is contested, it does resonate with certain aspects of the South African experience, such as the growing conflation of the state and ruling party, political interference in independent state institutions like the National Directorate of Public Prosecutions and the deployment of ANC cadres to key positions in public institutions.

Thirdly, representative democracy in South Africa coexists with other forms of democratic engagement. These different modes of **political participation** are often mutually supportive. For instance, the Constitutional Court, in two landmark cases in which it held that Parliament is under an enforceable obligation to facilitate public participation in the legislative process, stated that the Constitution envisages a model of democracy which contains representative and participatory strands, through which a dialogue between the people and their representatives is instituted.¹ However, not all democratic engagement occurs in formal spaces which are framed by the state and where members of the public participate at the state's invitation. Popular protests, which have become such a regular feature of public life in South Africa, take place outside of these institutional spaces and stand in a more complex relationship with representative democracy. While it would be wrong to conceive

1 *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC); *Matatiele Municipality v President of the Republic of South Africa (2)* 2007 (1) BCLR 47 (CC).

of these two as wholly distinct spheres which do not overlap, the apparent lack of a direct correlation between the number and intensity of public protests and shifts in electoral support away from the ruling party raises concerns over the link between voters and representatives and the overall legitimacy of the representative system.

These problems are, of course, closely bound up with the specific legal, historical, political and socio-economic contexts framing the post-apartheid legal order. However, that is not to say that the broader, underlying challenges are unique to South Africa. In other jurisdictions, too, it is claimed that **the represented have lost faith in the political classes**, and that representatives **themselves experience growing feelings of powerlessness**. In other democracies, too, doubts are raised over the capacity of the representative system to secure the conditions under which exercises of public power can truly be said to emanate from, and be held in check by, the power of the people. In other systems, too, the idea of civic participation as a remedy to the ills of the representative state has gained ground.

The aim of the 2014 conference was therefore threefold. First of all, it sought to **diagnose the crisis** of the representative system, with reference to i) the institutional and supra-national constraints and pressures to which representative institutions are subject; and ii) a loss of trust in representatives as a result of failures to comply with the democratic demands of openness and transparency. Secondly, it asked whether and how this (perceived) **loss of legitimacy** could be addressed through changes to the representative system, for instance by i) redrawing the boundaries of the electorate to ensure a better fit between those entitled to vote and those subject to state power; and ii) strengthening the position of legislators vis-à-vis the executive and political parties. Thirdly, it asked whether the representative system could be supplemented and reinvigorated through the **importation of elements of participatory and direct democracy**.

Reworked versions of three of the South African papers delivered at the conference are published in this volume. *Wessel le Roux*'s essay problematizes the very basis of political rights and of democratic representation in an age characterised by high levels of migration. He uses recent case law in Germany and South Africa which dealt either with the voting rights of non-resident citizens or with the voting rights of foreigners residing inside the borders of the state, as the backdrop for his analysis of two competing understandings of the basis of voting rights. While the traditional understanding grounds political rights in citizenship (understood as nationality), an alternative model bases the right to vote on equal residence or **denizenship**. The former can accommodate voting rights for non-resident citizens but not for resident non-citizens; the latter, by contrast, seeks to integrate migrants into the political community by granting them the right to vote, but excludes expatriate citizens from the electorate. *Le Roux* argues that the traditional model cannot facilitate a democratic response to the challenges of migration. Only the post-nationalist idea of residence-based voting rights can provide the basis for a democratic negotiation of the growing divide between nationality and residence in post-apartheid South Africa.

Jonathan Klaaren's essay examines the long-drawn-out process through which the controversial **Protection of State Information Bill** ("the Bill") was considered. The Bill – or

at least some of the various versions through which it has morphed – is viewed by many as a threat to the transparency that is indispensable to the open and democratic society envisaged by the Constitution. *Klaaren* is interested in what the consideration of and debate over this Bill reveal about the functioning of democratic institutions in South Africa. In this regard, he looks at Parliamentary oversight of the state's security apparatus, the position of political parties and the actual roles played by the two Houses of Parliament in national debate. In addition, he also considers the framing of the issues in public discourse. Criticising the dominant party democracy thesis, he argues instead for a frame of analysis which foregrounds tensions relating to the symbolic roles played by the media and the intelligence services. Finally, he argues for a rethinking of the relationship between transparency and secrecy as a way of providing a more nuanced understanding which is able to move beyond the rigid oppositions that have characterised much of the debate on the Bill.

Richard Calland and *Shameela Seedat*'s essay focuses on Parliament's institutional independence and its role in holding the executive to account. They note that Parliament has for a variety of reasons – related inter alia to the electoral system, the power of political parties to discipline their members and the dominance of the ANC – not been particularly effective in ensuring **government accountability**, but that the proceedings of the National Assembly appear to have been characterised by a renewed vitality since the 2014 elections. They analyse a number of recent events where parliamentary proceedings were characterised by sharp confrontation between the governing party and opposition parties over the latter's attempts to call the government to account, and ask whether and to what extent the EFF's disruptive tactics have reinvigorated Parliament or diminished its integrity.

Together, these contributions paint a picture of a democracy marked by contestation over the identity and bounds of the people, the relationship between the people and their representatives, the position of legislators vis-à-vis political parties and the executive, and the balance to be struck between transparency and countervailing interests such as national security. How these conflicts are to be navigated will have important implications for the post-apartheid constitutional order and for its capacity to respond to the crisis of the representative state.

The conference forms part of a larger and ongoing German-South African collaboration between Stellenbosch University, University of the Western Cape and Freie Universität Berlin on the law relating to democracy. In 2012, a first colloquium on questions of democracy in South Africa and Germany took place in Stellenbosch. A follow-up conference will be held at Stellenbosch University on 26 February 2016. The sessions will focus on the fundamental prerequisites of democracy, such as the people, the public sphere and fundamental rights. The conference will deal with these topics both from a South African and a German perspective. For more information please contact Henk Botha at hbotha@sun.ac.za.

Henk Botha/Nils Schaks/Dominik Steiger (guest editors)
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