LEGISLATIVE IMMOBILITY AND JUDICIAL ACTIVISM: THE IMPACT ON THE SEPARATION OF POWERS IN SOUTH AFRICA

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Abstract

The division between the legislature/executive and the judiciary in a constitutional state is a very important, but precarious relationship. It is important that the political arm (legislature/executive) understand the critical role of the judiciary as custodian of the Constitution within the constitutional framework. Without the basic respect for and understanding of the role of the judiciary, politicians in the government can easily frustrate the judiciary primary function to uphold the law and to establish the rule of law in a country. If the relationship deteriorates and the status of the judiciary is degraded by the ruling party it will in the long run tarnish the status of the constitutional state and that of the rule of law in the country. This article deals with the internal process to initiate a private members bill in parliament with an explanation how easily it can be frustrated by the majority party in the standing committees and in parliament. The passing of the private members bill could be frustrated by the ruling party by using their numerical advantage. However, it is also pointed out that the purpose or goal of the same private members bill could also be reached by other means, such as a ruling by the High Courts. The article analyse this phenomenon and outlines the potential impact thereof on the principle of the separation of powers in South Africa.

Keywords: Constitutional state, judiciary, legislature, executive, Supreme Court of Appeal.

Sleutelwoorde: Grondwetlike regering; regbank; wetgewende gesag; uitvoerende gesag; Appélhof.

1. INTRODUCTION

President Jacob Zuma has twice in 2011 declared that the judiciary in South Africa was not more powerful than the will of the majority. These sentiments were in reaction to the rulings by the courts (judiciary) in their determination to protect the rights of individuals or minorities in the country (*Die Beeld* November 2011). These and other similar statements by politicians have created some concern amongst the general public, and experts within the international law community particularly, because it reflects a contradictory understanding of the inherent characteristics and role of the judiciary in a constitutional state.

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The role of the Constitution and the Bill of Rights in South Africa's new constitutional state was earlier (1995) ably illustrated in the death penalty case.[2] The ruling in the case emphasised that basic (individual) human rights in some specific cases will have precedence over the will of the majority.

This case, which abolished the death penalty, was one of the first important decisions made by the Constitutional Court in South Africa in the period immediately after democratisation. In his deliberation, Judge Didcott referred to the statement of Powell and Jackson, judges of the United States Supreme Court, who argued that the "assessment of popular opinion is essentially a legislative, not a judicial, function, and that the very purpose of a Bill of Rights is to *withdraw certain subjects form the vicissitudes and to place them beyond the reach of majorities* [own emphasis]". Judge Didcott then argued that this decision is not a populist, legislative or executive decision, but the prerogative and duty of the judiciary "and not of representative institutions" (Klüg 2000:145).

In a constitutional state, the relationship between a powerful, effective parliament, representing the majority will, and the judiciary is an interesting dichotic relationship which will constitute the focal point of the article. In the discussion reference will be made to two important judgments that were recently made in the Cape High Court and the Supreme Court of Appeal.

2. BACKGROUND TO THE RESEARCH QUESTION

The relationship between the legislature and the judiciary in South Africa was clearly illustrated in a number of cases. The Supreme Court of Appeal judgment in *South African Transport and Allied Workers Union vs. Jacqueline Garvis and others*[3] on 27 September 2011 related to the constitutional validity of section 11(2)(b) of the Regulation of Gatherings Act 205 of 1993. The defence (the South African Municipal Workers Union) in the case maintained that section 11(2)(b) of the Act restricts the constitutional right of trade unions (s 17 of the Constitution) to assemble and to strike.

In its judgment, the Supreme Court of Appeal reaffirmed the decision that the court of the first instance (Western Cape High Court, Cape Town) has reached earlier. The Court found that the entire scheme of the Regulation of Gatherings, Act 205 of 1993, including section 11, was specifically designed to prevent unlawful violent behaviour when mass protest and strikes take place. The Court stated that when these actions occur and impinge on the rights of others, the Act will ensure that the organisers of strikes that degenerate into riots should bear liability. The

2 *S v Makwanyane* 1995 (3) SA 391; 1995 (6) BCLR 665 [188].
3 (007/11) [2011] ZASCA 152 (27 September 2011).

Court also found that this liability is not inconsistent with the constitutional right (s 17) to assemble and demonstrate peacefully.

The political irony is that this judgment handed down by the Supreme Court of Appeal in *South African Transport and Allied Workers Union vs. Jacqueline Garvis and others*[4] and the court of the first instance, the Western Cape High Court, accomplishes exactly what the official opposition (through legislative means) was earlier trying unsuccessfully to achieve in parliament. The official opposition (the Democratic Alliance) had in the preceding months and years attempted to reach a similar outcome (to hold strikers liable for damages) by submitting a private members bill to parliament. However, the numerical dominance of the ruling ANC party in the various standing committees effectively frustrated the progress of the bill.

The judiciary (the courts), however, confirmed and extended the rights of shop owners and other concerned parties to hold trade unions liable when damages occur during mass action. In reality, the formulation of such a policy should have been the prerogative, primary duty and function of the executive/legislature in parliament. Civil society has already expressed its opinion that there is a need for firm action to be taken against damage caused by strikers during mass action in central business districts. The DA has taken the initiative to formulate applicable legislation and submitted it as a private members bill to the standing committee in parliament.

The ability of a standing committee in parliament to block initiatives, such as a private members bill, is directly related to the shortcomings of the parliamentary system. A numerically overbearing ruling party can potentially frustrate the aspirations and initiatives of minority parties in the legislative chamber and in committees. In this regard the standing committee that deals with the private members bill was able to delay the specific bill for more than two years by putting technical hurdles in its path (Pretorius – e-mail communication October 2011).

The Supreme Court of Appeal judgment in this matter is therefore highly significant and will ultimately have an impact on subsequent political events in the country. The judgment will also have a significant impact on intergovernmental relationships and the application of the separation of powers between the fused legislature/executive and the judiciary.

3. OBJECTIVE OF THE ARTICLE

The Supreme Court of Appeal judgment in *South African Transport and Allied Workers Union vs. Jacqueline Garvis and others* and the parliamentary standing committee's reluctance to deal decisively with the matter have created an interesting scenario in terms of South Africa's constitutional development.

4 (007/11) [2011] ZASCA 152 (27 September 2011).

The impact of the judgment on the interrelationship between the fused executive/legislature and the judiciary is very significant and as indicated earlier forms the focal point of the article. The objective of this investigation is to isolate two interrelated aspects of the judgment for analysis, namely:

(i) The impact of the Cape High Court and the Supreme Court of Appeal's judgment on the separation of powers principle in government.

(ii) The ramifications of the perceived "judicial activism" on the status of the judiciary within the broader demographical transformation in South Africa.

In order to achieve the above objective, a brief introductory outline of the separation of power principle, with reference to the principle's status in South Africa, will be provided. This will include an outline of the three branches of government: the executive, the legislature and the judiciary and their interrelationship within the political system. However, in order to progress beyond a mere descriptive approach, the second part of the article will outline and explain the potential political effects and the impact that the Supreme Court of Appeal judgment may have on the future status and integrity of the judiciary in South Africa.

4. SEPARATION OF POWERS – SEPARATE BUT EQUAL?

Basson (1994: v) describes the (interim) Constitution Act 300 of 1993 as the most ambitious legislative instrument of all time (in South Africa). The adoption of a supreme Constitution represented a complete break with the old constitutional dispensation of Westminster-style sovereignty. However, one of the most important guiding constitutional principles that was ingrained in the new political system was the provision for the formal separation of powers between the executive, the legislature and the judiciary (Devenish 2004:112).

The separation of power was firmly entrenched in the interim and final Constitution[5] and complies with the conventional wisdom that the threefold division of labour between the legislature, the executive and the judiciary is a necessary condition for the rule of law in modern society (Wade & Bell 1991:50). The separation of powers is very valuable in maintaining a balance of power and for that reason is one of the oldest constitutional principles in politics and constitutional law. As Rautenbach and Malherbe (1996:68) remark, any discussion of the term *government authority* would be incomplete without reference to the contribution that the separation of powers doctrine can make to a stable government. The fundamental value of separation of powers lies in its constitutional checks and balances to ensure that state authority is constitutionally controlled and not exercised arbitrarily by a single body.

5 Act 108 of 1996.

The principles of cooperative government between the executive, legislative and judiciary are outlined in section 41 of the Constitution. Section 41(f) states that (all spheres of government) should "not assume any power or function except those conferred on them in terms of the Constitution". Section 41(g) adds that (all spheres of government) should "exercise their powers and perform their functions in a manner that does not encroach on … functional or institutional integrity of government in another sphere".

Within its basic functional domain the division of the three branches of government is described as legislative authority (power to make, amend and repeal rules of law), executive authority (execute and enforce rules of law) and judicial authority (to determine what law is and how it should be applied (Rautenbach & Malherbe 1996:68).

5. THE "DECLINE" OF THE STATUS OF THE LEGISLATURE IN MODERN PARLIAMENT

In modern governments there is a marked tendency that the legislature in parliament is losing its status in the threefold relationship. There is clearly a growth of the power of the executive at the expense of the legislature. In the classical work *The English Constitution* (1867), Sir Walter Bagehot had cynically declared that the parliament (legislature) is merely a big meeting of more or less idle people (Jackson & Jackson 2003:276 and also Heywood 2003:296).

Two inherent functions of parliament should potentially frame its character and role within a democracy. Inherent in a parliament's existence is the symbolic notion that it is democratically representative of a wider society. The legitimacy of parliament is therefore largely built on the fact that this institution or chamber "represents the people", which should enhance the notion and appearance of the presence of a democracy in a state.

Parliament's second function is to serve as the basic source of legislation as the supreme law-giver in society (Garner, Ferdinand & Lawson 2009:217). The primary function of parliaments in democracies to serve as the basic source of legislation has, however, historically being vindicated. The practical reality is that globally almost 90% of new legislation originates in the executive rather than in the legislature and 90% of the legislation that has originated in the executive branch has been adopted (Garner *et al*. 2009:217). In terms of formal institutional status, the legislature in a fused legislative/executive relationship is supposed to exercise control over the executive authority, but in practice it is dominated by the executive branch (Jackson & Jackson 2003:276). This practical reality dispels the notion that legislatures are crucial institutions in any political system, especially in democracies.

Although the formal trappings may indicate that the legislature contributes to the diversification of power within the political system, in reality it concentrates power as a result of the executive controlling the legislative chamber. In a parliamentary system a partisan majority party, especially when it enjoys a sizeable majority, generally dominate proceedings within the chamber. The fused executive/ legislative parliamentary system also exercises control over the legislative processes within parliament on the basis of its numerical dominance. A simple majority is all that is required to pass a bill in parliament and numerically the opposition is being outmanoeuvred. The only defence is to approach the judiciary when the bill appears to be unconstitutional.

As Devenish (2004:113) indicates, one of parliament's essential functions is to criticise and control the executive and in this manner play an important role in a negotiated and peaceful resolution of conflict. The Speaker of the parliament must also ensure that minorities are meaningfully protected and that they are alienated within the democratic environment. In reality, however, the ruling ANC with its majority of close to two-thirds of the members of the National Assembly, adopts a very strong partisan approach to politics and maintains a stranglehold on proceedings. It experiences few problems passing a bill in parliament, while the opposition and smaller parties are constantly frustrated in their efforts to influence proceedings.

6. PRIVATE MEMBERS BILL – A ROAD LESS TRAVELLED?

However, there is a lesser known avenue that opposition parties can use to introduce a bill in parliament and that is in the form of a private members bill. The procedure requires for this alternative procedure is that the private members bill first has to pass technical scrutiny in a standing committee before it can be submitted to parliament. This technical obstacle ensures that, in reality, only a small number of private bills are actually enacted worldwide. In Britain, with its long parliamentary history, only a relatively small number of private members bills have been enacted over the years, such as the Abortion Act of 1967. However, just across the channel, in the Republic of Ireland, a private members bill has rarely been enacted and this trend seems to be the more general one in parliamentary systems ((Jackson & Jackson 2003:259 and Heywood 2004:115). The main reason is that the bill needs to be scrutinised by various committees before it even reaches the legislature. During this process the ruling party will oppose and will even obstruct its progress and it is therefore very difficult to ensure the necessary support for the bill to progress. In parliament with disciplined political parties (following the partisan line) such as Australia, Britain and Canada private member bills are rare and a few ever become law (Jackson & Jackson 2003:276).

In South Africa where the ruling party, with a clear political agenda, has hesitated to instigate much-needed measures to deal with a problem such as the damage caused by strikers out of control, the responsibility will then undoubtedly shift to the parliamentary opposition. One of the available avenues to deal institutionally and democratically with such matters is to attempt to submit a private members bill. This is then an attempt to put measures in place to substitute the government's inability to act decisively because of party loyalties.

One such instance was in the central business district of Cape Town where shop owners and other concerned parties reacted with shock to the striking municipal workers acts of violence and their destruction of property during the South African Municipal Workers Union (SAMWU) mass protest action. Many concerned citizens felt that the union should be held responsible for the damage that was caused by its members during marches and strikes.

A member of the Democratic Alliance, Ian Ollis, in reaction introduced a private members bill to the applicable standing committee to address the specific problem**.** The private members bill was a proposal to amend the Labour Relations Act of 1995 in an effort to make unions and their striking members jointly responsible for their actions when property is damaged during an organised strike or picket action. As Ollis (2011:1) explains, the rationale behind the bill was to compel office bearers and unions to take reasonable action to avoid lawlessness during strike action in the central business areas of cities and to avoid damage to private property.

Ollis (2011:1) believed that there was a legal precedent for legislation to hold unions responsible for damage inflicted by their members during a strike. The courts emphasised this need when Cape Judge President, John Hlophe, awarded a sum of R70 000 for damages when striking members of the SAMWU inflicted damage on cars and shop fronts. As expected, SAMWU reacted strongly and although the union condemned the related violence it stated that it could not be held responsible for its members' actions (*Mail and Guardian on line* 2011:1). The main thrust of its reaction was that this proposed legislation through a private members bill was an attempt to curtail the trade unions and would hamper their right to strike.

The introduction of a private members bill by Ollis (2011:1) was intended to "incentivise unions and (force) office bearers to take action to avoid lawlessness". On a technical and procedural level a private members bill has to follow a specific route which starts with a submission to a standing committee in parliament that has to decide and eventually verify the bill's technical and constitutional merits. This includes aspects such as the constitutionality of the proposal, whether similar legislation already exists and whether government should consider similar steps through its own legislative programmes. If the proposal is found to be compatible with the technical and constitutional requirements, a report to this effect will then be

issued to parliament. The next step is for the proposal to proceed to the applicable portfolio committee for in-depth analysis of the nature of the bill (Pretorius – e-mail communication October 2011).

Within a volatile political environment the outlined theoretical and procedural requirements are however used regularly to frustrate the progress of private members bills. Since 2009, none of these bills that have originated from the opposition have managed to clear the first technical and/or constitutional hurdle to progress from the standing committee to parliament. The numerical dominance of the ruling party within the standing committee has undoubtedly ensured that very little progress has or will be made when such an avenue is pursued. Jan de Lange, ANC member of the standing committee, has already referred to the specific proposal as a "publicity stunt" (*Mail and Guardian on line* 2011:1) and the bill has since its introduction been bogged down in the standing committee for months.

There is therefore very little chance that the private members bill objective to hold trade unions responsible for the damage and violence that their members cause to the property of shop and car owners will be realised. The avenue is decisively controlled by the numerical dominance that the ruling party enjoys in parliament which makes its progress highly unlikely.

7. THE JUDICIARY: THE HIGH OR THE LOW ROAD?

As Rautenbach and Malherbe (1996:215) explain, one of the essential roles of government in a political system is to adjudicate disputes in the society. In this regard the legislature is an important institution for settling disputes in government where differences could be settled through debates and other forms of deliberation.

The judiciary is also a very important institution for resolving disputes in society. The difference is that the judiciary is restricted to those disputes *that can be resolved by applying the law***.** The judiciary's task is to resolve disputes through a process of interpretation and the application of statutory and common law rules. This is a very important role in government that ensures that existing policies can be adapted, supplemented and developed through the application of law. The important aspect, however, is that this form of judicial law-making always has existing rules of law as a point of departure during the process of interpretation and application.

As Rautenbach and Malherbe (1996:215) explain, this is a more limited form of the law-making function than that of the legislature whose primary function is to review, adapt or replace law. However, a decision by the court is "final" in the sense that it may only be reviewed by a higher court and not by another government body. It is against this background that the Cape Town High Court's and the Supreme

Court of Appeal's judgments that SAMWU should be liable for the damages that its members caused during the strike should be seen.

Ironically, the judgment that was made obtained the same outcome as the DA opposition were hoping to achieve through their private members bill. The opposition was hoping to hold the organisers of the strike liable for damages caused by the strikers through legislative means, albeit through the institutional parliamentary backdoor of a private members bill. (However, their attempts were futile in the face of the dominance that the ruling party exerted in the parliament and in the standing committee.)

Nevertheless, as Richardson and Genn (1994:15) explain, all forms of judicial review (including examples of judicial activism in the form of limited law-making) are enigmatic institutions, because they principally operate in states with democratic philosophies. The effect of the alternative route to "limited lawmaking" by the courts is that it could potentially set the decisions of the majority party aside, and in the process frustrate the will of the majority. This phenomenon creates tension within the intergovernmental sphere between the various branches and the relationship between courts (judiciary) and the authority of parliament.

The enduring and crucial question is therefore how to solve the theoretical insoluble contradiction that could emanate as a result of the relationship between the executive/legislative and the judiciary. The "undemocratic" institution (unelected judiciary) plays an important role in safeguarding groups and individuals against the "abuse of power" by majorities, but on the other hand it could frustrate the will of the majority, which could create tension within the political system.

SAMWU argued this point in its defence in *South African Transport and Allied Workers Union vs. Jacqueline Garvis and others* [4] when the union stated that section 11(2) places too great a burden on trade unions and that [5] trade unions would be deterred from organising marches or protest action for the fear of financial ruin. However, the court clearly valued the rights of individuals [49] and reiterated that members of the public are entitled to protection against the behaviour that flouts the rule of law and the rights of others [49].

The Cape High Court's and the Supreme Court of Appeal's judgements, which reiterated the rights of individuals during strike action, are strictly speaking just an interpretation of existing laws (Regulation of Gatherings Act 205 of 1993 section 11(2)(b)). As Mauro Cappeletti writes of judicial review or judicial activism in its varied forms in Western societies,"it serves as a protection against the mutable whims of passing majorities, a means of protecting minorities in democracies and expressing enduring values such as the permanent will rather the temporary whims of the people" (Richardson & Genn 1994:15).

In South Africa, the political reality is that tremendous pressure is constantly being put on the government for the judiciary to transform. The judgment by the

courts, in favour of individuals versus the majority, has therefore through the years been envisaged as just another obstruction in the "demographic revolution" of the state. The reform of the judiciary relates to the notion that the judiciary is not reflecting the racial demography of the country and that its unrepresentative nature continue to favour and protect especially the white minority in the country

The Supreme Court of Appeals' decision to extend protection to shop owners and other businesses during protest action is seen in some circles as a move to protect the interests of minorities against the rights and the will of the majority in the form of the trade unions. This was exactly the reason why parliament in the first place was reluctant to initiate stronger measures against strikers and explains why the opposition's private members bill made little progress.

The judiciary in South Africa was until recently able to maintain its distance from the centralising gravitational pull of the fused legislature and executive branches and was able to deliver objective decisions based on the interpretation of the law. However, this did not protect it from criticism and it had to endure perpetual criticism for the "lack of transformation" and for reflecting the previous regime's values.

When the different forms of government (presidential, semi-presidential and parliamentary systems) are analysed, it is obvious that the parliamentary form of government has more strongly institutionalised the notion that the whole (the parliamentary majority) is more important than the rights of minorities and individuals. In its purest form the parliamentary system, with the accompanying notion of parliamentary sovereignty, has an uninhibited ability to institutionalise and manifest the will of the majority. As the strongest party in parliament the majority party can afford to simply "ignore" smaller parties and minorities and steamroller their opposition.

In the modern state, as a result of the emergence of the policies of social and liberal democracies, the executive government and public administration are progressively characterised by an unprecedented expansion of executive power. South Africa's 1996 Constitution has created an executive presidency, which is more powerful than any similar position under the previous constitutions (Devenish 2004:148). The executive originates from the ranks of the majority party in parliament and in a fused executive/legislative system dominates the legislature and its standing committees and leaves the opposition in the legislature largely without any real power.

8. THE CONSTITUTION AND THE MAJORITY WILL – AN IMPLICIT CONTRADICTION?

During the early 1990s, South Africa's constitutional revolution replaced parliamentary sovereignty with a constitutional supremacy which designates the Constitution as the "supreme law" of the land. The constitutional state, in direct contrast with the characteristics of a parliamentary system, is not a product of nature, but rationally created with an atomistic view of the state and a strong emphasis on individualism and the rights of individuals and minority groups. The constitutional state furthermore strives to "frustrate and restrict" the majority will by contractually protecting individual rights in a bill of rights in an entrenched constitution.

The decision in *Marbury vs. Madison 5* US (1 Cranch) 137 (1803) in the United States to invalidate congressional legislation in conflict with the Constitution set the global stage for constitutional supremacy. This was achieved by channelling and separating political power into three institutions, the legislative, the executive and the judiciary, each with its own powers and inherent built-in checks and balances. Furthermore, differentiation and the acknowledgment of the rights of minorities were entrenched in a Constitution that was protected by a judiciary which played the watchdog role. Indeed, the constitutional state was created to dilute the will of the majority by putting rational created restrictions in its way.

The protection extended by the Cape High Court and the Supreme Court of Appeal to shop owners against striking workers who damaged their property was therefore a mere extension of the rights entrenched in the Bill of Rights. Vincent (2009:13) reiterates this and explains that constitutional supremacy, as encapsulated within a constitutional state, is a very particular form of representative democracy, because it was *foremost a non-majoritarian mechanism that entrenched fundamental individual rights out of the reach of majorities* [own emphasis].

A constitution is mechanically created to provide checks and balances within the democratic system and to act as a buffer against overbearing power, especially the power of a majority over a minority. As Vincent (2009:13) ably explains, the root problem still lies on a political level with the equation of democracy with the "will of the people". The will of the people represents a very basic challenge to the founding principles of a constitutional democracy, which are fundamentally different from parliamentary sovereignty.

As Devenish (2004:16) explains, constitutional democracy is more than a mere majority role and parliamentary sovereignty. "It is a complex phenomenon of political morality in which the majority, minorities and individuals have rights and obligations which the courts must interpret, apply and protect."

This was illustrated in South Africa during the death penalty case, one of the first important decisions made by the Constitutional Court after democratisation. Judge Didcott, in his deliberation, referred to the statement by Powell and Jackson, judges of the United States Supreme Court, who argued that the "assessment of popular opinion is essentially a legislative, not a judicial function, and that the very purpose of a Bill of Rights is *to withdraw certain subjects form the vicissitudes and to place them beyond the reach of majorities*"[own emphasis]. Judge Didcott then argued that this decision is not a populist, legislative or executive decision, but the prerogative and duty of the judiciary "and not of representative institutions" (Klüg 2000:145).

It is therefore evident that a constitutional state will (when necessary and based on law) "frustrate" the absolute freedom of the will of the majority, especially when individual rights are at stake. A constitutional state, with a liberal constitution, was created precisely for this purpose and to foster and protect the principles of differentiation, diversity, minority rights and individual freedom against majority will, or the idea that the whole is more important than the parts.

In the South African constitutional structure the legislature therefore has to function within this structural and functional environment and although it may give expression to the will of the majority it still finds itself within the overarching structure of a supreme Constitution. Within the Constitution the will of the majority may be set aside when the judiciary applies and interprets legislation and the Constitution, as was illustrated by the judgment in *South African Transport and Allied Workers Union vs. Jacqueline Garvis and others.*

However, the setting aside of the aspirations, objections or decisions of democratically elected bodies, such as the legislature (majority will) or of mass movements such as trade unions, is highly contentious and could potentially be a source of systemic stress (Devenish 2000:16). The constitutional state's intrinsic "counter-majoritarian" mechanism has an adverse effect on a democratically elected legislature, which depends on majoritarianism to effect and push through its will and effect changes, also on mass movements that rely on their numbers to effect changes (Devenish 2004:16).

To be democratic a government requires, *inter alia*, respect for the Constitution, especially for the internal arrangements (checks and balances) that were constitutionally set out to avoid the arbitrary abuse of power. The constitutional checks and balances include a high regard for the rule of law, the independency and integrity of the judiciary, a respect for the separation of powers within the state apparatus, and government's underpinning desire to maintain a clear separation between party and state.

To its credit, the ruling ANC, since taking over power in South Africa, has rarely used it numerical dominance in parliament to make any disturbing

amendments to the Constitution. A number of free and fair elections have been held during this period which has strengthened the consolidation of the democracy. However, on a different level, the ANC dominance in a *de facto* one-party state and its tendency towards majoritarianism, which is noticeable in most of its policies, is a disturbing development. As Jeffery (2010:1) states: "The ANC continues to regard itself, not as an ordinary political party, bound by the ordinary political rules of the political game, but as a vanguard of a liberation movement intent on implementing a national democratic revolution." In this regard mass movements such as trade unions fulfil an important role to implement the control of the majority.

The details of the ANC's national democratic revolution in South Africa are still consistently being hammered out in policy documents, including policy documents that were adopted at the 2007 Polokwane conference. The details are still sketchy, but the aim of the democratic revolution, according to the policy document that was adopted, is to "liberate Africans in particular and black people in general from political and economic bondage" (Jeffery 2010:6). (A further transformation is therefore planned for South Africa in the form of a "new" democratic revolution. This democratic revolution is being envisaged in spite of the fact that, in 1994, the previously disenfranchised majority received full democratic rights to participate in a new inclusive democracy.)

The indications are clearly that majoritarianism and populism have already been assured a bridgehead position in South Africa through mass movements. It seems on the surface that the transition from the Thabo Mbeki to the Jacob Zuma regime has also meant a firm shift in this regard. President Zuma's utterance in 2009 that the masses should again play a stronger role in the democratic processes of the country resulted in a wave of popular protests and strikes. Zuma's supporters took the dictum that democracy meant government by the people seriously. The rights of strikers to express themselves within mass action in central business districts and the decisions by the Cape High Court and the Supreme Court of Appeal that hold them responsible and liable for damages are seen as an obstacle to these aspirations. The judiciary is still seen as "an institution that has not been transformed" within the broader national democratic revolution, especially when it frustrates the majority will and protect the rights of individuals and minorities.

This explains why Gwede Manthashe, the Secretary General of the ANC, continues to label political opponents and public institutions that frustrate the majority will as antirevolutionary. The expelled ANC Youth League leader, Julius Malema, has also often labelled opponents of the ANC as antirevolutionary. President Zuma has similarly declared on numerous occasions, in a pseudo-religious manner, that he is a mere pionne, a servant of the majority will of the mass movement (Rossouw 2009:5).

This also explains why some politicians of the ruling majority party are waging an undeclared war on the judiciary and in effect on the constitutional state. The political "attack" on the constitutional state follows a two-pronged strategy, firstly to erode the material status of the judiciary and secondly to use its numerical advantage to oppose constitutional restrictions in order to apply unbridled majority will. This explains the statement that the majority will is stronger than the decisions of the judiciary (*Die Beeld* 2011).

The eroding of the ability of the judiciary to restrict an unbridled majority will has been a protracted and ongoing phenomenon in South African politics since before 2000. There are already countless examples of how the fused government/ ANC party has attempted to dilute judicial authority (Bertelsmann 2005:45).

The status of the Judicial Service Commission (JSC) as an independent judicial watch dog has also been politically tampered with, a move that has evoked angry responses from serving and retired experts in the law fraternity. Former Constitutional Court Judge, Johann Kriegler, legally challenged the decision by the JSC not to proceed with the misconduct probe into Cape Judge President John Hlope (<http://w.w.w.mg.cp.za/2009-09-03-krieger-to-challenge-hlope-decision>).

The ruling ANC government's intentions to strengthen its control over the judiciary were practically illustrated by a succession of controversial judiciary bills during the last decade. During 2005, the government released five draft bills, including a constitutional amendment (Constitution Fourteenth Amendment Bill) that would effectively place and subject the Bench to the authority of the justice minister (executive authority). This was followed by the Superior Courts Bill of 2006 that echoed the sentiments of the Constitution Fourteenth Amendment Bill which also attempts to shift the court administration and budgeting to the Minister of Justice. The proposed bills and other utterances by the ANC are in line with a decision that was taken at the ANC conference in December 2007 in Polokwane to transform the judiciary under the control of the executive branch (Jeffery 2010:55).

The ANC party's reliance on its numerical majority and the fact that hardly any separation between party and state exists, increases the inherent danger. The emphasis shift within South Africa's constitutional state towards stronger populist tendencies in tandem with the dilution of the separation of powers principle is a dangerous embracing of the principles of majoritarianism.

During the apartheid era the ANC relied heavily on its numerical dominance when mass political action was employed to effect changes. It popularised the version of democratic politics in which the masses had a voice and could enforce their will unabated in the townships. It is therefore a natural inclination to revisit and revert back to a tactic which was so effective in the past.

The recent widespread participation in political mobilisation to influence and intimidate political decision making and discussion is therefore just a return

to the old populist strategies. However, it should be remembered that as part of the political transformation of the country, this organic populist view of politics and the state was replaced in favour of a constitutional democracy.

In the minds of many ANC supporters their strongest weapon (mass participation) was replaced by an elite pact and the protection of minorities against the majority will. Fifteen years down the road the demobilisation of the popular voice within the restrictive parameters of the constitutional state has frustrated the majority of ANC supporters. The constitutional state and the role that the judiciary plays are seen as obstacles to the will of the majority.

9. CONCLUSION

In many democratic states the judiciary is ahead of the legislature and in the application of the law formulates policies that pave the way for later legislation to follow. In the United States during the turmoil surrounding civil rights, the Supreme Court spearheaded the civil right reforms. In *Roe v Wade* (1973) the Supreme Court upheld the constitutionality of abortion when the elective bodies were reluctant to address such a controversial issue. Politically the most significant example of "judicial activism" was in December 2000 when the court overturned a ruling of the Florida Supreme court and declared the disputed election in favour of George W Bush. In this case the court practically and effectively substituted itself for the American people (Heywood 2000:307).

However, the situation in South African is more volatile which puts a damper on the role of the judiciary as law-maker. There is still an inherent suspicion of the judicial system that is seen as the protector of minorities and in effect anti-majorities. A decision by the courts based on the law which protects minorities is not seen as an interpretation and application of objective norms, but as an effort to perpetuate the interests of the minority and to frustrate the will of the majority. The consequences of this attitude are alarming because in the final analysis it endangers the role and status of the judiciary in the political system. Within the notion that the executive/legislative represents the subjective (political) dimension of a political system the judiciary forms the balance by representing the objective nature of law to balance the system. With a degraded "transformed" judiciary the political system will lose its balance and the state will become highly centralised and monolithic.

LIST OF SOURCES

Bertelsman B 2005. "Wetswysigings: 'n regter se blik", *Die Vrye Afrikaan*, 21 Junie.

Devenish GE 2004. *A commentary on the South African Constitution.* Durban: Butterworths.

Die Beeld, 3 November 2011.

Die Beeld, 17 Desember 2009.

Garner R, Ferdinand P & Lawson S 2009. *Introduction to politics.* New York: Oxford University Press.

Heywood A 2003. *Politics.* London: MacMillan.

Jackson R & Jackson D 2003. *A comparative introduction to political science.* Upper Saddle River, NJ: Prentice Hall.

Jeffery A 2010. *Chasing the rainbow: South Africa's move from Mandela to Zuma.* Johannesburg: South African Institute of Race Relations.

Klüg H 2000. *Constitution democracy: law, globalism and South Africa's political transformation.* Cambridge: Cambridge University Press.

Mail and Guardian on line, 11 August 2011.

Milo T 2005. "Democracy is more than the sums of all parts", *The Star*, 19 September.

Pretorius L 2011 (personal e-mail correspondence with DA Member of Parliament).

Rautenbach IM & Malherbe EFJ 1996. *Staatsreg*. Durban: Lexis Nexis, Butterworths.

Richards G & Genn R 1994. *Administrative law and government action.* Oxford: Claredon Press.

Rossouw J 2009. "Wat Zuma gevaarlik maak", *Die By, bylae Beeld*, 9 January.

Thomson A 2000. *An introduction to African politics.* London: Routledge.

Vincent A 1992. *Theories of the state.* Oxford: Blackwell.

Vincent L 2009. "Populism: is the ruling party heading down this road?", *Pretoria News*, 28 August.

Wade L & Bell A 1991. *Constitutional and Administrative Law.* Cambridge: Cambridge University Press, <http://w.w.w.mg.cp.za/2009-09-03-krieger-to challenge-hlope-decision>, accessed October 2010.