

Observations on representivity, democracy and homogenisation

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1 *The representivity principle*

The notion of racial and gender representivity has mushroomed into one of the foremost principles in terms of which the public order in South Africa is organised. If *transformation* has developed into the master concept of our post-1994 public order, representivity is the principal instrument for achieving transformation. Through representivity “genuine South African institutions” and organised spheres are created, each one reflecting the national population and each being a replica of all the others. Representivity features in a number of places in the constitution. However, the importance of representivity as an instrument for achieving transformation only really becomes apparent from the large number of legislative enactments that in some way or another provide for representivity. Representivity as a foundation for organising the South African public order also plays an important part in the public discourse in general.¹

Representivity is the norm in terms of which institutions and organised spheres of people are required to be composed in such a manner that they reflect the national population profile, particularly the racial profile of the national population. The specific focus of this discussion is the principle in terms of which institutions and organised spheres must be composed in such a way that they represent a cross-section of the national population of the republic as a whole. It is referred to in this discussion as “national representivity” or simply as “representivity.”

Proportional representation in the legislature and representivity are premised on the same principle. The former applies to elected legislatures and the latter to other state institutions and organised spheres of civil society. The difference between the two is that proportional representation reflects the electoral strength of political parties in legislatures, while national representivity requires the national population profile to be mirrored in the composition of other state institutions and organised spheres of civil society.

In the discussion below, the representivity principle is analysed and critiqued. It is argued that adherence to national representivity is on the one hand required in order to achieve the democratic legitimacy for state institutions² that serve common interests in which all members of the national population have an equal stake (§ 4.1). However, the application of the representivity principle to state institutions that serve a particular section of society (§ 4.2), or organised spheres in civil society that serve or plead the interests of specific communities (subsections of the national

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¹ Stacey “‘We the people’: the relationship between the South African constitution and the ANC’s transformation policies” 2003: Nov *Politikon* 133 140 argues convincingly that the Employment Equity Act 55 of 1998 reflects the view held in the ruling African National Congress that the purpose of transformation and representivity is to establish a society characterised by the equality of the national groups, which means a balance of the national groups – *ie* a proper balance or representivity of the racial groups in all sectors of society.

² The concept of state institution is used in order to include both organs of state as contemplated in s 239 of the 1996 constitution and the courts.

population), produces majority-dominated homogeneity and domination and systemic inequality inconsistent with the basic foundations of a democratic society (§ 4.3).

In section 2 below the development of the representivity principle to its current paramount position is described. Section 3 sets out the criterion against which representivity should be measured and critiqued. In sections 4 and 5 the application and enforcement of the representivity principle are analysed. The discussion closes with a brief conclusion in section 6.

2 *The emergence of the representivity principle*

2.1 The constitution

The representivity principle features in a number of places in the Constitution of the Republic of South Africa, 1996. Section 174(2) provides for the need for the judiciary to reflect broadly the racial and gender composition of South Africa.³ Section 193(2) has a similar provision in relation to the composition of the bodies established in terms of chapter IX of the constitution.⁴ For its part, section 195(1)(i) provides that the public administration must be broadly representative of the South African people.⁵

2.2 Legislation

Added to the constitutional provisions relating to representivity are numerous statutes, passed since the constitution took effect in 1997, that require compliance with the principle of representivity.⁶ Representivity requirements, contained in what

³ s 174(2): “The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.”

⁴ s 193(2): “The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.”

⁵ s 195: “Basic values and principles governing public administration (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.”

⁶ A non-exhaustive list of legislation that creates bodies that must be composed in compliance with the representivity principle is provided below. The name of the body or staff components required to be composed in consonance with the representivity principle are mentioned in every case, together with the applicable representivity provision: the National Youth Commission (s 4(2) of the National Youth Commission Act 19 of 1996); cultural councils (s 5(3) of the Cultural Institutions Act 119 of 1998); the South African Geographical Names Council (s 3(2)(b) of the South African Geographical Names Council Act 118 of 1998); the National Environmental Advisory Board (s 4(2) of the National Environmental Management Act 107 of 1998); the National Empowerment Fund (s 6(1)(b) of the National Empowerment Fund Act 105 of 1998), appointments made in terms of the Employment of Educators Act 76 of 1998 (s 7(1)(b) of the act); the State Information Technology Agency (s 14(4) of the State Information Technology Agency Act 88 of 1998); the Competition Tribunal (s 28(1)(a) of the Competition Act 89 of 1998); the National Home Builders Registration Council (s 4(2) of the Housing Consumers Protection Measures Act 95 of 1998); the Municipal Demarcation Board (s 6(3)(a) of the Local Government Municipal Demarcation Act 27 of 1998); the National Film and Video Foundation (s 7(1)(c) of the National Film and Video Foundation Act 73 of 1997); the Small Enterprise Development Agency (s 11(4) of the National Small Enterprise Act 102 of 1996); the Board of the South African Broadcasting Corporation (s 13(4)(c) of the Broadcasting Act 4 of 1999); the National Heritage Council (s 5(2) and (3) of the National Heritage Council Act 11 of 1999); the South African Heritage Resources Agency (s 14(2) and 23 of the National Heritage Resources Act 25 of

might be referred to as representivity provisions, are applicable particularly to the composition of public bodies provided for in this legislation.

Representivity provisions are phrased in different ways. Typical representivity provisions require that the body in question when viewed collectively must represent a broad cross-section of the population of the Republic.⁷ Alternatively it is stated

1999); the Council of the Independent Communications Authority and the staff of the council (s 5(3) (b) and 14(2) of the Independent Communications Authority of South Africa Act 13 of 2000); the Council for Educators (s 6(1) of the South African Council for Educators Act 31 of 2000); the Board of the National Health Laboratory Service (s 7 of the National Health Laboratory Service Act 37 of 2000); the Council for the Built Environment (s 5 of the Council for the Built Environment Act 43 of 2000); the Council for the Architectural Profession (s 3 of the Architectural Profession Act 44 of 2000); the Council for the Landscape Architectural Profession (s 3 of the Landscape Architectural Profession Act 45 of 2000); the Engineering Council of South Africa (s 3 of the Engineering Profession Act 46 of 2000); the Council for the Property Valuers Profession (s 3 of the Property Valuers Profession Act 47 of 2000); the Council for the Project and Construction Management Professions (s 3 of the Project and Construction Management Professions Act 48 of 2000); the Council for the Quantity Surveying Profession (s 3 of the Quantity Surveying Profession Act 49 of 2000); public centres (s 11(4) of the Adult Basic Education and Training Act 52 of 2000); the Appeal Board established in terms of the Firearms Control Act (s 128(2) of the Firearms Control Act 60 of 2000); the Advisory Board on Social Development (s 5(2) of the Advisory Board on Social Development Act 3 of 2001); the National Council for Library and Information Services (s 8(2) of the National Council for Library and Information Services Act 6 of 2001); the Board of the Weather Service (s 5(3)(c) of the South African Weather Service Act 8 of 2001); the Council of the Private Security Industry Regulatory Authority (s 14(4)(b) of the Private Security Industry Regulation Act 56 of 2001); the Council for General and Further Education and Training Quality Assurance (s 6(c) of the General and Further Education and Training Quality Assurance Act 58 of 2001); the Council of the Africa Institute (s 4(3) of the Africa Institute of South Africa Act 68 of 2001); the Board of the Media Development and Diversity Agency (s 4(4)(b)(i) of the Media Development and Diversity Agency Act 14 of 2002); the Board of the Land and Agricultural Development Bank (s 8(6)(a) of the Land and Agricultural Development Bank Act 15 of 2002); the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (s 9(3) of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002); the Domain Name Authority Board (s 62(3)(a) of the Electronic Communications and Transactions Act 25 of 2002); the Minerals and Mining Development Board (s 9(2) of the Mineral and Petroleum Resources Development Act 28 of 2002); the Appeal Board (s 24(5) of the Planning Professions Act 36 of 2002); the staff composition of the Electronic Communications Security (Pty) Ltd (s 14(2) of the Electronic Communications Security (Pty) Ltd Act 68 of 2002); the Commission (s 8(1)(c) of the International Trade Administration Act 71 of 2002); the Council for the Natural Scientific Professions (s 3(2) of the Natural Scientific Professions Act 27 of 2003); the local valuation appeals boards (s 58(2) of the Local Government: Municipal Property Rates Act 6 of 2004); the Financial Services Ombud Schemes Council (s 3(2)(a)(ii) of the Financial Services Ombud Schemes Act 37 of 2004); the Energy Regulator, s 6(2)(b) of the National Energy Regulator Act 40 of 2004); the Independent Regulatory Board for Auditors and its committees (s 11(3)(a) and 20(3)(b) respectively of the Auditing Profession Act 26 of 2005); the National Consumer Tribunal (s 28(1)(a) of the National Credit Act 34 of 2005); the councils of public colleges as well as the appointment of lecturers and support staff of such colleges (s 10(7)(e) and 20(7) of the Further Education and Training Colleges Act 16 of 2006); the Board of the National Metrology Institute (s 10(2)(a) of the Measurement Units and Measurement Standards Act 18 of 2006); the Board of the South African National Accreditation System (SANAS) (s 8(2)(a) of the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act 19 of 2006).

⁷ See *eg* s 28(1)(a) of the Competition Act 89 of 1998; s 13(4)(c) of the Broadcasting Act 4 of 1999; s 5(3)(b) of the Independent Communications Authority of South Africa Act 13 of 2000; s 128(2) of the Firearms Control Act 60 of 2000; s 14(4)(b) of the Private Security Industry Regulation Act 56 of 2001; s 4(4)(b)(i) of the Media Development and Diversity Agency Act 14 of 2002; s 8(6)(a) of the Land and Agricultural Development Bank Act 15 of 2002; s 8(1)(c) of the International Trade and Administration Act 71 of 2002; s 6(2)(b) of the National Energy Regulator Act 40 of 2004; s 28(1)(a) of the National Credit Act 34 of 2005.

that the body in question must, *inter alia*, be composed in accordance with the principle of representivity.⁸

The two single most important acts in relation to the representivity principle are the Employment Equity Act⁹ and the Broad-Based Black Economic Empowerment Act.¹⁰

Racial representivity is the crucial principle – the organising concept of the Employment Equity Act.¹¹ According to section 2 of the act its purpose is, *inter alia*, to achieve equity in the workplace by

“(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, *in order to ensure their equitable representation in all occupational categories and all levels in the workforce*” (emphasis added)

“Designated groups” means black people, women and people with disabilities, while “black people” is a generic term, which means Africans, Coloureds and Indians.¹² The purpose of the act is therefore in the first place to achieve *equitable representation in all occupational categories and all levels in the workforce* for designated groups. The crucial question is what is meant by *equitable representation*. The answer is that each sector within the national population profile must be reflected in the staff composition of each employer to which the act applies. This conclusion flows from relevant provisions of the act. Designated employers must in terms of section 19 analyse their workforce within each occupational category and level in order to determine the degree of underrepresentation of people from designated groups in various occupational categories and levels of the workforce. In those cases where the analysis reveals underrepresentation, designated employers must in terms of section 20(2)(c) spell out numerical goals in their Employment Equity Plans to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce, the timetable within which this is to be achieved and the strategies intended to achieve those goals.¹³

Although the phrase “equitable representation” might suggest something different from numerical representation, this is in fact not the case. Equitable representation is but a different (and euphemistic) expression for what it actually is, namely numerical representation. This means that the workforce of each employer must be organised in accordance with the composition of the whole of the South African population (which is practically little different from quotas).¹⁴ This is the clear conclusion following from the provisions referred to.¹⁵

⁸ See eg s 5(3) of the Cultural Institutions Act 119 of 1998; s 3(2)(b) of the South African Geographical Names Council Act 118 of 1998; s 14(2) of the National Heritage Resources Act 25 of 1999; s 3 of the Architectural Profession Act 44 of 2000; s 3 of the Landscape Architectural Profession Act 45 of 2000; s 3 of the Engineering Profession Act 46 of 2000; s 3 of the Property Valuers Profession Act 47 of 2000; s 3 of the Project and Construction Management Professions Act 48 of 2000; s 3 of the Quantity Surveying Profession Act 49 of 2000; s 24(5) of the Planning Professions Act 36 of 2002.

⁹ 55 of 1998.

¹⁰ 53 of 2003.

¹¹ Brassey “The Employment Equity Act: bad for employment and bad for equity” 1998 *ILJ* 1363.

¹² s 1 of the Employment Equity Act.

¹³ As regards the duties of designated employers in relation to affirmative action see further Van Niekerk (ed) *Law@work* (2008) 153-156.

¹⁴ Stacey (n 1) 140 and 141. The difference between quotas and numerical targets is discussed in some detail by Louw “Should the playing field be levelled? Revisiting affirmative action in professional sport” 2004 *Stell LR* 240-242.

¹⁵ See Solomon 1999 *SA Mercantile LJ* 233 as well as Stacey (n 1) 139.

In order to achieve representation for black people, designated employers must apply the percentages of the population as a whole constituted by Africans, Coloureds and Indians as the criterion for the composition of their workforce. Compliance with the representivity requirement in racial terms therefore implies that all the categories and levels in their workforces must consist of approximately 79.6% Africans, 8.9% Coloureds, 2.5% Indians and 9.1% whites.¹⁶ The act is therefore substantively aimed towards the achievement and maintenance of quotas (euphemistically phrased as equitable representation) in the workforce.

The affirmative action (and representivity mechanisms) provided for in chapter III of the act applies to designated employers. Designated employers are employers with 50 or more employees or employers who employ fewer than 50 employees, but with a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of schedule 4 to the act.¹⁷

The act is broad in scope as regards the nature of employers. Of particular importance is the fact that the act is not limited to business ventures – mainly companies – that have people in their employ, but also covers employers in general regardless of the venture which employs people. Hence it is equally applicable to ventures with or without profit motive. Apart from business ventures, it therefore also applies in principle to cultural, recreational, sports, religious, educational, youth, political or professional organisations or any other organisation or society with employees.¹⁸

The Broad-Based Black Economic Empowerment Act establishes the legal framework for the promotion of black economic empowerment.¹⁹ The achievement of equitable representation in all occupational categories and levels in the workforce is one of the ingredients of black economic empowerment as defined in the act. Various other aspects of black economic empowerment are also broadly in line with the achievement of the goal of representivity. This also applies to increasing the number of black people who manage, own and control enterprises and investment in enterprises that are owned or managed by black people.²⁰ The codes of good practice and the transformation charters that have been adopted in terms of the act²¹ promote, inter alia, representivity in the management, workforces and ownership of private companies as important components of black economic empowerment goals. Business ventures participating in the achievement of these goals are advantaged in so far as they are placed in a much better position in respect of the awarding of state contracts, as opposed to those not participating. The prospects of the latter

¹⁶ This is according to the mid-2007 estimates of Statistics South Africa as reflected on <http://www.southafrica.info/about/people/population.htm> (29-4-2010).

¹⁷ s 1 of the act. Designated employer also means a municipality, as referred to in ch 7 of the constitution; an organ of state as defined in s 239 of the constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and an employer bound by a collective agreement in terms of s 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of the act, to the extent provided for in the agreement. If s 2(b) of the act is read on its own the purpose of the act which includes the achievement of equity in the workplace by implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce, seems to be applicable to all employers, regardless of their size. However, if it is considered with s 4 that deals with the application of the act, the goal of representivity seems to be applicable only to designated employers.

¹⁸ As to the applicability of the Employment Equity Act to athletes in contractual relationships with professional sports bodies, see Louw (n 14) in the first part of his article 132 and 134.

¹⁹ preamble of the act.

²⁰ s 1 and 2 of the act.

²¹ s 9 and 12 respectively of the act.

group drawing advantage from lucrative business contracts with the state are much weaker, to say the least.²²

2.3 The public discourse

With representivity being eagerly enforced and promoted with such a formidable array of legislation covering virtually all aspects of current South African society, there is in all probability no other legal principle that is so virulently and unrelentingly pursued. The representivity drive is also abetted by an ongoing insistence by government spokespersons and other prominent figures for institutions to be reflective of the national population profile. This has also contributed significantly to the fact that representivity, together with transformation, has developed into an exceptionally important notion of the present constitutional order. On 18 August 2009 a former justice of the constitutional court, Kriegler, noted that representivity has become the overriding principle applied in the selection of judges by the Judicial Service Commission, in spite of the fact that it flies in the face of the constitution. Kriegler observed:

“But, from where I look at the judiciary today, and the way I have been watching the Judicial Service 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.”²³

Years ago the former deputy minister of justice and constitutional development, Mr De Lange (in his capacity at that stage as chair of the justice and constitutional development committee in the national assembly and later deputy minister of justice), also stressed the importance of representivity as the guiding principle in the appointment of judges. Speaking in the national assembly De Lange explained that transformation of the judiciary comprised two elements: first, the realisation of the objective equitable representation of blacks and women, described as “diversity, personnel or symbolism transformation”; and, second, transformation relating to the intellectual or ideological approach adopted by judges and magistrates, which he referred to as “intellectual content or substantive transformation”. Transformation therefore requires that the profile of the national population be reflected in the composition of the judiciary and, on the other hand, that judges must have particular convictions, namely to think in a particular way.²⁴

In his capacity as chairperson of the court languages committee established by the heads of the superior courts, Zondo J noted that the concern was raised at a meeting of the heads of these courts on 14 February 2003 that Afrikaans was:

“treated in a manner that undermines attempts to transform the judiciary and ensure a representa-

²² See s 53 of the Employment Equity Act and generally the Preferential Procurement Policy Framework Act 5 of 2000. Even though the concept of representivity does not feature *eo nomine* in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, this act also has consequences in the present context. The act restrains the integrity of associations of civil society, which have to justify their admission/exclusion policies, failing which they are guilty of unfair discrimination and the penalties as provided for in the act.

²³ Kriegler “Can judicial independence survive transformation?” A public lecture delivered at the Wits Law School on 18 Aug 2009 <http://constitutionallyspeaking.co.za/can-judicial-independence-survive-transformation-a-public-lecture-delivered-by-judge-johann-kriegler-at-the-wits-school-of-law/> (29-4-2010) (hard copy on file with author).

²⁴ *Hansard* (17-02-2003) 124; See also Malan “The unity of powers and the dependence of the South African judiciary” 2005 *De Jure* 99 103-104.

tive Bench in each of the various courts. In this regard it was noted that it has been difficult to get black candidates for appointment as judges to those High Courts in which Afrikaans dominates court proceedings.”²⁵

From this, the paramount importance of national representivity also among the country's most senior judges is quite evident. Moreover, the sentiment within the ranks of these judges seems to be that national representivity is required at all courts, including where the language profile in court proceedings (in this case Afrikaans) clearly militates against the application of the national representivity principle in those courts.

Various other commentators in different fields have the same impression of the primary importance which representivity has gained in the South African politico-constitutional order. Hoffman, director of the Institute of Accountability in South Africa, claims:

“[W]hat has happened with black economic empowerment and general affirmative action measures is that this notion of representivity that constitutionally only applies to judges and public servants, has been expanded to apply to civil society, business, voluntary organisations, the NGO sector.”²⁶

The Solidarity trade union, which mainly represents the interests of persons falling outside the designated groups, destined to benefit from affirmative action, also complains that representivity has become an overriding principle.²⁷ So does former president De Klerk, who claimed, moreover, that representivity is unconstitutional and does not correspond with the purpose for which the affirmative action clause was written into the constitution in the first place.²⁸

Louw maintains that representivity is also the commonly stated objective of transformation and affirmative action measures in the field of organised sport.²⁹ This applies not only to the composition of sports teams, but also to that of supporters.³⁰ The White Paper on Sport and Recreation published by the department of sport and recreation in 1998 also highlighted the importance of representivity in sports. According to the white paper representivity should, *inter alia*, be a criterion for funding.³¹ Owing to political pressure sports bodies also “voluntarily” apply quotas in the composition of teams,³² thus further reinforcing representivity and in the process neglecting to accommodate the factors of fairness and proportionality.³³

²⁵ Letter by Zondo J, dated 4 April 2003 directed to organisations and individuals within the legal profession on the question of the use of official languages in the courts. (Letter on file with author.)

²⁶ Transcription of radio programme entitled *Dirk op Donderdag* Solidariteit Radio (21-05-2009) transmitted on the Internet radio service of the Solidarity trade union available at <http://www.solidariteitradio.co.za/?p=202> (28-5-2009) (hard copy on file with author).

²⁷ *ibid* 3. Hoffman (n 26) as well as Louw, director of the Free Market Foundation, emphasised what they see as the liberal nature of the constitution, underscored by the principle of non-racialism (25-26). In view of this race-blind reading of the constitution, both these liberal commentators are convinced that race-based affirmative action measures and black economic empowerment are unconstitutional (*ibid* 23, 25-6, 3-2).

²⁸ *ibid* 4. I state for the record that I do not subscribe to the *original intent theory* of interpretation that De Klerk unwittingly seems to embrace here.

²⁹ Louw (n 14) regards this as morally unjustifiable, constitutionally questionable and out of line with applicable legislation 121.

³⁰ Louw (n 14) in part three at 417.

³¹ Louw (n 14) 129-130.

³² Louw (n 14) mentions that this is contrary to the Employment Equity Act, which does not allow quotas (244).

³³ Louw (n 14) 419.

The legislation containing representivity provisions and the aspects of the public discourse referred to in which the importance of national representivity was highlighted convincingly show that representivity has in fact gained a central position in South Africa's politico-constitutional order. Thus, when one assesses and critiques representivity, this constitutes an investigation and critique of representivity not only as a pure theoretical notion alone, but also as a social phenomenon of considerable importance in South African society.

3 *Criterion for judging representivity: Multi-communalism and pluralist democracy*

3.1 Multi-communal societies

There is hardly any state that can claim that its population is fully homogeneous. All are to a lesser or larger extent heterogeneous – and often deeply divided – in terms of culture, language, religion, race etc. National populations are multi-identity populations. They are made up of a multitude of communal identities. They are religiously, linguistically, culturally etc multi-communal and diverse.

None of the communities to which we belong reflect the national population composition or national interests. On the contrary, communities are identifiable and distinguishable as communities precisely because they differ from (the rest of) the national population and from other communities that make up the national population. They are different in nature and interests. They are differently composed, have different interests and express themselves differently. They look, think and behave differently.

The multi-communal nature of national populations is reinforced by the fact that individuals are members of a wide variety of communities at the same time – arguably more than ever before. Shaped by the various communities to which we belong or relate, we are multi-identity beings. The identities of individuals, their self-understanding, their ethical, moral and political convictions, their ability to make sense of the worlds they live in and the ways in which this sense-making takes place, are profoundly shaped by their belonging to communities.³⁴ Individuals cannot possibly live meaningful lives outside communities. This communitarian picture of society reflects basic truisms and prerequisites for a meaningful and virtuous human existence. Precisely because the identities of individuals are shaped by their belonging to communities and because moral and political life without communities is inconceivable, communities are virtuous entities, worthy of protection.

3.2 Multi-communal societies require very specific constitutional arrangements in terms of which the integrity and freedom of communities can effectively be protected

They also require a particular concept of democracy, namely pluralist democracy, and not utilitarian or majoritarian democracy. These aspects are now concisely explained.

³⁴ See in general the valuable summary of some of the communitarian insights of Taylor in Mullhall and Swift (eds) *Liberals and Communitarians* (1992) 101-125.

3.2.1 Communal protection; not homogenisation

Constitutional arrangements must be so designed that they allow for full recognition of the particularly multi-communal and multi-identity nature of the national population. They must strictly refrain from promoting, abetting or allowing any programme of assimilation or homogenisation. Assimilation and homogenisation programmes are ordinarily construed on the basis of preference for a specific dominant community – usually a majority of the national population – which is identified with the idea of national identity or the national community. All non-dominant communities are then forced or manipulated to adopt the character of the dominant community, thus to be assimilated into one homogeneous national community that bears all the characteristics of the dominant majority. Such homogenisation programmes that require individuals to change their cultural, linguistic and religious characteristics/identities in order to be absorbed into the so-called national identity constitute an *iniuria* to those against whom they are directed and they are thus an assault against their individual identity.³⁵ Within a human rights paradigm they are an obvious offence against human dignity and freedom of expression and the right to freedom of association. If carried out wholesale against a whole cultural community, that is subjected to forced assimilation, such programmes would constitute attempted cultural genocide.³⁶ This flies in the face of basic minority rights protection, which, apart from prohibiting discrimination against minorities, also seeks to guarantee the survival of the distinctive identities of minority cultural, religious, linguistic and national communities.³⁷

Homogenisation would also be abhorrent to both a liberal-egalitarian and a communitarian perspective to politics. A liberal-egalitarian perspective, for example informed by a Rawlsian framework, would require equal concern and respect for each individual, and would mean that no individual or sector of society, regardless of how small or weak it is, should be excluded from the equal legal protection provided by a constitution. Besides, the very aim of a constitutional order based on a liberal-egalitarian perspective is to render protection to the very weakest in society and to prevent majority interests and prejudices from negating the interests of the weakest in society.

For its part, the bottom line of a communitarian perspective, viewed for example from the perspective of someone like Taylor,³⁸ would be to secure due recognition to all communities, once again regardless of their size. Due recognition implies that the constitutional order allows sufficient space for each community to be itself and to exercise its identity by freely expressing itself. Majority interests and prejudices

³⁵ The right to identity is an aspect of the broad right to *dignitas*. Various aspects of the right to identity have already been recognised in the positive law of a number of jurisdictions (see eg Neethling *Neethling's Law of Personality* (2005) 36-38 and 255-263). The aspect that is referred to here – protection of individuals against an assault on their identity by homogenisation programmes that require them to change their cultural, linguistic and religious identities in order to be absorbed into another collective – has as yet not expressly been recognised. It is submitted that this is in fact a pivotal aspect of the right to identity that calls for express recognition and protection.

³⁶ The Convention on the Prevention and Punishment of the Crime of Genocide is restricted to physical genocide. Lately there have been developments that suggest that the law may be evolving so as to broaden the prohibition of genocide to include acts of cultural genocide. See Chabas "Developments relating to minorities in the law on genocide" in Henrard et al (eds) *Synergies in Minority Protection* (2008) 199–203.

³⁷ See for example the discussion by Henrard *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (2000) 8-12 and 187.

³⁸ See Taylor *Multiculturalism and the Politics of Recognition* (1992).

would also in terms of this perspective not be allowed to deny minorities any aspect of the fullest spectrum of recognition on an equal footing with the majority.

3.2.2 Pluralist democracy; not (utilitarian) majoritarianism

A multi-communal society calls for a very specific form of democracy, namely a pluralist instead of a utilitarian or majoritarian democracy. Majoritarian democracy gives full sway to the will and preferences of the majority, regardless of the impact that these might have on minorities. Seeing the views of the majority and those of the whole of the national population as one and the same thing, majoritarian democracy translates the will of the majority into official state policy, regardless of its harmful consequences for the minorities. Majoritarian democracy is premised on the crude utilitarian principle that state policy should be based on what behoves the strongest – on what pleases the majority – irrespective of how this might impact on the minority, who might suffer pain from that what pleases the majority, even though it does not concern any specific interest of the majority. Utilitarian democracy allows for the free reign of the strongest – the majority – in favour of whom all political power is monopolised. Conversely, it leaves the minority – delivered to the will of the majority – with no power at all, even in relation to questions that are of core interest to the minorities and of no interest to the majority. The majority is therefore the only sector of the *demos* with meaningful political and governing power – *kratos*. Majoritarian democracy premised on the utilitarian principle is at best democratic only in part, namely to the extent that the majority can govern their own interest, but it is glaringly undemocratic in that it leaves the minorities devoid of any *kratos*, and thus vulnerable to domination by the majority. Majoritarianism is also ethically reproachable. Instead of allowing members of the minority the right to self-determination in regard to matters of core interest to them, majoritarian democracy delivers the minority to the dictates of the majority. Those belonging to the minority are treated on the same footing as minors who are subjected to the authority of adults. Their right to be treated as equals with all others as fully fledged legal subjects – to be treated with equal concern and respect – is in this way blatantly violated. Consequently, it denies those that belong to the minority their very personhood as free adult human beings. This all results from the application of utilitarian (majoritarian) democracy in a multi-communal society.

Pluralist democracy does not countenance this rather obvious majoritarian tyranny. It assigns *kratos* to all sectors of the *demos* and does not allow either a majority or any minority domination over any sector of society. It achieves this by barring a majority from deciding on matters of particular importance to a minority and by assigning power to a minority in relation to questions of specific importance to such minority. The South African constitution does not provide for such federalist-like division of powers. However, the constitutional court on various occasions strongly endorsed the notion of pluralism, pluralist democracy, tolerance for diversity and difference and expressed itself strongly against homogenisation and assimilation.³⁹ In *Minister of Home Affairs v Fourie* the court took a strong stance against homogenisation when it said:

³⁹ See *Minister of Home Affairs v Fourie* 2006 3 BCLR 305 (CC) par 60 379E-G, par 94 391C-D and par 95 391H-392A; *Christian Education South Africa v Minister of Education* 2000 10 BCLR 1051 (CC) par 24 1063A-C; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) par 132 1574H-1575A and par 134 1576A-C; *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) 1472C-D.

“Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation or stigma. At least it celebrates the vitality that difference brings to any society.”⁴⁰

In *National Coalition for Gay and Lesbian Equality v Minister of Justice* the court addressed the same question. It emphasised that equality should not be confused with uniformity and that uniformity can in fact be the enemy of equality.

Equality means equal respect and concern across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour.⁴¹

In the same paragraph the court strongly affirms the right to be different:

“South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognizing and accepting people with all their differences as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. ... At issue is a need to affirm the very character of our society as one built on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.”⁴²

Elsewhere in the judgment the court elaborated as follows on the accommodation of difference:

“The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner which is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.”⁴³

According to the *Fourie* judgment there are a number of constitutional provisions that underlie the constitutional value of acknowledging the value of diversity and pluralism in our society, and that give a particular texture to the broadly phrased right to freedom of association contained in section 18.

Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the “right to be different”. In each case, space has been found for members of a community to depart from the majoritarian norm.⁴⁴

The affirmation of difference and the rejection of majoritarianism expressly imply the protection of minorities. In this respect the court expressed itself as follows:

“I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be

⁴⁰ 2006 3 BCLR 355 (CC) par 60 379E-G.

⁴¹ 1998 12 BCLR 1517 (CC) par 132 1574H-1575A.

⁴² par 60 379H-380C.

⁴³ par 95 391H-392A.

⁴⁴ par 61 380C-E.

whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.”⁴⁵

Pluralist democracy strikes a balance between majority rule and minority protection. It does this by, on the one hand, acknowledging the general right of the majority to govern on account of the majority obtained at the ballot box, but at the same time by recognising the right of cultural and other minorities to survival and to flourish as communities. In accordance with this balance, the majority’s right to govern is prevented from degenerating into the majority dominating or suppressing minorities. A clear distinction is drawn between governing and domination. By virtue of its electoral majority the majority (party) has the right to govern, but not to dominate or suppress the minorities. In fact, the government (formed by the majority) has the obligation not only to tolerate, but also to create and maintain conditions within which the minority communities can survive and flourish.⁴⁶

The very idea of constitutional democracy in terms of a constitution that protects certain basic rights is in the first place to act as a counter to unbridled majoritarianism, as it places certain questions outside the reach of the political power of the majority.⁴⁷

4 Critiquing representivity

Representivity will now be critiqued against the backdrop of the dual criterion of multi-communalism and pluralist democracy. Critiquing the representivity principle requires a distinction between two species of bodies and organised spheres to be made:

- (i) State institutions that serve interests in which all members of the national population have an equal stake (*equal stake common interests*); and
- (ii) Bodies and organised spheres of people that plead the interests of particular communities, which are subsections of the national population.

4.1 State institutions⁴⁸ serving equal stake common interests

There are certain interests that might be regarded as equal stake common interests of the entire national population. These interests are not peculiar to a particular community (culturally, linguistically, religiously etc), in contradistinction with the rest, which have a discernibly higher stake than any other community. When a constitution avows equality and democracy in the manner that the South African constitution so profusely does,⁴⁹ the state should obviously also cater for such equal

⁴⁵ 391C-D par 94; see also 1063A-C par 24.

⁴⁶ See a 1 and 4 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities adopted by General Assembly of the UN resolution 47/135 of 18 Dec 1992; Item 6 of the General Comment No 23: The rights of minorities (a 27): 08/04/94 CCPR/C/21/Rev.1/Add.5, General Comment No 23.

⁴⁷ See in this regard the comments on the irrelevance of prevailing public opinion for the determination of the content or rights made in *S v Makwanyane* 1995 6 BCLR 665 (CC) par 84 703H-I.

⁴⁸ I prefer the phrase *state institution to organ of state*. I shall apply it in this article since *organ of state* in s 239 of the constitution does not include a court or a judicial officer, whilst the present discussion refers to the courts as well. Moreover, there might be the possibility that there are institutions that render public services that do not fall within the ambit of organs of state, but that are still included in the present discussion.

⁴⁹ See, eg, inter alia, the following sections of the constitution in which democracy and equality are avowed in the form of values, principles or criteria for limitation of rights: 1, 7, 36 and 39.

stake common interests in a manner that affirms the common interests of everybody regardless of community bounds. A suitable way to account for these equal stake interests would precisely be to require national representation in the composition of such organs of state – in the way in which the constitutional provisions and statutes referred to in § 2 above are doing.

Moreover, the application of the representivity principle in the case of equal stake common interests also reflects a communitarian perspective of society. This is so because it recognises communities (by requiring representation for them) not only in the case where specific community interests are being dealt with, but also in cases where interests are the same and do not run along community lines. From a communitarian point of view the principle of representivity can therefore be regarded as commendable when it is applied to equal stake common interests.

4.2 State institutions serving distinctive sections of society and community-bound organisations of civil society

Representivity is not as commendable in all cases, though. On the contrary, when applied to organs of state serving distinct sections of society and to community-bound organisations of civil society it proves to be incompatible with the principle of equal recognition and respect for everyone in a pluralist society and to the very idea of a multi-communalism and pluralist democracy. It homogenises society in favour of the majority. At best it denies minorities the equal protection they should be afforded in a pluralist democratic society; at worst it denies minorities the basic precondition for their cultural survival.

The concept of organs of state serving distinct sections of society will now be clarified, and this will be followed by an analysis of the application of the representivity principle to such bodies. This is then followed by a discussion of the representivity principle in community-bound organisations of civil society.

4.2.1 State institutions serving distinct sections of society

Most public institutions, including organs of state and the judiciary, are subdivided into various offices and/or divisions. Viewed on their own, these offices or divisions do not serve the national community as a whole and do not concern themselves with equal stake common interests (of the entire national population). Two species of institutions may be identified:

Firstly, there are institutions such as state departments and the judiciary that are nationally organised and that function nationally, but are subdivided into offices and sections that serve particular segments of society, particular communities. Secondly, there are state institutions that are either locally based or culturally bound and that are not nationally organised. A public school or university serves as an example of the first, while a state-sponsored radio station that broadcasts nationally in a specific language might be cited as an example of the second.

The application of the representivity principle to these two species of state institutions serving *distinct* sections of society is now dealt with.

4.2.1.1 Nation-wide state institutions subdivided into offices/divisions serving particular communities

The communities served by the various offices/divisions may be cultural, religious, linguistic, territorial etc. (Since territorial communities are populated by people of particular cultures or who speak specific languages, territorial communities also bear

particular linguistic or cultural characteristics, albeit multilingual or multicultural.) A public school using a particular language or languages for instruction serves a particular linguistic (and cultural) community which has certain discernible interests and preferences that are not shared by the national population as a whole. So do tertiary institutions. A radio station of the South African Broadcasting Corporation that broadcasts in a particular language serves a particular linguistic (and cultural) community that has discernible interests and preferences not shared by the rest of the population. The South African Police Force and all police stations country-wide taken together prevent, combat and investigate crime and in so doing protect the inhabitants of the Republic. But the Piketberg police station in the Western Cape prevents, combats and investigates crime in its area of jurisdiction and in so doing protects and secures the people of Piketberg. The police station of Nkandla in KwaZulu-Natal does the same for the people of Nkandla. The same applies to all courts and all offices of state departments. Together with all other offices they promote the interests of the national population, but on their own each one focuses on the segment of the population for which there is an office. The way in which they have to achieve the general goal of serving the population of South Africa is that every individual office must serve its particular community to the best of its ability. The same applies to the courts in relation to criminal and civil justice.

The vast majority of the population in, for example, Piketberg in the Western Cape, served by the police station in the town, is Afrikaans-speaking. In the vast majority of cases the perpetrators and the victims involved in crime will be Afrikaans-speaking. Witnesses will in most cases also be Afrikaans-speaking. If they are to tell their stories spontaneously and comfortably, *ie* make their statements to the police and testify in court, they will certainly do so in Afrikaans. In the ensuing police investigation and criminal trial the law will have to take its course through the medium of Afrikaans. For this to happen the investigating officer, prosecutor, magistrate and all others involved in the matter will have to be fully conversant in Afrikaans. In Nkandla (virtually) everyone is Zulu-speaking and the police officers and court personnel should in that case be Zulu-speaking in order to render the best service to the people of that area.

However, the cultural and linguistic profile of particular areas is often much more heterogeneous than in these two places. Nevertheless, the same policy, sensitive to the people of the area in question, should be followed. Hence, the police station of Bellville as well as the local magistrate's office should certainly be staffed in such a way that there are enough speakers of Xhosa and Afrikaans to serve the many Afrikaans and Xhosa speakers of that area. In each case therefore the staff composition needs to be determined by the profile and corresponding needs of the population of the area to be served by such court and police station. And what applies for police stations and magistrates' offices should likewise apply in respect of public service delivery and all state institutions that are subdivided into offices and divisions in general.

What would the consequences be if the principle of national representivity has to be enforced on each office and subdivision of state institutions that serve specific local communities?

a The members of the local community will in many cases be denied the benefit of being served in their home languages. Communication between members of the public and staff of the state institution will either be translated or will be in a language (or languages) that both the members of the staff and the members of the public have a basic command of, which in most cases will be English. The complainant in a

case in Nkandla will have to make his statement in English to a non-Zulu speaking (white) person who does not speak Zulu, but who was placed at Nkandla in order to satisfy the representivity criterion. The pitiable quality of the services emanating from this practice should be quite evident. Errors resulting from misunderstandings are destined to slip in and the communication and service delivery will definitely be much more time-consuming than in a case where the police officer and the complainant share the same mother tongue. The fact that translation facilities are not readily available (with the exception of the criminal courts) will promote the use of English. Apart from downscaling the use of the indigenous languages in this way,⁵⁰ this practice is also certainly incompatible with the objective of effective service delivery that is responsive to the needs of the public. The state ought to organise itself in such a way that it is responsive to the needs of the public. That requires that the state should adapt itself to the varying needs of each section of the public which it has to serve. The dire implication of national representivity is that it will bring about the exact opposite: that the public must adapt itself to the needs of state,⁵¹ which provides poor services that are insensitive to the communities it ought to serve.

b The application of national representivity to state institutions serving particular communities will also impact on the internal communication of such institutions. In attempting to represent the composition of the national population many of these institutions will have to switch to a common language – once again English – in order to make communication between everyone more or less possible instead of using the language of the area in question. Instead of communicating spontaneously and effectively in Afrikaans in Piketberg, the police officers will have to communicate in English among themselves in order to accommodate speakers of the African languages, many of whom will not know Afrikaans, but who have been transferred to that office to satisfy the representivity criterion. And instead of having all internal communication in Zulu in Nkandla, it will have to take place in English in order to accommodate the odd (white) Englishman or Afrikaner who, in order to achieve national representivity, has been allocated to that office. Representivity will in this context once again foster Anglicisation and promote poor public administration and low-quality service.

The kind of problems outlined above cast light on the inappropriateness of insisting that national representivity should be applied to each office/division of state institution that serves distinctive sections of society. What ought to happen instead is that the population profile of the specific community served by the state institution needs to be broadly reflected in the staff composition of such offices/divisions of state institutions. In this way effective services, responsive to local communities, can be achieved. It needs to be emphasised that this does not detract from the overall goal of national representation: Institutions serving the particular communities will be representative of the communities that they serve and not of the national popu-

⁵⁰ This will obviously be incompatible with s 6(2) of the constitution, which provides: “Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.”

⁵¹ Within the context of the public service this practice is certainly incongruent with various values and principles applicable to the public administration in terms of s 195(1) of the constitution, including the principle that people’s needs must be responded to (195(1)(e)) and that there ought to be good human-resource management (195(1)(h)).

lation profile, but all of them taken together will be representative of the national population profile.

4.2.1.2 Locally based or culturally bound state institutions (*eg* a university that provides tuition in an indigenous language and a radio station broadcasting in an indigenous language)

Universities providing tuition in an indigenous language (alongside English) come to mind in this context. There are for example six (partially) bilingual Afrikaans/English universities in South Africa.⁵² These universities provide tuition in English in order to meet the large demand for university education in that language. Situated in areas where there are also sizable Afrikaans communities, they also provide tuition in Afrikaans. The enforcement of the criterion of national representivity to such institutions requires that the white staff members, most of whom are Afrikaans-speaking and provide tuition in Afrikaans (and English), will have to leave the institutions in order to make room for black staff members in order to satisfy the representivity principle. It can be taken for granted that only a small minority of the replacing black staff members will have a command of Afrikaans sufficient to provide tuition in Afrikaans. Representivity will therefore spell the end of Afrikaans university education and all universities will therefore become monolingual English institutions. It should be noted that whereas representivity would mean the end of Afrikaans university education, it need not bear the same fruits for university education in the other African languages. If, for example, the University of Kwa-Zulu-Natal switched to tuition in Zulu, national representivity could be achieved by appointing black mother-tongue speakers of Zulu. That is to say that representivity can be achieved without disrupting the use of Zulu as language of tuition. Representivity is therefore readily compatible with using Zulu as a language of university education. Both representivity and the use of Zulu can be secured. Afrikaans is in a different position, however: it is either Afrikaans or representivity; both cannot be achieved in this context. If national representivity is strictly to be followed, there can be no room for Afrikaans as a university language.

In sum, the enforcement of representivity at universities promotes the use of English, readily allows the use of the African languages except Afrikaans, and extinguishes the use of Afrikaans. Hence, in relation to Afrikaans in university education, representivity is nothing less than a stringent suppressive measure. The same applies to the effect of representivity on Afrikaans in other levels of education.

The enforcement of national representivity has the same destructive effect on radio stations or television channels that broadcast in a specific language. Linguistic communities do not reflect the national population profile. If the management and staff of a radio station or television channel broadcasting in a particular language, say Afrikaans, are required to reflect the population profile, such staff and management will therefore eventually comprise sizable numbers of non-Afrikaans speakers. Continued broadcasting in Afrikaans will simply fall by the wayside. The in-house language of the broadcasting service will also switch to a language that everyone understands in order to accommodate the large majority of non-Afrikaans staff-members and management of the erstwhile Afrikaans radio station who have been appointed in order to satisfy the national representivity criterion. In short,

⁵² The University of Pretoria, the University of the North West, the University of the Free State, the University of Stellenbosch, the University of Johannesburg and the University of South Africa.

the enforcement of national representivity renders the existence of culturally bound state institutions virtually impossible.

4.3 Bodies and organised spheres of people that represent the interests of particular communities

Civil society organises itself through an infinitely wide variety of institutions (organised spheres): societies, organisations, clubs and an array of other organised formations such as cultural organisations, churches, trade unions, professional organisations, employers' organisations, sports clubs, interest and pressure groups. All these represent the interests of particular communities and groups, women's organisations, youth organisations etc. Often, particularly in a multicultural society, organised spheres will have a cultural character. Some are professional organisations for a distinct linguistic, cultural or language community such as organisations for Afrikaans lawyers or businessmen. Organisations may even have a racial character, such as a forum for black lawyers, journalists or businessmen. Some might be trade unions closely affiliated to a political party such as the COSATU-affiliated trade unions, who are in a formal political alliance with the African National Congress and the South African Communist Party. Other trade unions, such as Solidarity, focus on the interest of a specific section of the labour market, namely those employees falling outside the definition of a designated group in terms the Employment Equity Act, thus also displaying a very specific racial and cultural character. Some will have considerable economic clout, being in control of large amounts of money and employing considerable numbers of staff. Others will be financially weak. The bottom line is that civil society is made up of an infinite assortment of human groupings with different agendas that express themselves in different ways.

Where communities are the raw material for a pluralist society, institutions are the refined apparatus that stabilise, protect and strengthen communities and in so doing also safeguard pluralist societies. Institutions through which communities organise themselves are the infrastructure that protect and promote the well-being of communities. They stabilise the communities within which they have been formed and for the benefit of which they exist; they provide the oxygen by which communities secure their own existence and well-being to the benefit of the existing and future members/associates of these communities.⁵³ Communities and organised spheres shape the identities and convictions of the individuals belonging to and associated with them. They also enable individuals to pursue fuller, more meaningful lives in community with others with whom they share important commonalities. Communities and organised spheres therefore provide the framework for varieties in lifestyles, enable a multitude of diverse identities and also enable a multitude of views and convictions to be held and articulated. Institutions also enable or promote the exercise of the rights of their members and supporters, something that individuals on their own would often find difficult or impossible to do. Institutions reflect the particular character of the communities in which they are anchored and articulate the views and interests of those communities. Organised spheres embolden individuals; they enable otherwise isolated individuals not to succumb and conform to the hegemonic views of majorities. For this reason, organised spheres that occupy a position between, on the one hand, individuals and, on the other hand, an over-

⁵³ See Malan "The deficiency of individual rights and the quest for community protection" 2008 *THRHR* 415-437 for a detailed exposition.

whelming and overbearing state and/or intimidating majorities are the prerequisite for maintaining a multi-communal plural society and democratic politics.⁵⁴

Viewed in this light, a variety of divergent institutions is the infrastructure of civil society and an indispensable prerequisite for (pluralist) democracy.

What then would the effect be of the enforcement of the representivity principle to these institutions of civil society?

5 *The effect of representivity on organised spheres of civil society*

This section considers some of the most important implications of the representivity principle, specifically for minorities.

5.1 Majoritarian annexation and domination

In order to secure their continued existence, organised spheres must have the power to guard over their own integrity and to maintain their distinct characters, which are anchored in communities within which, and in the interest of which, they were formed. As long as they have that power, their continued existence is secured, and also accompanied by their capacity to express themselves in a distinct manner. With their own integrity thus secured, they will also have the capacity to serve the interests of the communities within which and in the interests of which they were established. In practical terms the power to guard over their own integrity and to maintain their distinct characters means the power of organised spheres to police their membership, *ie* to control who may and who may not belong to the organised sphere in question. They must be competent to include only those belonging to the community in question, or those subscribing to the lifestyle, convictions or goals of the organised sphere in question. Conversely, they must also have the power to exclude those not belonging to that community or who do not subscribe to its lifestyle, convictions or goals. When such organised sphere takes the form of an institution that employs staff, it must also be entitled to appoint staff members exclusively from amongst the number of the organised sphere in question who also share the same lifestyle, convictions or goals and are therefore best qualified to serve the interests and promote the goals of the organised sphere in question. Obviously, this has to be done in a fair and consistent manner. These are the core powers that should vest in organised spheres. This is also at the same time the basic prerequisites for exercising the right to freedom of association.⁵⁵ When organised spheres are denied these policing powers, this constitutes a serious breach of the right to freedom of association. But even more serious than this are the accompanying consequences for minority communities and for the nature of the macro-political order as such. Without the policing power, there would be unbridled access for all to an organised sphere, regardless of whether those that gain access share in the commonalities of the organised sphere in question. Uncontrolled access is destined to change the very character of that sphere. It would transform it into something different from what it initially was. If an organised sphere is inundated by a sufficient number of people not sharing the character, philosophy, or goals of the organised sphere in question, such sphere is transformed into an instrument for the newcomers, instead of an

⁵⁴ Siedentop *Tocqueville* (1993) 64, 80-84; 139-140; Degenaar "Pluralism" in Van Vuuren and Kriek (eds) *Political Alternatives for Southern Africa: Principles and Perspectives* (1983) 84-96.

⁵⁵ See Woolman "Freedom of association" in Woolman *et al* (eds) *Constitutional Law of South Africa* (2007) 44-2; 44-14-15; Currie and De Waal *Bill of Rights Handbook* (2005) 423.

instrument for the community within which and for which it was initially formed. And since the well-being of communities is dependent on and stabilised by their organised spheres, the destabilisation and overrunning of these spheres will also entail the disruption, if not the demise, of the communities as such.

It is this, precisely, that is the effect of representivity. If an organised sphere is to mirror the profile of the national population, instead of the distinct community it emanates from and for whose benefit it was formed, it obviously no longer reflects the composition of that distinct community and can also no longer promote and serve the interests of that community. Then it becomes a mirror image of the national population, serving *its* interests – the interests of the numerically dominant majority, instead of being an instrument of the minority community for which it was established in the first place.

Representivity mops up the organised spheres of minority communities and functions as a scheme through which organised spheres of minorities are transformed into organised spheres for the majority.⁵⁶ It establishes a system whereby organised spheres of the minorities are annexed⁵⁶ for and put to the service of the majority. Once representivity has taken its course, the erstwhile organised sphere of minority communities will no longer reflect the minority community in question. Neither will it be under the control of members of that minority community. Instead, it will reflect the composition of the national population and will be under the control of the numerically dominant section of the population. In short, representivity then is a strategy of systemic annexation through which minority-organised spheres are dismantled and placed under the control of the majority – a strategy of totalitarian majority domination of not only the state sector, but also of civil society in general.

In this way electoral domination of the majority as reflected in proportionally composed legislatures is expanded to all spheres in civil society where the representivity principle is enforced.

Minority rights seek to protect minorities against majority domination. Recognising the risk that majorities may abuse their numerical strength in the legislature to trample on core interests of minorities, minority rights restrain the legislative authority of the majority. Consequently, there are certain issues – those that relate to the distinctive interests of the minorities – that the majority may not decide on. In this way minority rights specifically secure a domain of freedom in civil society for minority communities to organise themselves and to promote their interests free from majority dictation. Thus minority rights play a pivotal part in achieving the pluralist democracy described in 3.2.2 above. The latter strikes a balance between majority rule and minority protection. It acknowledges the general right of the majority to govern, but at the same time it also recognises the right of cultural and other minorities to survival and to flourish as communities. Representivity achieves precisely the opposite. It obliterates all minority protection and expands and entrenches majority domination in all spheres of society. This stands in glaring contrast not only to the basic notion of internationally recognised minority rights,⁵⁷ but also to the very idea of pluralist democracy.

⁵⁶ See in this regard also the observations made by Woolman “Community rights: language, culture & religion” in Woolman (n 55) 58-42-3; 58-45; 58-49.

⁵⁷ See n 37 and 46.

5.2 Homogenisation and monotony

Reflecting the national population profile, all institutions and organised spheres of civil society will in the first place be copies of all the others. Diversity in civil society as manifested in the infinite possibilities in the composition of organised spheres is therefore destined to be brought to an end by the enforcement of representivity. In this way representivity acts as a strategy of systemic (majority-dominated) homogenisation.

This is manifestly undemocratic. A wide variety of actively expressed views are an indispensable prerequisite for a vigorous public discourse. But that is impossible in the absence of diversely composed organised spheres with different lifestyles, convictions and aims with different modes of self-expression. A variety of differently composed organised spheres are the prerequisite for variety in the public discourse, whilst uniformity in the composition of organised spheres is obviously destined to be reflected in an equally uniform public discourse. And a uniform public discourse is quite clearly no public discourse at all. Homogenisation is therefore not limited to causing organised spheres only to look the same – *ie* to be similarly composed – but also to think the same and express themselves in the same way. It is difficult to imagine something more incongruent with pluralist democracy than this kind of representivity-imposed homogenisation.

Small groups of people can organise themselves effectively, thus enabling themselves to articulate their views and convictions effectively, regardless of how small they are. But with such organised spheres compelled to extinguish themselves in order to be absorbed into the majority and thus to meet the criterion of representivity, the views that they could otherwise express also become extinguished.

Homogenisation inflicted by representivity is an obvious invasion of the right to freedom of association, freedom of expression and of the right of persons that belong to a cultural, religious or linguistic community, to enjoy their culture, practise their religion and use their language together with other members of that community, and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.⁵⁸ But even more grave is the overall systemic homogenisation impelled by representivity that directly flies in the face of the quoted *dicta* in the constitutional court judgments (3.2.2 above) in which homogenisation was rejected and diversity in society and tolerance for difference so eloquently affirmed.

5.3 Inequality

From a transformation point of view representivity and equality are regarded as two sides of the same coin. Representivity is viewed as a prerequisite for achieving equality. This is evident from some of the most prominent legislative instruments for the achievement of transformation, namely the Employment Equity Act and the Broad Based Black Economic Empowerment Act. Both these acts use representivity as a pivotal instrument for achieving transformation and both acts assert that they are there to achieve equality.⁵⁹ Louw states with reference to transformation in sport that representivity (or so-called equitable representation) has developed into a proxy for equality.⁶⁰ With representivity thus equated to equality, representation has become a goal and strategy to achieve equality. There are instances in our case

⁵⁸ within the context of the South African constitution s 17, 15 and 31 respectively.

⁵⁹ stated in the preambles of the acts.

⁶⁰ Louw (n 14) 419.

law where equality and representivity are also fully identified with one another. In *Soman v Minister of Safety and Security* Van der Westhuizen J stated:

“Measures to ensure representivity (or affirmative action measures, as these are being referred to within the context of this particular case) are constitutionally recognised. Section 9(2) of the Constitution states that to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. This sentence immediately follows the statement that equality includes the full and equal enjoyment of all rights and freedoms.”⁶¹

Elsewhere the court also dealt with equality and representivity as interchangeable concepts with the same meaning when it stated: “Efficiency and *representivity*, or *equality*, should, however, not be viewed as separate competing or even opposing arms.”⁶²

According to this view equality remains unattained as long as there is not full compliance with the representivity principle.

There is no merit in this view, however. On the contrary, representivity does not promote equality: it instead entrenches systemic inequality. Representivity denies minorities the organised spheres that they need as the infrastructure to stabilise and organise themselves. It affords such organised spheres exclusively to the majority. This, as indicated above, is the effect of annexation and the homogenising effects of representivity. Representivity enables the majority to capture the organised spheres of the minorities. All organised spheres are therefore those of the majority, while owing to representivity there is nothing left for the minorities. The majority can use all these organised spheres to promote their interests and to deny the interests of the minorities. The minorities have none of this. In accordance with the representivity principle individual members of minority communities are present in all organised spheres, but once again in accordance with representivity they are but a small outnumbered minority in each. No organised sphere is theirs, where they can fully exercise community identity with their fellow community members and no organised sphere is under their control. In this way representivity acts as a strategy of entrenching the totalitarian control of the majority – the tyranny of the majority – in the famous words of Alexis de Tocqueville.

The closest this gets to equality is equality in the formal sense, which is no less than a flimsy cover-up for systemic inequality and repression of minorities. It works like this: the same principle, namely that of national representivity, is applicable to all. However, since various people and groups find themselves in different positions they are differently – sometimes vastly differently – affected by the application of the very same principle. This is in fact what is occurring with the application of representivity. It is highly beneficial to the majority and glaringly disadvantageous to the minorities. It institutionalises a system of majority domination and minority repression. Hence, representivity is not a strategy of equality but a strategy of systemic substantive *inequality* to the detriment of the minorities. In fact, the working of representivity is a textbook example of the distinction between formal and substantive equality and how harmful the effects of formal equality can be.

⁶¹ 2002 3 SA 468 (T) 477D-E.

⁶² 482G (emphasis added). Van der Westhuizen J had this to say in the context of explaining how representivity is not at odds with but in fact instead serves efficiency. See also 483D.

6 Conclusion

This article does not suggest that the representivity principle has already fully permeated the South African social order. Rather, the assessment is based on a hypothesis, namely what the effects would be if representivity were to be fully developed. However, this hypothesis is not fanciful, because the article shows that representivity has established itself as a leading principle and strategy for achieving the ruling party's ideological and political goal of transformation. It also shows that there are strong forces at work both within the legal discourse and the public discourse in general that forcefully press for an ever-broadening scope of application of the representivity principle. It is precisely this practical currency of the representivity principle in daily life in South Africa that calls for an analysis of its consequences. Hence, there is in fact a need to analyse the consequences of the principle of national representivity if it is to be enforced consistently. This is primarily what this contribution seeks to (begin to) do, namely to analyse the consequences of the principle of representivity – the principle that requires institutions and organised spheres to be so composed that they mirror the composition of the national population of the Republic.

The discussion shows that the representivity principle ought to have but very limited application, namely to what has been described as state institutions serving *equal stake common interests* (§ 4.1 above). Over and above that, there should be no place for representivity, at least not when it is interpreted to require the composition of all institutions and organised spheres to reflect the national population profile. Representivity applied in this way constitutes a systemic invasion of various individual rights, particularly of those persons belonging to minority communities. This is at odds with the concept of basic minority rights increasingly acknowledged in international law. More importantly, it is inimical to the basic values of a pluralist democratic society and should have no place in a constitutional order that avows democracy. It engenders and entrenches majority domination, homogenisation and systemic suppression of minorities, instead of facilitating conditions for the accommodation of difference, tolerance of diversity, and the fair accommodation of minorities alongside the majority. In the final analysis it concocts a homogeneous nation in the image of the state – and in particular in the image of and dominated by the majority. If representivity is to have a role to play, it has to be reconceived so as to mean something entirely different from its present insidious meaning.

SAMEVATTING

GEDAGTES OOR VERTEENWOORDIGENDHEID, DEMOKRASIE EN HOMOGENISERING

Hierdie artikel ondersoek die implikasies van die toepassing van die beginsel van *verteenwoordigendheid*, ofte wel die beginsel waarvolgens vereis word dat die profiel van die nasionale bevolking van Suid-Afrika in instellings en georganiseerde sfere neerslag moet vind. “Verteenwoordigendheid” beteken iets anders as “verteenwoordiging”. Dit verwys na ’n politieke strategie waardeur aan die politieke ideologie van *transformasie* uitvoering gegee word. Dit verskil gevolglik van die regsfiguur van *verteenwoordiging* soos dit in verskeie sektore van die reg soos in die staatsreg (bv parlementêre verteenwoordiging), in die prosesreg (bv regsverteenwoordiging) of in die konteks van verteenwoordiging van ’n prinsipaal gebruik word. In Engels word inderdaad ook nie van die begrip *representation* gebruik gemaak om na hierdie verskynsel te verwys nie, maar juis van die term *representivity*. Verteenwoordigendheid is die Afrikaanse eweknie van *representivity* en nie van *representation* nie.

Daar word nie beweer dat hierdie beginsel inderdaad reeds oral in die Suid-Afrikaanse samelewing neerslag gevind het nie. Nogtans het die beginsel reeds een van die voorste strategieë geword wat ter bevordering van transformasie aangewend word. Verteenwoordigendheid kom op enkele plekke in die grondwet voor maar in talle statutêre reëlins word by die samestelling van liggame vereis dat dit die nasionale bevolkingsprofiel moet weerspieël. Verteenwoordigendheid speel ook na die

oordeel van verskeie vooraanstaande kommentators op sowel die gebied van die reg as die politiek 'n toonaangewende rol.

Teen die agtergrond van die bewese belang van verteenwoordigendheid is die vraag na die implikasies van die toepassing daarvan dus nie vergesog, of bloot teoreties nie. In die artikel word aangevoer dat verteenwoordigendheid slegs beperkte toepassing behoort te hê, naamlik op die terrein van nasionale liggame wat sake behartig waarby almal 'n gelyke belang het ("bodies representing *equal stake common interests*"). Wat die res betref, word geargumenteer, dat daar geen plek vir verteenwoordigendheid in 'n demokratiese samelewing behoort te wees nie, aangesien dit die oorname van die georganiseerde sferes van minderhede deur 'n getalryke dominante meerderheid – en derhalwe algemene meerderheidsoorheersing – in die hand werk; homogenisering meebring; en sistemiese ongelykheid tot die nadeel van minderhede bewerkstellig.