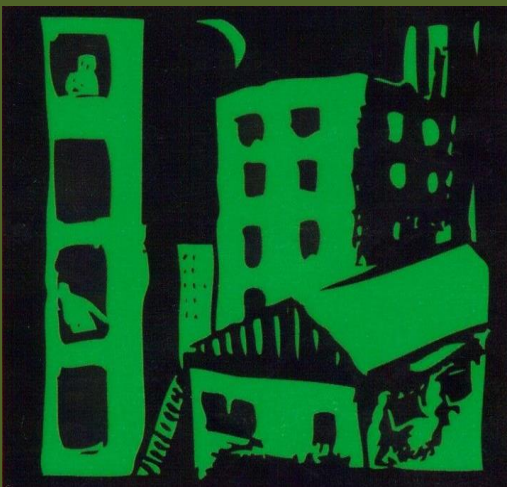


LAW
DEMOCRACY
& DEVELOPMENT



VOLUME 23 (2019)

DOI: <http://dx.doi.org/10.17159/2077-4907/2019/idd.v23b12>

ISSN: 2077-4907
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Democracy and (the essential content of) fundamental rights: marching in line or precarious balancing act?

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ABSTRACT

This article addresses the question of how democracy and fundamental rights interplay, and compares German and South African law for this purpose. The author argues that democracy requires and presupposes fundamental rights, but that these two values do not always align, and then deals with the question of how to reconcile democracy and fundamental rights in case of conflict. The potential conflict between the two values is sometimes reflected in the relationship between Parliaments as the embodiment of democracy and the Constitutional Courts as the embodiments of fundamental rights (the so-called

“counter-majoritarian dilemma”). However, the author rejects the recent critique by some scholars that the German Federal Constitutional Court structurally exceeds its powers vis-à-vis the German Parliament and that there is a permanent judicial overreach. On the contrary, the author argues that Constitutional Courts do not have sufficient tools to counter a democratic backsliding, i.e. the incremental erosion of democracy. Since the author considers democratic backsliding to be a greater and more acute threat to democracy than judicial overreach, he presents the view that the guarantee of the essential content of a right delineates the minimum of a fundamental right in a democratic society. This view is explained using freedom of expression as example.

Keywords: German Constitution, Grundgesetz, Constitutional comparison, Essential content of a right, Freedom of expression, Separation of powers, Democratic backsliding, Counter-majoritarian dilemma, Constitutional courts, Democracy, Fundamental rights, Preconditions of democracy

1 INTRODUCTION

Constitutional democracy is generally associated with the judicial review of legislative and executive action against the duty to respect, and sometimes even promote, fundamental human rights. This model of democracy is under threat from democratic backsliding in development States;¹ marked by the gradual erosion of fundamental rights, on the one hand, and an attack on the power of so-called “elitist” courts to review legislation produced by “popular legislative” assemblies, on the other. Several constitutional scholars have identified this threat in post-apartheid South Africa and have implored the Constitutional Court to manage the threat by strategically compromising the protection of rights (Roux)², judiciously avoiding controversial human rights disputes (Currie),³ or deferring to and building the capacity of other constitutional institutions (Fowkes).⁴ Critics of these approaches to judicial review, which all avoid substantive human rights doctrine when it appears to be most needed, have lamented South Africa’s “amazing vanishing Bill of Rights” in the hands of the

* Reworked version of a paper presented at the Third Biannual German-South African Dialogue on Democracy: The Preconditions of Democracy held at the University of the Western Cape on 26 February 2016.

¹ Gardbaum S “Are strong constitutional courts always a good thing for new democracies?” (2014) 53 *Columbia Journal of Transnational Law* 285; Tushnet M “New forms of judicial review and the persistence of rights-and-democracy-based worries” (2003) 38 *Wake Forest Law Review* 813.

² Roux T “Principle and pragmatism on the Constitutional Court of South Africa” (2009) 7 *International Journal of Constitutional Law* 106; Roux T *The politics of principle: the first South African Constitutional Court, 1995-2005* Cambridge : Cambridge University Press (2013) at 27.

³ Currie I “Judicious avoidance” (1999) 15 *SAJHR* 138.

⁴ Fowkes J *Building the constitution. The practice of constitutional interpretation in post-apartheid South Africa*. Cambridge: Cambridge University Press (2017) at 15.

Constitutional Court (Woolman).⁵ The simmering debate among academics about the proper place of the Constitutional Court in a development State recently erupted among the judges of the Court itself, with Chief Justice Mogoeng accusing the majority of the Court of a “textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament”.⁶

Accusations of judicial overreach and the danger of democratic backsliding are not limited to developing democracies. A global rise in populist politics has placed human rights and constitutional courts under pressure even in established democracies around the world. It is also not a new phenomenon. Germany experienced a nearly total backslide from Weimar democracy to Nazi totalitarianism during the first half of the 20th century. The German Constitution or Basic Law,⁷ which restored democracy in 1949, was specifically designed to prevent a similar backslide from occurring again. In this article I explore what the German response to the threat of democratic backsliding can contribute to the debate about the threat in South Africa.

The discussion takes place against the background of an ongoing engagement between German and South African scholars.⁸ In February 2016, a third biannual German-South African dialogue on democracy was held at the University of the Western Cape. The aim of the one-day conference was to analyse the foundations of democracy and the prerequisites required to make a constitutional democracy work. One aspect discussed was the relationship between democracy and fundamental rights.

South Africa introduced a Constitutional Court for the first time 25 years ago when the interim Constitution came into force on 27 April 1994.⁹ A second novelty of the interim Constitution was the introduction of a constitutional doctrine known as the essential content of a right. The interim Constitution stated that the limitation of a right in the Bill of Rights was only permissible if the limitation did not “negate the essential

⁵ Woolman S “The amazing vanishing Bill of Rights” (2007) 124 *SALJ* 762.

⁶ Mogoeng CJ in *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) at para 223. See also the response by Froneman J at para 219: “Conceptually it is difficult to appreciate how the interpretation and application of a provision in the Constitution by a court may amount to judicial overreach. The Constitution itself mandates courts to interpret and enforce its provisions. The discharge of this judicial function cannot amount to overreach whether one agrees or disagrees with a judgment that construes and applies the Constitution in a particular way.”

⁷ The German Basic Law (*Grundgesetz*) is the German Constitution. It was adopted on 23 May 1949 and entered into force the following day, BGBl. I, 1. It was last amended on 28 March 2019, BGBl. I, 404. An English translation can be found on the internet at https://www.gesetze-im-internet.de/englisch_gg/ (accessed 12 August 2019).

⁸ See for the links between South African and German constitutional law Davis DM “Constitutional borrowing: the influence of legal culture and local history in the reconstitution of comparative influence: the South African experience” (2003) 2 *International Journal of Constitutional Law* 181 at 186 seq; Du Plessis L “German Verfassungsrecht under the Southern Cross” in Hufen F (ed) *Verfassungen zwischen Recht und Politik. Festschrift zum 70. Geburtstag für Hans-Peter Schneider* (2008) 524; Rautenbach C & du Plessis L “In the name of comparative constitutional jurisprudence: the consideration of German precedents by South African Constitutional Court judges” (2013) 8 *German Law Journal* 1539.

⁹ Interim Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution).

content of the right”.¹⁰ However, the doctrine was abandoned soon thereafter and not incorporated into the final Constitution.¹¹ The Constitutional Court, on the contrary, was retained under the final Constitution and is today a globally respected institution. In fact, the Court is so activist that some critics fear judicial overreach.¹² The problem of a constitutional court with the power to invalidate an Act adopted by a parliamentary majority representing the people, is usually described as a “counter - majoritarian difficulty”.¹³ This article deals with this difficulty and the general question of how democracy and fundamental rights interact. As mentioned above, this problem is analysed from the perspective of democratic backsliding using a comparative perspective including Germany and South Africa.

The article is structured as follows. First, the relationship between democracy and fundamental rights is analysed from a conceptual perspective (part 2). It is argued that the two concepts are interrelated and interdependent. Here, it is important to stress that democracy is more than the mere will of the majority. Secondly, the relationship between democracy and fundamental rights is discussed from an institutional perspective (part 4). The question is posed whether, and if so how, the potential tension between Parliament and the Constitutional Court could be brought into balance. I reject the recent critique by some scholars that the German Federal Constitutional Court structurally exceeds its powers vis-à-vis the German Parliament and that there is a permanent judicial overreach. The only promising solution to prevent a judicial overreach by the Constitutional Court, to the detriment of Parliament, is judicial self-restraint. Former South African Constitutional Court judge, Albie Sachs, has challenged constitutional scholars to develop “a theory of when” (instead of whether) the Constitutional Court may exercise a stricter review.¹⁴ However, sometimes the judicial review of rights eroding legislation is not strict enough. In fact, constitutional courts do not have sufficient tools to counter a democratic backsliding or the incremental erosion of democratic values. Therefore, this article finally aims to determine what minimum fundamental rights must exist if a State is to be considered democratic at all (part 5).

I argue that the guarantee of the essential content of a right stipulated by section 19(2) of the German Basic Law delineates the minimum of a fundamental right. Even though the SA Constitution has not adopted the concept of the essential content of a right, a similar debate exists in South Africa. Here the question arises whether at least

¹⁰ Section 33(1)(b) of the interim Constitution stated: “The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation [...] shall not negate the essential content of the right in question.”

¹¹ Constitution of the Republic of South Africa, 1996 (SA Constitution).

¹² Mogoeng CJ in *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) at para 223.

¹³ De Vos P & Freedman W *South African constitutional law in context Oxford*: Oxford University Press (2014) at 72–77.

¹⁴ Sachs J “Book reviews” (2001) 51 *University of Toronto Law Journal* 87 at 90.

socio-economic rights have a minimum content.¹⁵ The German debate about the essential content of a right can therefore still be fruitful within the South African context, at least with regard to socio-economic rights. From the German perspective, it is argued that the minimum content of a right is useful in establishing a positive understanding of the constitution to determine whether legislative measures set in motion a process of democratic backsliding.

In this article, the terms “fundamental rights” or “fundamental liberties” will be used to describe the individual rights of persons against the State, as they are enshrined in the Bills of Rights in many modern constitutions.¹⁶ Democracy is understood as the form of government set out in the Constitutions of South Africa and Germany, respectively. This contribution will not follow a philosophical or political understanding of democracy, but a legal one.

2 DEMOCRACY AND FUNDAMENTAL RIGHTS: A CONCEPTUAL TENSION

The two core elements of a legal, as opposed to a political, understanding of democracy are the majority principle,¹⁷ and periodical elections (free, fair, equal, general and direct).¹⁸ Democracy, understood in this fashion, is based on and requires freedoms and liberties as enshrined in the Bill of Rights. The following quote from an early decision of the German Federal Constitutional Court illustrates that the Court has linked democracy and fundamental rights from the beginning of its jurisprudence:¹⁹

“The freedom of expression is one of the most direct expressions of a human personality within a society, one of the loftiest rights that exist (‘un des droits les plus précieux de l’homme’ pursuant to section 11 of the French Declaration of Human and Civic Rights of 1789).

It is a basic requirement of any free and democratic society. This is because this freedom allows a continual intellectual exchange, a battle of opinions, which is the life-giving element of any free and democratic society ... The freedom of expression

¹⁵ See Brickhill J & Ferreira N “Socio-economic rights” in Currie I & De Waal J (eds) *The Bill of Rights Handbook* 6th ed Cape Town: Juta (2013) at 574–584; Liebenberg S “Socio-economic rights: revisiting the reasonableness review/minimum core debate” in Woolman S & Bishop M (eds) *Constitutional Conversations* 303.

¹⁶ As in ss 7–39 of the SA Constitution and ss 1–19 of the German Basic Law. See in more detail part 5.3 below .

¹⁷ Section 53(1)(c) of the SA Constitution; s 42(2) sentence 1 of the German Basic Law: “Decisions of the Bundestag shall require a majority of the votes cast unless this Basic Law otherwise provides.”

¹⁸ Section 53(1)(c) of the SA Constitution; s 38(1) of the German Basic Law: “Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.”

¹⁹ BVerfGE 7, 198 at 208. Also in this sense Badura P *Staatsrecht* 7th ed Munich: CH Beck (2018) at D para 7.

is in a certain sense the foundation of any kind of freedom 'the matrix, the indispensable condition of nearly every other form of freedom' (*Cardozo*)."²⁰

The South African Constitutional Court has adopted the same position in its rulings. In Justice O'Reagan's words:

"Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."²¹

This does not come as a surprise. Without the right to vote,²² freedom of expression,²³ and freedom of assembly,²⁴ a community can hardly be said to be living under a democratic order. Just as fundamental rights allow individuals self-determination, a democratic State allows self-determination on a collective level.²⁵ The SA Constitution links democracy and fundamental rights at least three times: from section 7(1) we learn that the Bill of Rights is *a cornerstone of democracy* and that it affirms the democratic values of human dignity, equality and freedom; section 36(1) states that limitations of a right must be reasonable and justifiable in an *open and democratic society*; and finally section 39(1)(a) requires that the interpretation of a right must promote the values that underlie *a democratic society* based on human dignity, equality and freedom.

Similarly, the German Basic Law uses the term "free and democratic basic order"²⁶ more than once, implying that freedom and democracy belong together.²⁷ Even more

²⁰ BVerfGE 7, 198 at 208.

²¹ *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (6) BCLR 615 at 622 (CC). See also Botha H "Fundamental rights and democratic contestation: reflections on freedom of assembly in an unequal society" (2017) 21 *LDD* at 221.

²² Sections 19(2) and (3) of the SA Constitution; s 38(1), sentence 1 of the German Basic Law.

²³ Section 16(1) of the SA Constitution; s 5(1) sentence 1 of the German Basic Law: "Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

²⁴ Section 17 of the SA Constitution; s 8 of the German Basic Law: "(1) All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission. (2) In the case of outdoor assemblies, this right may be restricted by or pursuant to a law."

²⁵ Steiger D "L'État, c'est moi! L'État, c'est nous! Legitimation von Staatsgewalt durch individuelle und kollektive Selbstbestimmung" in Heschl *et al* (eds) *L'État, c'est quoi? Staatsgewalt im Wandel* Baden-Baden: Nomos (2015) 79 at 83–85.

²⁶ "*Freiheitliche demokratische Grundordnung*" such as in s 11(2): "This right may be restricted only by or pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or of a *Land*, to combat the danger of an epidemic, to respond to a grave accident or natural disaster, to protect young persons from serious neglect, or to prevent crime." Section 18 sentence 1: "Whoever abuses the freedom of

striking, limitations to freedoms acknowledged by the European Convention on Human Rights (ECHR),²⁸ of which Germany is a member, are only permitted in cases where it is “necessary in a democratic society”.²⁹ In other words, the wording of both section 36 of the SA Constitution and the ECHR suggest that certain legal limitations to rights are undemocratic, even though the limiting law was passed by the will of a majority. A preliminary answer to the question raised in the title of this article would therefore be that, in both the South African and German-European conceptions, democracy and fundamental rights march together in line.

However, even if democracy presupposes fundamental rights,³⁰ the belief that more fundamental rights inevitably mean more democracy is only true up to a certain point. Fundamental rights, understood as individual rights to be defended against the State, can work against the will of the majority and thus be seen as undemocratic from a majoritarian perspective.³¹ The German Federal Constitutional Court has, for example, decided that gatherings that may shock the majority of the people but do not violate penal provisions cannot be banned only because they are provocative.³² Freedom of assembly is a right that protects the majority as well as the minority. The minority is not obliged to exercise freedom of assembly in a way that pleases the majority. In order to gain attention it is allowed to provoke. The fundamental right of freedom of assembly limits the legislator in its law-making capacity.

In addition, fundamental rights may also be used to undermine democracy as a form of government. This is the case especially with political rights, such as, the freedom

expression, in particular the freedom of the press (paragraph (1) of section 5), the freedom of teaching (paragraph (3) of section 5), the freedom of assembly (section 8), the freedom of association (section 9), the privacy of correspondence, posts and telecommunications (section 10), the rights of property (section 14), or the right of asylum (section 16a) in order to combat the free democratic basic order shall forfeit these basic rights.” Section 21(2) sentence 1: “Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional.”

²⁷ See BVerfGE 5, 85 at 134–140; BVerfGE 144, 20 at 195–197.

²⁸ Available at <https://echr.coe.int/pages/home.aspx?p=basictexts&c=> (accessed 10 September 2019).

²⁹ Section 10(2) ECHR: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” Section 11(2) ECHR: “No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

³⁰ See in more detail part 5 below.

³¹ Schmitt C *Der Hüter der Verfassung* 4th ed Berlin: Duncker & Humblot (1996) at 155 & 159.

³² BVerfGE 111, 147 seq.

of expression or the freedom of assembly. Both these rights can be used to fight against democracy, as populist right-wing parties, for example, have tried to do time and again in Germany. In order to prevent the misuse of fundamental rights against democracy, the German Basic Law is designed as a defensive or militant democracy.³³ This concept means that the German Constitution includes provisions intended to protect the Constitution. These provisions allow for a greater limitation of fundamental rights and freedoms in extraordinary circumstances when democracy is threatened. This includes the forfeiture of fundamental rights, such as, freedom of assembly and freedom of expression,³⁴ and the ability to ban political parties.³⁵ The concept of *defensive democracy* resulted from the experience of democratic backsliding and of extreme injustice under the Nazi regime and seeks to prevent the recurrence of past injuries.³⁶

While fundamental rights may be used to threaten democracy as explained above, democracy may also be used to threaten fundamental rights. Majority rule is a core element of democracy and is often equated by some, especially populist movements, with majority rule. Legislative majorities can use their democratic power to curb the rights of minorities. The ban on minarets,³⁷ or the wearing of a full-body veil in public,³⁸ are two recent examples. Currently, in Europe tendencies to limit the rights of various minorities in the name of “the people” can be observed in many countries, including Poland³⁹ and Hungary,⁴⁰ two Member States of the European Union. The limitation of individual rights, often coupled with the reduction of judicial remedies, is justified by the claim that the individuals or minorities in question are exercising their rights in an undemocratic manner, against the best interests of “the people”. In Germany, a right wing party expressly states in its party manifesto that Islam does not belong in

³³ “*Wehrhafte Demokratie*”; see Schneider J-P “Art. 8” in *Beck OK Grundgesetz* 41st ed Munich: CH Beck (2019) para 59.

³⁴ In accordance with s 18 GG.

³⁵ In accordance with s 21(2) GG.

³⁶ BVerfGE 144, 20 at 195. Even though the South African Constitution is also a “never again” Constitution, it does not have this feature, but Chapter 9 provides for institutions to protect democracy. The German Constitution does not have this concept.

³⁷ See *Hafid Ouardiri v Switzerland*, ECtHR (2012) *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 289 seq.

³⁸ See *SAS v France*, ECtHR (2014) *Neue Juristische Wochenschrift (NJW)* 2925 seq with annotation by Hochhuth M; Finke J “Warum das ‘Burka-Verbot’ gegen die EMRK verstößt” (2010) *NVwZ* 1127 seq; Beaucamp G & Beaucamp J “In dubio pro libertate” (2015) *Die Öffentliche Verwaltung (DÖV)* 174 seq; Grabenwarter C & Struth K “Das französische Verbot der Vollverschleierung - Absolutes Verbot der Gesichtsverhüllung zur Wahrung der ‘Minimalanforderungen des Lebens in einer Gesellschaft?’” (2015) *Europäische Grundrechte Zeitschrift (EuGRZ)* 1 seq.

³⁹ See Starski P “Poland at Crossroads – The Constitutional Tragedy Continues ... Part I”, available at <https://www.juwiss.de/1-2016/> (accessed 29 May 2016) and “The Constitutional Tragedy Continues ... Part II” available at <https://www.juwiss.de/3-2016/> (accessed 29 May 2016).

⁴⁰ Fournier T “From rhetoric to action, a constitutional analysis of populism” (2019) 20(3) *German Law Journal* 362 at 367 – 375.

Germany.⁴¹ As a consequence, some party representatives suggest that Muslims should not be allowed to invoke the freedom of religion.

The relationship between fundamental rights and democracy is therefore more complicated than it may appear at first glance. On the one hand, democracy seems to depend on the protection of rights; on the other, the protection of rights can undermine democracy while democracy can undermine the protection of rights. Considering the potential conflicts between the two constitutional values, the next part analyses whether, and if so how, both values can be reconciled in case of conflict.

3 RECONCILING DEMOCRACY AND FUNDAMENTAL RIGHTS

One way of solving a potential conflict between democracy and fundamental rights is to establish a hierarchical order or ranking between them, with either democracy or fundamental rights as the more important value. However, no express or implied relationship of this kind can be found in the German Basic Law. Both principles have the same priority under the Constitution. In the absence of a hierarchical relationship (see part 3.1 below), the two values must be brought into harmony with as little friction as possible (see part 3.2 below).

3.1 Hierarchy

There is no evidence in the German Basic Law that fundamental rights are subordinate to the democratic principle (see part 3.1.1 below), or that fundamental rights are given precedence over democracy (see part 3.1.2 below).

3.1.1 *Democratic-functional theories of fundamental rights*

The principle of democracy would have logical priority if the exercise of fundamental rights was only allowed in ways that promote democracy. This is the view held by what is known as the democratic-functional theory of fundamental rights.⁴² The German Federal Constitutional Court has not endorsed a particular theory of fundamental rights, such as the democratic-functional theory. Rather, depending on the fundamental right and the particulars of the case in question, the Court has pragmatically applied a variety of approaches.⁴³ In the case of fundamental rights with a political dimension, such as, the freedom of expression and the freedom of assembly, the German Federal Constitutional Court has emphasised how important the exercise of the fundamental rights is to a democratic State.⁴⁴ Moreover, individual elements of some fundamental rights have occasionally been interpreted after considering the significance of that fundamental right in a democratic State. One of the *rare* examples of this is the Love

⁴¹ AfD, “Das Grundsatzprogramm der Alternative für Deutschland” available at <https://www.afd.de/grundsatzprogramm/> (accessed 15 August 2019).

⁴² See Böckenförde EW “Grundrechtstheorie und Grundrechtsinterpretation” (1974) *NJW* 1529 seq; Mahlmann M “Grundrechtstheorien in Europa – kulturelle Bestimmtheit und universeller Gehalt” (2011) *Europarecht (EuR)* 469 seq.

⁴³ In this sense Böckenförde (1974) at 1530.

⁴⁴ BVerfGE 7, 198 at 208; BVerfGE 69, 315 at 346 – 347.

Parade case, in which the term “assembly” in section 8(1)⁴⁵ of the German Basic Law was defined in relatively narrow terms.⁴⁶ German courts and legal scholars agree that an assembly, as opposed to a crowd, is characterised by a common purpose.⁴⁷ It is disputed whether every purpose (including cultural or sports purposes) is sufficient to constitute an assembly, or whether the purpose must have a special connection to the public sphere or public interest. The German Federal Constitutional Court adopted the narrower view, according to which assemblies are privileged by the Constitution because of the benefits of political assemblies for the democratic process.⁴⁸ On this basis, the Court denied constitutional protection to a Love Parade, essentially a techno party, and the counter-demonstration, essentially another techno party.

However, even in such cases, the interpretation of fundamental rights is not viewed exclusively within the context of their contribution to the principle of democracy. This would not be consistent with the nature and historical origins of fundamental rights as individual rights, as has continually been emphasised by the German Federal Constitutional Court in its rulings. In addition, a democratic-functional theory of fundamental rights would require an assessment of the contribution each right makes to democracy. The contribution made by expressions of opinion or assemblies, would have to be evaluated in terms of its effect on the democratic process and public opinion. Apart from the impracticability of such an approach, this approach would require, and thus allow the authorities to assess and evaluate, the value of the opinions expressed. This would lead to an oversight or censorship of opinions by the State; something not desirable in a democracy where public opinions should be developed by the people and not imposed by the government.

3.1.2 *A right to democracy?*

The previous paragraph established that the fundamental rights of the Bill of Rights are not inferior and subservient to the value of democracy. However, democracy is also not subsidiary to fundamental rights, in the sense that democracy is part of, or merely a simple consequence of, fundamental rights.

It is true that the sovereignty of the people⁴⁹ can be understood as a right of the individual to participate and have a voice in the political process.⁵⁰ However, the principle of people’s sovereignty is too abstract from which to deduce concrete legal

⁴⁵ For the text of the provision see the translation above.

⁴⁶ BVerfG (2001) *NJW* 2459 at 2460.

⁴⁷ BVerfG (2001) *NJW* 2459 at 2460; Depenheuer O “Art 8” in Maunz/Dürig (eds) *Grundgesetz-Kommentar*, Munich: CH Beck (2006) para 44.

⁴⁸ BVerfG (2001) *NJW* 2459 at 2460. In South Africa, legal scholars generally assume that all assemblies are protected, even concerts or soccer matches, De Vos & Freedman (2014) at 553.

⁴⁹ Preamble & s 42(3) of the SA Constitution; s 20(2) of the German Basic Law: “All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.”

⁵⁰ Kielmansegg P “Demokratiebegründung zwischen Menschenrechten und Volkssouveränität” in Schwartländer J (ed) *Menschenrechte und Demokratie* Kehl: Engel (1981) 99 seq.

consequences, such as, the voting system or the term of the legislative period. The relevant provisions on democracy in the German Basic Law are not formulated as individual rights, but as provisions determining the structure of the State. The only individual right expressly granted with respect to democracy is the right to participate in elections in accordance with section 38(1) of the German Basic Law. This provision is more specific than a general right to democracy would be. The SA Constitution also grants political rights, such as in section 19 of the SA Constitution, on the one hand, and provides for democratic institutions,⁵¹ with law-making procedures,⁵² on the other. A general right to democracy would level these distinctions. Therefore, it cannot be argued that democracy is subordinate to fundamental rights.

3.2 Reciprocity

If the tension between fundamental rights and democracy cannot be resolved by establishing a hierarchical relationship between these two values, they must be aligned by other means. This requires a closer conceptual analysis of each term.

3.2.1 Democracy

To reconcile fundamental rights and democracy, it is crucial not to view democracy simply as the will of the majority.⁵³ The protection of the rights of minorities is just as much a part of the principle of democracy; democracy means that a minority must have the opportunity to become the majority.⁵⁴ The possibility of a change in the majority is part of the democratic ethos.⁵⁵ The protection of minorities is closely related to the principle of temporary rule,⁵⁶ which is also an essential feature of democracy. Temporary rule means that government offices are awarded only for a certain term of pre-determined duration. The limits on public office linked to limited election periods, which require that public officials must be elected at regular intervals in general, direct, free, equal and secret elections,⁵⁷ make a peaceful change in the governmental majority possible. Thus, in German constitutional law, the principle of democracy includes within itself several sub-principles, which flank and counterbalance the majority principle.⁵⁸

This conception of democracy as a cluster of principles provides us with a better understanding of the relationship between democracy and human rights. The principle

⁵¹ "Parliament" (ss 42 seq of the SA Constitution) or "State Institutions Supporting Constitutional Democracy" (ss 181 seq of the SA Constitution).

⁵² Sections 73 seq of the SA Constitution.

⁵³ See Schmitt (1996) at 155 & 159; see also Drossel J-M "Das letzte Wort des Bundesverfassungsgerichts – Ein undemokratischer Mechanismus?" in Elser D et al *Das letzte Wort – Rechtssetzung und Rechtskontrolle in der Demokratie* Baden-Baden: Nomos Verlag (2014) 255 seq.

⁵⁴ BVerfGE 5, 85 at 198 seq.

⁵⁵ Böckenförde EW "Demokratie als Verfassungsprinzip" in Isensee J & Kirchhof P (eds) *Handbuch des Staatsrechts der Bundesrepublik Deutschland* vol II 3rd ed Heidelberg: CF Müller (2004) at §24 para 76.

⁵⁶ Böckenförde at § 24 para 50.

⁵⁷ Section 38(1) of the German Basic Law.

⁵⁸ Sachs M in Sachs M (ed) *Grundgesetz* 8th ed Munich: CH Beck (2018) at Art 20 para 26.

of majority rule is only a formal principle. It is silent about the content of the majority will. Viewed formally, the mechanical application of the principle of the majority will would justify the tyranny of the majority.⁵⁹ This is not in accordance with a modern understanding of democracy. Rather, the rule of the majority is based on the concept of equality of voters and a free and open forum of opinions culminating in regular elections.⁶⁰ Democracy can be described as the form of government “of free persons, subject to reciprocal recognition of the freedom of the others”.⁶¹

3.2.2 *Fundamental rights*

In the German context, the necessary material content of democracy, as opposed to the formal principle of majority rule, is provided by a Bill of Fundamental Rights which are based on human dignity. In German constitutional law, fundamental rights are not only negative liberties in the sense that they limit the law making capacity of the State.⁶² They are not only individual rights limiting State power. Fundamental rights, in particular freedom of expression and freedom of assembly, secure the free and open forum upon which democracy depends. They grant a sphere of privacy where values and opinions can freely develop. Only a sphere of freedom allows informed participation in the democratic process. Free elections as required by the formal principle of democratic will, will only be possible if the citizens who are members of the electorate are independent of State will and can build their own opinions in a sphere separated from State organs.

Fundamental rights guarantee more than the mere absence of legal limitations. Relying on the German Basic Law, the German Federal Constitutional Court has developed and given shape to further dimensions of fundamental rights. Fundamental rights require the State to act in favour of the individual person. There is a positive duty on the part of the State to protect the fundamental rights of the bearers of the rights.⁶³ This positive duty is not spelled out explicitly in the German Basic Law, but has been interpreted by the German Federal Constitutional Court as implied in the Basic Law. The South African Constitution explicitly embraces this fuller conception of rights in section 7(2): “The state must respect, protect, promote and fulfil the rights in the Bill of Rights”. The South African Constitutional Court has given effect to this provision by highlighting that it not only imposes negative but also positive obligations on the State.⁶⁴

⁵⁹ Voßkuhle A “Rechtsstaat und Demokratie” (2018) *NJW* 3154.

⁶⁰ Badura (2018) at D para 8.

⁶¹ Möllers C *Demokratie – Zumutungen und Versprechen* Berlin: Wagenbach (2008) at 9.13 & 13.17seq.

⁶² Hesse K *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* 20th ed Heidelberg: CF Müller (1999) at para 291.

⁶³ BVerfGE 39, 1 at 20; BVerfGE 46, 160 at 164.

⁶⁴ See for example *S v Baloyi* 2000 (2) SA 425 (CC) at 11 where s 7(2) read together with s 12 of the SA Constitution is interpreted as “obliging the state directly” to protect the right of everyone to be free from domestic violence; see also Klug H *The Constitution of South Africa: a contextual analysis* Oxford: Hart Publishing (2010) at 124.

However, fundamental rights are also ambiguous in themselves and in their formulation. Rights are not absolute but subject to internal qualification and external limitation. Section 4 of the French Declaration of Human and Citizens' Rights of 26 August 1789⁶⁵ stated that individual freedom means the ability to do anything that does not harm anyone else, but added that limitations could be imposed on the exercise of fundamental rights by passing a law.⁶⁶ Fundamental rights and their democratically adopted limitations may therefore at times require a careful balancing. This fact is not explicitly acknowledged by the German Basic Law but has been developed by legal scholars and the German Constitutional Court.⁶⁷ The South African Constitution addresses the limitation of rights explicitly,⁶⁸ and provides for a more nuanced and detailed approach to the tension between fundamental rights and democratic legislation.⁶⁹

3.3 Preliminary conclusion

The conceptual analysis of the tension between fundamental rights and democracy has revealed the following. Democracy requires and presupposes fundamental rights. Democracy is also the form of government which is best suited to protect fundamental rights. This is so because the minority has the chance to become the majority and vice versa. The two values are interrelated and interdependent. Therefore, any limitation of fundamental rights and freedoms must always be based on an action by the democratic legislature, the will of the majority. However, legislators are not entirely free. Due to the principle of proportionality inherent in fundamental rights,⁷⁰ they are required to strike a suitable balance between public and private interests. To play one off against the other would ultimately corrupt them both.

4 THE ROLE OF THE CONSTITUTIONAL COURT

The relationship between democracy and fundamental rights is not solely determined by the content of constitutional values; it is also determined by the actors (institutions envisaged by the constitutions, namely, a parliament and constitutional court) and their

⁶⁵ Starck C "Grundrechte und Gesetz. Eine Entwicklungsgeschichte" in Sachs M & Siekmann H (eds) *Der grundrechtsgeprägte Verfassungsstaat. Festschrift für Klaus Stern zum 80. Geburtstag* Berlin: Duncker & Humblot (2012) 197 at 198 – 200.

⁶⁶ "La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui : ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres Membres de la Société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la Loi".

⁶⁷ Hesse (1999) at para 317 – 320; BVerfGE 142, 74 at 96 – 97 & 101.

⁶⁸ Section 36 of the SA Constitution.

⁶⁹ See, for example, a description of this process in De Vos & Freedman (2014) at 347. Section 36 of the SA Constitution (or s 33 of the interim Constitution) has been applied in numerous cases before the Constitutional Court; see for example *S v Makwanyane* 1995 (3) SA 391 (CC); *Ex parte Minister of Safety and Security & others: in re S v Walters & another* 2002 (4) SA 613(CC).

⁷⁰ BVerfGE 19, 342 at 348 – 349.

actions. Whether the right balance between democracy and fundamental rights is struck will be ultimately decided by the constitutional court. This is so both in South Africa and in Germany, where the Constitutions provide for the separation of powers,⁷¹ but charge a Constitutional Court with interpreting the contents of the Bills of Rights and the value of democracy, and thus determine their relationship.⁷² The two Constitutional Courts are charged with reviewing the activities of Parliament, where the democratic majority enacts its laws.⁷³ The problem is that Parliament receives its mandate through direct democratic elections,⁷⁴ and thus represents the majority will, whereas the justices of the Constitutional Courts are only appointed or elected indirectly.⁷⁵ The Courts does not have a direct mandate to govern and their decisions are marked by a democratic deficit: the so-called “counter-majoritarian dilemma”.⁷⁶

This term was coined by Bickel and was used to criticise the extensive powers of judicial review which the US Supreme Court has acquired since the famous decision in *Marbury v Madison*.⁷⁷ Since the US Constitution does not provide for judicial review of legislation in clear terms, the debate in the US about the constitutional legitimacy of this power is justified to some extent. However, when it comes to modern constitutions, such as those of Germany and South Africa, the drafters were aware of the “counter-majoritarian dilemma” and must be assumed to have resolved the dilemma. One could thus argue that the German and South African Constitutional Courts simply apply the law when invalidating legislation passed by Parliament, as the Constitutions themselves reflect the political will of the majority of “we the people”. However, since constitutions are drafted in broad terms and make reference to abstract concepts (such as, freedom, equality, dignity), the constitutions as law leave constitutional courts with a large margin of discretion. Furthermore, the older a constitution gets, the less convincing it becomes that the old constitution reflects the will of the majority of the people more

⁷¹ Sections 41(1)(e) - (g) of the SA Constitution, see Parpworth N “The South African Constitutional Court: upholding the Rule of Law and the separation of powers” (2017) 61 *Journal of African Law*, 273 seq;

s 20(2) of the German Basic Law: “All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.”

⁷² Section 167 of the SA Constitution; s 93(1)1 of the German Basic Law: “The Federal Constitutional Court shall rule on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body [...]”

⁷³ Sections 167(4)(b) and (5) of the SA Constitution; s 93(1)2 of the German Basic Law: “The Federal Constitutional Court shall rule in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or Land law with this Basic Law, or the compatibility of Land law with other federal law, on application of the Federal Government, of a Land government, or of one fourth of the Members of the Bundestag [...]”

⁷⁴ Section 46 of the SA Constitution; s 38(1) of the German Basic Law, see text above at n18.

⁷⁵ Section 174 of the SA Constitution; s 94(1) sentence 2 of the German Basic Law: “Half the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat.”

⁷⁶ Bickel AM *The least dangerous branch* 2nd ed New Haven: Yale University Press (1986) at 16 seq.

⁷⁷ US Supreme Court, *Marbury v Madison* 5 U.S. 137 (1803).

accurately than a more recent law. Finally, it is true that an excessive use of judicial review can interfere with the separation of powers.

Given this background, it is necessary to examine how the material relationship between the values of democracy and fundamental rights is reflected in the institutional relationship between parliament and the constitutional court. Without much generalisation, the constitutional court⁷⁸ is viewed as the institutional embodiment of the rule of law (and thus of fundamental rights) while parliament is the institutional representation of the majority (and thus democracy).

4.1 Criticism: judicial overreach

The institutional interplay between parliament and the constitutional court is not always problem free. As mentioned above, the counter-majoritarian dilemma remains a constant point of debate for constitutional scholars. In South Africa this debate has recently become more heated. The 2017 case *Economic Freedom Fighters v Speaker of the National Assembly*⁷⁹ addressed the failure of the South African Parliament to hold the President accountable for his non-compliance with remedial action against him by the Public Protector. In his dissenting opinion, Chief Justice Mogoeng warned that the majority judgement represented a “textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament”.⁸⁰ Even before this judgement, some South African politicians indicated their dissatisfaction with the rulings of the Constitutional Court, warning about “encroachment”,⁸¹ and the risk of a “judicial dictatorship”.⁸²

The same debate involving the German Federal Constitutional Court is developing in Germany.⁸³ In recent years, the German Federal Constitutional Court has been increasingly criticised by legal scholars for the extensive exercise of its powers to the

⁷⁸ For the example of the German Federal Constitutional Court, see Schönberger C “Anmerkungen zu Karlsruhe” in Jestaedt M, Lepsius O, Möllers C & Schönberger C *Das entgrenzte Gericht* Berlin: Suhrkamp (2011) 9 at 50–56.

⁷⁹ *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC). See the case note by Parpworth (2017) at 273 seq.

⁸⁰ Mogoeng CJ in *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) at para 223.

⁸¹ Samson T “Executive Superior to Courts, says Zuma” (2 November 2011) *Business Day* available at <https://www.pressreader.com/south-africa/business-day/20111102/282480000577522> (accessed 24 September 2019).

⁸² Du Plessis C “Nzimande slams ‘judicial dictatorship’” (18 December 2011) *News 24* available at <https://m.news24.com/SouthAfrica/Politics/Nzimande-slams-judicial-dictatorship-20111217-2> (accessed 24 September 2019), see also Kawadza H “Attacks on the judiciary: undercurrents of a political versus legal constitutionalism dilemma ?” (2018) 21(1) *Potchefstroom Electronic Law Journal (PER)* at 7.

⁸³ See the dissenting opinions of Justices Lübbe-Wolff and Gerhardt, BVerfGE 134, 366 at 419 – 422 & 430.

alleged detriment of Parliament.⁸⁴ This becomes apparent when legal scholars speak of the “unlimited court”⁸⁵ or the “juristocracy”.⁸⁶ This criticism of judicial overreach is not new.⁸⁷ Rather, the relationship between constitutional jurisdiction and the legislature has been subject to debate since the phenomenon of strong review powers made its appearance in modern constitutional law.⁸⁸ What is disconcerting is that this criticism seems to be increasing in frequency and intensity. Critics of the German Federal Constitutional Court go as far as to say that a substantial shift altering the structure of the Constitution, in particular the separation of powers, is taking place, to the detriment of the German Parliament and the principle of democracy.⁸⁹ The following paragraphs will assess the accuracy of this broader attack on constitutional courts by self-styled democrats in the German context.

4.2 The shift within the power structure

Since Germany did not have a Constitutional Court under previous Constitutions, the German Federal Constitutional Court had no tradition or role model and had to find its own place in the institutional architecture of the State after the Basic Law entered into force in 1949. From the very beginning of its existence, it was the aim of the German Federal Constitutional Court to act and be recognised as a constitutional organ, of a status equivalent to that of Parliament and the executive.⁹⁰ It has succeeded in doing so in an exemplary way. The Court has interpreted fundamental rights in a broad sense,⁹¹ which gives it the opportunity to exercise broad review powers over the acts of other branches of government, especially the legislature. The German Federal Constitutional Court has created new aspects of fundamental rights, such as the duty to protect,⁹² and

⁸⁴ *Pars pro toto*. Jestaedt M, Lepsius O, Möllers C & Schönberger C *Das entgrenzte Gericht* Berlin: Suhrkamp (2011).

⁸⁵ Jestaedt et al (2011).

⁸⁶ Höffe O “Wer hütet die Verfassung vor ihren Hütern?” in Stolleis M (ed) *Herzkammern der Republik* Munich: CH Beck (2011) 124 at 127 & 135. See Brohm W “Die Funktion des BVerfG – Oligarchie in der Demokratie?” (2001) *NJW* 1 seq.

⁸⁷ See Simon H “Grundrechte im demokratischen und sozialen Rechtsstaat” in Gebauer K-E & Klein E (eds) *Grundrechte, soziale Ordnung und Verfassungsgerichtsbarkeit. Festschrift für Ernst Benda zum 70. Geburtstag* Heidelberg: CF Müller (1995) 337 at 346.

⁸⁸ US Supreme Court, *Marbury v Madison* 5 U.S. 137 (1803). In Germany, there was a controversy in the late 1920s as to whether the institution of a constitutional court was needed with main opponents Kelsen on the one hand (Kelsen H “Wesen und Entwicklung der Staatsgerichtsbarkeit” (1929) *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer (VVDStRL)* 5 at 30 seq; Kelsen H “Wer soll Hüter der Verfassung sein?” in van Ooyen R C (ed) *Wer soll Hüter der Verfassung sein?* Tübingen: Mohr Siebeck (2008) 58 seq) and Schmitt (1996) on the other.

⁸⁹ See dissenting opinions of Justices Lubbe-Wolf and Gerhardt, BVerfGE 134, 366 at 419-422 & 430; Jestaedt et al (2011).

⁹⁰ BVerfG “Die Stellung des BVerfG” (1957) 6 *Jahrbuch des öffentlichen Rechts der Gegenwart. Neue Folge* (JöR NF) 144 seq.

⁹¹ BVerfGE 6, 32 seq.

⁹² BVerfGE 39, 1 seq.

has even distilled new unenumerated fundamental rights, such as, the right to informational self-determination,⁹³ or the right to confidentiality and probity in information technology systems.⁹⁴

The Court has established the canon of *Verfassungskonforme Auslegung* or the principle that legislation must be interpreted as far as is reasonably possible in conformity with the Constitution (similar to the principle explicitly included in section 39(2) of the South African Constitution),⁹⁵ and the Court has set new requirements for the coherence of laws by ruling that new laws must “fit” without contradiction into existing sets of rules.⁹⁶ Finally, the Court has even subjected to its control the power of the democratic legislature to pass constitutional amendments, by ruling that it falls within the Court’s competence to assess whether the requirements for constitutional amendments are met.⁹⁷ The list could be extended at length. It is therefore true that the Court’s powers have grown significantly. At the same time the German legislature largely respects the role of the Court and is quite anxious to follow the Court’s existing case law.

In isolated cases, however, the Court may have exceeded the limits of its powers. Even so, the stark criticism of some German scholars concerning judicial overreach seems to be exaggerated. The number of successful constitutional litigation cases is extremely low.⁹⁸ The German Federal Constitutional Court very rarely invalidates Acts of Parliament. Thus, although the Court has found ways to enable it to exercise strict review of Acts of Parliament, it seldom makes use of this power. The aforementioned criticism is, in my opinion, imbalanced for another reason. Critics only look at the rulings in which the German Federal Constitutional Court used its powers extensively. The opposite effect, the occasional lack of judicial review, is not taken into account. For example, sometimes it is the German Federal Constitutional Court that saves legislation by postulating the necessary justification for a law which the parliamentary debates did not reflect.

Without sufficient justification, the law would otherwise have been considered unconstitutional.⁹⁹ In fact, scholars are sometimes puzzled by the fact that the Court

⁹³ “*Recht auf informationelle Selbstbestimmung*”, BVerfGE 65, 1 seq.

⁹⁴ “*Grundrecht auf Gewährleistung der Vertraulichkeit und Integrität informationstechnischer Systeme*”, BVerfGE 120, 274 seq.

⁹⁵ “*Verfassungskonforme Auslegung*”, BVerfGE 51, 304 seq. Section 39(1) provides that every court must interpret legislation in a manner that promotes “the spirit, purport and objects of the Bill of Rights”.

⁹⁶ BVerfGE 98, 83 seq.

⁹⁷ BVerfGE 109, 279 seq.

⁹⁸ In the last 20 years on average only two per cent of the constitutional complaints pursuant to s 93(1)(No. 4a) GG have been successful, BVerfG, “Jahresstatistik 2018” at 20 - 21, available at https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2018/statistik_2018_node.html (accessed 15 August 2019). Furthermore, in many cases only the application of the law by the courts were unconstitutional but not necessarily the underlying piece of legislation.

⁹⁹ BVerfG (1998) NJW 1776 at 1777. See Sodan H “Verfassungsrechtsprechung im Wandel – am Beispiel der Berufsfreiheit” (2003) NJW 257 at 258.

does not review the legislative activity of parliament more strictly.¹⁰⁰ These scholars argue that the Court could make better use of the essential content of a right,¹⁰¹ the requirement that the fundamental right effected by a law needs to be specified,¹⁰² or the requirement that a law must apply generally and not only to a single case.¹⁰³ In short: a closer look at the jurisprudence of the German Federal Constitutional Court reveals that much of the populist rhetoric about judicial overreach is overstated.

4.3 Preliminary conclusion

Where democracy and fundamental rights come into conflict, an independent Constitutional Court should resolve this conflict, since both the minority and the majority are partial and cannot rule in their own affairs. Therefore, modern constitutions provide, and rightly so, for constitutional courts with strong review powers. These courts are elected or appointed according to constitutionally or legally prescribed procedures and decide cases based on the constitution. Nevertheless, it is impossible to completely avoid the perennial problem of judicial overreach in a constitutional democracy based on the separation of powers, where the judicial power includes the power of judicial review. One has to accept the practical reality that the constitutional court is the highest authority in a constitutional democracy.

Fundamental rights require interpretation and many interpretations are potentially acceptable within any given methodological framework. Placing new limitations on the review powers of constitutional courts, as discussed in Germany some years ago,¹⁰⁴ and more recently introduced in Hungary and Poland, is no fruitful solution; at best these are manoeuvres of the ruling majority to prevent judicial review. Changing the powers of the constitutional court can serve as a dangerous precedent in the case of democratic backsliding. In such a scenario, a strong constitutional court with the power to review and, if necessary, invalidate an Act of Parliament, remains crucial. To avoid an unwanted judicial overreach, interfering with the separation of powers, judicial self-restraint appears to me to be the only promising remedy.

¹⁰⁰ Hillgruber C “Ohne rechtes Maß? Eine Kritik der Rechtsprechung des Bundesverfassungsgerichts nach 60 Jahren” (2011) *JuristenZeitung (JZ)* 861 at 863 & 865 seq.

¹⁰¹ “Wesensgehaltsgarantie” in s 19(2) of the German Basic Law: “In no case may the essence of a basic right be affected.” See Häberle P “Die Wesensgehaltsgarantie des Art. 19 Abs. 2” in *Grundgesetz* 3rd ed Heidelberg: CF Müller (1983).

¹⁰² “Zitiergebot” in s 19(1) sentence 2 of the German Basic Law: “In addition, the law must specify the basic right affected and the Article in which it appears.” See Sodan H “Art 19” in Sodan H (ed) *Grundgesetz* 4rd ed Munich: CH Beck (2018) at para 6.

¹⁰³ “Verbot des Einzelfallgesetzes” in s 19(1) sentence 1 of the German Basic Law: “Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case.” See BVerfG 121, 30 seq.

¹⁰⁴ Müller F “Berliner Gedankenspiele zur dritten Gewalt” (3 April 2014) *Frankfurter Allgemeine Zeitung (FAZ)* available at <https://www.faz.net/aktuell/politik/inland/bundesverfassungsgericht-berliner-gedankenspiele-zur-dritten-gewalt-12879093-p2.html> (accessed 12 September 2019).

As a consequence, it is not the institution as such that needs legitimisation, but rather the way in which constitutional courts exercise their powers. The existence of a constitutional court does not have to be considered as a contradiction of democracy, as populists around the world are suggesting, but can be viewed as a deeply democratic institution, since it can ensure that fundamental rights as preconditions of democracy are protected. The constitutional courts are thus able to prevent a democratic backslide. One way of doing so is to attach greater importance to the largely neglected (Germany) and discarded (South Africa) doctrine of the minimum content of fundamental rights.

5 THE MINIMUM CONTENT OF FUNDAMENTAL RIGHTS

One general task of legal research is to systemise the law, to work on a coherent legal system, and, especially in the case of constitutional scholars, to interpret the constitution and offer systematic solutions which can be used by the courts to give effect to the constitution.¹⁰⁵ It is the duty of legal scholars to analyse constitutional provisions which are neglected, and underdeveloped to offer solutions to current legal problems. However, threats to the constitutional order should also be anticipated. As mentioned from the beginning of this essay, one of the most imminent dangers is democratic backsliding. The term “democratic backsliding” can be defined as “a deterioration of qualities associated with democratic governance, within any regime”.¹⁰⁶ This process is also referred to as democratic recession or democratic deconsolidation. Elected officials destroy democracy incrementally from within, and not from without through military power and coercion.¹⁰⁷ Since the threat to democracy comes incrementally from within, there is the chance of other actors, such as a constitutional court, countering this threat within the constitutional framework.

In this regard, the constitutional courts have generally not been active enough to resist the rise of populist and majoritarian democracy. Contrary to the general criticism of judicial overreach, constitutional courts have to act on the problem of democratic backsliding and develop tools to prevent it. As stated above, democracy presupposes fundamental rights. Nevertheless, the mere existence of a Bill of Rights in itself is insufficient; there must be some substance to the rights, some minimum content. In my opinion, constitutional courts must develop a positive understanding of the constitution as a whole. With respect to the Bill of Rights, this means establishing a minimum content of the relevant rights that cannot be sacrificed without compromising the liberal democracy constitutional scheme in its entirety. Since courts review only single pieces of legislation at a time and decide whether it is compatible with the Bill of Rights, they have no tools to determine whether a democratic backsliding is occurring, and to stop it.

¹⁰⁵ Ipsen J “Grundzüge einer Grundrechtsdogmatik” (2013) 52 *Der Staat* 266 at 288.

¹⁰⁶ Waldner D & Lust E “Unwelcome change: coming to terms with democratic backsliding” (2018) 21 *Annual Review of Political Science* 93 at 95.

¹⁰⁷ Levitsky S & Ziblatt D *How democracies die* New York: Crown (2017) at 3.

The answer lies in the guarantee of the essential content of a right as laid down in section 19(2) of the German Basic Law.¹⁰⁸ This provision is to be understood as protecting the grant of fundamental rights in the sense that a substantial part of the fundamental right must remain intact at all costs. The core of the fundamental right is not available to balancing against countervailing interests but is granted in an absolute manner.

It might be objected that the guarantee of the essential content of a right provides only limited protection, because both the individual fundamental right, as well as the guarantee of the essential content of a right, are subject to the actions of the legislature, which has the power to amend the constitution. Prima facie, this might appear to be true. However, a State that abolishes fundamental rights or the essential content of a right, moves itself from the concept of a free and democratic basic order until ultimately the State cannot be considered as free or democratic.

Although the South African Constitution has not adopted the “essential content” provision of the interim Constitution, legal scholars still debate the minimum core or essential content of some constitutional rights, especially with regard to socio-economic rights.¹⁰⁹ The SA Constitutional Court has also referred to the minimum content of rights, even after the entry into force of the final Constitution.¹¹⁰ A closer look at the German doctrine and the following methodological considerations when defining the essential content of a right, may therefore still be helpful within the South African context.

5.1 The importance of determining the essential content of a right

The guarantee of the essential content of a right has never played a major role in the jurisprudence of the German Federal Constitutional Court.¹¹¹ Academia barely pays attention to this provision.¹¹² In South Africa, the guarantee of the essential content of a right was enshrined in section 33(1)(b) of the South African interim Constitution but was not incorporated in the SA Constitution.¹¹³ Therefore, one could question the utility of trying to establish the essential content of the fundamental rights. However, it is one of the very few constitutional provisions that applies in absolute terms and thus is not

¹⁰⁸ Section 19(2) of the German Basic Law, see Hillgruber (2011) at 863 & 865 seq.

¹⁰⁹ Botha H “Learning to live with plurality and dissent: the *Grundgesetz* in South Africa” in Häberle P 60 *Jahre deutsches Grundgesetz* Tübingen: Mohr Siebeck (2011) 409 at 424 – 425.

¹¹⁰ See for example *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8 2018 (4) SA 1 (CC) 2018 (7), BCLR 763 (CC) at 45.

¹¹¹ Schaks N “Die Wesensgehaltsgarantie, Art 19 II GG” (2015) *Juristische Schulung (JuS)* 407 with further references.

¹¹² Schaks (2015) 407 with further references.

¹¹³ Section 19(2) of the German Basic Law, see Hillgruber (2011) at 863 & 865 seq.

subject to the weighing of other factors. Rather, the right contains an objective core or substance which must be protected.¹¹⁴

It is my view, that determining the essential content of a fundamental right will enable us to recognise the possible systematic abandonment of fundamental rights, as has happened in Russia, Turkey, Poland or Hungary, where governments are increasingly becoming, or have already become, authoritarian. Since democracy and fundamental rights are interrelated and interdependent, a democratic backsliding does not only affect democracy, but also fundamental rights. Only if the essential content of the rights is established in good time can the process of abandoning fundamental rights be identified and stopped. The concept of the essential content of a right is quite simple and originated during the period of the Weimar Republic (1919-1933) in the late 1920s. It holds that if a fundamental right exists, even after limitations by the State, something of the fundamental right must remain that accords it its title as a *fundamental right*.¹¹⁵

5.2 The threat of erosion

Section 19(2) of the German Basic Law is intended to prevent the erosion of fundamental rights.¹¹⁶ In the academic debate, scholars discussed whether severe limitations, such as, lifelong imprisonment or the final and fatal shot fired by the police to save lives, would constitute an infringement of the guarantee of the essential content of the right to liberty and right to life.¹¹⁷ Similarly, the first time the South African Constitutional Court dealt with the essential content of a right under the interim Constitution was with regard to the constitutionality of the death penalty.¹¹⁸ The erosion that section 19(2) of the German Basic Law was intended to prevent cannot only be caused by serious *individual* violations, but also by less serious violations if they have the same effect cumulatively.¹¹⁹ Whether a fundamental right is undermined by one serious violation or by an accumulation of different violations can be manipulated arbitrarily by legislative techniques. The difference is immaterial when the outcome is

¹¹⁴ See Schaks N “Das Verbot der Belastungskumulation als Bestandteil der Wesensgehaltsgarantie des Art. 19 Abs. 2 GG” (2015) *DÖV* 817 at 823 – 824.

¹¹⁵ Hensel A in Anschütz G & Thoma R (eds) *Handbuch des deutschen Staatsrechts* vol 2 Tübingen: Mohr Siebeck (1932) at 316.

¹¹⁶ Leisner-Egensperger A “Wesensgehaltsgarantie” in Merten D & Papier H-J (eds) *Handbuch der Grundrechte in Deutschland und Europa* vol III Heidelberg: CF Müller (2009) at § 70 paras 1 - 3; Dreier H in Dreier H (ed) *Grundgesetz* vol I 3rd ed Tübingen: Mohr Siebeck (2013) at Art 19 II paras 1 - 2; Huber P M in v Mangoldt H, Klein F & Starck C (eds) *Grundgesetz* vol I 7th ed Munich: CH Beck (2018) at Art 19 paras 110 - 112; Remmert B in Maunz T & Dürig G (eds) *Grundgesetz* at Art 19 Abs 2 paras 1, 18 Munich: CH Beck (Lfg. 52, May 2008); Stern K *Das Staatsrecht der Bundesrepublik Deutschland* vol III/2 Munich: CH Beck (1994) at 841 seq, 864. See v Mangoldt H in Pikart E & Werner W (eds) *Der Parlamentarische Rat 1948-1949 – Akten und Protokolle, Ausschuß für Grundsatzfragen* vol 5/I Munich: Oldenbourg (1993) at 119.

¹¹⁷ Schaks N (2015) at 409 – 410 with further references.

¹¹⁸ *S v Makwanyane* 1995 (3) SA 391 (CC) at para 132.

¹¹⁹ See Ipsen J *Staatsrecht II* 21st ed Munich: Vahlen (2018) at paras 218 – 219; Schaks “ Das Verbot” (2015) at 821 with further references.

considered. Courts should thus stop focusing solely on the most extreme forms of limitation, such as, the aforementioned lifelong imprisonment or the final and fatal shot fired by the police to save lives, and rather focus on the dangers for fundamental rights caused by the cumulative effect of a series of seemingly harmless limitations.

5.3 An example: the essential content of the freedom of expression

In this part I will attempt to develop the essential content of freedom of expression. Freedom of expression is “a basic requirement of any free and democratic society”, because “this freedom allows a continual intellectual exchange and a battle of opinions, which is the life-giving element of any free and democratic society”.¹²⁰ Consequently, this freedom is particularly suited when one tries to establish the minimum content of a fundamental right in order to prevent a democratic backslide.

5.3.1 *The essential content of all fundamental rights*

All fundamental rights set out in German and South African constitutional law are binding legal provisions.¹²¹ This is the defining aspect of all fundamental rights, including freedom of expression, as they have developed throughout history. Thus, the essential content of each individual fundamental right can be characterised as an individual right that is orientated towards the State and that can be exercised against the State. This incorporates “effective means of protection” which includes the possibility to successfully challenge in court limitations to one’s fundamental rights.¹²²

5.3.2 *The essential content of freedom of expression*

To answer the question of whether the essential content of freedom of expression¹²³ has been infringed, it is my submission that qualitative¹²⁴ and quantitative¹²⁵ aspects of the freedom of expression must be taken into consideration. The requirement that the essential content of the fundamental right be provided for *qualitatively* can be derived from the term “essential”. Essence (essential) describes that which characterises the fundamental right. In addition, section 19(2) of the German Basic Law contains a *quantitative* aspect. A sufficiently significant part or enough of what constitutes the

¹²⁰ BVerfGE 7, 198 at 208.

¹²¹ This is expressly stated in s 1(3) of the German Basic Law: “The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.”

¹²² BVerfGE 61, 82 at 113; Huber (2018) at Art 19 para 154 seq.

¹²³ Section 5(1) sentence 1 var. 1 of the German Basic Law: “Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures [...]”

¹²⁴ Section 5.3.2.1

¹²⁵ Section 5.3.2.2

essence of a fundamental right must remain; anything else constitutes infringement.¹²⁶ This is the same way in which the South African Constitutional Court interpreted the essential content under the interim Constitution.¹²⁷ The term “content” is generally used to refer to “substance”, “purport” and similar terms, which imply that a significant part must not be infringed.

Insofar as the *qualitative dimension* is concerned, the formulation of a fundamental right (including any internal limitations) gives us important information about the core of the right. In addition, it is significant to look at the historical dangers that gave rise to the formulation of a fundamental right. One example is the express ban of censorship.¹²⁸ From the historical background, we can conclude that it was especially important to the drafters of the German Constitution that no censorship be allowed. This was in reaction to a particularly severe historical danger. Section 143 of the German “Paulskirche Constitution”, drafted in 1849 but never entered into force, is an early document expressly forbidding censorship. This was considered of vital importance after the resolutions passed in Karlsbad in 1819 which limited the free expression of opinion to the point of repression, entirely changing the political climate of the time .

The German Constitution of Weimar (1919)¹²⁹ also included an express ban on censorship in section 118(2) sentence 1.¹³⁰ To prevent individuals from censoring themselves in anticipation of repressive measures, the German Federal Constitutional Court requires that the principle of free speech must be applied even to the interpretation of an allegedly defamatory statement.¹³¹ This means that the courts, before convicting a person, must interpret the statement carefully. Only if there is no single interpretation that could be regarded as legal, may the court convict a person because of his or her statement.¹³²

The German Federal Constitutional Court ruled early on that the freedom of expression “is one of the most direct expressions of a human personality within a society”.¹³³ This is because this freedom allows “a continual intellectual exchange, a battle of opinions”.¹³⁴ From this we may conclude that only intellectual debate is protected; freedom of expression does not make reference to other forms or methods, such as economic power. In the newsstand case, for example, the Court held that a

¹²⁶ Stern K (1994) at 847 & 864; Krüger H “Der Wesensgehalt der Grundrechte i. S. des Art 19 GG” (1955) *DÖV* 597 at 599.

¹²⁷ *Makwanyane* 1995(3) SA 391 (CC) at para 134.

¹²⁸ Section 5(1) sentence 3 of the German Basic Law: “There shall be no censorship.”

¹²⁹ 11 August 1919, *RGBl.* 1919 p1383.

¹³⁰ “Censorship does not take place, but for light shows deviating regulations can be made by law.”

¹³¹ For example in case of criminal convictions for libel or defamation.

¹³² BVerfGE 82, 43 at 51 seq.; BVerfGE 93, 266 at 295 – 296.

¹³³ BVerfGE 7, 198 at 208.

¹³⁴ BVerfGE 7, 198 at 208. In a similar way, the South African Constitutional Court stresses that freedom of expression protects the “free and open exchange of ideas”, *S v Mamabolo* 2001 (3) SA 409 (CC) at para 37.

dominant publishing house may not use its economic power to force a small, privately run newsstand to boycott certain newspapers with controversial content.¹³⁵ The publishing house tried to use its economic power to ban other newspapers for their pro-communist opinions. The German Federal Constitutional Court held that the publishing house could not invoke freedom of expression if it merely tries to force the newsstand by economic means to change its view.¹³⁶

The limitations placed on fundamental rights also contain information about the essence of a fundamental right: from the specific requirement for limitations of freedom of expression that only “general laws” may limit freedom of expression,¹³⁷ we can conclude that the content of a particular opinion lies at the core of the protected right, because no particular opinions may be forbidden.¹³⁸ The German Federal Constitutional Court interprets the aforementioned term “general laws” in the sense that they must not be directed against a certain opinion as such and that the mere holding of a certain opinion cannot be forbidden.¹³⁹ Because the content is more important than the form, requirements of moderation which apply only to the form (and not to the content) of the expression of opinion, do not represent an infringement of the essential content, as defined by the German Basic Law. Furthermore, since section 5(2) of the German Basic Law allows limitations for the protection of minors and for the protection of personal honour, opinions interfering with the protection of minors or personal honour may fall within the scope of freedom of expression. However, these opinions do not constitute the essential content of freedom of expression, because the German Basic Law facilitates their limitations.

After all the infringements have been taken into account, a quantitative view must be taken to establish whether the bearer of the right still has a sufficient part of the right remaining.¹⁴⁰ To determine this, all limitations on freedom of expression must be taken into account. Although it is not possible to compile a comprehensive list here, an attempt may be made to evaluate limitations of a right. The more the content of an opinion is concerned (what is expressed as opposed to the manner in which an opinion is expressed), the more likely it is that the guarantee of the essential content of freedom of expression is negated.

¹³⁵ BVerfGE 25, 256 at 264–266.

¹³⁶ BVerfGE 25, 256 at 264–266.

¹³⁷ Section 5(2) of the German Basic Law. This clause applies only in the case of restrictions to freedom of expression and is an additional safeguard to the generally applicable ss 3(1) and 19(1) sentence 1 of the German Basic Law which state that all limitations must apply generally and not merely to a single case, and that all persons shall be equal before the law.

¹³⁸ See BVerfGE 124, 300 seq; Schaefer J P “Wie viel Freiheit für die Gegner der Freiheit?” (2010) *DÖV* 379 seq; Volkmann U “Die Geistesfreiheit und der Ungeist – Der Wunsiedel-Beschluss des BVerfG” (2010) *NJW* 417 seq.

¹³⁹ BVerfGE 124, 300 at 321 – 325.

¹⁴⁰ Schaks N “Das Verbot der Belastungskumulation als Bestandteil der Wesensgehaltsgarantie des Art. 19 Abs. 2 GG” (2015) *DÖV* 817 at 823 – 824.

Determining the essential content of a fundamental right, and whether it is infringed, forces academia to consider all limitations on a fundamental right that exist thus far. This helps scholars to clearly determine how much freedom exists, and where it has been sacrificed.

5.4 Preliminary Conclusion

The minimum fundamental rights and freedoms that must exist if a State is to be considered democratic are provided for and ensured by law. Section 19(2) of the German Basic Law includes the guarantee of the essential content of a right, which states that a substantive core of each fundamental right granted may not be infringed. With regard to freedom of expression, this means protection of the right to free speech, which is to be understood as the right to express one's own human personality without censorship and as a means of peaceful intellectual debate.

6 CONCLUSION

Democracy presupposes fundamental rights. At the same time democracy is best suited to protect fundamental rights. Democracy and fundamental rights are interdependent and interrelated without a fixed hierarchy between the two values. Where the two values come into conflict, they need to be balanced. The interdependence between democracy and fundamental rights is also reflected in the institutional relationship between parliament and constitutional courts. Both institutions are bound by both principles and have to satisfy both principles within the boundaries of their constitutional competences. Under modern constitutions with a system of separation of powers, such as, the South African Constitution or the German Basic Law, the constitutional court ultimately strikes the balance. The constitutional court can further invalidate Acts of parliament. This is not undemocratic *per se*, because the protection of the minority is part of the democratic principle. Even though constitutional courts sometimes do overreach, there is no empirical evidence of a constant judicial overreach that is contrary to the separation of powers. In order to prevent a transgression of constitutional courts into the powers of the legislative body, only the self-definition and self-limitation of the constitutional court, accompanied by the critical attention of legal scholarship, seem to be viable options.

However, a bigger threat to democracy than a judicial overreach are the dangers of a democratic backslide. However, constitutional jurisprudence is not well-developed to recognise and counter democratic backslides. Constitutional courts have to develop and implement tools to prevent such backslides, which are today a risk in both developing and established democracies. It is suggested that such democratic backslides can only be halted when rights are interpreted to have a core or essential content. When the essential content of a right is examined, both the qualitative and quantitative aspects of a right are at stake. I illustrated above how the core content of a right can be derived using the freedom of expression. The essential content of the other fundamental rights remains to be defined. This task may be burdensome, but it has become essential if

constitutional scholars are to detect potentially fatal attempts to terminate the interdependence of fundamental rights and democracy.

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