

On the Future of Democracy

Henk Botha/Nils Schaks/Dominik Steiger

A. Introduction

The legitimacy of the state's authority is in crisis, as one is informed from all quarters. The future of representative democracy is in danger, and the era of post-democracy has been proclaimed. One of the most pressing constitutional and policy discussions in recent years has accordingly been whether, and to what extent, the representative system has reached its limits and how democracy can be revitalised.

In this regard, pressure is being exerted on the traditional forms of parliamentary representation from two sides. On the one hand, the political class frequently deplores the loss of confidence among the represented. This lack of confidence is not new. On the other hand – and this is new, at least in this form – there is a feeling of helplessness amongst the representatives, who feel that they are being confronted by multiple and increasingly complex issues which they are required to deal with by governments, constitutional courts and “markets”, or which are pressed upon them by processes of supranational integration.

The debate has not only been ignited at the parliamentary level but also at the administrative level. In view of the vehement protests against major projects – for example, against Stuttgart 21 and against the plans for the transformation of the energy system – the debate has now come to focus on participation. Politicians in Germany have reacted – in differing degrees at the federal and the state levels – to the newly emerging expectations of the citizens by the introduction of means of sporadic forms of public participation. Examples include legislation on finding a final disposal site for nuclear waste and the introduction of early public participation in administrative procedural law. It appears as if the state is increasingly unable to achieve its regulatory purposes by means of the traditional legal instruments, which are no longer fully accepted.

This discussion is not limited to Germany. All over the world, traditional concepts of democracy are being challenged. Citizens who no longer feel that they are properly represented, are increasingly resorting to

protests and popular mobilisation. In South Africa, a similar phenomenon can be observed. Here, there is great dissatisfaction with the political system and its representatives. In part, this finds expression in violent protest – South Africa is sometimes called the global leader in this regard. Violent action occurs almost on a daily basis. The causes for this are as complicated as they are multi-layered and encompass inadequate public services, including interruptions in the supply of electricity, corruption, the violent use of force by the police, as well as a lack of democratic accountability on the part of local public authorities. Despite numerous differences between South Africa and Germany, South Africa is particularly suitable as a comparative country because it shares a similar political system with Germany. The post-apartheid constitutional order, which celebrated its 20th anniversary in 2014, is founded – like the Basic Law of the Federal Republic of Germany – on human dignity and human rights, and provides for a federal parliamentary system as well as a powerful constitutional court. Both constitutions are based on the experience of injustice in the past and seek to ensure a humane constitutional and democratic present and future. As is currently the case in Germany, the government in South Africa can also rely on a substantial majority in Parliament. However, Germany is governed by a coalition government, while in South Africa a single party, the African National Congress (ANC), regularly receives more than 60% of the total vote – most recently during the parliamentary elections in May 2014. Legal academics and the courts in both countries have considered these developments and have recognised new – and different – forms of democratic participation.

The present conference proceedings aim to discuss these changes in relation to the state's authority and the associated challenges to the principle of democracy, as well as developing possible solutions. After the initial diagnosis of the loss of the legitimacy of the representative state (B.), possible cures inherent in the representative system itself are explored: how can one improve the basis of representation, on the one hand, and the position of the representatives, on the other hand, to strengthen legitimacy (C.)? In a further step, the existing democratic system is considered from a different perspective by asking to what extent more participation can help to strengthen the legitimacy of the state (D.), before, finally, venturing to provide a summarised outlook (E.).

B. Diagnosis: The State's Loss of Legitimacy

The loss of the legitimacy of the state can be attributed to many factors that exist, in part, independently of each other, but to a far larger degree are interlinked and mutually reinforcing. These include: Internationalisation and Europeanisation, in other words the increasing power of international institutions, such as the WTO or the EU, that do not fully satisfy the traditional requirements of a democratic order; privatisation and the consequential withdrawal of the state and the increasing influence of non-state actors, such as corporate finance; declining growth; wars and migration in a magnitude that has been unknown since 1945; the rise of the party state; the (alleged) domination of the political process by unelected elites; the alienation of elected elites from the people; the exclusion of many social groups from the decision-making processes of the state and society; and, finally, increasing socio-economic inequality. The financial and sovereign debt crisis has acted as a catalyst for all these problems, which were however already recognisable before. In view of these difficulties, the state has frequently lost its authority to act, so that the state is reaching its limits.

I. Parliament as the ventricle of the democratic state is of vital importance. If confidence is lost in the only directly elected organ of the state, this will taint the entire political system. However, the answers provided by Parliament in respect of this loss of control may only be part of the problem, as Christian Calliess diagnoses in his contribution *Repräsentanten unter Druck: Zwischen Vertrauensverlust und Ohnmacht* (*Representatives under Pressure: Between Loss of Confidence and Powerlessness*). Legislation is characterised by an increased reliance on the administrative state by transferring tasks to the administration and to experts. The regulatory language adopted by the German Bundestag increasingly makes use of vague legal terms. However, the delegation of wide discretionary powers to the state administration represents a danger, because it strengthens an administration that is itself not fully legitimised. Moreover, private entities are increasingly becoming involved in the law-making process. This certainly does not constitute an opportunity for the greater participation of all citizens, but only for certain “interested parties” who do not enjoy direct democratic legitimacy. Such forms of “participation” are less a solution than part of the problem. Christian Calliess does not stop at this diagnosis, but also proposes tentative solutions to strengthen the confidence of citizens in Parliament. It is essential that Parliament retains and exercises the influence that is assumed and demanded of it by the constitution, so

that, amongst other things, the legislature ensures by means of its laws that the administration does not uncritically adopt privately created norms – e.g. from rating agencies. Parliament must also decide independently on key issues, such as the euro bailout. However, most importantly, since the surrendering of decision-making powers to the administration is the result of laws that become more and more abstract and which consequently diminish the substantive protection of individual rights, there is a need to guarantee the rights of the individual vis-à-vis the administration and to strengthen rights of participation.

The power of Parliament as a representative body is also waning in South Africa. Unlike in Germany, democracy in South Africa is only twenty years old and its legitimacy is tied to the capacity of the political system to address the socio-economic marginalisation of many of its citizens. The promise of material equality through democracy has not yet been fulfilled for large sections of the population. Ongoing economic exclusion, together with a reductionist understanding of democracy as a mere voting process, results in discontent with the representative system. Too often, Parliament is regarded as an extended arm of the ruling ANC party. These problems are exacerbated by high incidences of corruption. Christi van der Westhuizen, in her comment *Democratising South Africa: Towards a 'Conflictual Consensus'*, argues that, while South Africa is currently experiencing disaffection with the institutions of democracy, this does not amount to political apathy. On the one hand, she asks to what extent the idea of representation – as it is usually understood in western democracies – is the source of the discontent. The problem is the intermittent influence that citizens have which only recurs after intervals of several years and the overall weak feedback between represented and representatives. Although the constitutional principle of responsiveness (see the contribution by Barbara Loots) can provide a remedy, this will fail if it is merely applied formalistically and without conviction. On the other hand, Van der Westhuizen cites the example of the Economic Freedom Fighters (EFF), a left-wing populist party which has been represented in Parliament since 2014 and which is known for its unusual and confrontational tactics. In accordance with the conclusion of the Public Protector in her report on the upgrades to President Jacob Zuma's private residence, the representatives of the EFF have repeatedly demanded that the costs, amounting to the equivalent of 18.7 million euros, be repaid. Their refusal to back down and disruption of parliamentary proceedings have, on more than one occasion, met with state force, when they were removed from Parliament. For

Van der Westhuizen, the EFF's parliamentary activism serves as an example of a conflictual politics which participates in, yet at the same time pushes against the limits of representative democracy.

Jan Philipp Schaefer, in his contribution *Perspektiven der repräsentativen Demokratie (Perspectives on Representative Democracy)*, sees the representative democratic state as continuing to be the global model for good state order. This is true even though the individual objections of so-called post-democratic critics are justified, who correctly refer to weaknesses in representation and thereby in legitimacy.

II. One of the reasons for the loss of legitimacy is a lack of transparency. It is often argued that trust cannot be established if there is no transparency. Transparency is not only a weapon in the fight against corruption, but also enables citizens to be politically informed and to hold politicians accountable. The creation of transparency is a matter of legal form and is accordingly the responsibility of the state itself. The reference to external factors, such as "the markets", "globalisation" or other aspects that cannot be controlled, does not apply here. Section 32 of South Africa's Constitution guarantees the right of access to state-held information, as well as certain privately held information, and tasks Parliament to adopt legislation to give effect to this right. Parliament has done so through the enactment of the Promotion of Access to Information Act 2 of 2000.

Although secrecy is a material factor which contributes to the loss of legitimacy, transparency as a precondition for a functioning democracy must not be viewed in simplistic terms, as Jonathan Klaaren points out in his contribution *The South African 'Secrecy Act': Democracy Put to the Test*. His argument for a nuanced approach to transparency is based on the following considerations. Firstly, trust can also be destroyed in a system which is transparent, for example by misinformation and deception. Secondly, transparency can also have adverse effects, such as political action becoming increasingly informal and withdrawing itself from control mechanisms. Another danger is that too much hope is placed in transparency. Klaaren demonstrates this by an example from the United States. The *Citizens United* decision of the U.S. Supreme Court in 2010 opened the floodgates for party financing as never before. The Supreme Court permitted unrestricted expenditures by juristic persons for political purposes, i.e. primarily in support of election campaigns. The court referred to the restraining power of transparency as a barrier to the unrestrained influence of special interests on politicians. In practice, this barrier has

proved to be illusory and, in consequence of the judgment, special interests have a far greater influence than ever before.

In South Africa, no debate about a bill has been more intensely and fiercely fought than that in respect of the “Protection of State Information Bill”, also called the “Secrecy Bill” by its opponents, which was passed by Parliament in 2014. On the one hand, the bill restricts transparency and public governance, and thereby, in view of critics, puts the conditions for a functioning democracy in doubt. On the other hand, it limits the number of state documents which may be classified as secret in comparison to the present legal position, thereby strengthening democracy and fulfilling the constitutional mandate to establish a legislative framework regulating the right of access to public documents. It is generally expected that, in the event that the legislation is promulgated, the Constitutional Court will ultimately determine its validity. The lively public debate and controversy surrounding the adoption of the Bill have thrown a number of key issues affecting the legitimacy of South Africa’s representative democracy into sharp relief. Klaaren’s analysis foregrounds the following issues in particular: the lack of responsibility of political elites; the insufficient role played by the National Council of Provinces (the second chamber of parliament that was modelled on the German Bundesrat), which fails to raise local and regional debates to the national level; insufficient control of the intelligence services; and the struggle of the media for power and influence.

There is no express constitutional mandate for transparency in Germany. Nevertheless, parliamentary democracy in Germany is also based on public debate, freedom of expression and access to information. Consequently, transparency is not only a constitutional precept but also an indispensable condition for democracy. A balance between transparency and the interests of confidentiality must however be struck. Elke Gurlit, in her commentary *Das Spannungsfeld von Transparenz und Geheimhaltung im demokratischen Staat* (*The Tension between Transparency and Secrecy in a Democratic State*), argues that the German Freedom of Information Act (Informationsfreiheitsgesetz – IFG) of 2005 lacks this balance and unduly emphasises the interests of state secrecy, as evidenced by, *inter alia*, the exceptions provided for the intelligence services. It is, however, not only the state itself that threatens democracy but also private actors. In particular, companies like Facebook and Google constitute a threat to individual liberties due to their dominant position in the market as well as their knowledge about individuals, to which the state must respond. This could

also increase the legitimacy of state authority. Consequently, Elke Gurlit argues for comprehensive legislation governing access to information. It is evident that in this area there is room for improvement in both countries.

The diagnosis of the loss of legitimacy in the first part of the proceedings already includes initial suggestions for improving the representative system and for developing it further by increasing opportunities for participation. These improvements and developments raise important questions over the appropriate balance between transparency and secrecy and between representation and participation.

C. Curing the System: The Road to Better Representation

In the academic literature, calls for more direct democracy and participation predominate, and the strengthening of the representative system does not always receive adequate attention. This is surprising, as representation remains the basis of democracy. The approaches that may strengthen democratic legitimacy include – with regard to the represented – extending the right to vote and – with regard to the representatives – strengthening the position of the MPs in relation to their parliamentary group and Parliament. Finally, it must be considered whether the legislative process should not be fortified with participative elements in order to strengthen the representative system.

I. One of the reform options is an extension of the franchise by uncoupling it from nationality, so that individuals are entitled to vote solely on the basis of their territorial affectedness. Such reform laws were introduced in 1989 in Schleswig-Holstein and (to a lesser extent) in Hamburg as well as more recently in 2013 in Bremen. The German Federal Constitutional Court and the Constitutional Court of Bremen respectively rejected the relevant laws as unconstitutional. In view of increased global mobility, many are demanding that the criterion of nationality, which is perceived as nationalistic and anachronistic, should no longer be the decisive basis of the franchise. Conversely, consideration is given to whether a limitation of voting rights might also increase the legitimacy of the state by excluding the rights of nationals living abroad from voting, contrary to the constitutionally sanctioned legal position in both Germany and in South Africa. This would be the logical result if territorial affectedness were solely decisive for the entitlement to vote. In such an event, subjection to the laws of a territory would then be a positive as well as a negative con-

stitutive. These positions, which Wessel le Roux adopts in his contribution *Migration, Representative Democracy and Residence Based Voting Rights in Post-Apartheid South Africa and Post-Unification Germany (1990-2015)*, are controversial in Germany and South Africa, despite the fact that 500,000 foreigners were allowed to vote in the first election in South Africa after the end of apartheid. In 1997, the European Commission of Human Rights held that there is a correlation between the affectedness of an individual and his or her right to vote; subsequently, the European Court of Human Rights has repeatedly confirmed this decision. However, this has been in respect of the restriction of the right to vote of nationals who are resident abroad. Against this view, it is argued that a distinction must be made between the population and the nationals of a country, because only a unity can be represented and not a multiplicity. Conflicts of loyalty are inevitable and cannot be afforded by a society that has reached the end of its “life in political paradise”, according to the vehement objection by Otto Depenheuer in his commentary *Ende der repräsentativen Demokratie? Eine Staatsform vor der Alternative ihrersebst (The End of Representative Democracy? A System of Government Confronted by an Alternative to Itself)*.

II. In multi-party democracies, such as South Africa and Germany, questions arise over the independence of individual MPs in relation to Parliament and, in particular, their own political parties. The stronger the political party, the more difficult it tends to become for MPs to retain their independence. Richard Calland and Shameela Seedat note, in their contribution *Institutional Renaissance or Populist Fandango? The Impact of the Economic Freedom Fighters on South Africa's Parliament*, that Parliament has for a variety of reasons – related inter alia to the electoral system, the power of political parties to discipline their members and the dominance of the ANC – not been particularly effective in ensuring government accountability, but that the proceedings of the National Assembly appear to have been characterised by a renewed vitality since the 2014 elections. They analyse a number of recent events where parliamentary proceedings were characterised by sharp confrontation between the governing party and opposition parties over the latter’s attempts to call the government to account, and ask whether and to what extent the EFF’s disruptive tactics have reinvigorated Parliament or diminished its integrity.

In Germany, the conduct of the established and organised parties in the Bundestag also cries out for criticism, when due to power-political considerations an unconstitutional electoral law was adopted. The state be-

comes the spoils, as it has repeatedly been said. In order to revive the representative system, it is important to consider “how” – and not merely “whether” – to re-regulate party financing and to strengthen the oppositional rights of minorities, especially in times of an overpowering “great coalition”. Sophie-Charlotte Lenski considers these as well as other problems from a German perspective in her commentary *Abgeordnete zwischen Parteibindung, Regierungsdisziplin und neuen Formen der Partizipation (MPs between Party Ties, Government Discipline and New Forms of Participation)*. Her prognosis for Germany, in contrast to that of Richard Calland and Shameela Seedat for South Africa, is that Parliament will be weakened and not strengthened in the near future. In particular, the importance and influence of individual MPs – irrespective of whether they are part of the government or opposition – will be reduced. However, even if one leaves the parliamentary sphere in the narrow sense and considers the relationship between party, state and society, all is not well. Parliamentary groups (i.e. groups consisting of MPs belonging to a particular party), especially the parliamentary groups supporting the government, have also taken control of the social sphere by continually increasing their public relations activities in favour of the party – something that the government itself is prohibited from doing in terms of a decision of the Constitutional Court. However, both the government and the parliamentary groups spend tax payers’ money. Furthermore, members of parliamentary groups and their employees are proactively provided with public offices or posts in the civil service, before the outcome of the next election fails to “provide for” them. These mechanisms disrupt the thread of legitimacy that ought to run from the people to the elected representatives. If the will of the electorate has become increasingly less important to MPs, by virtue of other, more important dependencies, this must eventually have an effect on representation.

III. The representative system could also be substantially strengthened by the introduction of new participatory elements in the legislative procedure. Until now, Bundestag committees have only heard experts and the representatives of special interest groups, in terms of Section 70 of the Rules of Procedure of the Bundestag, but the people are not directly consulted. This is different in South Africa. Two ground-breaking judgments of the South African Constitutional Court had the effect that the people are involved in the parliamentary legislative process to a far greater extent than in Germany. The principle of responsiveness of state action obliges the state to invite the citizens to comment on proposed legislation and to

record and consider these views. A failure to do so results in the invalidity of the legislation. In her contribution, *Civic Dignity as the Basis for Public Participation in the Legislative Process*, Barbara Loots analyses the possibilities and limitations of the Constitutional Court's jurisprudence relating to public participation in the legislative process. She argues that the principle of responsiveness is closely linked to the dignity of the citizen. It also represents the resolve of the framers of the Constitution to break with the almost unlimited power that Parliament enjoyed during apartheid, and to subject Parliament to democratic control mechanisms. Through the principle of responsiveness, the Constitution ensures that democracy does not remain an empty promise and that human rights are protected differently than before 1994.

That these ideas can be transferred to Germany is demonstrated at the level of the individual states. The state of Baden-Württemberg is a frontrunner in matters of citizen participation in the legislative process in Germany. Even though public participation is only a voluntary experiment and not mandatory as in South Africa, the methods that are used resemble those in South Africa. Citizens are invited to furnish their opinions in respect of the legislative process online. These contributions are read and evaluated. They are taken into account in regard to the legislation as well as in the opinions of the experts. In his commentary *Baden-Württemberg zwischen Wählen, Mitreden und Entscheiden – Mehr Partizipation als Regierungsauftrag* (*Baden-Württemberg Between Elections, Commenting and Deciding – More Participation as a Governmental Duty*), Fabian Reidinger questions whether this increases the acceptance of the proposed legislation by the people or whether – on the contrary – politicisation might lead to the polarisation of the population. He also examines how the representatives – and the ministries – have accepted this “new” instrument and to what extent it has resulted in changing the political culture. The opening address by Cosima Möller has shown that this instrument is not revolutionary. She refers to the history of the origin of the General State Laws for the Prussian States of 1794. During the many years of preparation, not only experts were involved in drafting the law but the population was also encouraged to make proposals.

D. Enhancing the System: Direct and Participatory Democracy

Finally, we consider the possibility of enhancing representative democracy by means of direct-democratic and participatory elements. The concept of direct democracy relates to the legislative level. At the administrative level, in contrast, it is more common to speak of participatory or deliberative democracy. All these forms of democracy are characterised by attempts to reconnect the state's authority to the community of citizens through an open process. A reconciliation of interests is also made possible through deliberation: the relationship of responsibility between state authority and the community is strengthened by the state's obligation to respond to its citizens' views and concerns. Furthermore, participation also serves the (democratic) control of the state by its citizens.

I. The primary example of citizen participation is direct democracy by means of referendums and public initiatives. Although this discussion has been going on in Germany for a long time, the relevance of these issues became apparent during the coalition negotiations in 2013 when different positions were adopted at the federal level by the CSU and SPD on the one hand and the CDU on the other. Moreover, Germany has learned new lessons through the introduction and increased use of popular legislation in all 16 federal states. Direct democracy presents opportunities and poses risks – but the opportunities outweigh the risks, provided that representative democracy and parliamentarianism continue to be accepted as the norm, as Peter M. Huber emphasises in his contribution *Direkte Demokratie? Gefahren und Chancen für das repräsentative System (Direct Democracy? Threats and Opportunities for the Representative System)*. Direct democracy complements the existing system, but cannot replace it. The low number of successful referendums at the federal state level has already shown that the dangers that are often highlighted are probably overestimated. The benefit, in contrast, is substantial. Direct democracy slows down the process in relation to the pressure created by internationalisation and privatisation. Furthermore, it constitutes a counterweight to the party state that is one of the causes of deep scepticism towards the representative system. Elements of direct democracy increase acceptance and produce legal harmony, and are therefore urgently required at the federal level.

Despite the fact that the South African Constitution makes provision for referendums to be held at the national and provincial levels, a similar debate about direct democracy is not taking place in South Africa. A possi-

ble explanation is that the Constitution guarantees a significant degree of participation and responsiveness. However, the high incidence of protest action and social dissent suggests that there is a substantial gap between the constitutional promise of responsive government and the everyday reality of millions of South Africans, whose lives continue to be affected by poverty, inequality, social exclusion, poor service delivery and corruption. It further suggests that, in the South African political imaginary, direct democracy may be more closely linked to popular mobilisation and protest action than to the institutionalisation of the people's voice through formalised mechanisms such as referendums or citizens' initiatives.

II. The possible introduction of elements of direct democracy at the federal legislative as well as the administrative level in Germany has dominated the debate on participation in recent years. Planning procedures for major infrastructure projects (such as Stuttgart 21, Transrapid lines, power line routes, coal-fired power plants), in particular, provoke the opposition of citizens. Substantial attention has accordingly been paid to participation in planning law, which often directly affects the citizen. This may explain why citizen participation in the enactment of statutory regulations, which account for the bulk of the legislation, has been dogmatically neglected. Participation differs significantly depending on whether substantive laws or individual acts are being adopted. Nevertheless, the expectations in respect of participation are very similar. These relate to the effectiveness of the implementation of laws, information, transparency, control, acceptance and compensation for deficiencies in representative democracy. In any event, these expectations may be too high, as Jan Ziekow warns in his article *Exekutive Entscheidungen und Partizipation: Verbesserung der Steuerungsfähigkeit des Staates und der Legitimität staatlichen Handelns?* (*Executive Decisions and Participation: Improving the Controllability of the State and the Legitimacy of State Action?*). He points out that at most an acceptance of the process but not of the result can be expected. Moreover, even this only applies in respect of participation that has been carried out well. This raises important questions relating to the implementation and design of participatory programmes, as poorly designed and/or executed programmes can frustrate the aims of participation. The criteria are clarity of purpose and adequacy of form, conflict analysis, timeliness, the principles of knowledge, fairness, transparency and responsiveness. While the law requires participation in many cases involving individual decisions in administrative procedure, the systematic involvement of the public in relation to statutory regulations is absent in Germany. The strengthening

of this type of participation is limited by the Constitution itself, as participation can only take the form of consultation, not co-decision. Otherwise, the responsibility of the Government as envisaged by the Basic Law would be thwarted. When assessing participation at the level of statutory regulations, it must always be borne in mind that a legal basis for the statutory regulations exists, since the Federal Basic Law prescribes that a statutory regulation may only be adopted if and insofar as a law expressly allows this. Depending on how strong the legal determination is, the legitimising strength of the legislation will radiate to a greater or lesser degree on the statutory regulation. Especially in regulatory contexts that have a high social, economic and/or scientific and technological dynamism with a corresponding complexity of the regulatory framework and uncertainty of the decision-making basis, the legal determination will generally be low. Here there is room for the legitimising power of participation, which can function as a supplement but not as a replacement.

Some of these concerns are mirrored in the chapter by Petrus Maree, *Participation in Executive Rule-Making: Preliminary Observations towards a Conceptual Framework*, who asks why participation in the legislative process is a requirement for the validity of laws made by elected legislatures, but not for the validity of rules made by the executive. He argues that the constitutional provisions relating to the executive, democracy and separation of powers should provide the basis for a conceptualisation of participation in executive rule-making. More should be done to come to terms with the role of the state administration as a fourth branch of government, and more emphasis should be placed on the functions performed by the executive and/or state administration, as opposed to the identity of the functionary.

III. So far, there has not been a comprehensive attempt to systematise and conceptualise the shift in constitutional and administrative law towards greater participation. In particular, two questions arise. First, who can participate in exercising public authority? Secondly, what legal effect should emanate from such participation or, alternatively, from non-compliance with this requirement? Dominik Steiger argues in his contribution, *Gewaltenteilung als Mittel zur Konzeptualisierung von Partizipation (The Separation of Powers as a Means of Conceptualisation of Participation)*, that the principle of separation of powers can help us come to terms with these questions. He shows that different values underlie the demand for participation in different branches of government. The Rechtsstaat principle and fundamental rights, which underpin the right to participate in judi-

cial proceedings, pull in the direction of individual forms of participation. By contrast, the principle of democracy, which underlies participation in the legislative process, favours broader, more public forms of participation. As far as participation in executive and administrative decision making is concerned, a thorough analysis is required to locate the relevant decision on the sliding scale between these two values, in order to determine how much influence may be exerted via participation and who may participate.

Henk Botha argues, in his response titled *Democratic Participation and the Separation of Powers*, that Dominik Steiger's conceptualisation of participation resonates to some extent with the jurisprudence of South Africa's Constitutional Court. At the same time, however, the prevalence of poverty and inequality in South Africa presents this understanding with some difficulties. A separation-of-powers based conceptualisation of participation needs to come to terms both with the fluidity and contested nature of the relationship between the general/collective and particular/individual, and with the ways in which unequal power relations affect the capacity of the poor and marginalised to participate on an equal footing. The boundary between individual and collective participation must therefore be drawn and redrawn in a way which takes the effects of deep-seated structural inequality into account.

E. Conclusion

The legitimacy of representative institutions is under pressure in both Germany and South Africa. The contributions contained in this volume suggest that, in both these countries, the pressures of globalisation, increasing complexity, the widening distance between the electorate and their representatives and a lack of transparency are at the root of the perceived crisis of legitimacy, even if these problems manifest themselves differently in the two countries under consideration. These problems require rethinking important aspects of the representative system. The relationship between political rights, nationality and residence is identified as one of the areas in need of reconsideration. The independence of representatives is another: in both countries, there is a need to strengthen their position vis-à-vis the executive and their own political parties. The relationship between transparency and the protection of sensitive information also needs to be

rethought in ways that go beyond the dichotomies between secrecy and transparency and between state-held and privately held information.

Parliamentary democracy further needs to be strengthened through the addition of participatory elements. This can be done through the facilitation of public involvement in parliamentary processes, executive rule-making and administrative decision-making, as well as the introduction, through referendums and citizens' initiatives, of forms of direct democracy. As in the case of transparency, participation is not a panacea, but is an instrument to achieve certain ends. These include democracy, the rule of law and the effectiveness of state action. The relative weight of these purposes will differ, depending on the context and the type of decision-making. Difficult questions are raised in the contributions about the balance between individual and collective self-determination and the design and implementation of participation programmes.

The contributions show that democracy needs to evolve if it is to remain relevant. To paraphrase Giuseppe Tomasi di Lampedusa: If we want democracy to stay as it is, things will have to change. Which changes are possible, desirable and (constitutionally) feasible, is the subject of these proceedings.

