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# A CITIZEN'S PERSPECTIVE ON THE RULE OF LAW: DEMOCRACY AND ELECTIONS IN SOUTH AFRICA

By Johandri Wright and Curtly Stevens  
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Dullah Omar Institute  
University of the Western Cape  
Private Bag X17  
Bellville  
7535  
SOUTH AFRICA

[www.dullahomarinate.org.za](http://www.dullahomarinate.org.za)

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## 1 Introduction

On 21 February 2024, the Dullah Omar Institute, in collaboration with the Hanns Seidel Foundation South Africa (HSF), hosted a hybrid seminar to facilitate conversations and debates about a citizen's perspective on the rule of law focusing specifically on democracy and elections in South Africa. This was the second seminar, in a four-part series on elections in South Africa. The first was held on 8 November 2023 and explored Coalition Governments at municipal level.

This seminar took place against the background of a strained relationship between state institutions and its citizens. Much has been written and said about 'democratic backsliding', the rise of populism, the tyranny of majorities, voter apathy, and other worrisome trends. Citizen confidence in democratic processes and the rule of law is declining globally and in Africa. At the same time, more than a third of the continent's countries, including South Africa, will hold national elections in 2024.

This hybrid seminar therefore set out to examine democracy and the rule of law from a citizen's perspective. In doing so, it explored the implications of the above-mentioned negative trends. Developments across the globe and how they relate to South Africa were discussed. The seminar brought together an audience of local and international experts, state institutions, civil society, and youth representatives to reimagine democracy and the rule of law from a citizen's perspective.

## 2 Speakers

The Chair for SARChI Chair in Multilevel Government, Development and Law, Professor Jaap de Visser, welcomed our guests and speakers by setting the stage for the conversation to follow.

Professor Henk Kummeling was the first speaker. He is an extraordinary professor at the University of the Western Cape (UWC) and the *Rector Magnificus* of Utrecht University. Prof Kummeling is also the former chairperson of the Electoral Council of the Netherlands. He currently serves as the chairperson of the State Commission of the Rule of Law in the Netherlands which was appointed by the Dutch Government to investigate the current state of the rule of law from the perspective of citizens.

The second speaker was Professor Cherrel Africa from the Department of Political Studies at the University of the Western Cape. Previously, Prof Africa worked for the Institute for Democracy in South Africa. She also served for two terms as a chair of the Political Studies Department.

The last speaker was Mr Michael Hendricksen who is the Provincial Unit Head of the Independent Electoral Commission for the Western Cape. Before assuming office at the IEC, he was the deputy director general of the Premier for the Western Cape. Other roles Mr Hendrickson has occupied in the past include serving

as a member of Parliament and being one of the drafters of the *African Charter on Democracy, Elections, and Governance* of 2007.

### 3 Setting the stage

The rule of law is one of the founding values of the Constitution and South Africa. It encompasses aspects such as the principle of legality, separation of powers, and the respect of human rights. Some argue that democracy is part of the rule of law while others argue that they are separate. However, one cannot deny that they are closely linked. For South Africa, 2024, is a national and provincial election year, but 2024 can be seen as *the* election year, globally. In 2024, 64 countries' national elections will take place, including elections for the European Union. Together, this encompasses about 49% of the global population. These elections will prove consequential for the years to come. In Africa, more than a third of the states will head to the polls this year.

Aside from the theory, what is the state of the rule of law according to citizens? Does it create trust and legitimacy among communities? [The Afrobarometer paints a bleak picture for South Africa](#). Few citizens (28%) approve of the government's performance for electricity and water. Many respondents indicated that corruption is growing in the public sector. Up to 35% believe that elections are the best way to choose leaders, while about 30% of respondents believe that other methods should be considered. In 2021, for the first time, the majority of respondents showed that they lost trust in the judiciary. Startlingly, a sizeable portion showed that they are willing to their right to vote for a capable government that can provide basic services, housing and job creation.

What does this view mean for democracy in South Africa and elsewhere? The discussion that followed interrogated this question.

### 4 Democracy and the Rule of Law: the Citizen in the Squeeze

Prof Kummeling started his presentation by reiterating the importance of 2024 as an election year and its effect on democracy. However, some elections will have no impact because those countries do not have a choice to vote or there are simply no capable candidates standing for election. A major concern for elections that will make a difference, however, is that populism will again gain the upper hand. Populism has severe consequences because it often leads to the marginalization and exclusion of specific interest groups. Extremist groups are also on the rise globally. Parliaments in addition have also become unstable worldwide and social media have contributed somewhat to this. It is increasingly difficult to agree on how representatives will fulfil their governing role. For example, politicians now prefer to use instruments that

grab the attention of social media such as motions of no confidence as opposed to settling disputes out of the public eye as a political strategy to gain more support. This is done instead of prioritising the needs of the community and engaging in the real, less flashy work of government. In the end, communities suffer from a government not being able to fulfil its mandate and that is why the three branches of government in the Netherlands established the [State Commission of the Rule of Law](#).

The presentation briefly showed that the rule of law includes the principle of legality, separation of powers, protection of fundamental rights and an independent judiciary. Democracy on the other hand refers to general elections on a regular basis, universal suffrage, political rights, and protection of minorities.

Prof Kummeling introduced the Commission and gave details of its mandate: to advise, from a citizen's perspective, proposals, or measures to promote the rule of law and its culture, where these arise from the mutual relationship between state powers. This would improve the guarantee of protecting citizens against measures or decisions by the legislature and administrative bodies, as well as ensure effective legal protection in legal proceedings. In its analysis and proposals, the Commission pays particular attention to how the following five measures can be implemented. Firstly, improve the balance of the rule of law between professional cooperation of the state powers and sufficient distance from each other. Secondly, establish better appointment procedures and secondary activities within state powers. Thirdly, it enhances communications and information flow between state powers. Fourthly, it increases access and accessibility to state powers. Fifthly, develop a rule of law agenda. This is a relatively new idea. Briefly, this would require all branches and levels of government to develop a plan on how they will set out to improve the rule of law within that planning year.

The Commission is composed of experts from various disciplines. The Commission set out firstly to do a review of the existing laws and scholarship on the rule of law and its relationship with democracy. Together with the Netherlands Institute for Social Research, the Commission's research showed that there is still vast support for democracy and the rule of law amongst citizens of the Netherlands. However, there is a great deal of dissatisfaction with recent politics and subsequent governance. Some of the reasons for the dissatisfaction are that the government can no longer produce results, a lack of responsiveness, and unfair governance. There is also a deteriorating problem-solving capacity. Losing public trust in the rule of law and democracy creates a danger to the population being open to a strong leader, who can deliver at the cost of democracy. One can observe recurring themes of inaccessibility, distrust, and mistreatment which act as incentives to move away from democracy.

Conversations with citizens raised some ways on how their trust in government (and the rule of law) can be built. The first is in strengthening listening and communication skills. This means that the government should improve how it engages with its citizens, making language more accessible in the courts, for example. It also means that state institutions need to improve how they communicate with each other.

Tackling the problem of the many counters the interests of minorities. Sometimes government procedures are developed in a manner that disproportionately prejudices certain vulnerable groups. For example, the homeless community in the Netherlands. Citizens must go through many government channels or checkpoints (desks) to gain more information and assistance on eviction-related matters. The government should rethink such complicated and time-consuming interfaces with citizens and provide more user-friendly methods of interaction that do not unnecessarily burden citizens, especially when dealing with vulnerable groups. Such interfaces should also be sensitized to the unique needs of such groups. These conversations also reinforced the need for healthy interaction with government institutions.

Another problem is accessing the judiciary. Legal proceedings are notoriously complex and take place in an environment that is usually experienced as unfriendly and cold. Moreover, the legal costs involved in litigation are substantial enough to preclude a large chunk of the population from being able to access the courts.

Lastly, the ethos of administration and civil servants must be improved. There is not enough understanding of the fundamental values and principles that underpin the rule of law and democracy. Government should teach and create awareness among civil servants on these values and how they impact their work. Public office is often accompanied by substantial power and public officials must know how to exercise this power in a manner that complies with the rule of law and democracy.

To all these problems, one must try to find solutions that are as concrete as possible. They need not be completely novel, many municipalities are already doing good work, and would be most beneficial to capitalise on these good practices. Solutions must also be accompanied by a sufficient budget to ensure that they are implementable.

There is a large rise in the number of political parties, and this is mainly due to an overall distrust in the current regime. Current administrations are not able to live up to the citizens' expectations. There is a common perception that the cabinet is too preoccupied with itself and internal conflicts than governing the country to the interests of the community. Shockingly the Dutch government had to hold talks in parliament where the objective was to agree to obey the Constitution and the rule of law. This is just one

example of how the rule of law is endangered by a self-serving state power. It is also equally important that state powers respect the informal constitutional culture such as mutual tolerance and institutional forbearance. The former relates to political rivals having a right to exist and that they do not treat each other as existential threats. The latter involves not stretching one's powers beyond its limits so that it encroaches on another institution's powers - "playing for keeps is not something you do".

Prof Henk concluded by reaffirming the need to improve the deliverance of the rule of law as critical to prevent subversion through democracy.

## **5 Reflections on the Rule of Law, Elections, Voter Motivations, and Declining Electoral Turnout in South Africa**

Prof Africa started her presentation with a general reminder of why the rule of law is important for modern society. Based on the scholarship of [O'Donnell \(2005\)](#) the rule of law ensures that all citizens are equal before the law, laws are clear, publicly known, universal, stable, and fairly and consistently applied by an independent judiciary. The rule of law provides the mechanisms that ensure political rights, civil liberties, and accountability are respected. On the other hand, accountability affirms political equality and constrains the potential abuse of state power. Consequently, a democratic rule of law is needed to ensure that the various agencies of electoral, societal, and horizontal accountability function effectively without the obstruction and intimidation of powerful state actors.

For South Africa, democracy holds a very personal story. For Prof Africa her democratic story was about her father and him not being able to see and live in a post-1994 South Africa. Her father, like so many was denied the opportunity to pursue his career of choice which would have been marine biology. Democracy is precious, should not be taken for granted, and must be safeguarded.

An absence of democracy and the rule of law means a lack of freedoms. One important safeguard for both democracy and the rule of law is accountability, particularly vertical accountability when discussing elections. Broadly speaking, accountability can be defined as "the obligation of elected political leaders to answer for their political decisions when asked by citizen electors or other constitutional bodies ([Diamond and Morlino, 2005](#))". More specifically vertical accountability is the justification claimed by citizens from their officials during campaigns and elections. The success of vertical accountability relies upon high voter turnout levels and a credible threat to electoral alternations. This is made possible by information on political actions, knowledgeable and engaged voters, institutionally strong parties that offer pragmatic alternatives, and an independent pluralistic mass media.



Despite needing a high voter turnout and a credible threat to electoral alternations, South Africa has seen a consistent voter turnout decline since 1994. When consulting voter turnout statistics one must remember that it is worked out against the number of registered voters and not against the number of persons eligible to vote. The eligible voting-age population has increased over the years, but the number of registered voters has not grown at the same rate. Participation as a proportion of the voting-age population declined from 86% in 1994, down to 72% in 1999, and stabilised around 58% in 2004, 2009, and 2014. Then it further declined steeply to 49% in 2019 ([Schulz-Herzenberg, 2019](#)). These figures show that substantial portions of eligible voters are not even registering and are completely absent from the polls.

There is a long-standing debate on how voters decide who to vote for, the most popular theory being the bounded rationality and gut reasoning theory. This theory states that voters make rational decisions within the information that is known to them at the time that they cast their votes. This information relates to long-, medium- and short-term factors. Long-term factors include matters such as the current economic structure of a country, social divisions, racial classifications, historical patterns, religion, language, and geography. Medium-term factors involve issues such as family life, socialisation, party loyalty, personal values, information networks, lived experience, and perceptions of parties and leaders – their leadership depth, trustworthiness, inclusiveness, and competence. Short-term factors concern manifestos, campaign rhetoric, campaign behaviour, current economic, social, political conditions, the media, and feelings of political efficacy. An important point was highlighted that voters do not simply ignore information they have or fabricate that which they do not have and do not choose what they do not want when making voting decisions ([Achen, 1992](#)).

There are two reasons advanced in scholarship for a declining voter's turnout. The first is that voters are apathetic and generally disinterested in participating in elections. The second relates to voters being disillusioned, angry, and frustrated with a system that failed them. In South Africa, the latter reason is most popular especially if one looks at other political activities such as protest action. A history of government failure may be at the heart of declining public trust and the reason for this angry sentiment. This is also visible when scanning through the comments of citizens on popular social media platforms. It is clear that this distrust is non-discriminatory and that citizens are generally frustrated with the majority of political parties which make up the choices citizens have to choose a leader from.

In addition, South Africans live in what can be characterised as a multi-faceted crisis made up of economic decline, increased living costs, energy- and water-insecurity, failing infrastructure, poor health services,

increasing crime, etc. This forces South Africans to make impossible choices daily – which builds up to a dangerous desperation. Can voters then really be blamed for being fatigued?

## **6 Hendricks: Perspectives from the IEC**

During his presentation, Mr Hendricks announced the date for the national elections, which will take place on May 29, 2024. The President confirmed this date through a proclamation issued on February 23, 2024. In the context of South Africa, Mr Hendricks emphasised that citizens should not limit themselves to participatory democracy alone but should also explore other forms of democracy such as direct democracy and representative democracy. These other forms of democracy can help citizens hold their representatives accountable, lodge petitions with the speaker of local councils, and call for referendums. Mr. Hendricks also highlighted that social media has become a vital tool for direct democracy.

In South Africa, unfortunately, while citizens have a right to vote, and exercise it, Hendricks referring to a study ([The Smoke that Calls](#), 2011) noted that citizens often protest immediately the next day or two weeks after the elections to get the attention of government, which is setting a dangerous precedent.

So, how do we rectify this and what are the theories underpinning why people do not want to participate in elections in South Africa? At first, Hendricks emphasised the significance of having effective leadership and stressed the need for political parties to reveal information, including the names of donors. He also urged that research be carried out on political parties and their ideologies, which he suggested universities should do to create a database of such information. This will go a long way in strengthening South Africa's democracy.

From the IEC's perspective, Hendricks provided some explanation regarding the low voter turnout in South Africa. One of the reasons is apathy. However, Hendricks believes that this term is often misused, implying that people do not care, which is not true. According to Hendricks, the majority of South Africans still rely on the state. He explained that most of the time people feel disconnected from the political process. This can be because they do not believe politicians are providing real solutions, or because the electoral processes are not accessible or inclusive. For instance, in the past, people had to stand in long lines to register to vote, but now it can be done online. However, some people still face challenges, such as having to prove their residency or provide identity documents, which can be difficult for vulnerable members of society, such as homeless individuals who may not have these documents.

Instead of participating in the electoral process, people tend to focus more on alternative methods such as service delivery protests to get a quicker response from the government. They also tend to engage in

lawfare, whereby they are more interested in influencing policy through the courts. Finally, people are simply angry due to the widespread corruption and greed in the state turning them away from the electoral process. Hendricks cited a quote from American author [Octavia Butler](#) to illustrate the difficulties faced by voters in South Africa:

*“Choose your leaders with wisdom and forethought. To be led by a coward is to be controlled by all that the coward fears. To be led by a fool is to be led by the opportunists who control the fool. To be led by a thief is to offer up your most precious treasures to be stolen.”*

The South African Constitution has established the importance of regular elections as a foundational value, similar to the rule of law. Political rights, such as the right to vote and the right to be voted for, further reinforce this value. To give effect to these rights, various electoral laws have been put in place, including the Electoral Act and its regulations. These laws provide a detailed description of the electoral process to create certainty and uniformity. Political parties and the Electoral Commission are both governed by these rules, which means that any decision made by the Commission can be contested in a court of law. In South Africa, there is an Electoral Court specifically established to deal with electoral disputes. Unfortunately, despite this court structure, Hendricks highlighted that you still get political parties discrediting the IEC as not being fair. According to Hendricks, there are currently 3.295 million registered voters in the Western Cape, which is 200,000 more than the previous year. This represents 64% of eligible voters in the province, based on census figures of those aged 18 and older (which is currently 5.1 million).

The Human Sciences Research Council (HSRC) has conducted [various surveys](#) to gain insight into the state of elections in the country through the eyes of citizens. For instance, in the Western Cape, 75 per cent of the population expressed satisfaction with the state of democracy in the province. One key theme that emerged from these surveys was a decline in institutional trust.

## **7 Discussion**

The discussions were guided by several questions emanating from the audience. For example, a participant asked whether South Africa should adopt a compulsory voter registration system like the Netherlands' by linking it with Home Affairs. Another participant also raised concerns about the 359 political parties and independent candidates contesting, which can make it difficult for voters to identify

their preferred candidate. One member of the audience also questioned the value of voting and democracy, given the lack of service delivery and development, using South Africa as a case in point.

Prof Africa addressed the question concerning the value of voting. She stressed that holding regular elections is important because it incentivises the state to consider the views of the voters. Prof Africa acknowledged that despite having democracy, many rights are not realised or are constantly under threat. This, she emphasised is not caused by democracy itself, but rather due to a crisis in governance. Mr. Hendricks agreed, saying that economic progress and democracy are not mutually exclusive but rather must occur simultaneously. He cited numerous examples of democracies that have experienced both.

Concerning the matter of mandatory registration, Hendricks raised the argument that, as the right to register is a personal choice, making someone register automatically imposes an obligation on them to deregister. This option is not viable, and it has in 1998 been considered by the IEC. Hendricks confirmed that the IEC declined to use the national population register because, at that time, a lot of Namibians were still on the population register. A decision was thus taken to develop a voter's roll which is kept up to date and verified against the population register. Instead of making voter registration compulsory, the IEC could expand the registration process to include vehicle/driver or identity registration, inviting individuals to register as voters at the same time. To the number of political parties on the ballot paper (likely to rise in 2024), Hendricks noted that this is not a big logistical issue, as the current ballot paper can take up to 98 political parties. Hendricks does not expect there to be more parties on the ballot paper.

The use of electronic voting in our current system, Hendricks reminded us that there is a distinction between electronic voting and online voting. Electronic voting involves a stand-alone machine (not linked to the internet) where citizens indicate their choice on the machine. The machine will produce a receipt showing the election results immediately. This voting method has been implemented successfully in Brazil and India and has numerous benefits, such as reducing the expenses of ballot papers and being less susceptible to hacking because it is not connected to the internet.

However, due to the possibility of hacking and the existence of an online audit trail, online voting (not commonly used) has the potential to compromise the secrecy of the ballot. It would also not be viable in South Africa given the limited network coverage in the country. Hendricks, however, did recognise the value and need for electronic voting – it can assist in limiting the number of spoiled ballots and drastically reduce the costs of elections (costs of printed ballots).

Hendricks concluded the discussion segment by highlighting the important role the IEC played in the last year, where it participated in more than 4,000 events as part of its ongoing voter education program.

## 8 Conclusion

The upcoming elections in South Africa and the need for citizens to participate cannot be overemphasised. Participation in the elections ensures that people's voices are heard and that they hold their representatives accountable. This seminar forming part of the series on elections touched on some of the risk factors to democracy in South Africa and beyond. While democracy itself does not constitute a threat, several factors do. These include inept leadership, a government that is not responsive, a general erosion of trust in government, and worsening social and economic conditions.

We extend our sincere appreciation to our seminar sponsor HSF South Africa for their support in promoting civic engagement and awareness. We also take the opportunity to cordially invite those interested to join us in our next conference on March 20<sup>th</sup>, focusing on the elections and whether our system of intergovernmental relations is resilient enough to deal with whatever political differences between spheres of government the outcome will produce.