Contending Interpretations of the Rule of Law in South Africa

by
Charl Swart

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Supervisor: Prof P.V.D.P. du Toit
Co-supervisor: Dr N de Jager

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Abstract

The following study examines whether there are contending interpretations of the rule of law present within the South African democracy. The study proposes that the rule of law forms part of the societal understanding of democracy and everyday life. Rule of law is defined in terms of mental models which influence how stakeholders conceive and define institutions. Rule of law is more than a mere institutional guarantee or set of rules — rule of law is understood as a component of a specific culture of understanding. It is shown that conceptions of rule of law have a long history in western society and have been influenced by both liberal and social ideals. Contemporary conceptions of the rule of law are tightly bound with specific notions of liberal democracy.

It is hypothesised that there are distinctly identifiable opinions, beliefs and views of the rule of law present in South African democracy, and that these can be systematically described at the hand of a conceptual typology. The conceptual typology developed, identifies two contending interpretations of the rule of law, namely *liberal* and *social rule of law*. *Liberal rule of law* emphasises the status of the individual, moral plurality and the creation and maintenance of a rule-based society of the future. In contrast, *social rule of law* places emphasis on the status of the community, a single communally defined conception of the moral good and places greater emphasis on righting past injustices.

Other publications that address the themes of democracy and the rule of law in South Africa are also examined in order to determine whether there is congruence between the conceptual typology developed in this study and other works. It is found that the conceptual typology is congruent with other works that depict the African National Congress's conception of democracy, equality and liberty. These congruencies validate and strengthen the conceptual typology developed in this study.

The conceptual typology is subsequently applied to a specific court case, the *AfriForum v Malema* hate speech case. The conceptual typology is found to be sufficiently accurate in analysing contending beliefs associated with the rule of law as expressed in this court case and identifies the African National Congress's conception of the rule of law as falling under the *social rule of law* and AfriForum's conception as aligning to the *liberal rule of law*.

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It is concluded that the conceptual typology can be empirically validated at the hand of the selected case. The conceptual typology is therefore validated with other works (conceptually) and with a specific case (empirically). It is concluded that the conceptual typology provides a clear, robust, concise and comprehensive analytical description of values and beliefs associated with the rule of law in South Africa.

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Opsomming

Hierdie studie ondersoek of daar uiteenlopende en teenstrydige interpretasies oor die oppergesag van die reg teenwoordig is binne die Suid Afrikaanse demokrasie. Die studie stel voor dat die oppergesag van die reg deel uitmaak van die wyse waarop alledaagse samelewingsinteraskies, asook demokrasie, verstaan word. Die oppergesag van die reg word gedefinieer in terme van kognitiewe modelle, wat die belanghebbende partye se konsepsie van hierdie instelling beïnvloed. Die oppergesag van die reg word dus as ŉ element van ŉ spesifieke kulturele begrip vertolk en meer as ŉ institusionele element, wat die behoud van reëls waarborg, beskou. Dit word gewys dat konsepsies van die oppergesag van die reg ŉ lang geskiedenis in westerse samelewing het en dat dit deur liberale en sosiale ideale beïnvloed is. Kontemporêre konsepsies van die oppergesag van die reg het noue bande met die liberale demokrasie.

Die hipotese is dat daar afsonderlik identifiseerbare opinies, oortuigings en sieninge van die oppergesag van die reg teenwoordig is in die Suid Afrikaanse demokrasie, en dat hierdie opinies sistematies aan die hand van ŉ konseptuele tipologie beskryf kan word. Die konseptuele tipologie wat ontwikkel word in hierdie studie identifiseer twee konsepsies van die oppergesag van die reg, naamlik die *liberale-* en die *sosiale oppergesag van die reg*. *Liberale oppergesag van die reg* plaas klem op die status van die individu, morele pluraliteit en die skep en handhawing van ŉ reëlsgebaseerde toekomsgerigte samelewing. Hierteenoor word die *sosiale oppergesag van die reg* gekontrasteer wat klem plaas op die status van ŉ gemeenskap of groep, ŉ enkele kommunale gedefinieerde konsepsie van die morele doelwit voortsit terwyl die klem geplaas word op die regstelling van ongeregtighede van die verlede.

Ander publikasies wat die temas van demokrasie en oppergesag van die reg in Suid Afrika aanspreek, word ook bestudeer om sodoende ooreenkomste tussen die konseptuele tipologie wat hier ontwikkel word, en die bestaande literatuur vas te stel. Daar word gevind dat die konseptuele tipologie wel ooreenkomste met ander werke, wat die African National Congress se konsepsies van demokrasie, gelykheid en vryheid bestudeer, vind. Die ooreenkomste valideer en versterk die konseptuele tipologie.

Die konseptuele tipologie word ook toegepas op ŉ spesifieke hofsaak, naamlik die *AfriForum v Malema* haatspraaksaak. Daar word gevind dat die konseptuele tipologie wel ŉ akkurate

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analise van teenstrydige opinies, wat geassosieer word met die oppergesag van die reg, moontlik maak. Die African National Congress se konsepsie word in die kategorie van die so*siale oppergesag van die reg* geplaas terwyl AfriForum se siening in die kategorie van die *liberale oppergesag van die reg* geplaas word.

Dit word bevind dat die konseptuele tipologie voldoen aan empiriese validasie aan die hand van 'n geselekteerde saak. Die konseptuele tipologie word daarvolgens gevalideer met ander werke (konseptueel), asook met 'n spesifieke gevallestudie (empiries). Daar word tot die gevolgtrekking gekom dat die konseptuele tipologie 'n duidelike, robuuste, bondige en omvattende analitiese beskrywing van die waardes en oortuigings, wat geassosieer word met die oppergesag van reg in Suid Afrika, beskryf.

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List of Abbreviations

ANC – African National Congress

ANCYL – African National Congress Youth League

CA - Constitutional Assembly

CC – Constitutional Court

CODESA - Convention for a Democratic South Africa

COSATU - Congress of South African Trade Unions

FAK – Federasie van Afrikaanse Kultuurverenigings

IFP - Inkatha Freedom Party

IIAG - Ibrahim Index of African Governance

JSC – Judicial Service Commission

MPNP – Multiparty Negotiation Process

NDR – National Democratic Revolution

NEC - The National Executive Committee of the ANC

NP – National Party

PEPUDA - Prevention of Unfair Discrimination Act 2000

SCA - Supreme Court of Appeal

SACP - South African Communist Party

SAHRC - South African Human Rights Commission

TAU-SA – Transvaal Agricultural Union of South Africa

WJP – World Justice Project

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Chapter 1: Introduction

1.1Background and Rationale

During March and April of 2010, Mr Julius Malema, the then president of the African National Congress Youth League (ANCYL), made news headlines for the singing of the controversial apartheid struggle song that contains the lyrics "*dubula ibhunu*" (shoot the *boer*). The controversy started after Mr Malema sang a song containing the above mentioned lyrics at a student gathering on the campus of the University of Johannesburg on the 9th of March 2010 (The Mail and Guardian, 2010a; Business Day, 2010). AfriForum, a civil rights organisation, consequently laid a charge of hate speech against Mr Malema at the Equality Court on the 12th of March 2010. Despite the uproar caused by the singing of the song, and the consequent charge of hate speech laid against him, Mr Malema continued to sing the song on two more occasions in South Africa; on the 22nd of March 2010 during a public address at Mafikeng in celebration of Human Rights Day and on the 26th of March 2010 at Rustenburg. After these occurrences, an urgent appeal was filed by AfriForum at the Pretoria High Court on the 1st of April 2010 seeking an order to bar Mr Malema from singing the song, which AfriForum perceived as hate speech. The Pretoria High Court issued an interdict ruling that the words under consideration constitute hate speech and barred Mr Malema from singing the song pending the outcome of the Equality Court proceedings (The Mail and Guardian, 2010b).

Despite pending litigation in the Equality Court and the court order issued by the Pretoria High Court barring Mr Malema from singing the song and declaring the words as hate speech pending the Equality Court case outcome, Mr Malema sang the song during a visit to neighbouring Zimbabwe early in April 2010, further fanning the flames of controversy in South Africa as the event was highly publicised (SABC News, 2010). The response from the African National Congress (ANC) concerning the Mr Malema incident, and his repeated singing of the song was equally interesting, with the organisation becoming an intervening party in the Equality Court case citing a lack of consideration for historical context as their main grounds of opposition (The Mail and Guardian, 2010c). This was however not the first time a struggle-era song or chant had caused an uproar. In 2003 an appeals committee of the South African Human Rights Commission (SAHRC) found that the singing of similar lyrics

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within a similar context constituted hate speech (*Freedom Front v SAHRC and Another*, 2003)[1]. The ruling by the SAHRC was on the slogan "kill the farmer, kill the *boer*" which had been chanted at an ANCYL meeting and funeral of Peter Mokaba (Du Plessis and Gevers, 2010). Within the South African context, the song sung by Mr Malema therefore had a contemporary, political and social context as a result of previous hate speech litigation.

On the 7th of September 2011 the judgement was delivered in the Equality Court, ruling that the song did constitute hate speech, which was not a surprising outcome considering the way that hate speech laws have been applied in the South African legal framework. The ANC voiced its disappointment at the ruling by the Equality Court (Mthembu, 2011a) and also lodged an appeal against the ruling of the Equality Court with the Supreme Court of Appeal (SCA) (Mthembu, 2011b). The case was settled by way of a mediation agreement between the involved parties before an appeal could be heard in the SCA.

This apparent lack of respect for constitutionally enshrined principles and court orders may demonstrate that important political stakeholders hold divergent conceptions of the rule of law. The aim of this study is to investigate if there are identifiable and contesting conceptions of the rule of law in South Africa and if such conceptions can be described and analytically categorised.

The example of apparent disregard for the law by Mr Malema and the subsequent responses of the ANC is not an isolated incident and there are other incidents which could support such a hypothesis. In the battle for leadership of the ANCYL in 2010, and with specific reference to disputes regarding rightful nominations and election of possible leaders, it is reported that the then ANCYL secretary-general, Vuyiswa Tuelo, had stated that "If someone takes the ANC Youth League to court … it's an automatic expulsion. No negotiations, no interpretation" (Shoba, 2010). A statement such as this shows disregard for notions of administrative justice and due process which are fundamental elements of standard conceptions of the rule of law.

In his welcoming speech to Chief Justice, Mogoeng Mogoeng, President Zuma stated that:

[1] For all judgments/law reports and acts see 'Primary and Legal Sources' in the Bilbiography.

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> We respect the powers and role conferred by our Constitution on the legislature and the judiciary. At the same time, we expect the same from these very important institutions of our democratic dispensation. The Executive must be allowed to conduct its administration and policy making work as freely as it possibly can. *The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote.* We also reiterate that in order to provide support to the judiciary and free our courts to do their work, it would help if political disputes were resolved politically. *We must not get a sense that there are those who wish to co-govern the country through the courts, when they have not won the popular vote during elections* (own emphasis added) (The Presidency, 2011 quoted in Budlender, 2011:585).

Budlender (2011:585) notes that according to this quote, the courts and the legislature must not interfere with the executive. It must however be noted that cabinet members are not elected through a popular vote, but are appointed by the president (Budlender, 2011:585). Cabinet therefore does not have a stronger democratic mandate than that of the legislature (Budlender, 2011:585). Budlender (2011:599) argues that statements such as these, which allude to the idea that the courts are anti-democratic, rest on a number of false premises. These notions conflate 'the people' with the Parliament, executive or the party; they are premised on the notion that court judgments have impeded transformation and finally on the inability to see that the courts offer a means for broadening and deepening democracy (Budlender, 2011:599).

Paul Hoffman discusses respect for the rule of law when writing in reference to President Zuma's corruption trial[2] and appointment process of the Judicial Service Commission (JSC)[3]. Hoffman (2012) notes that the actions of the two parties pose a threat to the rule of law because both President Zuma and the JSC had lost litigation, yet according to Hoffman, continued to act as if they had not. Hoffman is of the opinion that the attitudes of the parties

[2] President Zuma prevented compliance with a SCA judgment which stipulated that the National Prosecuting Authority make available a "…redacted record of what was under consideration by it when it was decided to stop Zuma's prosecution on more than 700 charges of corruption in 2009" by "…raising spurious and unfounded objections to the production of the transcript of a conversation that was taped by the National Intelligence Agency" (Hoffman, 2012:9).

[3] The JSC failed to deliver reasons for the appointment and omission of certain candidate judges despite a SCA judgment which compelled the JSC to furnish reasons for its appointments (Hoffman, 2012).

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go beyond the mere cases mentioned, "[t]hey go to the root of the respect for the rule of law and reflect poorly on the attitude of the two parties…" (Hoffman, 2012).

Issues with implications for the rule of law are also of importance at an institutional and at a state level. The rule of law has bearing on the function, roles, composition and transformation of the judiciary within the South African context (Afrimap and Open Society Foundation for South Africa, 2005; Budlender, 2005; Dugard, 2008; Mothupi, 2006; Wesson and Du Plessis 2008). Issues pertaining to the Constitution, transformative constitutionalism and to democracy also engage with the rule of law (Fredman, 2008; Malherbe, 2008; Roux, 2005, 2009; Van Huyssteen, 2000). Closely tied with these issues and warranting concern are, amongst others, state action or non-actions relating to the separation of powers doctrine (Labuschagne, 2004; De Vries, 2006), treatment of illegal foreign nationals (Landau, 2005), non-compliance with court orders (Roos, 2006; Malherbe and van Eck, 2009 a & b) and the abuse of 'imagined powers' (Beckmann and Prinsloo, 2006).

The Preamble of the Constitution of 1996 states that the Constitution was adopted as the supreme law of the Republic in order to: "Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law" (Act 108 of 1996). The founding provisions of the Constitution of 1996, Sections 1 and 2, include that "[t]he Republic of South Africa is one, sovereign, democratic state founded on the supremacy of the constitution and the rule of law". Furthermore, the "Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled" (Act 108 of 1996). The principles of the supremacy of the constitution and the rule of law therefore form inalienable components of the South African democracy. The Constitution of 1996 also includes provisions dealing with freedom of expression and hate speech. Section 16 of the Constitution states that the right to freedom of expression is guaranteed, but not when said expressions include "...advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm" (Act 108 of 1996). Mr Malema's utterances and the ANC's response appear to be in contravention with these constitutional principles if viewed from a specific understanding of the rule of law. This study aims to examine whether statements such as those quoted above, and incidents described above, could indicate that there is a specific understanding of the rule of law present in South Africa

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and that such a conception differs from standard liberal definitions of the term as it is understood in established democracies.

Despite the rule of law being a widely used concept in political science and legal studies there is no canonical definition of the term (Radin, 1992:142). Sánchez-Cuenca (2003:63) argues that the ideal behind the rule of law is that of "...universal compliance with the rules that define the political system and regulate its functioning". It is possible that the example of the actions of Mr Malema and the response of the ANC could lead one to conclude that the rule of law is being disregarded by these parties under these circumstances. Sánchez-Cuenca (2003:63) states that such a conclusion would be unwarranted, as it "...is always possible to think of situations in which the law does not stand above men". Another conception by Radin (1992) advocates interpreting the rule of law not solely as a list of formal requirements that hinge on issues of compliance, but rather as a political ideal that is intertwined within theories of democracy. In accordance with such a conception Kahn (1999:36) argues that the rule of law is a social and cultural practice which includes a specific set of beliefs about how a society is structured and what constitutes the rule of law.

1.2 Problem Statement and Aims

It would seem that some political stakeholders in South African politics, in their actions and statements as those cited above, demonstrate a lack of respect for the principle of rule of law. However, the problem is one of interpretation: what can be construed as a disregard for the rule of law could just as readily illustrate differing interpretations of the rule of law as held by some stakeholders within the political arena of the South African democracy. This dissertation holds that the manner in which people conceptualise key concepts or components of democracy, such as the rule of law, could affect not only the understanding of democracy, but also the subsequent expression thereof in South Africa. Should there be diverging interpretations of the rule of law present amongst role-playing stakeholders and agents, it may pose a threat to the stability, quality and future of the South African democracy. However, it is necessary to first establish whether there are contending interpretations of the rule of law present in South Africa before making statements and empirical claims about the effects and implications, such possible diverging interpretations of the rule of law could hold for democracy in South Africa.

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The study will aim to gain a conceptual understanding of the manner in which the rule of law is interpreted by role-playing stakeholders in the South African democracy. The overall aim of the study is to interpret the meaning and significance of this aspect of the negotiated Constitution of 1996 (henceforth the Constitution). The question is to determine whether rival, contending and divergent interpretations of a central concept of the Constitution are held by role-playing stakeholders within the South African political domain, and, if present, whether these interpretations can be systematically described. The central concept for interpreting the contrasting and contending understandings of the Constitution is that of the rule of law[4].

1.3 Research Questions

The main research question for the study is: *Are there contending interpretations of the rule of law in the politics of the South African democracy as held by role-playing stakeholders?* A conceptual typology which contains contrasting and divergent conceptions of the rule of law will be developed and constructed. The validity of the conceptual typology will be tested by analysing a specific case, namely the *AfriForum and Another v Malema and Others* (2011)[5] hate speech case. This analysis will be guided by a secondary research question: *Is the rule of law conceptualised as social-, or liberal- or other conceptions in the politics of the South African democracy by role-playing stakeholders?*

1.4 Limitations and Delimitation

The study does not aim to establish one particular interpretation of the concept rule of law as a benchmark against which to adjudicate other expressed opinions, but to identify and classify interpretations considered to be contending and divergent within a conceptual typology. The process will be one of description, interpretation and classification. It is not one of adjudication, and therefore not an exercise in jurisprudence. The problem of

[4] This study can also be linked to other studies in the broader field of the rule of law and democracy, some examples of recent and relevant work include: Bratton, 2007; Carothers, 2007; Cotterrell, 2008; Diamond, 2008; Gibson and Caldeira, 2003; Maravall and Przeworski 2003; O' Donnell, 2001 & 2004; Weingast, 1997. The seminal work by Dicey (1973) discussing the rule of law with reference to the English political system laid the foundation for studies engaging with the concept in localised context.

[5] Henceforth referred to only as *AfriForum v Malema* for the sake of brevity.

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'intentionality' is not the subject of the study. The ideological question of action, in other words, what needs to be done, and how, is not examined.

The study recognises that rival interpretations of the rule of law could possibly pose a threat to constitutional democracy in South Africa. However, the study does not consider, beyond recognising this possibility, what the potential consequences of possible divergent interpretations of the rule of law could hold for the future of South African democracy. The study does not provide a detailed discussion on arguments relating to the nature and prospects of the South African democracy. It is not a work concerned with the future, durability or success of democracy in South Africa and is therefore not a work concerned with democratic consolidation[6].

The aim of the study is not to establish the popular support for different interpretations of the rule of law, should these be found. The study is therefore not about numbers. The aim is solely to establish whether there are instances of endorsement of such divergent and competing interpretations of the rule of law, should these be found.

Limitations include that the study will only use sources that are recorded in either English or Afrikaans. A further limitation relates to the material to be used in the case study section in chapter five which relies on court documents (transcripts, heads of arguments, written submissions and the judgement). Yin (2009:102) notes that documents have several strengths — they can be reviewed repeatedly in an unobtrusive manner; documents are exact as they contain details and references to specific events; and being broad they allow the researcher to cover a larger time frame. Documents however, also have weaknesses — they are not always reliable; they suffer bias; and finally the access to documents may be deliberately withheld.

There are two time periods under consideration in this study. The first time period under consideration ranges from 1994 to 2013 and will be used for creating the general context in which the research questions and conceptual typology will be developed and situated. The second time frame is that of the specific case, namely the *AfriForum v Malema* hate speech case. The case stretched from March 2010 until the mediation agreement was reached on the 30th of October 2011. A final delimitation is that this study will focus solely on the South

[6] Examples of such works include: Bratton and Chang 2006; Garcia-Rivero, Kotzé and du Toit, 2002; Gibson, 2006; Gumede, 2008a; Kotzé, 2007; Landsberg, 2000; Mattes, 2002, 2012; Mattes and Thiel, 1998.

African society within the context of the politics of the democratisation. The application of the conceptual typology to other cases will not be considered in this study. It is however possible that this will be an avenue for future research projects.

1.5 Research Design and Method

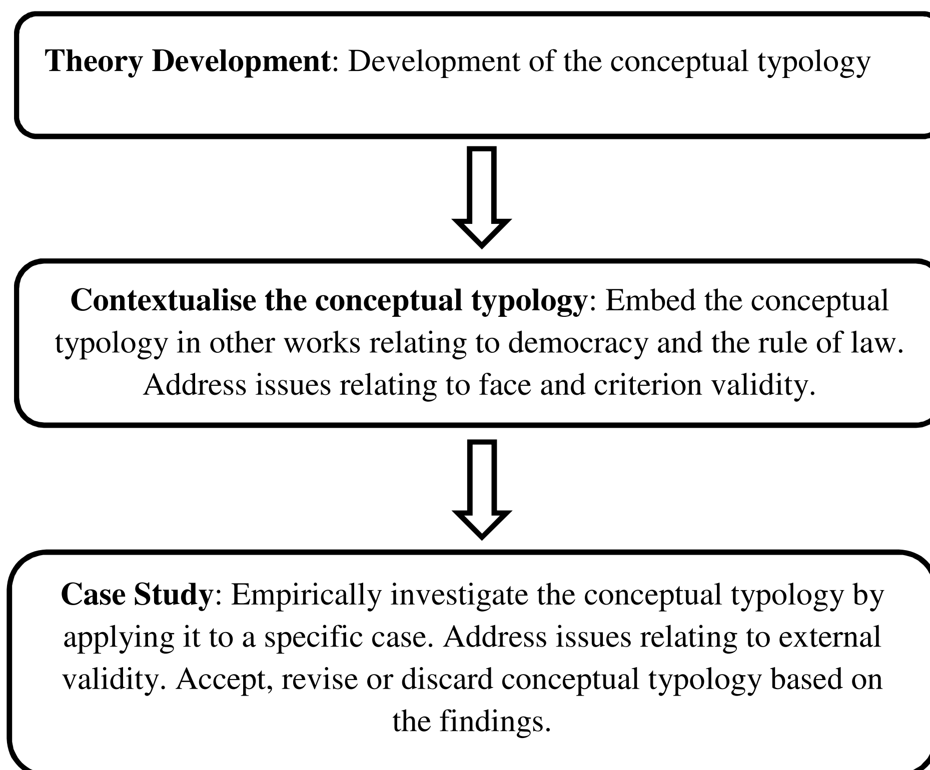
The research questions of the study are exploratory, conceptual and empirically descriptive in nature. The study will attempt to describe how the rule of law is interpreted within the politics of the South African democracy. A conceptual typology, or measuring instrument, is to be developed with a specific set of categories with which to classify the observed opinions. The study is a descriptive and exploratory analysis of the interpretation some role-playing stakeholders have of the established constitutional order by means of their opinions of the rule of law as expressed specifically in the *AfriForum v Malema* hate speech case. The interpretation of these opinions will identify the beliefs and values embedded therein. At the conclusion of this process, the validity of the conceptual typology as a measuring instrument will be assessed. On the basis of this assessment the typology will be validated, revised and modified, or discarded.

The research design of this study is a multi-design as both theory-building and case study research designs are employed, as illustrated in figure 1. This design was selected due to the nature of the research questions, which seek to establish the presence of rival and divergent interpretations of the rule of law, which is a conceptual, theory building and exploratory inquiry. An empirically descriptive exercise will subsequently be carried out to determine whether this conceptual typology can be applied to a specific case. In order to address the first question it is necessary to construct a model or theory, in this case a conceptual typology, by means of which the secondary research question is then examined.

Chapter three is devoted to constructing a conceptual typology and relies on a theory-building research design. Theory-building designs are ideally suited for "questions of theoretical linkages and coherence between theoretical propositions" (Mouton, 2001:176). Such designs are furthermore suited for studies in which research questions are related to theories or conceptual models (Mouton, 2001:176). Hofstee (2006:130-131) notes that theory development is concerned with creating new ways of understanding real-world events.

Chapter three will develop a conceptual typology, or model, with which to interpret a real world event. Mouton (2001:177) notes that a model is a "…set of statements that aims to represent a phenomenon or set of phenomena as accurately as possible". Ultimately, as Hofstee (2006:131) notes, the key test for a theoretical model is if it offers predictive power. Mouton (2001:177) concurs noting that good "…theories and models provide causal accounts of the world, allow one to make predictive claims under certain conditions, bring conceptual coherence to a domain of science, and simplify our understanding of the world". The conceptual typology or model will be reviewed after it has been investigated whether the conceptual typology can be applied to specific real-world phenomena, which in this study is the *AfriForum v Malema* hate speech case.

Figure 1: Schematic Representation of the Research Design



The second research design employed is that of a case study. Case studies are suited for research projects that contribute to the knowledge of social and political phenomena and are a common form of research design in political science[7]. This is in part because a case study allows for the retention of holistic and meaningful characteristics of real-life events. The case study is an appropriate design for studies that pose "what" and "how" questions, or

[7] For examples of case studies in political science see David, 2006: 137-327.

differently phrased; questions that are exploratory, such as the primary research question of this study. Furthermore, case studies are especially well suited for research dealing with contemporary events in which the researcher has no control over said events (Yin, 2009:4-10, 13). Yin (2009:18) argues that one would use a case study "…because you wanted to understand real-life phenomena in depth, but such an understanding encompassed important contextual conditions-because they were highly pertinent to your phenomena of study [sic]". Finally, case studies benefit greatly from the prior development of theoretical propositions, or theory development, which guides the data collection and analysis (Yin, 2009:18). Case studies can be employed to generalise from a case to a theory, analytical generalisation is employed to compare the empirical results of a case study to a developed theory (Yin, 2009:37-8).

There are therefore numerous reasons to employ case study design in this study. Firstly, the case selected is a good example of a contemporary political phenomenon. The research questions of this study are also suited to a case study research design as they are primarily exploratory in nature. Thirdly, the case under consideration in this work was completely beyond the control of the researcher with the political and social context being of utmost importance to this dissertation. Finally, and perhaps most importantly, the study at hand will develop and propose a conceptual typology, or model, in order to guide the data analysis. The conceptual typology developed in chapter three will be used to analyse the findings of the case study. The case study is therefore employed as a means of investigating the applicability and relevance of the conceptual typology which is developed in chapter three.

Yin (2009:29, 33) notes that the case under investigation can be an individual, a group, organisation, event, entity, relationships or a decision. Case studies rely on numerous research techniques which can include the use of primary and secondary documents, cultural and physical artefacts, direct observation of the events being studied and interviews with those involved in the events or who possess knowledge of the events (Yin, 2009:11). Furthermore, the unit of analysis within a case study varies depending on what is being investigated with the unit of analysis determined by the research question and the case under consideration. It is of utmost importance that the case under consideration be clearly defined in terms of the subjects it represented and also in relation to the duration of the case. The case requires specific boundaries which separate the case from the context of the case (Yin, 2009:29-32).

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The case under consideration for the current study is the hate speech case involving AfriForum, Transvaal Agricultural Union of South Africa (TAU-SA), Mr Julius Malema and the ANC. The case is therefore an event. It is important to note that the materials under consideration are the court and legal documents associated with the hate speech case. By focusing on the legal proceedings, the case has a clearly demarcated time frame. This also lends focus to the materials under consideration and separates the case from the political and social context wherein the event took place. The study will make use of qualitative data. The materials used will be court documents: transcripts of the case, heads of arguments and written submissions of the involved parties, the judgment delivered and the case file of the *AfrioFrum v Malema* case. The unit of analysis will therefore be the respondents in the legal proceedings: Julius Malema, the ANC and AfriForum. The level of analysis will therefore be at individual and institutional level. Peer reviewed articles, books, and newspaper articles will be employed to describe the political and social context wherein the events took place.

The material to be studied in this dissertation suffers fewer of the disadvantages set out in section 1.4. The documents under consideration are official and legal court documents and can therefore be considered to enhance reliability. The problems encountered with author bias and incomplete information are minimised. The heads of argument and written submission of all parties involved are examined and the judgment delivered as well as the transcripts of the court proceedings are considered. Access was gained to all the relevant material. Court documents were procured by myself from the South Gauteng High Court. The heads of argument were available from AfriForum's website whilst the written submission was obtained from the legal representatives of Mr Malema and the ANC.

Validity is a principle concern of this study because a conceptual typology will be developed with which to classify contending interpretations of the rule of law. The study will therefore develop a conceptual measuring instrument with which to systematically and analytically describe possible varying conceptions of the rule of law. Bailey (1987:60) argues that theories and research studies can be sufficiently detailed and well-constructed yet fail to adequately measure the concepts they intend to. Bailey (1987:60) notes that concepts have a wide degree of variability, with some being easier to measure than others. Concepts which are difficult to measure include attitudes, as they may not be directly observable and could be multidimensional (Bailey, 1987:60). It is therefore important that the measuring instrument adequately addresses certain concerns regarding the validity of the measuring instrument.

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Bailey (1987:66) argues that validity is primarily concerned with two elements. The first concern is "…that the measuring instrument is actually measuring the concept in question, and not some other concept; and that the concept is being measured accurately" (Bailey, 1987:66).

Validity is generally a major concern for research in social science and Bailey (1987:67-70) identifies face-, criterion-, construct-, internal- and external validity as different forms of validation procedures. Bailey (1987:66) notes that notions of validity are complicated and controversial topics in social science and remarks that "…there is a disturbing plethora of different types of validity…" and that discussions of these different types often fail to adequately distinguish between them. Since the selected research design is a multi-design which includes both theory building and case study elements, the three forms of validity relevant to this study are those of face validity, criterion validity and external validity.

Selltiz, Wrightsman and Cook (1976:178) argue that face validity is determined by whether "… […] the instrument is measuring the kind of behaviour that the investigator assumes it is, and […] whether it provides an adequate sample of that kind of behaviour". Bailey (1987:68) notes that "…whether the instrument measures what it is supposed to measure, is [...], ultimately a matter of judgment". In order to know if the measuring instrument has face validity, the definition of the concept, which it is intended to be measured, must be known. Bailey (1987:68) argues that face validity is always partially a matter of definitional or semantic judgment and identifies the following as the major problems confronting face validity: a lack of consensus on the definition of the concept to be measured; whether the concept is multidimensional; and whether the measure is lengthy and complex. Within this study, these problems are exemplified by the nature of the rule of law which is a complex multidimensional concept on which no universal agreement of definition exists. It is therefore necessary that this study provides sufficiently adequate grounds to show that the conceptual typology developed actually represents differing understandings of the concept of the rule of law, that is to say, that it measures what it says it measures. These problems are not insurmountable and these issues relating to face validity are addressed comprehensively in sections 3.7, 3.8, 5.2.1, 5.2.2, 5.3, 5.4 and 6.3.

Criterion validity is another form of validity which is relevant to newly constructed measuring instruments and is determined by using a "…second measure of the concept as a

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criterion by which the validity of the new measure may be checked" (Bailey, 1987:68). It is therefore necessary that there are previously established measuring instruments available and that the results from the new conceptual typology to be developed is consistent with these in order to ensure criterion validity (Bailey, 1987:69). Similar descriptive conceptual typologies which have been employed in research studies are those of Cohen (2004); Craig (1997); Du Plessis and Corder (1994); Gagiano and Du Toit (1996); Gloppen (1997); Hudson (2000); Johnson (2003); Radin (1992); Stacey (2003) and Tamanaha (2004). Concerns relating to criterion validity are addressed in chapter four in which the conceptual typology is related to and grounded in other works concerned with democracy and the rule of law in South Africa. Criterion validity is increased if the new measure improves on the previous measures. It is proposed that the conceptual typology which will be developed in this study improves on previous typologies by including a comprehensive set of categories; the distinction between categories lends accuracy with a detailed and descriptive classification of the object under investigation. This will be addressed in chapter four as well as sections 5.2, 5.3, 5.4 and 6.3.

The final form of validity which is relevant to this dissertation is that of external validity. External validity is concerned with questions or problems relating to the representativeness of the experimental events (Selltiz, Wrightsman and Cook: 1976:131). Yin (2009:43) concurs, noting that external validity deals with whether the findings of a study are generalisable beyond the immediate case study. Yin (2009:43) notes that critics of single-case case studies argue that such studies offer a poor basis for generalisation. He points out, however, that this is an incorrect assumption as case study research relies on analytical generalisation, not statistical generalisation (Yin, 2009:43). In employing analytical generalisation the researcher is attempting to generalise a particular set of results to a broader, prior developed, theory, and is not attempting to generalise to a larger universe of cases (Yin, 2009:43). Concerns regarding external validity are addressed in sections 5.2, 5.3, 5.4 and 6.3.

The final judgment criterion is that of reliability and refers to the notion that other researchers can employ the same methods to other cases and arrive at similar conclusions. This can be overcome by doing the research "as if someone were always looking over your shoulder" (Yin, 2009:43). The key is to be systematic and transparent with procedures and thorough with analyses and ensure that other researchers can discern how one has reached the conclusions.

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Case study research design is not without its criticism with four main avenues of critique being discernible. Case studies have been accused of lacking systematic rigour as a result of researchers not applying systematic procedures in the formulation of their findings and conclusions. The problem is not insurmountable and a disciplined researcher can readily portray issues of design, findings and conclusion in a rigorous systematic fashion (Yin, 2009:14-5).

Secondly, case studies have been said to lack any basis for scientific generalisation. This critique is based on the false assumption that all case studies try to make generalisations of populations and universes, which is not always possible. Case studies can however be generalisable to theoretical propositions if the goal is to analytically generalise to theories (Yin, 2009:14-5). Attempts will be made to be as logical, systematic and rigorous as is possible in order to overcome the first criticism. In addition, this study will describe and compare the case analytically to a developed theoretical model and by doing so bypass the second avenue of criticism.

A third objection to case studies is that this approach takes too long and produces long and unreadable documents. This objection however confuses the case study design with a specific method of data collection, namely ethnography. Case studies need not take long, nor do they necessarily produce long unintelligible documents (Yin, 2009:15-6).

A final critique is that case studies do not offer direct insights into causal relationships. Case studies can however provide important insights which can complement other studies on phenomena related to the case under investigation. Case studies can therefore play a supplementary role of adding to the context in which to understand a causal mechanism (Yin, 2009:15-6). The work at hand will deal with a specific case which has already been concluded. It will therefore not suffer from being too time consuming. It is not the goal of this study to offer causal explanations and thus issues related to causality need not be of concern.

Regarding different types of case study designs, Yin (2009:46-9) identifies four primary case study designs: single-case (holistic); single-cases (embedded); multiple-cases (holistic) and embedded multiple-cases (embedded). The terms holistic and embedded merely refer to the unit of analysis; with holistic referring to one unit of analysis whilst embedded is a reference

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to multiple units of analysis. Both holistic and embedded single-case studies are suitable forms of single-case study designs under a number of circumstances. Firstly, single-case study designs are ideally suited when the case represents a critical event which can be tested against a well-formulated theory which specifies clear propositions. Secondly, single-case studies aid in determining whether the propositions of theories are correct as it either confirms or challenges the theory. Depending on the findings, the theory can be extended, discarded or left unchanged. A further rationale for employing a single case-study design is when the case under consideration can be considered an extreme or unique case. A final rationale for employing a single-case study design is if the case is a revelatory case. This refers to the notion that the case offers researchers the opportunity to investigate a phenomenon previously inaccessible.

The design of the research at hand is that of an embedded single-case design since there are multiple units of analysis (ANC, Malema and AfriForum) within a single case, the hate speech case. In addition the hate speech case represents a critical case which can be considered unique and extreme. This can be attributed to the parties involved in the case, together with the issue at the heart of the case — hate speech and freedom of speech. This will become apparent during the course of the study and particularly in chapter five. The findings will furthermore be analytically generalised to a newly developed theory. This study therefore meets many of the important criteria for an embedded single-case study design.

1.6 Literature Review: The Rule of Law and Democracy

This dissertation relies on the idea that the rule of law is more than an institutional guarantee and that it goes beyond issues of obedience, compliance and obligation. It will be argued in chapter three, that conceptions of the rule of law are the function of mental models, are influenced by cultural orientation and can be embedded in models of culture and democracy based on the primacy placed on the individual or the community which resonates in liberal and social ideals respectively. The connection between liberal democracy and the rule of law will be explored, and even though they are connected in modern discourse on the subjects, it will be shown that they are conceptually distinct from one another[8]. It will be argued that the connection between rule of law and democracy can be understood through competing

[8] This will be done in section 2.3.

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ideological paradigms. It must however be noted that not all studies that focus on the rule of law and democracy take such an approach. On the contrary, many works on rule of law and democracy within the field of political science rely on a completely different approach which will briefly be explored in the following section. This will serve the purpose of providing a brief exposition of the literature on the rule of law and democracy within political science while also highlighting the gap in the literature which this study aims to address.

Maravall and Przeworski (2003:1) note that law rules if actions are consistent with prior norms and argue that the question of whether the law rules centres on notions of obligation, obedience or compliance. It is this line of reasoning that, to a large extent, has shaped many contemporary works on democracy and rule of law within political science. Many works are not concerned with conceptions of the rule of law, but rather in exploring why, how and if laws are obeyed. It is possible to discern two broad categories within the field of political science — those studies that focus on institutional arrangements that uphold the law or ensure that the law exists and those studies that focus on issues of compliance to the law. These categories are by no means mutually exclusive or exhaustive, and there is a large degree of overlap between them. It is however a useful conceptual distinction in providing a broad overview of the political science literature on the rule of law and democracy. The common theme which connects this dissertation to other works in the field is the idea that there exists a fundamentally deeper element attributed to the rule of law than mere adherence to the law. O'Donnell (2004) refers to this as the "essence" of rule of law, Weingast (1997) refers to "something beyond laws" whilst Maravall and Przeworski (2003) touch on this when arguing that traditional notions of law's legal efficacy have been challenged in modern times. These authors are referring to that which this dissertation wishes to investigate: Can this "something" which lies at the heart of the rule of law be described in an analytical manner?

A good point of departure would be to point out what the key features of modern liberal democratic regimes are. A defining element of liberal democracies is the role attributed to the legal framework governed by a constitution which guarantees the civil and political rights of citizens and the separation of powers while also specifying the powers and interactions of government (Dryzek and Dunleavy, 2009:18). This definition highlights the two broad themes mentioned above, that of institutional arrangements as well as the issue of governmental and state compliance, obedience and obligation.

O'Donnell (2004) attempts to conceptualise democratic rule of law and investigates if it can be empirically measured. The work is rooted in the context of democratic regimes in Latin America but is relevant to many new democratic regimes. O'Donnell (2004:32-34) argues that traditional minimal conceptions of the rule of law do not capture the essence of what the rule of law refers to in the context of democratic regimes. The rule of law is a highly disputed term, but despite this, a minimal definition of the term is thought to refer to the notion that laws must be publicly known and fairly applied; all citizens are subject to the law, regardless of class, social, political or economic standing; state apparatus is also subject to the laws, that is to say that state institutions are subject to act in a legally defined way. Another crucial element is that rulers are held accountable for their actions. Despite this, O'Donnell (2004:34) notes that "...strictly speaking there is no "rule of law," or "rule by laws, not men". All there is, sometimes, is individuals in various capacities interpreting rules which, according to some preestablished [sic] criteria, meet the condition of being generally considered law".

Regardless of the conceptual difficulty, O'Donnell (2004:39-45) presses on and identifies six main dimensions attributed to rule of law in democratic regimes, which includes the manner in which the rule of law relates to the legal system — that it is uniform and the supremacy of the constitution is realised; that law and order is exercised and all are held accountable, including state and the government officials; that an independent judiciary is required; that state institutions act within boundaries of law; that there needs to be the correct societal context which includes the notion of rights and guarantees for civil organisations; and finally that the civil and human rights of all citizens are protected. These dimensions determine whether rule of law is consistent with a democratic regime or not.

These indicators of the rule of law are also highlighted by the following organisations and studies that aim to measure the rule of law. The World Justice Project (WJP) is an organisation that measures and tracks the rule of law throughout the world. The organisation measures the rule of law along nine key indicators: limited government powers; absence of corruption; order and security; fundamental rights; open government; regulatory enforcement; civil justice; criminal justice and informal justice (Agrast, Botero, Martinez,

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Ponce and Pratt, 2012:11)[9]. Similarly the Mo Ibrahim Foundation includes the rule of law as a key indicator of the Ibrahim Index of African Governance (IIAG). This organisation identifies five key indicators of the rule of law: judicial process, judicial independence, sanctions, transfer of powers and property rights (Mo Ibrahim Foundation, 2012)[10]. The World Bank also includes the rule of law as an indicator in the construction of its governance index. For the World Bank the rule of law is concerned with respect for rule in the society with particular focus on contract enforcement, property rights, the functioning of the police and the courts as well as the prevalence of crime and violence (Kaufmann, Kraay and Mastruzzi, 2009:6).

The common theme throughout these works attempting to measure the rule of law is that they all include issues of obedience, compliance and the role of institutions such as the judiciary. This is also the rationale employed by studies in the field of democratic consolidation and works concerned with gauging the quality of democracy. The importance of the rule of law to the field of democratic consolidation is aptly captured by Diamond and Morlino (2004:23) who argue that the "…rule of law is the base upon which every other dimension of democratic quality rests". Further examples of works in this field include that of Lipset (1994) who argues that the rule of law is one of the factors that leads to the institutionalisation of democracy. Linz and Stephan (1996) list the rule of law as one of the conditions necessary in order for a democracy to become consolidated. Bratton and Chang (2006) advance the argument that rule of law is crucial to democratic consolidation. Andrews and Montinola (2004) argue that the rule of law is strengthened if there are more 'veto' players involved in the legislative process and that this is good for democratic stability[11]. The works cited above largely employ the rule of law as an element of, or a prerequisite for, democracy without becoming entangled in the difficulties associated with defining the term or with complex issues associated with problems relating to compliance to the law.

[9] The indicators are further subdivided into a total of 48 sub-indicators (Agrast, Botero, Martinez, Ponce and Pratt, 2012:11).
[10] For a detailed breakdown of the indicator composition see: moibrahimfoundation.org.
[11] For other works in the field of democratic consolidation relating to the rule of law see: Alexander, 2002; Alexander, Inglehart and Welzel 2011; Bogaards, 2009; Boix, 2011; Carothers, 2007; Davis, 2006a; Diamond, 1994, 2008, 2010, 2011, 2012; Fukuyama 2010; Haggard and Tiede 2010; Huntington, 1991; Moller and Skaaning, 2010; Owusa, 1997; Peterson, 2010; Plattner, 2010; Rose and Shin, 2001; Rothstein and Teorell, 2008; Sater, 2009; Schedler, 1998; 2001; Stranger 2004; Stotzky, 2004; Temmes, 2000.

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The problem of compliance is dealt with by Weingast in his frequently cited work on the rule of law entitled '*The Political Foundations of Democracy and the Rule of Law*'. Weingast (1997:245) employs a game-theoretical approach to investigate what "…accounts for the remarkable variance among states in the rule of law, a set of stable political rules and rights applied impartially to all citizens [?]". Weingast (1997:245) attempts to synthesise three key elements found in the literature on democracy namely the interest and values of elites, democratic stability in divided societies and elite pacts in order to investigate the question of why some states conform to the rule of law, and why some do not. Weingast (1997:245) achieves this synthesis by employing a "...game-theoretic model of the stability of limited government". Weingast (1997:245) argues that democratic survival requires political actors to observe limits on their behaviour such as respecting election results and laws governing policy choices.

Weingast (1997:246, 261) finds that state infractions on the rights of citizens can be stopped if the citizens act in concert, with the sovereign consequently avoiding violating fundamental boundaries in order to remain in power. In short, the sovereigns' self-interest to remain in power will lead it to limit certain behaviour, with these limits being self-enforcing. This situation is not easily achieved as the citizens are faced with a massive social coordination problem. The most likely equilibrium in Weingast's model for overcoming this coordination problem is a coalition between one group of citizens and the sovereign which in many cases is expressed in either elite pacts or a constitution. This equilibrium will prevent society from imposing unrealistic limits on the state and sustain the rule of law (Weingast, 1997:260-1). Weingast (1997:262) argues that the rule of law is a central feature to democracy (limited government) and that his model provides a new approach to the foundations of the rule of law. According to Weingast (1997:262) this is

> [b]ecause laws and political limits can be disobeyed or ignored, something beyond laws is necessary to prevent violations. To survive, the rule of law requires that limits on political officials be self-enforcing. As we have seen, self-enforcement of limits depends on complementary combinations of attitudes and reactions of citizens as well as institutional restrictions.

Of course this summation of Weingast's (1997) work is by no means complete, but it captures the essence of the problem facing scholars grappling with the rule of law, namely, that of conforming to the ideal of rule of law. The rule of law is only in effect if political

leaders abide by the principle. As Weingast (1997:262) notes, "*something* beyond laws" is necessary to prevent the violation of the rule of law as the rule of law is not in itself a preventative measure on the behaviour of those in positions of power. It is this notion of 'something' which casts the rule of law in such academic and practical vagueness in the field of political science and it is this element of vagueness that this study wishes to shed light upon. It is possible that this element results in many works in political science which deal with democratic consolidation and democratic theory, to acknowledge the importance of the rule of law, without becoming immersed in conceptual difficulties associated with the rule of law and without critically engaging the concept. This is not meant as arguing that such studies are incorrectly using the term, or using faulty definitions. More specifically, for the sake of the focus within such works, namely that of investigating what makes democracies endure or consolidate, a minimal working definition is adopted to ensure that authors are not tied down by the complexities and conceptual difficulties which are associated with the ideal of rule of law.

The notion of compliance plays a central role in the 2003 compilation edited by Maravall and Przeworski which is dedicated to investigating the question of why governments do, or do not, act according to laws. Maravall and Przeworski (2003:1) argue that traditionally the answer to this question has been to attribute an autonomous casual efficacy to law, which is the notion that people obey the law because it is the law. Maravall and Przeworski (2003:1) further argue that the question of "…whether the law rules is […] one of obligation, obedience, or compliance". Stating what the rule of law is, or what it is about, still does not address the question of why people obey the laws. Przeworski (2003:140) focuses on why election results are obeyed by losing parties and echoes the findings of Weingast (1997; 2003) arguing that those in power will obey the rules if it is in their interest to do so. If the cost of non-compliance is too great, then those in power will comply even if it is not necessarily the desired outcome. An important element of this theory is the idea that the sovereign is ultimately limited by collective action and collective will.

The argument that the electorate acts as a check on power seems less persuasive within democracies where a single party enjoys a clear electoral dominance. Gargarella (2003:147) challenges the common assumption that certain "…institutional arrangements put the rule of law at risk". Commonly, the rule of law is linked to liberal political systems characterised by checks and balances, individual rights and an independent judiciary. Gargarella (2003:147)

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notes that there is a perception that majoritarian democracies, defined in the Jeffersonian manner as the idea of citizens acting in mass, is detrimental or counter to rule of law. Gargarella (2003:147-150) argues that majoritarian democracy is usually perceived as a threat to rule of law. If one considers the idea that the masses, acting in unison, can curb arbitrary power as argued by Weingast (1997; 2003) and Przeworski (2003), one can easily understand why this is the case. If there is no opposition to the dominant party that represents the majority of the population, what then will keep the sovereign in check? Gargarella (2003) notes that this problem arises due to traditional definitions and views of what democracy and the rule of law are. Gargarella (2003:152) argues that there is a "...tendency to identify the rule of law with a particular (liberal) model of constitutionalism, as well as a tendency to evaluate all moves in the direction of a more majoritarian democracy as impermissible departures from the rule of law". Gargarella (2003) argues that there is no intrinsic conflict between majoritarian democracy and rule of law.

Gargarella's argument has direct bearing on the study undertaken in this dissertation. Gargarella (2003) is in effect saying that what has traditionally been *perceived* as a threat to the rule of law is a result of *specific beliefs and opinions on what the rule of law ought to be in a normative sense*. This perspective, according to Gargarella (2003:147), equates the rule of law with "liberal political systems". However, Gargarella (2003) argues that there is no logical contradiction between, for example, majoritarian democracies and the rule of law. It is therefore plausible that *what can be construed as threats or dangers to the rule of law from a liberal political perspective of politics are not necessarily considered to be threats and dangers by those from a political perspective which differs from that of the liberal view of politics.* Gargarella (2003) argues that what has traditionally been perceived as threats to the rule of law is influenced by how the ideal of the rule of law is conceptualised. The study at hand wishes to investigate whether there are fundamentally divergent conceptions of the rule of law present in South Africa and if these can be described systematically.

There are situations that push the idea of compatibility of rule of law with non-democratic regimes to the limit and beyond for rule of law can exist without democracy[12]. Barros (2003:188-220) makes a case highlighting this apparent contradiction. By investigating the military dictatorship of Chile (1979-90), Barros (2003) argues that the rule of law, albeit in a

[12] Section 2.3

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certain form, is compatible with such a regime. The author also employs a dichotomous interpretation of rule of law and finds that, particularly during the last nine years of the military regime, there was a distinct form of the rule of law in operation in Chile, despite it being under the leadership of a military dictatorship. Barros (2003:197) analyses the rule making process which served to regulate relations among the members of the junta and finds that the inclusion of defined procedures, a bill of rights, a constitution and a constitutional court ensured that the rule of law was present to a certain degree. Barros (2003:205) concludes that in order for the rule of law to be present in such circumstances, a plurality of actors must be present within the ruling elite. It is only when there are competing factions amongst the ruling elite there can be a semblance of the rule of law.

A final topic to be addressed is the role of institutions in liberal democracies and more specifically the role of the judiciary. In the operational definitions of rule of law as put forward by the WJP, the World Bank and the Mo Ibrahim Foundation in the preceding pages, a common element was the stipulation of an independent judiciary. Ferejohn and Pasquino (2003:242-3) argue that democracy and rule of law are institutionally embodied in the legislature and judiciary respectively. According to Ferejohn and Pasquino (2003:242-3) the rule of law is about the relationship between the populated institutions of the legislatures and the courts. Maravall and Przeworski (2003:14-15) argue that ideological issues bring governments and courts into conflict, with the modern trend being that the judiciary tends to have the final say in these conflicts. They label this trend the judicialization of politics. This has been most prevalent in the United States of America but has, however, also become an increasingly common phenomenon throughout liberal democracies worldwide (Ferejohn and Pasquino, 2003:248). Maravall (2003:262) argues that democracy becomes judicialized when courts take actions that alter the rules of democratic competition. In essence the judicialization of politics refers to the increased power vested in the judicial institution in modern liberal democracies. This could refer to such acts as criminalising opposition parties or merely that courts make decisions which have consequences and implications on policy directives. Decisions by courts that alter legislative and executive powers are included under the judicialization of politics. This need not be a threat to democracy, but Tamanaha (2004:110) cautions that when the judiciary is disproportionately comprised by a certain

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group or is highly politicised it can pose threats to the rule of law and by association to democracy[13].

Hirschl (2004:71) examines the rise of the importance of the judiciary over the past twenty years, which he labels juristocracy. According to Hirschl (2004), the rise in importance of the judicial institution is arguably one of the most significant developments of contemporary governments. This trend is in part the result of many regimes adopting constitutional systems which places a court system at the apex of the institutional arrangement (Hirschl, 2004:72). Hirschl (2004:73) finds that this trend is part of the process conducted by political elites to insulate policy making measures from democratic politics by placing this power in the hands of the unelected judiciary. Not all authors agree that the judicialization of politics is anti-democratic or necessarily detrimental to the rule of law.

Finn (2004) argues that judiciaries play an important role in deepening the rule of law in newly democratic regimes with Horowitz (2006) echoing this sentiment arguing that judicial review in the form of a constitutional court can contribute to the rule of law and democracy. Prempeh (2008) argues that judiciaries commonly fulfil the role of the legislature within the African context. The judiciary is often responsible for limiting the powers of African presidents by enacting laws and enforcing constitutional constraints that limits presidential power. The reality is that there are no easy answers to questions relating to the role of the judiciary within liberal democratic regimes. In some cases the judiciary acts as the only check against legislative dominance, in others the appointment of judges might become so politicised that the judiciary is merely an extension of legislative and executive will. Regardless of the specific roles and functions the judiciary fulfils, all liberal democratic regimes reserve an essential place for judicial institutions which play an important role in the manner in which the ideal of the rule of law ideal gains expression within a specific country.

1.7 Contribution of the Study

This brief exploration of important aspects of the literature on the rule of law and democracy has brought to the fore that there is an important element in these studies which needs to be addressed. This is the element of the rule of law which is referred to by O'Donnell (2004) as

[13] For detailed discussion on the judicialization of politics see: Ferejohn and Pasquino, 2003: 242-260; Hirschl, 2004; Maravall, 2003:261-301; McDonald, 2001; Tamanaha, 2004:108-110; Tate and Vallinder, 1995.

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the "essence" of the rule of law, by Weingast (1997) as "something beyond laws" and by Dyzenhaus (2007) as the "nature of the substance" of the rule of law. This dissertation explores whether the elusive element referred to by Weingast (1997), O'Donnell (2004) and Dyzenhaus (2007) can be investigated by developing a conceptual typology with which to interpret and investigate the presence of contending beliefs, values and ideas associated with the rule of law. It is hypothesised that such an inquiry may shed light on these uncertain elements of the rule of law that also confront other studies.

The study aims to contribute to the theoretical body of knowledge of democracy in South Africa by investigating opinions, beliefs and values associated with the rule of law as held by role-playing stakeholders. Furthermore, a qualitative measuring instrument, or conceptual typology, will be developed and employed in this study with the aim of contributing to theory development. It is envisioned that the conceptual typology will be applicable not only to the *AfriForum v Malema* hate speech case, but also to other cases that may present a possible divergence of opinions on the rule of law.

1.8 Chapter Outline

Chapter Two: Historic Development of Conceptions of the Rule of Law

This chapter will focus on the development of conceptions of the rule of law in a historic sense. The historic overview is brief and is intended to show that the rule of law developed out of a specific historical context and that there is a strong connection between liberalism and the development of the rule of law. It is then argued that the development of socialism as a counter theory to liberalism has had a profound impact on the development of the rule of law and that the ideological battle between social and liberal ideals can be seen, in part, as contributing towards the divergence in conceptions of the rule of law. The chapter not only serves as a brief historic account of the development of understandings of the rule of law but also, through the attention paid to liberalism and socialism, shows the reader that the rule of law is a deeply contested concept that can be conceptualised in different ways. The brief discussion of liberalism and socialism highlights that there are fundamental elements of the rule of law which are in contrast with one another.

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Chapter Three: Theory and Development of the Conceptual Typology

This chapter will explore the concepts central to the research question which is concerned with values, opinions and beliefs of role-playing stakeholders in the South African democracy. The chapter commences with a brief exposition of culture, law and institutions. The argument presented is that societal institutions, such as the rule of law and democracy, can be defined in terms of 'mental models' of ideas, beliefs and culture as found in institutional-economic literature. Law is not defined in strictly legal terms but is defined rather as consisting of ideas and beliefs. It is put forward that the rule of law is more than a property of a political or legal system and can also be conceived in a cultural sense. After the link between ideas, values, beliefs, culture, democracy and the rule of law is established, democracy, culture and the rule of law are defined in a normative and dichotomous sense. This is done in order to create a conceptual typology that will be employed within the case study with which to determine if identifiable and contending interpretations of the rule of law, found within the literature, are expressed in the selected case.

Chapter Four: Rule of Law and Democracy in South Africa

In this chapter the theoretical propositions and the conceptual typology developed in chapter three are grounded in and applied to the larger body of literature on rule of law and democracy in South Africa. It is investigated whether the key components of the conceptual typology and the arguments advanced on rule of law and democracy in South Africa resonate within the literature. In doing so, the case study to be presented in chapter five is contextualised within the broader literature on rule of law and democracy in South Africa. This also serves as an exercise in addressing the criterion validity of the conceptual typology. The chapter contextualises the arguments presented thus far by examining whether certain elements that form part of the arguments advanced and the conceptual typology developed can be found in the body of literature on rule of law and democracy in South Africa. This is achieved by establishing whether the South African democracy, as a product of a negotiated settlement, can be understood as a democracy in which role-playing stakeholders hold different views on the democratic order produced by the constitutional negotiations. The main stakeholders that this study is concerned with are the ANC and the population of South Africa. It is investigated whether there are identifiable ideological views and opinions within the ANC and within the South African population on concepts central to the conceptual

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model and arguments presented in chapter three. This chapter thus serves as a theoretical and conceptual bridge between the arguments advanced in chapter three and the case study presented in chapter five.

Chapter Five: Case Study: Malema's Hate Speech Case

The aim of this chapter is to present the hate speech case and to analyse it with the conceptual typology developed in chapter three. The chapter begins by exploring elements which are central to justifying and validating why the selected case can be seen as an adequate case for exploring if there are contending interpretations of the rule of law present in South Africa. Thereafter the events relevant to the case are presented. This includes exploring the events which took place and the manner in which these events were reported in the media and also the significance of the events in a social sense. The legal framework which stipulates how hate speech and freedom of speech operates in South Africa is also explored. Relevant material is subsequently presented which includes the court transcripts of the proceedings in the Equality Court and the heads of argument and written submissions of the complainants and respondents respectively. It is then considered whether those defending the singing of words could have a fundamentally different conception of how the rule of law gains expression than the conception of the complainant. This is explained at the hand of the conceptual typology developed in chapter three.

Chapter Six: Conclusion

This chapter presents the conclusions which can be drawn from the findings of the research project and provides a summary of the main findings of the research done throughout the entire dissertation. It also gives the conclusions drawn from the research question and aim of the study. Possible problems associated with this work are also briefly elaborated upon. Attention is given to the contribution that this study makes to the field of political science through the development of a conceptual typology. Suggestions for further research are made and the study concludes with the final remarks.

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Chapter 2: Historic Development of Conceptions of the Rule of Law

2.1 Introduction

The aim of this chapter is to give a historical account of the development of conceptions of the rule of law as a political ideal. The discussion intends to show that key elements of the rule of law such as obedience, compliance and obligation have historic origins. The account begins in the Middle Ages and progresses to the late nineteenth century. It must be noted that there are references to medieval society and the Western realm as single geo-political, geo-social and geo-historical entities. Historically speaking this is not entirely accurate, but as Finer (1997, Vol.II:883) notes, detailed accounts of the politics of this age are immensely complex due to a very wide variety of local and regional customs and also as a result of complicated conceptualisations resulting from different political traditions. Generalisations are therefore made in order to facilitate the discussion of the historic development of the rule of law. The account that follows is intended to highlight the elements of this period that have influenced contemporary understandings of the rule of law. Although an attempt has been made to do so in a chronological fashion, many aspects, such as Germanic customary law and the power struggle between clergy and monarchy, have no single starting or end point and must be seen as processes which occurred over hundreds of years with varying points of influence upon one another. References to specific topics are provided in the footnotes throughout the chapter.

The chapter will rely heavily on Brian Tamanaha's 2004 work, *On the Rule of Law: History, Politics, Theory.* Tamanaha (2004:4) argues that the myriad of conceptions of the rule of law found within the literature today are all derived from specific historical-political contexts. The chapter is by no means a complete account of the history of the rule of law and associated ideals nor is it a complete exposition of the development of the manner in which conceptions of the rule of law have developed over time. It is merely a summation of what can be considered as relevant in order to gain adequate insight into certain historical elements of the development of the rule of law which influence modern conceptions of the ideal. Special attention is given to the influences that liberalism and socialism, as competing ideologies, have had on the development of the rule of law over the last 150 years.

2.2 The Historic Origins of Rule of Law

"The rule of law tradition congealed into existence in a slow, unplanned manner that commenced in the Middle Ages, with no single source or starting point" (Tamanaha, 2004:15). Tamanaha (2004:7-15) recognises the contribution that Greek scholars made to the ideal of rule of law. It must however be remembered that major Greek political works, except for fragmentary quotes, remained lost to the West until the rediscovery and translation of Plato's works into Latin during the thirteenth century (Finer, 1997, Vol.II:982). Sealy (1987) investigates the Greek contribution to the rule of law, whilst Franz Neumann (1986:49-54) takes a closer look at the Roman contribution. Enlightening as these studies may be, they fall outside of the historic scope of the current study for as Tamanaha (2004:18) argues the rule of law tradition "took root" in the Western realm during the Middle Ages.

Historic convention plots the Middle Ages as commencing from the collapse of the Roman Empire in the fifth century to the Renaissance and the Reformation of the 15th and 16th centuries respectively. After Emperor Constantine shifted the capital of the Roman Empire to Constantinople, thus creating the Eastern Roman empire, the western half of the empire suffered a long and steady decline precipitated by numerous invasions from Germanic tribes in the fourth and early fifth centuries. In contrast to the refined Greco-Roman civilization that they were overrunning, the Goths, Visigoths, Ostrogoths and Vandals were primitive in nature. Rome was sacked numerous times during this period and was reduced to a shadow of its former glory. During the seventh and eighth centuries Saracens from Arabia conquered the Middle East, North Africa, the Iberian Peninsula and extending as far as what is today known as southern France. During the ninth and tenth centuries Norsemen travelled along navigable rivers and coastlines of Western Europe plundering and settling where they pleased. The tenth century also saw Hungarians threatening from the eastern border of Europe (Tamanaha, 2004:15).

In the face of these threats, medieval society became closed off, retracting upon itself (Tamanaha, 2004:16). Rural inhabitants engaged in subsistence farming (Wallerstein, 1974:18); small towns with tiny populations, surrounded by walls to keep out roving gangs of plunderers or a neighbouring lord's conquests, became the norm; travel was unsafe and merchants once common in the Roman Empire nearly disappeared (van Creveld, 1999:50-2);

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coinage was minted and exchanged in a fraction of the former volume; trade diminished severely with towns forming economic hubs where weekly markets were held and coins were minted (Pirenne, 1956:46). There was no independent and professional body of jurists as had existed during the height of the Roman rule and feudal and customary law mixed and co-existed with Roman and ecclesiastical law. Churches were located in towns and were almost the sole place of learning in society (Finer, 1997, Vol.II:857-8; Tamanaha, 2004:16).

During the ninth and tenth centuries the feudal system[14] came into existence within the dramatic context briefly sketched above. The feudal system was characterised by a strict social order consisting of nobility, clergy and serfs (lower class) and revolved around land ownership and rights to work the land as there existed little or no market on which to trade or sell goods. The nobility was at the pinnacle of society with vast land-holdings which were divided and sub-divided in a complex system that ensured that the serfs would be bound to the landowner through the right to work the land, to eke out a living, in exchange for manual labour, military service or tributes payable to the nobility. In return for the services from serfs the nobility was responsible for defending them from outside attacks, resolving disputes and providing in times of shortage (Finer, 1997, Vol.II:864-870; Southern, 1968:96-115; Tamanaha, 2004:16; van Creveld, 1999:52). Some of the clergy were Latin-educated descendants of the aristocracy, held vast landholdings and functioned in a manner much akin to that of the nobility. Others were of poorer origin and worked beside serfs and had limited education and command of Latin. The only people who fell outside of these categories were free town folk who were of negligible presence during this period (Tamanaha, 2004:16-17). Feudal society was characterised by set classes and a hierarchical structure with production limited to that which was needed by the population owing to the relative lack of a market and trade system and for the people living in this time, "...there was no means to improve their condition" (Tamanaha, 2004:17).

A defining element of the Middle Ages was that the only institution that spanned the entirety of the Western realm was the Roman Catholic Church with Tamanaha (2004:21) noting that the "[h]oly Roman Empire of the West was united only in being Christian". In the late 11th and early in the 12th centuries the precursors of the state system, as it is understood today, emerged in the guise of courts, effective tax collection mechanisms and the increase in

[14] For comprehensive accounts of feudalism see: Bloch, 1961; Stephenson, 1942; Wallerstein, 1974, Ch. 1.

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legally trained people in service of the nobility (Tamanaha, 2004:17)[15]. Van Creveld (1999:60) argues that because the Church's assets were scattered across large areas of Europe it posed severe geographical challenges and forced the Church to develop sophisticated financial, judicial and administrative apparatus to cope with these logistical difficulties. Furthermore, the rediscovery of Aristotle's work and the Justinian code, coupled with a rise in the number of educated men along with the founding of the Universities of Bologna and Paris as well as the beginnings of Oxford and Cambridge signalled a significant shift in the Middle Ages as students from across Europe converged on these centres of learning. The late 11th and early 12th centuries also saw an increase in economic activity in terms of trade and production and heralded the start of the rise of the West (Tamanaha, 2004:18).

The Church, possessing sophisticated institutional structures, remained a major obstacle to the development of the West as it immersed society in Catholic orthodoxy that did not see the importance of commerce, prohibited the charging of interest on loans and insisted on unquestioning faith towards the Church whilst viewing reason as a threat to the future of the Church (Tamanaha, 2004:18). Thomas Aquinas is credited with showing that Church doctrine is compatible with reason (Figgis, 1956:6-7; Finer, 1997, Vol.II:862; Gilby, 1958:127, 142-4, 173-5; Tamanaha, 2004:18). Aquinas argued that judges must be governed by law, that law is based on reason and that sovereigns could decide to subject themselves to the law, even though they are above it as they are the makers of the law. Aquinas however still acknowledged the superiority of divine and natural law and argued that ultimate judgment was reserved for God (Tamanaha, 2004:19). Neuman (1986:55) argues that Aquinas's version of rule of law was a "...codification of the feudal order" and that the Thomist system by partially recognising "...the right of passive resistance and the equally partial concretisation of the *lex naturalis* [natural law], institutes a factual domination of the rule of material law, at least to a certain degree"[16]. Although Aquinas did not establish the rule of law tradition, he laid down important precepts thereof that were accepted by the Church and monarchs.

It is within this context that Tamanaha (2004:19-27) identifies three essential medieval contributions to the rule of law tradition, namely the outcome of the power struggle between

[15] For works dealing with the origins of the state see: Poggi, 1978; Strayer, 1970; van Creveld, 1999.
[16] For a more detailed account of Thomas Aquinas's contribution to the rule of law, see: Neuman, 1986: 51-66.

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popes and kings, Germanic customary law and the Magna Carta[17]. The first, the power struggle between popes and kings[18] must be understood within the context of the Christianised medieval society. It was mentioned previously that the Western Empire was united only in being Christian, what was not mentioned was the extent to which medieval society was saturated with Christian ideas. Organised society identified completely with the church during this period (Finer, 1997, Vol.II: 857). More than this, the church, with its sophisticated institutional arrangements mentioned previously, was the only state form during this period. All political activities and all learning were functions of the church (Southern, 1970:22)[19] and with such a configuration the church managed to exercise almost total control over morals within medieval society (Finer, 1997, Vol.II:856).

Conflict between popes and kings was made inevitable as early as the fourth century by Constantine's assertion of theocratic kingship. The conflict was suppressed by the Gelasian Doctrine (Tamanaha, 2004:19). Pope Gelasius I is credited for creating a distinction within the Christian framework between the functions of ecclesiastical clerical hierarchy (*Sacerdotium*) and that of secular rulers, either emperors or kings (*Imprium and Regum*). These broad divisions shared the government of the Christian society of the medieval period (Morrall, 1958:22). Emperors, beginning with Justinian, and later kings, would reject this division and lay claim to sacred realm based on their own divinely ordained status (Tamanaha, 2004:19). A hallmark of the Western Empire was the emperor's singular position which combined regal and sacerdotal power. "The emperor's laws and decrees and commands were the laws, decrees, and the commands of divinity made known through the emperor" (Ullmann, 1965:33). Thus, within the Christianised Roman Empire the emperor was both king and priest. Charlemagne, the last great Frankish king and true emperor of the Western Empire wrote that he was "lord and father, king and priest, chief and guide of all Christians" (Pirenne, 1939:230). Following the demise of the Western Empire and the rise of the feudal order, primacy in power shifted towards that of the clergy and the battle for political power was waged between medieval monarchs and popes. The stage had however been set by the role of emperors in Europe.

[17] This section will put forward a brief summary, for the complete argument see: Tamanaha, 2004: 15-32.
[18] For discussions of the relationship between popes and kings see: Canning, 1996; Pirenne, 1939; Ullmann, 1965.
[19] For detailed accounts of the role of the church and Christianity in the development of the state see: Smith, 1913; Temple, 1928.

Roman popes looked to extend their rule over both secular and religious realms by taking on juridical and authoritarian qualities by issuing binding orders. Much like emperors before them, popes cast themselves as the human representatives of natural and divine law which in this period controlled positive law and applied to monarchs with the only mitigating factor on papal power being the relative weakness of their military strength in relation to monarchs. Papal power was instated through two mechanisms: the *Dictatus Papae* and the Donation of Constantine. Pope Gregory the VII issued the *Dictatus Papae* which stated that papal authority was universal and plenary (Tamanaha, 2004:20). The Donation of Constantine was an eighth century forgery created by the Roman church. This document recast a historical fact, the transfer of the capitol from Rome to Constantinople by the agreement and acquiescence of Pope Sylvester, in purely ideological terms. The Donation stated that Constantine handed the pope all his imperial power and even stated that Constantine led the papal horse for a short distance to display his subordinance to the pope. The pope was also given the entire city of Rome and all the provinces of Italy. Very significantly the pope refused to accept the imperial crown, conferring this honour upon Constantine. Through the Donation the pope became the papal emperor based in Rome (Ullmann, 1965:33, 59-61).

The Donation had an immediate political effect with the father of Charlemagne, Pepin, who required legitimating in order to take over the Frankish kingdom. The pope ceded to Pepin's request and approved his claim for the crown. The arrangement was mutually beneficial because it reciprocally reinforced their legitimacy. However, Charlemagne was in a much stronger position than his father in relation to the pope both as a result of his military conquest and also as a result of the weakness of Pope Leo III, who had suffered a beating at the hands of a Roman mob (Tamanaha, 2004:21). However, Leo's shrewdness won the day: "On Christmas day, 800, as Charlemagne rose from prayer before the tomb of St. Peter, Pope Leo suddenly placed the crown on the king's head, and the well-rehearsed Roman clergy and people shouted, "Charles Augustus, crowned great and peace-giving emperor of the Romans, life and victory!"" (Cantor, 1994:176 quoted in Tamanaha, 2004:21). This act signified that the pope had conferred political power onto Charlemagne, something he did not need owing to his own power-base, but which nevertheless signified the pope's power over him by "giving" him the crown.

Monarchs were rightfully wary of papal claims of authority, as Pope Leo's political nuance illustrates, but despite this "...oath-taking became an integral aspect of the coronation

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ceremony, thereby consolidating the understanding that the king was subject to a higher authority and operated within legal restraints" (Tamanaha, 2004:22). The church controlled coronation ceremonies which included the Germanic secular notion that the King's paramount duty was to guard the communities' law. Importantly this oath was given to the church as well as the community and was confirmed by a religious oath (Morrall, 1958:24). The repeated oath-taking and voluntary affirmations confirmed that monarchs were bound by positive, customary, natural and divine law and reinforced the notion of obligation by the ruler. Tamanaha (2004:23) concludes that "...society was governed by a law identified with Christian justice; the monarch as a Christian was subject to this law, like everyone else, and made an explicit oath confirming his subjugation to the higher (natural, divine and customary) law and the positive law". Similarly, Ullmann (1965:101) finds that the subjugation of laity to the priesthood through oath-taking, which used ideas of body and soul to show the superiority of Christ in coronation ceremonies, can be interpreted as the medieval version of rule of law. The preceding paragraphs are by no means a complete account of the relationship and power struggle between papal and regal authority during the medieval period. It merely serves as an illustration that modern notions of obedience by the ruler to something greater than themselves, has its roots in medieval society.

The second important element of this period is the influence of Germanic customary law[20] and the belief therein that the king is bound by, and subject to, the law. Germanic customary law influenced large regions in medieval Europe such as France, Spain and parts of England (Tamanaha, 2004:23). Customary law was neither reliant on statutory nor positive law. It is an unwritten form of law that gained significance through historical and social practices (customs) and was passed on within the society from one generation to the next. Germanic customs are credited with embedding the idea that both the ruler and ruled had a mutual obligation to preserve the law from infringement and corruption (Morrall, 1958:16-7). During the medieval period it was one of the most important forms of legitimating as customary law has strong connotations of consent by the people. Within this view, the monarch and state were seen as products of law that were orientated towards the interest of the community. The King was bound by law and could not arbitrarily make new laws (Kern, 1939:70-1; Morrall, 1958:16-7). Contact with Christianity also infused Germanic customary law with moral

[20] For a detailed account of customary law and the role of kingship see: Kern, 1939.

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principles and embedded a sense of justice within the law (Figgis, 1956:152-3; Tamanaha, 2004:24; Kern, 1939:71-2).

An essential element of this system was the idea of fealty, whereby both ruler and subject were bound to the law. Under this system both parties had duties and obligations, although unequal, towards each other and neither could simply break the law in order to satisfy personal ends. Loyalty and allegiance was given to the king in return for feudal obligations such as honouring of agreements and the protection of property rights. Despite the general hardships of the medieval period, there existed a tradition that the sovereign was limited by law, although this was not always honoured in practice, it forms an important precursor to the ideal of rule of law (Kern, 1939:86-8; Tamanaha, 2004:24-5).

The third element identified as playing a role in advancing the rule of law tradition during this period is the Magna Carta, written in 1215[21]. Holt (1965:1) argues that the 1215 Magna Carta was a failure as it "…was legally valid for no more than three months". Despite this, it was re-issued in 1216, 1217 and finally in 1225 with the last version becoming law to be enforced by the courts (Holt, 1965:1). The document, which today is regarded by many as a source of liberal constitutionalism and the rule of law (Dunham, 1965:26) and due process in the United States (Kurland, 1965:48-75), only acquired significance to the people of England in the seventeenth century, hundreds of years after its adoption (Radin, 1947:1061). The Magna Carta represented the idea of protection of citizens from the king in the clause which states that "…no free man is to be imprisoned, dispossessed, outlawed, exiled or damaged without lawful judgement of his peers or by the law of the land" (Holt, 1965:1-2). This identified regular courts, and not the will of the King, as the proper avenue of legal conduct (Dunham, 1965:26).

The previous two factors mentioned were both concerned with the manner in which rulers (popes and kings) related to subjects (serfs). The Magna Carta differs from these in that it represents the interests of wealthy nobles attempting to restrain the power of the King. The Magna Carta was a result of barons forcing concessions upon King John in order to protect their rights through the king's court and a unified government (Fukuyama, 2012:272). The

[21]Tamanaha (2004:25) acknowledges that there is debate around the document's role and relevance within historic and academic circles, for present purposes the historic debate need not be resolved. Regardless of historic reading, the document represents the nobilities attempt at seeking protection from the actions of a sovereign. For detailed accounts see: Holt, 1965; Thorne *et al.* 1965.

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Magna Carta represents one of the first attempts by citizens to use the law in order to protect themselves from a sovereign. Very importantly, the Magna Carta is viewed as a source of constitutionalism through its structuring of the relationship between people and the sovereign in legal terms. Furthermore, the document added the institutionalised components of courts and a jury of peers to the legal system (Tamanaha, 2004:25-27).

In light of the preceding paragraphs, it should be evident that there was a semblance of rule of law during the Middle Ages and although it did not always present in a uniform fashion, elements of rule of law can be identified. It should also be noted that the Church had infused notions of divine and natural law and as a consequence had a very strong grasp on medieval society. Within this society the law was to some extent or another coupled with a Christian notion of justice (Figgis, 1956:153; Finer, 1997, Vol.II:857-8; Kern, 1939:182; Morrall, 1958:16). It was not until the 16th century Reformation and the 18th century Enlightenment that the monopoly on morality held by the Church would be broken. This period (16th to 18th century) saw the rise of science; a separation of the sacred and temporal; the separation of divine and natural law from positive and statutory law with the former two losing power over affairs of state and legislative legal systems replacing customary legal systems (Tamanaha, 2004:27-28). Crucially to the argument at hand, "[l]ong standing conceptions that legislation did not create new law but merely declared pre-existing natural or customary law were superceded [sic] entirely, supplanted by the view that law is the product of legislative will to be shaped as desired..." (Tamanaha, 2004:28).

The separation of church and state was not as clear and smooth as the preceding paragraph implies. During the 17th century much of Europe was ruled by absolutist monarchs[22]. These sovereigns made use of the Divine Right of Kings which asserted that the King was appointed by God and was therefore only answerable to God (Tamanaha, 2004:28; Figgis, 1956:63; Pipes, 1999:136). Finer (1997, Vol.II:862) argues that the notion of kingly restraint under divine law originated with the Jewish kingships and that this idea was transplanted to European monarchs by the most read book of the age, the Bible[23]. The Old Testament, which is a shared history of Christian and Jewish faiths, tells of Jewish kings upholding divine law, and when contravening divine law, being severely rebuked for it in public, by various prophets (Finer 1997, Vol.I:240-1,264). These notions were taken up by monarchies of this

[22] For detailed accounts of the role of monarchs during this period see: Pipes, 1999 Ch. 2 & 3; Williams, 1972.
[23] Finer deals with the development of Jewish kingships in detail, see: Finer, 1997, Vol.I: 238-273.

age, conferring upon them this divine duty which was widely known and therefore relatively easily accepted in medieval society due to the Latin translation of the Bible. For a period kings stood above the law because they were the makers of law and were responsible only to God. However, it was still in the interest of monarchs to operate within the constraints set by the law in many routine practices (Tamanaha, 2004:29).

Two additional factors played a role in tempering the power of absolutist monarchs. Firstly, there was an increase in the number of professional lawyers and judges throughout the period of the Middle Ages coupled with increasing jurisdictional independence of the courts. This was particularly prevalent in England which had, by this time, developed a significant legal tradition (Tamanaha, 2004:29). In the 17th century, chief justice of the Court of Common Pleas, Edward Coke, denied King James I the right to interfere in a case which was already before the court. Coke found that because the matter was already before the court, it had moved out of the jurisdiction of the monarch and was now to be decided by the court and guided by legal precedent, and not by monarchical decree (Ferejohn and Pasquino, 2003:244).

The second factor that played an important role in curbing the power of absolutist monarchs was the rise of the middle class (Tamanaha, 2004:29). The rise of the middle class is important to the development of the rule of law because of the role of the middle class in the emergence of liberalism. The demise of the feudal system, which lost total social dominance by the 13th century and finally ended by the 17th century in Europe, has its roots in the rise of towns[24] as centres of commerce, the increase in population and the increase in wealth of merchants which had begun in the 12th century (Tamanaha, 2004:29; Pirenne, 1956:9-10; Stephenson, 1942:97-9). Merchants were in a unique position within the feudal order as they had no place in feudal society, they were neither landed elite, nor clergy, nor serfs. Despite the increase of the wealth of merchants they were at a disadvantage in terms of political power and social influence within a feudal society that still placed importance on land ownership. Monarchs found it increasingly difficult to acquire moneys from the landed elite to fund war efforts (as a result of the Magna Carta), and were forced to sell off land to raise revenues. An unspoken alliance formed between monarchs and merchants with the former relying on the latter to boost revenues from the sale of land (Tamanaha, 2004:28-30).

[24]Pirenne, 1956 offers a detailed account of the role of medieval towns, also see: Wallerstein, 1974, Ch. 1 & 2.

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Furthermore, merchants required that there be adequate labour available to them for their economic activities leading to the concession that all those residing in cities for more than a year became free. Commerce increased and the basis of wealth shifted from land ownership to the trading of goods. Monarchs became dependant on merchants for revenue in an economic system where their sole means of income (land) was of diminishing financial value. It became in the interest of monarchs to free serfs and sell land, thus reducing their responsibility and increasing revenue. Monarchs became mere landlords, who in many cases were indebted to merchants and cities. In time the shift in importance from ownership to commerce and trade created an entirely new social order and set of legal institutions. Status acquired and set at birth was replaced by individuals seeking to accumulate wealth through market activities, commercial credit, financial instruments, property rights and the enforcement of contracts. The shift created a new class, the bourgeois, who had a vested interest in politics and law and also signalled the rise of liberalism (Tamanaha, 2004:29-31).

While the constraints on the power of absolutist monarchs ensued from the above mentioned factors, the power of the church was curbed through the Protestant Reformation. The Protestant Reformation played an integral role in breaking the Church's hold on society and was a precursor of the Enlightenment period out of which liberalism would be born (Schmidtz and Brennan, 2010:99; Tamanaha, 2004:27;39). According to Finer (1997,Vol.III:1262-3) 1300 years of Christian unity was broken when Luther posted his theses at Wittenberg in 1517. In a general sense, this action, transferred "… to the temporal sovereign the halo of sanctity that had hitherto been mainly the privilege of the ecclesiastical, and to change the admiration of men from the saintly to civic virtues, and their ideal from monastic life to the domestic" (Finer, 1997, Vol.III:1262-3). In England, Henry III supported the Reformation due to his wish to annul his marriage to Catherine of Aragon. In his endeavour to do so, many powers once reserved for the papal authority, were transferred to the authority of the Crown (Finer, 1997, Vol.III:1271-3). Furthermore, the Reformation emphasised the need to personally engage with scripture (Schmidtz and Brennan, 2010:99). The Reformation promoted the notion of individualism by removing the church and papal authority from an individual's communication with, and belief in, God. In essence, the Reformation paved the way for individual thought and reason by making the individual the diviner of his own religious life (Tamanaha, 2004:27; Schmidtz and Brennan, 2010:99-100).

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Before the discussion on liberalism commences, one must first consider the context of ideas and beliefs that were born during the eighteenth century Enlightenment[25]. "The primary creed of the Enlightenment was the application of reason and science..." (Tamanaha, 2004:39). Newton's laws accurately predicted the location and motion of celestial bodies and instilled in Enlightenment scholars the belief that nothing was beyond the power of reason and science. These scholars applied the principles of reason and logic, made famous by natural science, to social, political, legal, economic and moral fields of study. Enlightenment scholars held the belief that science could develop a system that would give rise to a more just existence than had previously existed. The teachings, traditions and customs of the Church, which had enjoyed unquestionable status, became the subject of scientific scrutiny (Tamanaha, 2004:39). Finer (1997,Vol.III:1430-1) concurs arguing that in the Age of Reason, as it is also known, all institutions were to be appraised by reason alone and this included the notion of Divine Right of Kings. The beliefs in this period brought about a series of reforms which coincided with the state-building process. Many of these reforms, such as anti-clericalism, the reigning in of the aristocracy and the promotion of free trade, coincided with changes monarchs had to make owing to the economic and social changes described in the previous paragraphs (Finer, 1997,Vol.III:1430-1).

Enlightenment scholars were primarily concerned with freeing people from the constraints of supernatural beliefs prevalent at the time. The reforms espoused centred on two clusters of ideas. The first was concerned with anti-Catholic measures which included the reduction in monasteries and taxation of their wealth; increased state control of church activities; and the freedom of thought and ideas. The second cluster was concerned with justice and law. The primary notion was the idea of equality before the law which signalled a significant shift from feudal conceptions of legality. The idea of the *Rechtsstaat* is a product of this school of thought. This period also heralded the birth of humanitarianism, which included the notion of natural equality of mankind. Serfdom and slavery were incompatible with the equality of mankind, conceived in a Lockean sense as the natural right to life, liberty and property (Finer, 1997, Vol.III:1434-8).

Notions of moral certainty that prevailed through the medieval period were brought into question by Enlightenment beliefs. Beliefs that moral right and natural law were discerned

[25]For works on the Enlightenment period see: Cassirer, 1951; Finer, 1997, Vol.III: 1434-8; Gay, 1996; Hampson, 1990.

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from Biblical revelations and Godly intervention, as taught by the Church, were broken. Enlightenment scholars believed that a secular foundation for moral right and natural law could be discerned through the application of reason and logic in the study of human nature. This was ultimately a utopian dream, and the enlightenment scholars were not able to produce such a social system (Tamanaha, 2004:39-40). Among the most influential of the Enlightenment scholars was John Locke, whose ideas resonated throughout the continent of Europe during this period (Finer, 1997, Vol.III:1434).

Published in 1690, Locke's Second Treatise of Government is seen by some as the most influential formulation of liberal theory (Tamanaha, 2004:48). Locke offers an explanation on the origins of law from an idealised state of nature. Locke's (1952:4, 54)[26] argument starts from the state of nature wherein all people are free, equal and independent. Disputes would eventually arise and Locke proposed that individuals would join together to form a government in order to settle disputes in a fair and just manner. Locke is credited with the notion of the separation of powers between legislative and executive ensuring that government acts in accordance with the laws and that disputes are fairly settled (Locke, 1952:49-50)[27]. Locke's conception of liberty is legalistic as is expressed in his claim that where "…law ends, tyranny begins…" (Locke, 1952:114)[28]. For Locke, to be free was to be free under the law, or to have rules that are common and known to everyone in society which guides all actions (Locke, 1952:15)[29]. Although this is a severely shortened account of Locke's argument,[30] it captures important elements of liberal theory with relation to the rule of law — the idea that everyone is equal under law; that people should be free from interference to act as they see fit; and that a government, with clear separation of powers, is to be the adjudicator of disputes. Nearly 200 years would pass before John Stuart Mill would publish *On Liberty* in 1859, which included a classic formulation of liberty: "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it" (Mill, 1956:16-17).

[26] If using a different publication, see Sections 4 and 95.
[27] If using a different publication, see Sections 88-89.
[28] If using a different publication, see Section 202.
[29] If using a different publication, see Section 22.
[30] For a detailed discussion see Tamanaha, 2004:47-52.

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2.3 The Ideological Battleground Over Rule of Law: Liberal and Social Ideals

Thus have we now progressed, in a very brief manner, from antiquity to the mid-19th century and the height of classical liberalism. The dominance of classic liberalism was short-lived, with Tamanaha (2004:61) remarking that liberalism "…had hardly a moment to enjoy its apotheosis before its retreat began...". Two factors contributed to the decline of classical liberalism and the rise of socialism both commencing at the end of the nineteenth century.

The first was the large number of working poor who worked and lived in terrible conditions. The difference in their living standards to those of the bourgeois was painfully obvious to all. They were trapped by their environment in much the same way the serfs were in the medieval period. Tamanaha (2004:62) argues that it is no coincidence that Marx and Engels produced their theories whilst living in England during this period. The disparities between workers and those who were the owners of land and the means of production were glaringly obvious (Girvetz, 1966:297-8).

The other important factor was the increase in suffrage to include these masses of working poor. It is noteworthy that despite the egalitarian rhetoric of democracy in Europe, the practice thereof reserved the right to vote for the elite. Eventually the ideology of liberal democratic theory, with particular reference to individual liberty gradually led to the extension of the vote to the poorer classes and to women (Girvetz, 1966:297-8; Tamanaha, 2004:62). Coupled with "…the great depression that occurred in the final quarter of the nineteenth century…" (Tamanaha, 2004:63) these factors culminated in the rise of the welfare state. Gradually governments in Europe sponsored initiatives including limits on working hours, pensions, health insurance, compensation for workers accidents and universal education to name a few. This expansion in government involvement led to the increase in size of government bureaucracy and ultimately the gradual decline of classical liberalism and the rise of the social welfare state (Girvetz, 1966:297-8; Tamanaha, 2004:63)[31].

Tamanaha (2004:60) notes that during the past 150 years theorists on the right and left of the political spectrum had noted the decline of the rule of law. This decline refers to the changing nature of the rule of law as a result of the ideological contest between liberal and social

[31]Tamanaha (2004:32-91) frames this debate within theoretical debates around rule of law.

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ideals, the origins of which can be found in the birth of the welfare state early in the 20th century. Scheuerman (1994:22) argues that the minimal conception of the rule of law was under threat at the end of the 20th century due to the increasing amount of state intervention in the form of parliamentary rule making, administrative decrees and the general lack of predictability on the part of contemporary democracies. The rise of the social welfare state heralded the beginning of this ideological contest between liberal and social ideals, which in political theory, can be framed as the contest between liberal and social democracy[32]. This debate can be constructed on three key elements: the nature of equality (formal or substantive); the status of the individual; and the status of the community. These are themes that resonate throughout this dissertation as will become evident in the following chapter.

Before the discussion on liberal and social ideals commences, the reader needs to be cognisant of a few factors. Firstly, what the preceding pages have attempted to do is briefly elaborate on the historic development of the rule of law. The discussion was chiefly concerned with showing that notions of obedience, compliance and obligation, key elements of the rule of law, have historic roots. It was not an attempt to fully elucidate the historic development of rule of law as such an account would go far beyond the scope of this study. This dissertation is primarily concerned with contemporary conceptions of the rule of law in a liberal democratic regime.

Secondly, liberalism and the rule of law are intertwined for as Tamanaha (2004:32) notes "…every version of liberalism reserves an essential place for the rule of law. And the rule of law today is thoroughly understood in terms of liberalism". Liberal systems require the rule of law, but the rule of law can exist without liberalism (Tamanaha, 2004:33). The situation suffers further complications when democratic theory enters the discussion, as it will in this study. "The relationship between the rule of law and democracy is asymmetrical: the rule of law can exist without democracy, but democracy needs the rule of law, for otherwise

[32] Tamanaha (2004: 32-90) elucidates the changes in the rule of law in the past 150 years in a far more detailed manner. His analysis goes beyond mere social theories of liberalism and socialism and includes legal debates such as: critical legal studies movement, see Ungerer, 1975, 1976; instrumentalist legal debates, see Summers, 1982; Tamanaha, 2001 & 2006; legal liberalism, see Mazor, 1972; legal realism see Wiecek, 1998; morality and law, see Dworkin, 1977,1985,1986; Nonet and Selznick 1996. These debates are about issues such as what is 'right' and 'wrong' for society to be determined by law; the role of judges in law; the moral content of law and many more. These are however complex legal debates and have therefore been omitted from the current study which is focused on political conceptions of the rule of law within a liberal democratic framework. These debates, although relevant, play out within the legal field of study and a political study of rule of law need not concern itself with the debates however intriguing they may be.

democratically established laws may be eviscerated...” (Tamanaha, 2004:37). The link between rule of law and liberalism is entrenched in modern notions of democracy. Zakaria (1997:22) argues that “...for almost a century in the West, democracy has meant *liberal* democracy – a political system marked not only by free and fair elections, but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion and property”.

Rule of law, liberalism and democracy, despite being theoretically and historically distinct from one another, are woven into a package that, in modern terms, is considered to be one and the same. It is nearly inconceivable that a regime could completely disregard property rights or civil liberties and yet claim to be a democracy based solely on the right to vote. The study at hand is not an attempt at elaborating fully on the connection between rule of law and liberalism[33]. Liberal ideology is the dominant ideological orientation of modern democracies, with social ideals representing the counterpoint to liberal ideals. Even though social ideals find resonance in the welfare state, these ideals are not the dominant factors in contemporary conceptions of democracy. The demise of communism and the consequent failure of socialism to provide a viable alternative to liberal democracy are partly responsible for the global endorsement of liberal ideals. Communist thought has however imparted on modern liberal regimes the notion that the well-being of the community is important and modern liberal democracies all grapple with the fundamental tensions between liberal and social ideals.

Finally, what follows is a brief description of liberalism[34]. It is an abbreviated discussion, as liberalism, even though it is entrenched in notions of rule of law, is not the focus of this study. Due to the intertwined nature of liberalism, rule of law and democracy, and the dominance of liberal democracy over social democracy, liberalism will receive more attention than socialism. The reader should be cognisant of the fact that the following discussion on liberalism and socialism is intended to show that there are competing ideological camps which influences the manner in which rule of law is conceptualised within liberal democratic regimes. These conceptualisations may be constructed around notions of

[33] For material dealing with the connection between rule of law and liberalism, see: Cunningham, 1979; Hayek, 1960; Schmidtz and Brennan, 2010, Ch. 2;.
[34] For material dealing with the historic development of liberalism see: Bellamy, 1992; Bramsted and Melhuish, 1978; Girvetz, 1966; Schmidtz and Brennan, 2010.

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equality, the status of the individual and the status of the community and will be presented as such in this dissertation.

2.3.1 Liberal Ideals

The advent of liberalism heralded a shift in the rule of law tradition by moving primacy away from the community to that of the individual and is a comparatively modern notion as ancient societies placed prominence on the community above the individual (Berlin, 1969:129). Berlin (1969:129) argues that "[t]the sense of privacy itself, of the area of personal relationships as something sacred in its own right, derives from a conception of freedom which, for all its religious roots, is scarcely older, in its developed state, than the Renaissance or Reformation". Liberalism is however more than the mere preservation of an individual's right to pursue a life goal and takes on many forms[35]. According to Tamanaha (2004:32) liberalism is further complicated because it includes more than just a political theory and system of government — it also includes culture, economic, psychology, ethics and knowledge theories. Equality plays a central role in liberal theory since without the equal treatment of citizens by government, it is not possible for everyone to pursue their version of the good equally. Liberalism requires that all citizens be treated equally. When dealing with liberalism confusion can be a danger as liberalism is intertwined with notions of justice, equality and fairness. Berlin (1969:125) has apt words regarding the conceptual difficulty surrounding liberalism: "[e]verything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience".

Berlin (1969:121-122) identifies two notions of liberty, negative and positive, which he develops in relation to political questions concerned with obedience and coercion. Negative liberty deals with freedom from interference whilst positive liberty is concerned with the source of the interference. Negative liberty

> ...is simply the area within which a man can act unobstructed by others. If I am prevented from doing what I could otherwise do, [...] I can be described as being coerced [...]. Coercion implies the deliberate interference of other human beings within the area in which I could otherwise act. You lack political liberty or freedom only if you are prevented from attaining a goal by human beings. Mere incapacity to

[35]For different theories on liberalism see: Berlin, 1969; Gutman, 1980; Hayek, 1944, 1960; Locke, 1952; Mill, 1956; Nozick, 1974; Rawls, 1999.

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> attain a goal is not lack of political freedom. […] It is argued, very plausibly, that if a man is too poor to afford something on which there is no legal ban – a loaf of bread [...] – he is as little free to have it as he would be if it were forbidden him by law. […] It is only because I believe that my inability to get a given thing is due to the fact that other human beings have made arrangements whereby I am, whereas others are not, prevented from having enough money with which to pay for it, that I think myself a victim of coercion or slavery. In other words, this use of the term [economic slavery] depends on a particular social and economic theory about the causes of my poverty or weakness (Berlin, 1969:122-123).

This view of liberty is echoed by Rawls (1999:179), a champion of social justice and social welfare liberalism who argues that "[t]he inability to take advantage of one's rights and opportunities as a result of poverty and ignorance, and lack of means generally, is sometimes counted amongst the constraints definitive of liberty. I shall not, however, say this, but rather I shall think of these things as affecting the worth of liberty [...]". Rawls distinguishes between liberty and worth of liberty with the former representing a "complete system of liberties of equal citizenship" and the latter referring to a person or groups' "capacity to advance their ends within the framework the system defines" (Rawls, 1999:179). In essence, being free means that I am not being interfered with or coerced into a specific action, the less interference or coercion, the greater the freedom (Berlin, 1969:123).

Berlin (1969:129) argues that this sense of liberty is concerned with the area of control over people, not the source of control. Liberty then is not synonymous with democracy for as Berlin (1969:130) remarks it is conceivable, although unlikely, that a liberal despot could allow many freedoms to citizens.

> Freedom in this sense is not, at any rate logically, connected with democracy or self-government. Self-government may, on the whole, provide a better guarantee of the preservation of civil liberties than other régimes,[sic] and has been defended as such by libertarians. But there is no necessary connection between individual liberty and democratic rule. The answer to the question 'Who governs me?' is logically distinct from the question 'How far does government interfere with me?' (Berlin, 1969:129-130)

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Positive liberty is concerned with answering the first question, whilst negative liberty deals with the latter[36]. Positive liberty deals with ideas concerning 'who' is to govern, whilst negative liberty deals with levels, degree or sphere of interference from governments. Within liberalism this relationship between citizens and government is regulated by law. Berlin (1969:131-2) notes that the logical distance between the sense of negative and positive liberty may seem to be of no great importance. However, the two senses of liberty developed in historically divergent fashion until they were eventually brought into direct conflict with one another. A positive conception of freedom, unlike its negative counterpart, entails the notion of self-mastery by posing the question 'who governs me?'. Positive liberty includes the notion that a human being is his/her own master and is slave to no man, 'I govern myself'. This doctrine of freedom has lent itself to split the personality or 'the self', more so than negative conceptions, into the dominant, rational, controller and irrational passion and desire which in turn needs to be controlled by the dominant self (Berlin, 1969:134). The dominant self is then identified as the 'true self' which can also be conceived of as something other than the individual but as an entity which is part of a social whole, tribe or community (Berlin, 1969:132). The individual in this sense is reduced to a cultural or social background (Stacey, 2003:141). Once this metaphysical shift has been made, it is possible to reduce an individual's freedom to that of a social group or community.

> Once I take this view, I am in a position to ignore the actual wishes of men or societies, to bully, oppress, torture them in the name, and on behalf, of their 'real' selves, in the secure knowledge that whatever is the true goal of man […] must be identical with his freedom – the free choice of his 'true', albeit often submerged and inarticulate, self (Berlin, 1969:133).

Berlin's argument is that there is historical divergence between negative and positive liberty and that this divide widened with metaphysical fission of the higher, rational self, set to rule or dominate, the 'lower' self. The 'higher self' came to be identified with institutions, nations, states, cultures and more indistinct concepts such as the general will and common good of society (Berlin, 1969:xliv). Negative liberty does not concern itself with issues of common good or the will of society; it values only the ideals of individual freedom whilst positive liberty includes these ideals. This distinction in conceptions of freedom illustrates that there are various ways in which to conceive liberty and serves as an example of how

[36] For a detailed discussion, see Berlin, 1969:118-172.

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liberalism allows for a certain pluralism of ideas. It will be argued that it is this variance in scope of liberty which lays the foundation for the theoretical model to be developed in chapter three on differing conceptions of the rule of law.

2.3.2 Social Ideals

Socialist ideals, as has been mentioned, were born in the era of immense hardships suffered by the working poor during the early stages of capitalist development. Liberalism, defined in the Lockean sense during this period, was very much a system that favoured those of the middle and upper classes, or in pure Marxist terms, the bourgeois (Girvetz, 1966:297-9; Tamanaha, 2004:73). Marx's *Das Kapital* was published in 1867 and, despite being somewhat unreadable and unintelligible, it had become canonical by 1880 (Finer, 1997, Vol.III:1642). Marx presented a radical shift from the prevailing liberal ethic of the time. His argument centred on the notion of state control. Marx argued that the state was a product of the leading wealthy class and served their interests alone whilst subjecting the working masses to harsh and inhumane living conditions. Marx's communism advocated a revolution by the working class in order to subvert the needs of the few and uplift the community living in squalor. Marx advocated that state power must be seized and used by the working masses in order to promote their interests (Finer, 1997, Vol.III:1642; Held, 2006:112). Marx's views were very much concerned with the well-being of the community and not with that of the individual. Freedom, under Marxism, means economic freedom, not the freedom to pursue any desired life goal. This view of freedom also necessitated more than mere non-interference, or absence of coercion by the state. For freedom to be realised under communist ideals, the state must be an active actor in helping citizens achieve freedom by enacting laws and implementing policies that would ensure social, economic and political resources be transferred to the people. Liberty under communist thought rests on the notion of substantive equality, a theme which will be taken up to shortly.

Held (2006:116) argues that 20th century Marxism evolved into three distinct camps, libertarians, pluralists and orthodox Marxist. Marxism also underwent severe changes during the 21st century with the collapse of communism and the failure of the communist state and ultimately communist ideals. The intention is not to elaborate on the theoretical differences between differing strands of Marxism, nor is it to plot the historical changes that Marxist

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theory underwent[37]. Today, communist ideals of community and substantive equality are represented by social democracy, which has remained true to some of the core assumptions of communist thought. Specifically, this refers to the notion that communism heralded a shift in primacy from individual freedom and well-being to collective freedom and well-being. It was the community, not the individual with which communism was concerned. The principle justification of social democracy is the notion that in order for freedom to be realised, economic exploitation must be ended and everyone must be economic and political equals. Contemporary conceptions that are centred on the equal distribution of resources and the equality central to social democracy is concerned with that of substantive equality (Held, 2006:120).

2.3.3 Equality

Another way to frame the debate between liberal and social ideals is with reference to equality. One can distinguish between formal equality, treating everyone alike, and substantive equality, which means treating people differently depending on their position within society. Although adherents to each conception of equality vehemently defend it as the sole conception thereof, both are defensible positions of the term. If people are at an unequal position owing to their social conditions, then employing formal equality will only serve to perpetuate their inequality relative to others within society. This idea forms the basis for affirmative action policies found around the world and is an important element of social democratic thought (Tamanaha, 2004:77).

The connection between liberty and equality can thus be framed in this light.

> Self-determination can be understood, in negative terms, to mean that individuals should be left alone by government to live as they desire; self-determination can also be understood, in positive terms, to mean that government is obligated to empower individuals – to assist them in acquiring the tools necessary to become self-determining – in order that their liberty may be fully enjoyed (Tamanaha, 2004:77).

[37] For works detailing Marxists schools and different forms of Marxism see: Dryzek and Dunleavy, 2009:79-99; Finer, 1997, Vol. III: 1462-9; Held, 2006:116-120. For works detailing the historic changes Marxism has undergone see: Gordin, Tilley and Prakash 2010; Muravchik, 2002; Satgar and Zita, 2009.

Substantive notions of equality are grounded in a 'positive' conception of liberty, whilst formal equality and 'negative' liberty accompany one another. The former shares historical ties with social welfare theories and the idea that the community and community well-being is of utmost importance and that government must assist the community to realise equality (i.e. socialism), whilst the latter is tied to notions of individual freedom and restriction of government interference in societal affairs found in liberal ideals.

2.3.4 Liberty and the Rule of Law in Contemporary Democracies

Marxist theories and analysis can be said to be in a relative decline due to the collapse of communism. The liberal democratic state, not the social democratic state, has become the dominant form of government around the world (Dryzek and Dunleavy, 2009:1). Within this dominant liberal theory, individuals consent to being under the law in order to ensure their freedom. Liberals argue that if everyone is absolutely free, then no one is truly free due to the threat people pose to each other (Tamanaha, 2004:32-34). "Even if this were correct – by no means obvious – to be told that one is free after submitting to law should evoke some suspicion. Is it not more candid to admit that under law we are not free, but the benefits that law brings are worth the trade off?" (Tamanaha, 2004:34). Modern liberal democracies answer this question through the preservation of a fourfold conception of liberty.

Tamanaha (2004:33-36) argues that one can distinguish between *political liberty*, *legal liberty*, *personal liberty* and *institutionalised preservation of liberty* and that these four liberties offer the answer to the question posed above. *Political liberty* refers to consent to being governed by laws and an obligation to follow the laws since laws were created through a democratic process. "Moreover, presumably under a democracy citizens would not enact laws to oppress themselves; their power to make law is, accordingly, their own best protection. Self-rule is "*political liberty*". Representative democracy is the modern manifestation of self-rule in the West" (Tamanaha, 2004:34). Furthermore, political liberty requires that citizens have the opportunity to participate in collective decisions with respect to governing political and legal structures, that they have the right to vote, to run for office and are afforded protection of speech, assembly and association (Tamanaha, 2004:34).

The second, *legal liberty*, allows individuals to predict when they will be coerced by state legal apparatus since laws stipulate which actions will evoke state sanctions thereby allowing

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citizens to avoid legal interference in their daily affairs. "Citizens are subject only to the law, not the arbitrary will or judgement of another who wields coercive government power" (Tamanaha, 2004:34). *Legal liberty* operates under the assumption that laws are publicly known in advance and are equally applied in a reliable manner (Tamanaha, 2004:34).

Personal liberty refers to a sphere of non-interferences in personal affairs. This is often expressed as civil rights and liberties which are contained in a bill of rights (Tamanaha, 2004:35). "Personal liberty constitutes the minimum degree of autonomy individuals retain even after they consent to live under law" (Tamanaha, 2004:35). It is the preservation of personal liberty that prohibits the state from imposing on citizens a particular view of the good. Tamanaha (2004:35) recognises that personal liberty is variable in scope and content and that regular disagreement about the scope and content of personal liberty is common in modern democracies. Commonly personal liberty includes freedom of religion, conscience, speech, political belief, freedom from torture and freedom to determine one's life pursuits and values (Tamanaha, 2004:35).

The *institutional preservation of liberty* is the fourth strand identified by Tamanaha. It refers to notions of separation of powers, both horizontal (legislative, executive and judicial) and vertical (municipal, state and national) presided over by an independent judiciary. The *institutional preservation of liberty* ensures that power is not accumulated in a single institution by separating the legislative, judicial and executive branches of government (Tamanaha, 2004:35).

Tamanaha (2004:36) concludes that:

> Modern political democracies answer the sceptical question posed earlier – how is an individual under law still free? – by offering a tight combination of these four themes. In a democracy, citizens create the laws under which they live (political liberty); government officials take actions against citizens in accordance with these laws (legal liberty). In the first respect they rule themselves; in the second they are ruled by the laws which they set for themselves. Citizens, therefore, are at no point subject to the rule of another individual. Moreover, citizens possess a specially protected realm of individual autonomy that restricts the reach of law (personal liberty). Liberal democracies typically carry out this combination by utilizing some form of separation of powers, in particular with an independent judiciary (institutionalized preservation

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> of liberty). Almost without exception (the UK being a prominent partial exception), this arrangement is set out in a written constitution, binding on government officials and citizens and enforced by independent courts. As is evident, this liberal construction is thoroughly legalistic. Law is the skeleton that holds the liberal system upright and gives it form and stability.

It was previously mentioned that the rule of law requires neither liberalism nor democracy to function; it is the latter two that depends upon the former. The reason for this can be explained at the hand of the inherent tension amongst the four themes of liberty. Legal liberty can exist without personal liberty in that legal liberty refers to a person being free to act, it says nothing about the scope or range of said action (Tamanaha, 2004:37). "Legal liberty is not offended by severe restriction on individuals, for it requires only that government actions be consistent with laws declared in advance, imposing no strictures on the content of the laws" (Tamanaha, 2004:37). It is therefore conceivable, and theoretically possible, for a system to respect legal liberty at the expense of political liberty.

The tension between personal and political liberty is perhaps the most severe, for as Berlin (1969) argues, the question of 'Who governs?' is distinct from 'How far does government interfere?' Personal liberty aims to limit governmental authority against individuals whilst political liberty is concerned with controlling and exercising government power. Personal liberty is concerned with individual freedom. Political liberty focuses on the sources of power and determining who will mould the social and political community by means of legislation (Tamanaha, 2004:38). "Drawn in the sharpest terms, this conflict represents the battle between two contesting ideologies: collective self-rule in the interest of the community versus the desire of the individuals to be left alone" (Tamanaha, 2004:38). It can therefore be seen as an extension of the ideological struggle between liberal and social ideals previously discussed.

It is paradoxical that the very feature cherished by those committed to liberal democracy is also the source of the inherent conflict within liberal democratic regimes governed by the rule of law. This tension lies at the heart of liberal democratic theory as it revolves around differing conceptions of liberty as influenced by liberal and social ideals. The tension amongst those who cherish the sanctity of the individual and those that hold dear community oriented values is irreconcilable. The former group wishes to curb government authority,

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whilst the latter wishes the power to be wielded by them. Berlin (1969:166) eloquently captures the problem:

> That is a cardinal issue. These are not two different interpretations of a single concept, but two profoundly divergent and irreconcilable attitudes to the ends of life.[…] These claims cannot both be fully satisfied. But it is a profound lack of social and moral understanding not to recognize that the satisfaction that each of them seeks is an ultimate value which, both historically and morally, has an equal right to be classed among the deepest interests of mankind.

The contrast between the interest of the individual and those of the community is a recurrent theme throughout the work at hand and it should be noted that this tension is one that can be traced to the very core of the beliefs associated with liberal democracies guided by the ideal of the rule of law.

Despite these inescapable tensions between the ideological camps of liberalism and socialism, and the tensions inherent to the competing notions of liberty, the problems they pose are not insurmountable. It is, in many instances, the manner in which a democratic regime deals with these tensions, inherent to the conflicting ideologies within the rule of law and democracy, which defines them. Moral pluralism is one way liberal democratic regimes mitigate these tensions. Liberty central to liberalism is the freedom to pursue one's own version of the good. This does not necessitate that the good be defined in a certain manner, only that the pursuit of this good does not infringe upon the right of others to do the same. Moral pluralism can function simultaneously in two alternate forms within liberalism. The one involves a pluralism of moral views amongst individuals whilst the other is concerned with the co-existence of multiple and distinct communities within a single system (Tamanaha, 2004:41).

> In either case, the liberal state purports to be neutral with respect to the alternative circulating visions of the good. That is, it cannot adopt and promote as the state sanctioned good or religion one vision over others, with the important caveat that it may prohibit or sanction those that perpetuate violence on others or threaten the survival of the liberal state (Tamanaha, 2004:41).

Tamanaha (2004:42) argues that the neutral stance on the nature of the good does not equate liberal systems to complete neutrality. Firstly, liberal systems afford primacy to the notion

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that a position of neutrality is the right way to construct a government. Secondly, the primacy afforded to individual rights imposes limits on the extent to which the community can claim prominence (Tamanaha, 2004:42). In sum, under the liberal view it is not necessary that there is a common conception of the good. Individuals need only have a tacit agreement that everyone should be free to pursue their own desires (Tamanaha, 2004:42). "Rather than a community integrated by shared values, it amounts to an aggregation of individuals held together by a mutual non-interference pact" (Tamanaha, 2004:42).

2.4 Summary

The ideological contest between community and individual oriented views of liberty and substantive and formal equality expressed in social and liberal theory respectively, has continued unabated to the present day[38]. It is however not the goal of this study to investigate in full the range of theoretical and practical arguments found within legal and political literature on this debate. The discussion above is a partial representation of an ideological contest present within contemporary democratic regimes and highlights only those elements that are regarded as essential to the argument presented in this dissertation. It is important to take the following from the preceding discussion.

The ideal of the rule of law developed over a long period of time. Original understandings thereof in ancient and medieval society were not concerned with promoting the well-being of the individual, for these societies rule of law, as it existed then, was concerned with promoting community welfare. It is also during the medieval period that crucial elements of contemporary conceptions of rule of law, obedience, compliance and obligation, were laid down. Conceptions of the rule of law underwent a dramatic change during the 16th to 18th centuries through ideas associated with the Reformation and the Renaissance. Conceptions of the rule of law in this period developed out of individual-centric notions of liberty and equality prevalent in liberalism at the time. In the late 19th century, with the expansion of capitalism and the increase in material inequalities and the absolute numbers of those living in poverty, the concept of the rule of law acquired a distinct social characteristic with the notion of the social welfare state which held to differing and contending views of equality and liberty found in liberalism. This ideological battle between individual and community

[38]Tamanaha, 2004:60-91.

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continues to this day to a certain extent, and many democracies are concerned with finding a social, political and economic configuration that can mitigate these fundamental tensions.

The problem identified in this dissertation is therefore not new, and the research question posed is in many ways merely a different angle of approach to the well-established political problem of how to structure a society, in the political sense, to adequately reconcile differing beliefs. The final section of this chapter highlighted the ideological battle which is on-going amongst modern rule of law theorists. It was a partial presentation of conflicting paradigms within the rule of law. The purpose was merely to show that the conceptual divergence on the rule of law can be grounded in the ideological battle between liberal and social ideals regarding the nature of freedom and equality and the status of the individual and the community. The detailed differences between differing schools of thought on the rule of law will be more fully elaborated on in the following chapter.

Rule of law and liberalism are intertwined in modern notions of liberal democracy and therefore exploring the history of rule of law inevitably involves exploring liberalism. However, the focus of this study is on rule of law, not liberalism, and therefore the discussion of liberalism was limited to contemporary conceptions thereof. Liberalism was discussed not only in terms of a dichotomous interpretation put forward by Berlin (1969), but also as relating to rule of law and democracy as espoused by Tamanaha (2004). Consequently the discussion on socialism, as a counterpoint to liberalism, was also done within the context of liberal democratic regimes. The historic elaboration was guided by the rule of law in the sense that this chapter was devoted to the historical elements that played a role in the development of the rule of law. For the sake of brevity, there are many elements which were not covered in totality, such as the historic development of liberalism and socialism as competing ideals which influence the rule of law.

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Chapter 3: Theory and Development of the Conceptual Typology

3.1 Introduction

The following chapter will explore the concepts that are central to understanding the argument presented in this dissertation. The chapter will begin by reiterating the main aim of the study in order to focus the theoretical discussion which is to follow. It also emphasises the importance of conceptions and mental models as they pave the way for exploring the manner in which such mental models and ideas influence the construction and maintenance of political and legal institutions. The definition of law which is put forward is not a narrow legal definition, but rather relies on notions that law is constituted from specific institutional elements. The link between rule of law and culture is explored wherein it is argued that the rule of law can be conceived as a cultural entity. The chapter continues to define culture, democracy and the rule of law in both a normative and empirically dichotomous sense to create a conceptual typology with which a theoretical model is then constructed and presented.

3.2 Outlining the Study

This study investigates possible diverging interpretations of the rule of law in South Africa and explores whether role-playing stakeholders in the South African democracy may hold differing interpretations of the Constitution of 1996 as revealed through their conceptions of the rule of law. The argument advanced is one that relies heavily on the notion that the manner in which people conceptualise key concepts or components of democracy, such as the rule of law, will have an effect on the understanding of democracy in South Africa.

The overall focus of the study is to interpret the meaning and significance of a specific aspect of the negotiated Constitution of 1996 within South Africa's political democratisation process. The question is to determine whether there are rival, contending and divergent interpretations of a central concept of the Constitution present within the South African political domain, and if so, whether these can be systematically described. The central concept for interpreting contrasting and contending understandings of the Constitution is that

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of rule of law. More specifically, the study will aim to gain a conceptual understanding of how the rule of law is interpreted by stakeholders in the South African democracy.

The following study therefore relies on the notion that the beliefs and ideas of role-playing stakeholders are of importance for the future of the South African democracy. Denzau and North (1994:4), writing in the discipline of economics, argue that in order to understand decisions in conditions of uncertainty, one "...must understand the relationships of the mental models that individuals construct to make sense out of the world around them, the ideologies that evolve from such constructions, and the institutions that develop in a society to order interpersonal relationships".

The following study proposes the same rationale, but is not set in the field of economics and institutional learning, but in political science. The conditions in South Africa are uncertain; the South African democracy is a young democracy that has risen out of the demise of an authoritarian regime through a negotiated settlement that culminated in the creation of the Constitution of 1996. Decisions are therefore being made in an uncertain environment, one that relies on the terms of the compromises reached during the negotiated transition[39]. The result is that the South African democracy exists within the context set by the Constitution of 1996, yet as a document, ideology and a vision of the future, the Constitution is open to many interpretations.

3.3 The Importance of Ideas: Law, Institutions and Culture

In his book *The Legacies of Law*, Jens Meierhenrich (2009)[40] argues that legal norms and institutions can have an important effect on democratic transitions and demonstrates that negotiated transitions, such as from apartheid to democracy, can be less intractable when adversaries share convergent mental models. The author's main concern is with the role of the law in the democratisation process and argues that shared mental models of the law will enable a more reliable transition from an authoritarian to a democratic regime. Meierhenrich (2009) argues that conceptions of important institutions make a difference in the durability

[39] I shall elaborate on the contemporary nature of the negotiated transition in the following chapter, for now the reader need only take into account that the transition was steered by a negotiated settlement.

[40] *The Legacies of law: Long Run Consequences of Legal Development in South Africa, 1652-2000*, sheds light on the relationship between path dependence and the law. It is a work firmly rooted in path dependence and focuses on how, why and to whom the law matters and with what consequence (2009:1-2).

and ensured success of democracy, or more simply stated, "ideas matter" (Denzau and North, 1994:3, 27).

Both Denzau and North (1994) and Meierhenrich (2009) express the argument that "ideas matter" in the sense that ideas, as constructed in the form of mental models regarding both what (empirically) is and what (normatively) ought to prevail in the realms of social, economic and political life, do shape actions and these authors produce empirical studies to substantiate their argument. The present study which examines whether divergent (or convergent) mental models of the rule of law and democracy are present in South Africa is embedded in the body of work established by these scholars. The question of whether and the manner in which these mental models impact on political action in the process of democratic consolidation, if found to be present, is not considered.

The South African democracy can be described as a constitutional democracy, the role of the constitution is paramount and consequently the role and conceptions of law are of utmost importance as a constitution is, in a minimal sense, merely a legal document. Meierhenrich (2009:56) argues that law "...is a manifestation of three interlocking elements: interests, institutions and ideologies". Interests form part of law because law is a purposive activity that facilitates the solution of recurrent problems of social interaction. Institutions, such as courts, shape the articulation, adjudication and performance of law and structure incentives in social interaction. Ideologies refer to the shared mental models and normative beliefs that constitute law's real and imagined place in society (Meierhenrich, 2009:56-57). Meierhenrich (2009:60) maintains that law, as an institutional framework, is at the very heart of his work and argues that law "...has cultural value in democratization, and that this value – the ideology of law – has been neglected in existing literature". Kahn (1999:1) echoes this sentiment and remarks that " [t]here is remarkably little study of the culture of the rule of law itself as a distinct way of understanding and perceiving meaning in the events of our political and social life".

Kahn (2001:141) argues that "[t]he rule of law, [...], is not just a set of rules to be applied to an otherwise independent social order. Rather, law is, in part, constitutive of the self-understanding of individuals and communities". For Kahn (2001:158) "[t]he rule of law is a kind of short-hand way of referring to a matrix of beliefs and practices within which the citizen acknowledges the possibility that the state will make a demand upon his or her life

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and, regardless of personal interests, the legitimacy of that claim will have to be acknowledged". Kahn (1999:36) argues that the

> …rule of law is a social practice: it is a way of being in the world. To live under the rule of law is to maintain a set of beliefs about the self, and community, time and space, authority and representation. It is to understand the actions of others and the possible actions of the self as expressions of these beliefs. Without these beliefs, the rule of law appears as just another form of coercive governmental authority.

The rationale behind the citation of Kahn's (1999, 2001) work is twofold. Firstly, it illustrates that within the literature on the rule of law, there are conceptions and theories thereof which hinge on cultural values and beliefs. Although Kahn (1999, 2001) is advocating a different approach to the rule of law within legal studies, one not devoted to legal reform, it is relevant to this study as Kahn (1999, 2001) argues that rule of law is a cultural phenomenon that hinges on beliefs and values of individuals. Secondly, the constitutive elements of the beliefs identified by Kahn (1999), namely the self and community, time and space as well as authority and representation, bear a close correlation to the elements within the cultural typology advanced by Cohen (2004) which will be used in this study.

This work shall follow Meierhenrich (2009) and make use of Mantzavinos, North and Shariq (2004), Denzau and North (1994) and North (1990)[41] to elucidate the connection between law[42] and culture by making use of institutional theory. "Institutions are the rules of the game in a society, or more formally, are the humanly devised constraints that shape human interaction" (North, 1990:3). Institutions consist of both formal and informal rules, with formal rules including constitutions, statute, common law and regulations as well as informal rules such as conventions, morals and social norms (Mantzavinos *et al.*, 2004:77). Mantzavinos *et al.* (2004:77) further argue that it is useful to distinguish between external and internal aspects of institutions.

> From an external point of view, institutions are shared behavioural regularities or shared routines within a population. From an internal point of view, they are nothing more than shared mental models or shared solutions to recurrent problems of social

[41] Although these are authors in the fields of economic history, path dependence and cognitive learning and institutionalism, their work is applicable and important in the structuring of the argument presented here.

[42] Defined by Meierhenrich (2009:56) as "... a manifestation of three interlocking elements: interests, institutions and ideologies".

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> interaction. Only because institutions are anchored in people's minds do they ever become behaviourally relevant (Mantzavinos *et al.*, 2004:77).

A further distinction is that informal institutions are endogenous to communities and are produced internally whilst formal institutions are imposed onto a community as an exogenous product of ruling relationships (Mantzavinos *et al.*, 2004:79).

Denzau and North (1994:3-4) argue that individuals who share a cultural background will have reasonably convergent mental models, ideologies and institutions. Individuals who do not share a cultural background will have different models, ideologies and institutions with which they interpret their environment. Denzau and North (1994:4) define ideologies as:

> …the shared framework of mental models that groups of individuals possess that provide both an interpretation of the environment and a prescription as to how that environment should be structured. […] The mental models are the internal representation that individual cognitive systems create to interpret the environment; the institutions are the external (to the mind) mechanisms individuals create to structure and order the environment.

The paragraphs above are an attempt to show that the law, as defined by institutions, interests and ideologies (Meierhenrich, 2009), is comprised of formal institutions which are in turn influenced by mental models, ideologies and interests produced internally, as held by individuals and/or organisations. Conceptions of law and by extension conceptions of the rule of law, are therefore nothing less than shared mental models, internally held opinions and beliefs,[43] that shape the manner in which external manifestations of the rule of law gain expression through formal institutions such as a constitution and the common law.

This can be ascribed to the notion of cultural learning which Denzau and North (1994:15) describe as a common cultural heritage which contributes to reducing divergence found in mental models existing within a community. Cultural learning also provides a means of transferring knowledge from one generation to the next. The idea of cultural learning also forms part of the definition of culture as put forward by Raymond Cohen (2004) and is one that shall be employed to provide an adequate definition of the concept. Cohen (2004:11)

[43] Echoing the argument put forward by Kahn (1999).

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argues that from the many definitions of culture to be found in the literature, three themes have gained prominence — culture is a property of a society not individuals; culture is acquired through socialisation; and finally, culture is unique and complex and subsumes every area of social life. Taking these elements into account, Cohen (2004:12) argues that, "[c]ulture is fundamentally a property of information, a grammar for organizing reality, for imparting meaning to the world".

On a very basic level, culture influences the manner in which we understand and make sense of the world around us and has an influence on most, if not all, societal interactions including political and legal institutions. People from similar cultural backgrounds, by definition, share mental models and tend to have convergent ideas about institutions and how they function in society.

Exploring institutional theory in the discussion above is relevant due to the notion that in many ways the two concepts central to this study, rule of law and democracy, are both important institutions. Importantly, the manner in which these institutions are conceived and understood by role-playing stakeholders is dependent upon their cultural background and the consequent mental models they subscribe to. Based on such logic, it is plausible that different role-playing stakeholders may hold different conceptions of these important institutions. The elaboration on law, institutions and culture was intended to serve as the foundational understanding that is required in order to create the conceptual typology that is to be developed in this study. In the following sections the manner in which the concepts of culture, democracy and the rule of law are understood and employed in this study will be discussed.

3.4 Culture: A Dichotomous Conceptualisation

Cohen's (2004) definition of culture centres on the notion that culture is essentially a shared understanding of the world around us, and the manner in which we make sense of what we perceive. Culture is comprised of shared meanings, permitting members of a community to perceive and consequently act on reality (Cohen, 2004:12). Cohen (2004) elaborates on the influence of certain cultural orientations on the process of negotiation. The author argues extensively that cultural differences influence not only the context of negotiation, but also the

'*meaning*' of '*what*' is being negotiated. Through numerous examples, it is argued by Cohen (2004) that American-individualistic cultures can be distinguished from communal based cultures. The author identifies and labels two distinct cultural frameworks — the *high-context* cultures and cites China, Egypt, India, Japan and Mexico as examples of societies that exhibit *high-context* cultures (Cohen, 2004:19) and the *low-context* culture epitomised by the American culture. The basis for this distinction lies in the prominence or status that is ascribed to the individual within the specific cultural context.

High-context cultures follow a communal ethos wherein the needs and freedoms of the individual are subordinated to the welfare of the group. The identity of an individual is derived from group affiliation and not personal choice with individual needs being defined in terms of communal interests. Face, an individual's standing in the eyes of the group, is paramount and dishonour is considered to be worse than death. Group identity is acquired at birth, is lifelong and bestows upon the individual a sense of duty to family and group that supersedes other obligations. The notion of duty towards an abstract entity such as the state is foreign, as duty and obligation is towards the individual's group (Cohen, 2004:30-31). "Law, as some disembodied notion of justice, is meaningless [.]" and is rather viewed in the context of group affiliation and past favour (Cohen, 2004:31). Contracts are subordinated to customs, and the idea of a disembodied contract applying to all is alien to this cultural framework. Authority is paternalistic and unquestionable in nature and roles are ascribed within the group and rests heavily on past hierarchies. Conflict is resolved by mechanisms of communal conciliation and not with an idea of an abstract universal law. Maintaining group harmony is the paramount concern of conflict resolution while ensuring that contracts are adhered to irrespective of context is not of paramount concern (Cohen, 2004:30-31).

In contrast *Low-context* cultures are dominated by the idea that status is afforded to the individual, and holds that individual rights are more important than duty towards one's family or community. In this framework status is acquired and not inherited. Political authority is a function of office and can and should be questioned and challenged when individuals feel their rights are being impeded in any way. Conflicts are resolved through legal processes enshrined in law, wherein justice is an abstract notion that applies to all, where litigation is common and all parties are allowed to argue their cases on equal basis. Equality before the law is the 'prevailing ethic' in such societies and the importance of contracts above custom cannot be overstated. The economic side of this framework is enshrined in the principles of

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the free market and the prevailing political system that is usually pursued is that of representative democracy (Cohen, 2004:29-30).

The role of language, time and history are significant points of difference between *low-* and *high-context* cultures. For the *low-context* cultures, language is merely a means of communication and communication is viewed as a tool for relaying information. Language and communication are seen as performing an informational function. For *low-context* cultures, time is seen to be precious, and to waste time on frivolities when work could be done is meaningless and unfulfilling. This cultural orientation that values individual achievement highly, views time as a medium in which productive tasks must be completed in specific periods. In addition, time is viewed as monochronic, alluding to the idea that it is best to do one task at a time and, in a sense, this culture 'regiments time'. Consequently, this cultural perspective has a view of the present that tends to underplay the importance of the past in shaping current context. History is mostly subordinated to dealing with more pressing and immediate concerns, and the preoccupation and fascination with the future leads to historical factors being underestimated in their significance of shaping the present (Cohen, 2004:31-35).

Within *high-context* cultures, language and communication forms part of the entire social fabric and in this cultural perspective language is not merely a way of communicating, but forms an integral part in maintaining face, group harmony and social cohesion (Cohen, 2004:31-32). *High-context* cultures attribute far less value to the division of time on the clock dial and are not as preoccupied with the future as their *low-context* counterparts. *High-context* cultures subordinate the importance of time to human interaction and assign value to the act of 'doing' rather than to 'getting things done'. Cohen (2004:34) captures this when he poses the following question, "… in the overall scheme of things, where the individual counts for so little in the face of much greater, inexorable forces, what could be more futile than urgency?" This sense of time has implications on the importance placed on the role of history in contemporary context.

High-context cultures tend to view what their *low-context* counterparts would perceive as 'ancient, irrelevant' history, as having a significant impact on creating the current social context (Cohen, 2004:31-36). In a sense, for *low-context* cultures history is recreated in terminology of today, and is compartmentalised and viewed as distinct from other social

forces. In contrast, *high-context* cultures view the present as part of a continuum of events. There is no division or segmentation of time, but rather a flowing continuum of social interactions that shape today and tomorrow, based on what happened yesterday — hence the label, *high-context*. For *high-context* cultures, the context dominates the details of the present. All social interactions and relationships are characterised by the context that they take place in, nothing is void of context and all interactions and relationships are influenced by a specific context.

One final aspect that is an important distinction between *high-* and *low-context* cultures is the idea of *good faith* as opposed to *goodwill*. The idea of *good faith* is important in *low-context* cultures. Negotiation is viewed as a finite process that terminates in the creation of a legally binding contract. *Low-context* negotiators assume that the goal of negotiations is to reach an agreement and create a contract. Once an agreement has been reached and a contract created, the negotiation process is complete and is replaced by the structured certainty that was agreed upon and captured in the contract. Negotiation in the view of *low context* cultures culminates in the decisive action of creating, and honouring, the contract (Cohen, 2004:199-200). For the *high-context* counterparts, this is not the case. *High-context* cultures view the creation of a legal contract as merely another stage in the process of an open-ended relationship. They operate on the basis of *goodwill* — the idea that all parties are working together in a co-operative way, and that non-compliance to, or the changing of a contract is part of the open-ended relationship and does not in any way signify an offence or the breaking of contract or a disregard for an agreement. (Cohen, 2004:200-201). This difference in *good faith* and *goodwill* is grounded in the contrasting views the two cultural orientations have on the role of law, contracts and time. Whereas *low-context* cultures view negotiation and contracts as being a function of a clearly demarcated time period, *high-context* cultures view it as part of the continuum of time, the always changing social reality that cannot be abstracted or subordinated to the ticking of a clock (Cohen, 2004:201).

In essence, the difference between *high-* and *low-context* cultures lies in the separation of meaning from context. For *low-context* cultures, events, actions, processes and relationships can be invested with meaning without bringing the entire context of relationships into the framework of understanding. To the contrary, by stripping the context away, by eliminating, discarding or ignoring the context of the relationship and regarding it as ‘irrelevant’, even greater clarity, and therefore meaning can be established. It is held that context can clutter,

obscure and confuse the understanding and functioning of relationships. *High-context* cultures argue the exact opposite of their *low-context* counterparts. In the following sections this dichotomous conception of culture will be paired with a specific and dichotomous definition of democracy, however, the ideal type of democracy must firstly be defined.

3.5 Democracy: A Working Definition

There are many definitions of democracy to be found in the field of political science. Held (2006:2-3) attributes the difficulty of, and variation in, definitions of democracy to the notion that democracy can be defended on many grounds ranging from rightfully determining political authority to liberty and a moral compromise and that the justification offered will determine which definition of democracy is adopted. Dahl (1989:5) echoes this sentiment by stating that "...democracy has been variously conceived of as a distinctive set of political institutions and practices, a particular body of rights, a social and economic order, a system that ensures certain desirable results, or a unique process of making collective and binding decisions". The reality is that democracy encapsulates all of these institutions, ideals and processes, and this is in part why definitions of the term vary so greatly. For those authors taking a rights-based approach, democracy would hinge on the institutions and processes that ensure that the basic rights of all citizens are protected. A more minimalist, or proceduralist approach, would focus on the processes of making decisions, as Dahl does (1971). Stormberg (1996:10) notes that those who attempt to define democracy tend to employ some form of typology in order to distinguish between different forms of democracy. Such an approach will also be followed in this section and the different approaches of defining and categorising democracy will be highlighted briefly.

The works by Held (2006) and Dryzek and Dunleavy (2009) present typologies of democratic theories. Dryzek and Dunleavy (2009:1) explore the modern liberal democratic state, which has become the dominant form of political configuration world-wide. Despite the dominance of the liberal democratic state, there are considerable differences in theories addressing the manner in which these liberal democratic states do work (explanatory theories), and the manner in which they should work (normative theories). Although explanatory and normative theories are conceptually distinct they are intertwined in practice (Dryzek and Dunleavy,

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2009:xi). Dryzek and Dunleavy (2009:35-127) identify four main theories on democracy namely pluralism, elite theory, Marxism and market liberalism.

Dryzek and Dunleavy (2009:18) argue that, currently, the most important state form is liberal democracy which falls under pluralism. "Pluralism is a belief in many (plural) ways of life, many approaches to knowledge and many centres of power in society, committed to moderate, non-rancorous competition. These conditions are thought by pluralists to be achieved, and ultimately perhaps only achievable, under liberal democracy" (Dryzek and Dunleavy, 2009:35). Liberal democracy is defined as a system of government where elections determine who holds power; fundamental rights (civil and political liberties) are protected by a constitution presided over by an independent and impartial judiciary; a legal framework that holds everyone equal before the law; the constitution also specifies the powers of public officers and the configuration and relationship of government branches (Dryzek and Dunleavy, 2009:18).

In his analysis of the variants of democracy David Held (2006) constructs a far more comprehensive typology than the one mentioned above. It is however interesting to note that Held (2006) and Dryzek and Dunleavy (2009) identify similar democratic models. Held (2006) identifies eleven models of democracy which are presented in figure 3.1.

Held (2006:1-3) defines democracy as a form of government in which the people rule. A democracy also includes the notion of a political community which is characterised by political equality amongst the people. Held (2006:3) is primarily concerned with describing different models of democracy and notes that the clash of positions regarding a definition of democracy is chiefly centred on whether democracy is conceived in relation to popular power or as an aid to decision making. Schumpeter (1976:269) is credited with framing the debates internal to democracy in this fashion, that is to say as power vested in the people or as a means to determining representatives by arguing that the "…democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote". An equally concise and procedural definition of democracy is offered by Adam Przeworski (1991:10) when he writes that democracy is "…a system in which parties lose elections. There are parties: division of interests, values, and opinions. There is competition organized by rules and there are periodic winners and losers".

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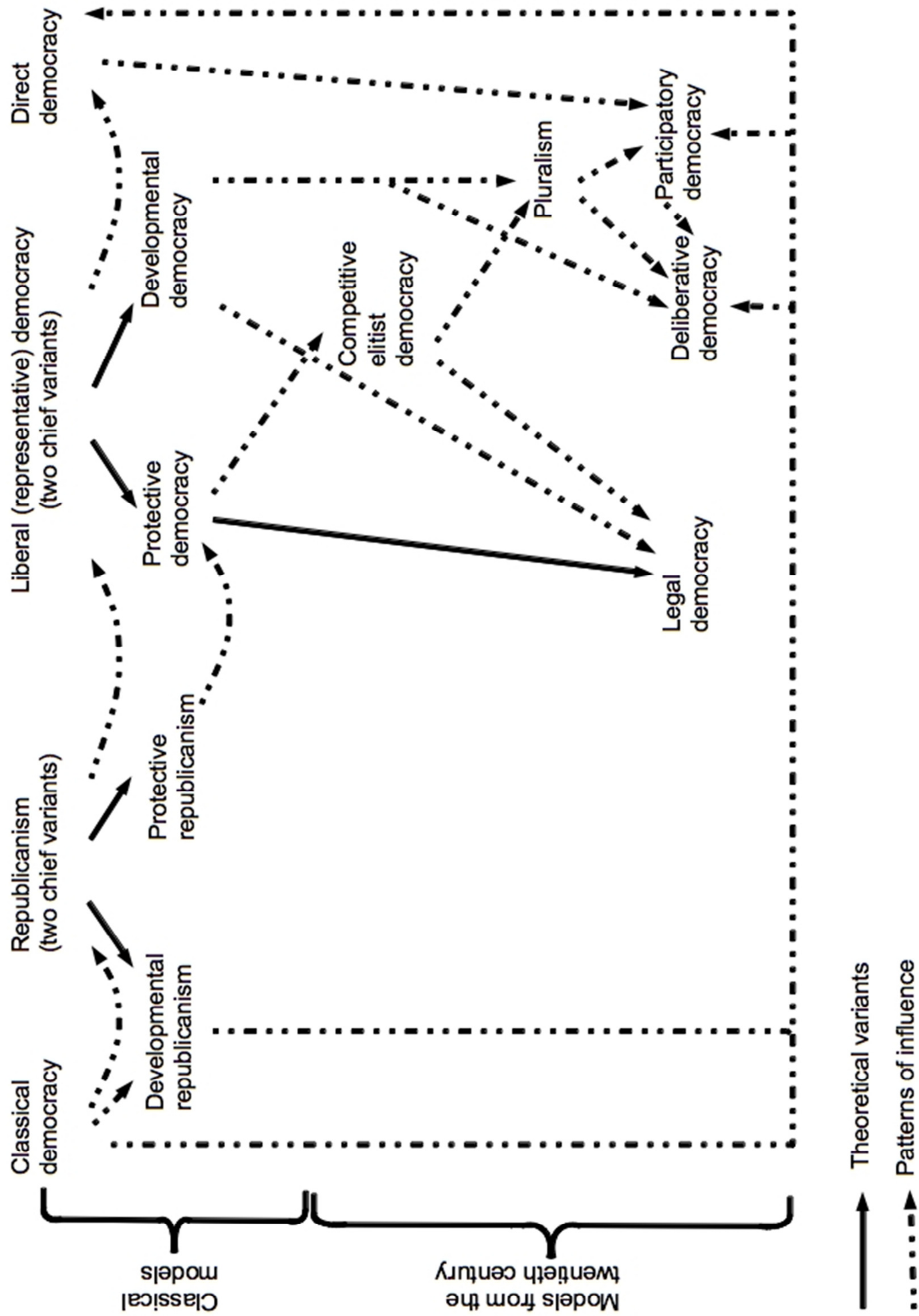
Figure 3.1: Held's Variants on Democracy



(Reproduced from: Held, 2006:5)

As mentioned by Dryzek and Dunleavy (2009), the dominant form of democracy today is a pluralist conception which they label liberal democracy. Perhaps one of the most canonical conceptualisations of pluralistic liberal democracy found in the literature is that of Robert Alan Dahl (1971)[44]. Dahl (1971) defines democracy not as a static ideal but as an evolving goal of political systems, and terms it polyarchy. Democracy for Dahl is an ideal-type of political configuration for government. Dahl places this political configuration on a spectrum of differing configurations based on certain criteria. Democracy for Dahl is one end of a spectrum along which he orders political systems based on their level of participation and contestation (1971:7).

Dahl's (1971) conception of democracy has been described as a minimalist conception of the term (Przeworski *et al.*, 1996:38). The advantage of a minimalist definition is that it contains a lower level of ambiguity and is more concise than those definitions that focus on a specific social order. What is important to note, however, is that all definitions of democracy must at the very minimum include those aspects of democracy that ensure that the decisions are made in a collective and binding manner, more specifically, that citizens are allowed to vote and that they are legally protected to do so. O'Donnell (2001:8) argues that "...democracy should not be analyzed only at the level of the political regime. In addition, it must be studied in relation to the state - specifically the state qua legal system - and to certain aspects of the overall social context". O'Donnell (2001:8) further argues that "...a theory of democracy *tout court* must go beyond the level of regime and include, very centrally, various aspects of legal theory, insofar as the legal system enacts and backs fundamental aspects of both agency and democracy".

O'Donnell (2001) is concerned with theory building and the work cited is to a large extent exactly that, a different way of defining and conceptualising democracy while taking into consideration the social and legal context. The reason for citing this work is due to the importance it places on the legal institution, or the law, which is a crucial element of many definitions of democracy, even minimal proceduralist definitions such as the one advanced by Dahl (1971). All definitions of democracy implicitly assume that there are rules, and that the rules are to be followed, for without rules (written in the form of laws) there can be no prescribed procedure.

[44] Diamond, Linz and Lipset (1990:6-7) use Dahl's definition of the term as does Przeworski, Alvarez, Cheibub and Limongi (1996:50-51).

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Dahl (1971:2) begins his argument by stating that the term democracy refers to a political system that is completely or almost completely responsive to all its citizens. Three conditions have to be met for the government to continue to be responsive to all the citizens. These are, together with their required institutional guarantees listed in table 3.1. The citizens must have the opportunity to formulate their preferences, to signify their preferences to government and citizens, and finally to have their preferences weighed equally in the conduct of government. Dahl (1971:2) also stresses that such a system is conceived in purely hypothetical terms in order to serve as an ideal-type of government that must be strived towards in order for a political system to be termed a democracy. Dahl (1971:2) argues that for these three conditions to be met, the institutions of society must provide the citizens with at least eight guarantees. It must be noted that the opportunity to signify preferences and have these preferences weighed equally require more guarantees than to only formulate preferences.

Dahl (1971:6) further argues that the eight institutional guarantees can provide one with a theoretical scale along which one could order different political systems, based on the level of public contestation and inclusiveness. It must be noted that in order to formulate preferences there are five requirements; in order to signify preferences equally there are seven guarantees required and finally to have one's preferences weighed equally requires all eight requirements. Democracy then is made up of at least two dimensions, the right to contest and the right to participate, and all political systems can be placed somewhere along this theoretical matrix based on their levels of contestation and participation (Dahl, 1971:4-8).

The main features of Dahl's definition, and other similar proceduralist definitions, are that they spell out attributes of elections that are considered fair and list conditions designated as guarantees of rights that apply to fair elections (O'Donnell, 2001:13). Dahl (1971) essentially describes the minimum conditions or characteristics that a political system must be endowed with in order to be termed a democracy. Dahl (1971, 1989) also includes in his definition of democracy the right to run for public office. According to O'Donnell (2001), political democracy gains a distinct differentiation from other types of regimes by assigning individuals the right to govern, and by association, the right to enforce state coercion.

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Table 3.1 Dahl's Requirements for a Democracy

For the opportunity to:	The following institutional guarantees are required:
I. Formulate preferences	1. Freedom to form and join organizations 2. Freedom of expression 3. Right to vote 4. Right of political leaders to compete for support 5. Alternative sources of information
II. Signify preferences	1. Freedom to form and join organizations 2. Freedom of expression 3. Right to vote 4. Eligibility for public office 5. Right of political leaders to compete for support 6. Alternative sources of information 7. Free and fair elections
III. Have preferences weighed equally in conduct of government	1. Freedom to form and join organizations 2. Freedom of expression 3. Right to vote 4. Eligibility for public office 5. Right of political leaders to compete for support 5a Right of political leaders to compete for votes 6. Alternative sources of information 7. Free and fair elections 8. Institutions for making government policies depend on votes and other expressions of preference

(Source: Dahl, 1971:3)

O'Donnell (2001:17) argues that the participatory rights of voting and gaining access to elected roles define an *agent* as each adult carries the right of sharing in the responsibility of making collectively binding decisions and eventually the application of state coercion. According to O'Donnell (2001:17) these rights are assigned to most adults by the state with exceptions that are legally defined. "This is agency – sufficient autonomy and reasonableness for making choices that have consequences which, in turn, entails duties of responsibility – at least in relationships related to a regime based on fair and institutionalized elections" (O'Donnell, 2001:17). Political democracy, viewed from such a perspective of agency, is not

> ...the result of some kind of consensus, individual choice, social contract, or deliberative process. It is the result of an institutionalized wager. The legal system assigns manifold rights and obligations to individuals who, already at birth, are immersed in a web of rights and obligations enacted and backed by the legal system of the territorially based state in which they live (O'Donnell, 2001:17).

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The fact that we are legally defined as citizens who can vote and run for office is in the opinion of O'Donnell (2001) what differentiates democracy from other systems.

> Political democracy is the only regime that is the result of an institutionalized, universalistic, and inclusive wager. All other regimes, whether they include elections or not, place some kind of restriction on this wager or suppress it entirely. New or old, beyond their founding moment democratic regimes are the result of this wager, and are profoundly imprinted by this fact (O'Donnell, 2001:18).

The definitions of democracy given above highlight the importance of 'rules'. Dahl (1971, 1989) labels them as institutional guarantees, whilst O'Donnell (2001) refers to it as the institutionalised wager. Both authors are discussing the same concept from different angles as both highlight the importance of rules. Even though neither of these authors use the term explicitly, nor cover the totality of its meaning, what they are referring to falls under the scope of what is today termed, the rule of law. The rule of law is however more than a mere institutional guarantee, in many ways it is *the* institutional guarantee as it provides the social rationale upon which other guarantees are built. The rule of law subsumes and extends beyond the idea of an institutionalised wager, as values and ideas that go with it forms the ideological and rational basis upon which the institutionalised wager is built. It is however, as an institution, subject to interpretation through the same mental models described in preceding sections. Democracy does not only mean one thing to all people, there are differing and contending ways of conceptualising and understanding the notion of democracy, as will be presented below.

3.5.1 Democracy in South Africa: A Dichotomous Interpretation

Gagiano and du Toit (1996:48) argue that in the South African context, there are two diverging interpretations of what constitutes democracy and more pertinently, what strategies should be followed to foster democratic consolidation and the establishment of a successful democratic dispensation. The authors argue that there are two distinct and conflicting paradigms about normative ascriptions of democracy in South Africa and label these the *liberal* and *liberationist* perspectives on democracy[45]. The authors argue that although all the major political role players are to some extent or in some way concerned with consolidating

[45] Johnson, 2003, employs a similar conceptual distinction.

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the South African democracy, there is no agreement about the "…sort of normative or institutional order in society that will give concrete expression to the philosophical principles…" that underlie these two paradigms (Gagiano and du Toit, 1996:48). I will argue that these paradigms, or models of democracy, can be linked to the cultural framework described above through corresponding notions regarding the status of the individual, and more pertinently the degree of importance placed on individual autonomy and the maintenance of such a system by codifying it into law[46].

The *liberal* view of democracy holds that the defining feature or most important function of democracy is to maximize individual freedom and autonomy. For *liberals*, inequalities in political, economic and social power threaten to expose the individual to economic, political and social repression (Gagiano and du Toit, 1996:50). *Liberals* argue that in order to maximize freedom and autonomy of the individual, democracy must ensure the separation of the political, economic and social spheres of society and prevent the creation of a single power bloc with simultaneous influence in all these spheres. It is only when the separation of these spheres is complete that the individual is protected against a coercive state, a repressive society and exploitative economic forces. Democracy for liberals requires an autonomous state apparatus, a robust civil society and a market economy (Gagiano and du Toit, 1996:50-51).

It is argued that the ability of the individual to pursue personal choice is to a degree influenced by inequality constituted by the unequal distribution of resources. However, the separation of these spheres is crucial in curtailing, or at least, ensuring the transient nature of inequality, by dispersing power amongst individuals or groups within society. Consequently, "[a]ssociations that organize these spheres of power in society, and the elites at their apex, do not overlap to form a united power bloc capable of controlling society on its own terms. The hierarchies of wealth, status and power are controlled by different groups" (Gagiano and du Toit, 1996:52).

Liberals hold that democracy is undermined when there is a blurring of the boundaries between these societal realms (economic, political, and social). For them, democracy is only possible if there is a clear institutional separation of the realm of politics from the overall

[46] Also see Gerber, 2004; du Toit 2003, 2006.

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system of inequality in society (Gagiano and du Toit, 1996:52). Democracy is thus viewed as the process of ensuring that the individual has the greatest scope to exercise individual choice with this being achieved by codifying these freedoms into law. The aim of democracy for *liberals* is "…the transformation of society into civil society" (Gagiano and du Toit, 1996:54). Furthermore "…it also entails the transformation of members of society into individuals" (Gagiano and du Toit, 1996:54). Within the *liberal* framework, transformation refers to creating a society that will increase individual autonomy. As this interpretation holds dearly the value of human choice, it equates equality and freedom to individuals being treated equally under the law and being free to pursue their own perception of the good life.

Liberals argue that in order to achieve successful democracy, strong, autonomous state and the application of the principle of the *rule of law* is required. For them the rule of law means that all people are equal before the law and that the law creates the framework which stipulates the rules that will allow the society to be democratic. The state is seen as the guardian of the separation of the spheres and the essence of the state is expressed in law (Gagiano and du Toit, 1996:56). In short, "Democracy, for them, is [was] about the rules that secure the boundaries of state, civil society and economy" (du Toit, 2006:3).

In contrast to the above, there exists what Gagiano and du Toit (1996) label the *liberationist* perspective of democracy in South Africa. This school draws its support base from the large numbers of the population that were dispossessed, disenfranchised and disempowered under the partisan apartheid state. Democracy for them has a distinct emancipatory goal and is not merely a process enshrined in law. Democracy is furthermore viewed as the next site of the liberation struggle — it is with democracy that the *liberationists* will gain freedom from economic, political and social repression. Democracy entails the breaking down of previously oppressive state structures and the psychological empowerment of those oppressed under the previous regime (Gagiano and du Toit, 1996:59-60).

Inequality, from the perspective of *liberationists,* is perpetuated and increased when viewing democracy in the vein that the *liberals* do. Inequality is not seen as being dispersed throughout the separate spheres of society, but is rather viewed as being concentrated amongst a certain community. This school holds that within the *liberal* framework inequalities in society will only increase, since it functions to protect only a small portion of

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society, the middle class. "What *liberals* see as the remedy, the *liberationists* interpret as the problem" (Gagiano and du Toit, 1996:61).

At the core of democracy according to the *liberationist* perspective, the aim is to pursue the interest of the previously oppressed community. It is not individual choice that is paramount, but rather the emancipation of the previously oppressed community from material inequality. The *liberationists* wish to shape society in such a way that emancipation can be pursued on behalf of the community through a democratic system of government. This is achieved by the *fusion* of institutions in political, social and economic spheres so that a powerful ruling bloc can be created that will pursue the interests of the previously oppressed community, which in South Africa, is the Black community. In contrast to the *liberals*, the aim of democracy is not to transform society into civil society that increases individual freedom, but rather to transform society in such a way that will facilitate the pursuit of the communal good (Gagiano and du Toit, 1996:60-61). The *liberationists* view democracy as a process that transforms society through empowering the previously disenfranchised community. In summary, democracy for them in the South African context can be equated to the process of black empowerment, and all forces that impede policies designed to foster such changes are essentially viewed as undemocratic (Gagiano and du Toit, 1996:60).

Transformation for the *liberationist* refers to transforming society in order to emancipate the majority, the black community, from material suffering. The *liberationist* wishes to transform society in such a way that those individuals who were disempowered (in a political, economic and social sense) under the apartheid regime, are given the necessary political, economic and social resources with which to uplift themselves from their current oppressed situation. The *liberationists* do not place an emphasis on individual autonomy, but rather on group emancipation. Consequently, it can be deduced that the *liberationists'* view of equality is not the same as that of the *liberals*. *Liberationists* hold that equality is not equated to individuals being equal to pursue their own conceptions of what is desirable in life. Rather, equality to the *liberationists* is more closely aligned to the idea of having equal access to the material benefits of democracy. The notion of equality espoused by the *liberationists* is therefore a substantive equality, whilst the *liberals* hold to formal equality. As was argued in section 2.3, the latter has closer ties to classical liberalism whilst the former is a notion of equality found in theories of socialism.

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3.6 Culture and Democracy: Linking Dichotomies

It should be evident from the presentation above that there exists a correlation between specific conceptions of democracy and the sketched cultural framework. The *liberal* model with its emphasis on the individual, the rule of law as codifying and prescribing rules and institutional separation geared towards enhancing individual freedom, is consistent with the *low-context* cultural paradigm. The main link between the two is the prominence and the status of the individual in society, which consequently entails that both paradigms have specific and somewhat similar notions of equality and liberty that are geared towards the needs of the individual in society. Both these paradigms view equality in the formal sense, in other words equality before the law. Law is seen as safeguarding this institutional configuration. This has the consequence that democracy from this perspective is a rule-based form of government with the main goal being the creation of a rule-based society geared towards the needs of the individual.

The *liberationist* model finds congruence with the *high-context* cultural values with its emphasis on the community and the merging of spheres of society in order to achieve communal goals. These paradigms subscribe to similar notions of equality and liberty and consequently they view the community as more important than the individual. Democracy is seen as an outcomes-based process geared towards the needs of a specific community due to past indiscretions which account for the conditions of inequality currently present in society. These paradigms therefore place greater importance on the historical context and significance in framing future political and societal configurations. Law in this paradigm, is not centred on the creation of a rule-based society, but is geared towards the needs of a specific community. Equality in this view is not formal equality, but substantive equality.

An explanation has now been provided of the definition of culture and democracy and the manner in which they will be employed in the current study. It has been argued by some analysts that there are distinct views of democracy in South Africa (*liberal* and *liberationist*) and that these interpretations of democracy find congruence within the cultural dichotomy of *low-* and *high-context* cultures as advanced by Cohen (2004). It is postulated that individuals who are more community orientated (*high-context*) in their cultural makeup are likely to subscribe to the *liberationist* view of democracy, whilst their *low-context* counterparts are

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likely to subscribe to *liberal* democratic theory. It is not my intention to argue that all individuals with a communal ethos will subscribe to the *liberationist* model of democracy, nor that those who hold dearly to individual freedoms will subscribe to *liberal* democratic theory. It is therefore not an exercise in causality or directionality or in numerical presence. I am merely arguing that there are identifiable cultural models which can collate to identifiable democratic models within the South African context. The study is however primarily concerned with contending interpretations of the rule of law, and the preceding discussion on democracy and culture is intended to provide a theoretical context within which a dichotomous interpretation of rule of law can be situated.

3.7 The Rule of Law

The rule of law as a political ideal and theoretical concept poses perplexing problems to those who wish to employ it as an analytical concept. What makes it so peculiar is that in many ways it has become "...*the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means" (Tamanaha, 2004:4). Since the end of the Cold War and the collapse of communism, the rule of law has become a prominent value in the new democracies of Eastern Europe, and is included as a constitutional provision in Bulgaria, the Czech Republic, Slovakia and Poland (Esquith, 1999). The ideal has been endorsed by a wide range of government heads from a range of societies, cultures, economic and political systems that include, amongst others, former presidents of Russia, Indonesia, Mexico, China and Iran, embattled leader of Zimbabwe Robert Mugabe, and even notorious Taliban warlord, Abdul Rashid Dostrum (Tamanaha, 2004:2). "The concept is suddenly everywhere..." Carothers remarked in 1998, with the author arguing that "... a multitude of countries in Asia, the former Soviet Union, Eastern Europe, Latin America, sub-Saharan Africa and the Middle East are engaged in a wide range of rule-of-law reform initiatives" (Carothers, 1998:95). The spread of the rule of law as a political ideal is seen as an anomaly by some, with Tamanaha (2004:3) commenting that "[t]his apparent unanimity in support of the rule of law is a feat unparalleled in history. No other single political ideal has ever achieved global endorsement".

Despite the apparent global endorsement for the rule of law as a desirable political ideal, it remains a highly contested concept to such a degree that "...there is no canonical formulation of its meaning…" (Radin, 1992:125). Numerous authors note this troubling and intriguing

feature of the rule of law. Both O' Donnell (2004:33) and Fallon (1997:1) argue that the rule of law is disputed and has always been contested, respectively. Bassu (2008:21-22) argues that the rule of law has always been an ideal that is tightly bound with the development of liberal democratic discourse in Western political thought and that the application of it in the Western countries from which it originated, has adopted multiple forms. Maravall and Przeworski (2003:1) have gone as far as to argue that a "...normative conception of the rule of law is a figment of the imagination of jurists". The political science literature on rule of law, in both explicit and implicit understandings of the concept, suggests that contrasting meanings of the concept could be held. Beliefs on what the rule of law include range from those who believe it includes the protection of individual rights and that is part of democracy, while others equate it to more formal and minimal elements that hinge on procedural aspects. Some theorists hold that it includes an entire ideological package including social, economic and cultural aspirations (Tamanaha, 2004:3). There are many popular phrases that attempt to encompass a part, or the totality, of its meaning such as the *Rechtsstaat*, 'the sovereignty of law', 'supremacy of law' and 'a government of laws, not of men'. Sánchez-Cuenca (2003:62) concludes that "[a]ll this is empty rhetoric. The law, being a human creation, must necessarily be subject to human will. […] The law cannot rule. Ruling is an activity and laws cannot act". This sentiment is echoed by O'Donnell (2004:34) who argues that it is how laws are interpreted and applied by various individuals in various capacities that give the concept meaning, and that there is no norm of concept. As a concept used in the field of political and democratic studies it is fraught with ambiguity.

Despite such conceptual difficulties and variability in meanings and values associated with it, one can state that the ideal of the rule of law is concerned with "...universal compliance with the rules that define the political system and regulate its functioning" (Sánchez-Cuenca, 2003:63). According to Finn (2004:12), "[m]ost understandings of the rule of law, [...] have at their center [sic] a concern with the accountability and principled exercise of governmental power". One of the more concise definitions is that put forward by Hayek (1944:75-76):

> Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.

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Highlighting what the rule of law is not, is yet another way of articulating its meaning. The rule of law is not a form of government, nor is it the judicial articulation of politics. Both democracies and dictatorships are forms of government that can conform in some sense or another to the ideal of the rule of law. Furthermore, it is conceivable in both such systems of government that the law can be implemented to exercise power through legal means. The rule of law is more fruitfully conceived as a property of a political system. What makes the rule of law so problematic is that there is no way of identifying any clear divisions in political systems between those that have the rule of law, and those that do not. The rule of law can be said, in a very minimal sense, to exist when there is compliance with the law and the law satisfies certain conditions (Sánchez-Cuenca, 2003:67-68).

Tamanaha (2004:91) concurs with the above arguing that there is a wide variety of possible definitions of the rule of law. Theorists make sense of the wide range of competing theories on the rule of law by paring them in two categories, formal versions and substantive versions. These labels are by no means universal, Neuman (2002:2) labels them 'thick'/moralized and 'thin'/non-moralized; Radin (1992:127) labels them 'instrumental' and 'substantive' conceptions of rule of law; Dworkin (1985:11-12) refers to a "rule-book" conception of the rule of law and a "rights" conception of the rule of law; Sánchez-Cuenca (2003:70) labels one a "weak or static" rule of law contrasted to "strong and dynamic" rule of law; Barros (2003:188) calls the distinction "rule by law" and "ruling bound by law"; Holmes (2003:49) refers to the distinction as "rule of law" and "rule by law" whilst Craig (1997:467) labels them formal and substantive conceptions of the rule of law. However, despite varying labels, there is a level of conformity characterising each strand, with the alternative formulations of the rule of law summarised by Tamanaha (2004), shown in table 3.2.

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Table 3.2: Alternative Rule of Law Formulations

	Thinner----------------------------to-------------------------		Thicker
Formal Versions	**1.Rule-by-law** -law as instrument of government action	**2.Formal Legality** -general, prospective, clear, certain	**3.Democracy + Legality** -consent determines content of law
Substantive Versions	**4.Individual Rights** -property, contract, privacy, autonomy	**5.Right of Dignity and/or Justice**	**6.Social Welfare** -substantive equality, welfare, preservation of the community

(Source: Tamanaha, 2004:91)

The authors cited above do not all agree on the exact boundaries between the two strands of rule of law, nor is there conformity on the works they cite as being preeminent within each strand. Subtle differences in definition and scope of the two strands are not of concern presently,[47] what is important is that there is a level of uniformity within rule of law literature on the grounds of the distinction between the two strands. Craig (1997:467) offers a concise explanation of the differences:

> Formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.); the clarity of the ensuing norm (was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life, etc.); and the temporal dimension of the enacted norm, (was it prospective or retrospective, etc.). Formal conceptions of the rule of law do not however seek to pass judgement upon the actual content of the law itself. They are not concerned with whether the law was in that sense good law or bad law, provided that the formal precepts of the rule of law were themselves met. Those who espouse substantive conceptions of the rule of law seek to go beyond this. They accept that the rule of law has the formal attributes mentioned above, but they wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation of

[47] For a full elucidation of the differences see Craig, 1997; Neuman, 2002; Tamanaha, 2004:91-126.

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these rights, which are then used to distinguish between "good" laws, which comply with these rights, and "bad" laws which do not.

Tamanaha (2004:92) summarises the distinction as follows: "...formal theories focus on the proper sources and form of legality, while substantive theories also include requirements about the content of the law (usually that it must comport with justice or moral principles)".

The study at hand wishes to systematically describe possible contending interpretations of the rule of law in South Africa. The study will therefore attempt to analyse interpretations of the rule of law with a conceptual typology that will borrow from the classification of rule of law presented by Tamanaha (2004) and the other authors cited above. The intention is not to place understanding of the rule of law in South Africa within the entire matrix of rule of law presented by Tamanaha (2004). Instead I will construct a dichotomous model, or conceptual typology, using two of the conceptions of rule of law described in the literature and presented in Tamanaha's model. These are labelled "formal legality" within the formal strand of rule of law and "social welfare" within the substantive strand of rule of law as labelled by Tamanaha (2004).

Formal legality is selected as representing the formal strand since it is the adopted as the definition of rule of law by the majority of Anglo-American legal scholars. The theory is also identified as being, relative to other theories, morally less loaded or more politically neutral. The political neutrality, and relative lack of content requirements inherent to this conception, is identified by scholars as the leading factor for its global spread and universal application (Summers, 1993:136; Tamanaha, 2004:93-94). Furthermore, formal rule of law holds to a specific notion of equality. Equality in this sense refers to the idea that the "...law applies equally to everyone according to its terms (whatever those might be), without taking account of wealth, status (government official or public), race or religion, or any other characteristic of a given individual. Everyone is equal before the law no matter who they might be" (Tamanaha, 2006:94). "Social welfare" rule of law was selected to represent the social strand of rule of law for two reasons. Firstly, within the context of Tamanaha's (2004) distinction it forms the conceptual opposite of "formal legality". Secondly, and perhaps more importantly, it is the strand of rule of law that is closely associated with social welfare ideals which form a crucial part of social welfare theories on democracy. It is therefore the legal framework that accompanies social welfare ideas of democracy. For the sake of simplicity and in order to create an analytic framework, I shall refer to the formal legality merely as the formal rule of

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law. For the same reason I shall refer to "social welfare" rule of law as substantive rule of law.

3.7.1 A Formal Conception of the Rule of Law: Lon Fuller[48]

Fuller (1969:33-41) presents his conception of the rule of law in an allegory of an imaginary monarch Rex. Fuller (1969) explains that King Rex failed to create and maintain a system of legal rules by ignoring the eight elements required to create such a system, thus ensuring his demise as the ruler. The eight characteristics of the rule of law identified by Fuller (1969:39, 46-91) are generality, public promulgation, prospectivity, clarity, laws must be non-contradictory, performability, stability and congruence between official actions and declared rules[49]. Failure in any of these criteria will not simply result in an ineffective system, but rather one that cannot properly be called a legal system. Fuller (1969) is describing a system of legal rules which is applicable to all people. Fuller (1969) is primarily concerned with what he terms 'the morality of law' which refers to his notion that a system which coerces public behaviour by means of rules creates a situation that is morally preferable to one where such a system does not exist.

"The first desideratum of a system of subjecting human conduct to the governance of rules is an obvious one: there must be rules. This may be stated as the requirement of generality" (Fuller, 1969:46). This characteristic can be interpreted as meaning that the law must act impersonally with the idea that "...rules must apply to general classes and should contain no proper names" (Fuller, 1969:47).

Public promulgation is the second characteristic of such a system and according to Fuller it is subject to the marginal utility principle (Fuller, 1969:49-51)[50]. The author argues that it would be foolish to try and educate every citizen on every law that might conceivably be applied to them as these are far too numerous (Fuller, 1969:49). The need for a citizen's education of laws will depend upon how far the requirements of the law depart from shared views on right and wrong held by society. Furthermore, if only one citizen wishes to inform

[48] I will also make use of Radin's (1992) work in this section as she provides an excellent summary of Fuller's arguments.
[49] For a similar formal account of the rule of law, see: Raz (1979:210-229).
[50] Fuller never explicitly defines what he means by the 'marginal utility' principle or why he borrows from economic theory. It is thought to refer to the idea that people need not know all the laws, but merely those that have impact upon their activities.

himself of the laws applicable to his actions, then the laws need to be available for him to view. It is also noted that in many cases people observe the law not because they know it, but because they are following the precedent set by those whom they believe are more knowledgeable (Fuller, 1969: 49-51). In essence this refers to the idea that rules must be publicly known.

The third characteristic is that laws must be prospective (Fuller, 1969: 51-62)[51]. Fuller (1969:53) warns that a retroactive law can be a “monstrosity” in a system that is comprised of prospective laws. “To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose” (Fuller, 1969:53). Despite the notion that the proper movement of law is forward in time there are sometimes mistakes made by prospective legal systems in passing statutes to which the only remedy is a retroactive law. Retroactive laws can be passed to help remedy defects in the administration of government. Suppose a dispute arises between two parties concerning the meaning of a statutory rule by which their respective rights are determined. The dispute subsequently goes to court and the judge finds that the involved parties’ concerns are equally valid to such an extent that the statute gives the judge no clear standard for deciding the case. Failure by the judge to deliver a judgement will amount to him/her failing in his/her duty to settle disputes arising out of the existing body of law. However, if he/she decides the case, the judge is inevitably engaging in retrospective legislation. The judge must decide the case, for failure to do so would impair the functioning of a system of prospective rules. Citizens must have the opportunity to familiarise themselves with the rules enabling them to act on rules, and they should be assured that if a dispute were to arise concerning their meaning, there is a method available to solve the dispute (Fuller, 1964:56-57). For the purposes of clarity and simplicity, the principle in essence means that rules must exist prior to actions being judged by them (Radin, 1992:128).

Despite the prerequisite of clarity being one of the most essential ingredients of legality, to the degree that it is scarcely subject to challenge, it remains unclear which responsibilities are required to meet this criterion. Legal clarity is important since obscure and incoherent

[51] Retroactive laws that deal with criminal instead of rights issues also pose problems for the prospectivity principle and the principle is fraught with difficulties of analysis. For the purposes of the argument presented here, it is not unnecessary to delve too deeply into the legal, and philosophical debate, see Fuller (1969:51-62).

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legislation can make legality unattainable (Fuller, 1969:63-64). In sum, laws must be clear and understandable.

The notion that laws must be non-contradictory is the fifth element of a system of rules and is closely related to clarity. Even though it is obvious that laws cannot contradict one another, identifying these contradictions, or merely knowing about their existence, is not always a simple matter. "It is generally assumed that the problem is one of logic. A contradiction is something that violates the law of identity by which A cannot be not-A" (Fuller, 1969:65). Fuller (1969:65-70) argues that it does not only revolve around logic, as it is logically acceptable to make someone do something, and then punish them for it. One must take into account a host of considerations extrinsic to the language of the rules themselves in order to determine when two rules are incompatible. It is therefore a problem which is more complex than merely an exercise in logic (Fuller, 1969:69)[52]. The basic premise of the non-contradictory principle is, however simpler and hinges on the idea that those who are expected to obey the rules are not simultaneously commanded to do both A and not-A (Radin, 1992:128).

A further characteristic of the rule of law is that laws must not require the impossible, or stated otherwise, laws must be performable, people must be able to conform their behaviour to laws (Fuller, 1969:70-79). On first consideration it would appear that a law demanding the impossible is such an absurdity that there would be no reason to state it as a characteristic of the rule of law, for no sane legislator would enact laws that are impossible to comply with (Fuller, 1969:70). Unfortunately such an assumption is ill founded and Fuller (1969:71-72) explains it at the hand of another allegory and likens the legislator to the teacher. A good teacher often demands more of a student than the student believes he/she is capable of with the laudable intention of stretching the student's capabilities (Fuller, 1969:71).

> Unfortunately in many human contexts the line can become blurred between vigorous exhortation and imposed duty. The legislator is thus easily misled into believing his role is like that of the teacher. He forgets that the teacher whose pupils fail to achieve what is asked of them can, without insincerity or self-contradiction, congratulate them on what they did in fact accomplish. In a similar situation the government official

[52] Fuller explains this with a few concise examples (1969:66-70).

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> faces the alternative of doing serious injustice or diluting respect for law by himself winking at the departure from its demands (Fuller, 1969:71)[53].

It should be kept in mind that, when regarding this principle, no clear distinction can be drawn between extreme difficulty and impossibility — laws may be brutally harsh and unfair, yet remain possible to conform to (Fuller, 1969:79). A final consideration of this principle demands that we recognise the transient nature of impossibility, for what is impossible today may be made possible tomorrow through technological or other advances (Fuller, 1969:79).

The penultimate characteristic of a system based on rules is that the laws must be consistent through time. The notion that laws must not be changed too frequently is perhaps least suited to formalising as a legal restriction, for it is difficult to imagine, for example, a constitutional provision stating that no law may be changed too frequently (Fuller, 1969:79-80). The problems raised by frequent changes in the law are akin to the issues of retroactive legislation as both follow from what can be labelled as legislative inconsistency. Laws can be changed as long as there is a reasonable time for actions to be changed to conform to intended changes (Fuller, 1969:79-81).

Finally, there must be congruence between official actions and declared rules. Fuller (1969:81) identifies this as the most complex of all the criteria of a system based on laws. Congruence may be impaired in a variety of ways including mistaken interpretation, lack of insight as to what is required to maintain the integrity of the legal system, bribery, prejudice, indifference, personal ambition and even stupidity (Fuller, 1969:81). Congruence is maintained largely through procedural due process and includes a variety of forms such as the right to legal representation and the right of access to courts. In many systems the burden of ensuring congruence falls on the shoulders of the judiciary, for it is the judges who become the arbiters of disputes and pass judgments that have legal implications. Interpretation is therefore at the heart of maintaining congruence between official actions and law and poses the gravest risk to this principle (Fuller, 1969:81-82)[54].

[53] The principle that the law should not demand the impossible in many occasions rests on the legal notions of intent and neglect. For a full description, see Fuller (1969:71-79).

[54] For the complex arguments related to interpretation see Fuller (1969:82-91).

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Radin (1992:128) offers an eloquent summation of Fuller's (1969:46-91) requirements through classifying them into two principles — firstly, there must be rules and secondly, the rules must be capable of being followed[55]. The first principle includes that laws must be general and consistent. This refers to the notion that rules are broader than specific cases and that similar cases are treated alike. The requirement that addressees must be capable of following the rules, encompasses the remaining requirements set out by Fuller (1969) and Radin (1992:129) argues that these can be colloquially labelled 'know-ability' and 'perform-ability'.

> In order for those to whom the rules are addressed to *know* what they are commanded to do, the commands must be public, congruent, and non-contradictory, clear enough to understand, and they must not change too fast. In order for the addressees to *do* what is commanded of them, [...] the commands must be prospective (not retroactive), not contradictory or non-congruent, and not physically, mentally, or circumstantially impossible for the human beings addressed to follow (Radin, 1992:129).

Radin (1992) argues that this is a classical formal conception of the rule of law. Although Fuller (1969) objects to such a reading of his conception of the rule of law,[56] it is indeed a formal conception as all the requirements listed are directed towards there being rule-like commands that induce behaviour in the addressees. Substantive ideals such as fairness, liberty, equality, justice and democracy are not raised, nor are democratic traditions such as the separation of powers or access to courts emphasised. This conception of the rule of law assumes that law consists of rules and it is conceivable that heinous regimes could accomplish its goals by means of rules if this conception of the rule of law would be adopted (Radin, 1992:129). Fuller (1969:91) acknowledges that his conception does not ensure a fair, just or absolutely correct system when he writes: "No single concentration of intelligence, insight, and good will, however strategically located, can ensure the success of the enterprise of subjecting human conduct to the governance of rules".

[55] Fuller acknowledges that most of the criteria of a system for subjugating human behaviour to rules as listed above can revolve around the issue of compliance. His justification for the separation of the principles is because his concern is not with an argument grounded in the exercise of logic, but in developing principles for the guidance of purposive human effort (Fuller, 1969:70).

[56] Fuller (1969:187-244).

3.7.2 A Substantive Conception of the Rule of Law: John Rawls[57]

For John Rawls[58] the rule of law forms part of his notion of justice as fairness. This gains expression when he writes that

> ...the conception of formal justice, the regular and impartial administration of public rules, becomes the rule of law when applied to a legal system. […] Now the rule of law is obviously closely tied with liberty. We can see this by considering the notion of a legal system and its intimate connection with the precepts definitive of justice as regularity. A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation (Rawls, 1999:206-207).

Laws of a legal system establish the basis for legitimate expectations when the said laws are just. However, if the basis of these laws is uncertain, the boundaries of liberties will also be undefined. For Rawls (1999:207) law "...defines the basic structure within which the pursuit of all other activities takes place". The importance of liberty in Rawls' (1999) conception of rule of law cannot be understated.

Based on his definition of a legal system, and more importantly that it is addressed to rational persons, Rawls (1999) argues that one can account for the basic precepts of justice associated with the rule of law. The author argues that the entire point of thinking of a legal order as a system of public rules is that it enables one to derive the maxims associated with the principle of legality. He also argues that a legal system that is more justly administered will better fulfil the precepts of the rule of law and thus provide a more secure basis of liberty (Rawls, 1999:208). From his definition of a legal system, Rawls derives four precepts of the rule of law: ought implies can; similar cases be treated similarly; no crime without law and the notion of natural justice.

The precept "ought implies can" identifies several obvious features of a legal system with the first being that laws must not require or forbid that which cannot be reasonably expected. "It

[57] For other substantive conceptions of the rule of law, see Dworkin, 1985; Hayek, 1944.
[58] Rawls is principally concerned with a conception of justice as fairness, as he sees this as the central aim of a constitutional democracy. His hope is that such a conception of justice will seem reasonable to a wide range of political opinions and thereby express an essential part of the common core of democratic tradition. He presents this notion of justice as an alternative to utilitarianism which in some form or another has come to dominate Anglo-Saxon traditions of political thought (Rawls, 1999:xi).

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must not impose a duty to do what cannot be done" (Rawls, 1999:208). Secondly it includes the notion that legislators and judges act in good faith. The officials of the system must believe that the laws can be obeyed and they can assume that orders given can be carried out. Laws and commands are only accepted as such if those who are commanded to obey believe that they can be obeyed. Once questioned, the actions of authorities are also cast in doubt. It is also derived from this precept, that the legal system must recognise impossibility of conformance as a defence. A legal system that does not regard impossibility to conform as a defence would place an intolerable burden on liberty (Rawls, 1999:208).

The second precept implied by the rule of law is that similar cases be treated similarly. For Rawls (1999:209) this precept is largely concerned with judicial consistency and implies that "like decisions be given in like cases". Although this places significant restrictions in the discretion of judges and others in authority, without this precept people would not be able to regulate their actions. The requirement of consistency holds for the interpretation of rules and justifications of decisions at all levels (Rawls, 1999:209).

The penultimate precept is that there is no offence without law (*nullum crimen sine lege*) (Rawls, 1999:209). This precept requires that laws be known and expressly promulgated, that their meaning be clearly defined, that statutes must be general in statement and intent and not applied to the detriment of specific individuals (no bills of attainder) and that laws must not be retroactive (Rawls, 1999:209). These requirements for Rawls (1999:209) are implicit in the idea of regulating behaviour through public rules.

The final precept identified by Rawls (1999:209-10) is that of the notion of natural justice. This is the idea that there are guidelines that preserve the integrity of the judicial process. The courts must ensure that they apply and enforce the laws in an appropriate manner by making a conscientious effort in determining whether an infraction has taken place and subsequently impose the correct penalty. A legal system must therefore include provisions which ensure that trials and hearings are conducted in an orderly regular fashion and that the rules guarantee a rational process of inquiry. The rule of law requires due process; this is explained by Rawls (1999:210) as "...a process reasonably designed to ascertain the truth, in ways consistent with the other ends of the legal system, as to whether a violation has taken place and under what circumstances". To this end, judges must be independent and impartial and

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trials must be fair and open. "The precepts of natural justice are to insure that the legal order will be impartially and regularly maintained" (Rawls, 1999:210).

As stated previously, there is a strong connection between Rawls' conception of rule of law and liberty. Rawls argues that there is a definitive connection between liberty and the rule of law. Liberty is defined by Rawls (1999:210) as "... a complex of rights and duties defined by institutions. The various liberties specify things that we may choose to do, if we wish, and in regard to which, when the nature of the liberty makes it appropriate, others have a duty not to interfere"[59]. If, for example, the precept of no crime without law is violated by vague and imprecise statutes, then what we are at liberty to do will also be vague and imprecise. This has the effect that the boundaries of our liberties are uncertain. The same sort of consequences can be applied to the other precepts as well. The notion of legality subsumed by the rule of law "...has a firm foundation, then, in the agreement of rational persons to establish for themselves the greatest equal liberty" (Rawls, 1999:210-11).

According to Radin (1992:32) it is Rawls' emphasis on liberty in his version of rule of law that defines it as a substantive version. Rawls conceptualises liberty in the classical libertarian sense as negative liberty. Rawls' argument surrounding the rule of law is based on the notion that liberty is required to achieve justice in society and the precepts of rule of law are seen as being strongly connected to that substantive value. Although the substantive version shares many precepts with the formal version, where they differ is in the justification offered for the advancement of a system regulated by laws (Radin, 1992:132).

3.7.3 Formal and Substantive Conceptions: Convergent and Divergent Elements

Tamanaha (2004:92) argues that the distinction between formal and substantive, although informative, is by no means complete. Formal versions of rule of law have substantive implications and substantive versions incorporate formal requirements. There is, however, a difference, formal notions are concerned with what is necessary to make a legal system work in order to structure behaviour of society whereas the substantive version holds that the rule of law is necessary for justice, fairness, human dignity, freedom and democracy. It is argued by Radin (1992:134) that the ambiguous or shared precepts include generality, consistency,

[59] Rawls' definition of liberty is that of negative liberty of classical liberalism, as discussed in section 2.3.

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notice, non-retroactivity, performability and congruence. The two conceptions also share five philosophical underpinnings: laws consist of rules; rules exist prior to and are more general than specific cases and are applied to specific cases; rules are applied to achieve ends; a clear separation is required between rule-givers and rule-followers and that the person is a rational chooser.

> Nevertheless, the two conceptions *are* different. The instrumental conception is a model of government by rules to achieve the government's ends, whatever they may be. The substantive conception is a model of government by rules to achieve the goals of the social contract: liberty and justice. The instrumental conception purports to be more general and ahistorical; the substantive is more clearly bound up with our particular modern ideological heritage (Radin, 1992:134).

Some effort has been put in the previous pages to explain differing ways in which one could interpret the rule of law. I have not yet explored the connection between democracy and the rule of law, aside from arguing in section 3.5 that the rule of law is an institutional guarantee required for democracy as stated by Dahl (1971) and O'Donnell (2001)[60]. Democracy and the rule of law are to some extent represented by populated institutions, the legislature and the judiciary. As legislation moves from one chamber to the next, the interests of humans comprising those institutions come into conflict. This is to a certain extent what the relationship between democracy and the rule of law is about, a world of institutions filled and operated by individuals wherein these individuals have conflicting interests (Ferejohn and Pasquino, 2003:242-3) and different cultural backgrounds. On a deeper and more conceptual level, it is the theory of liberalism that connects democracy and the rule of law (discussed in section 2.3). It is through liberalism, and the goals advanced by this ideological package, that the connection between the rule of law and democracy becomes apparent. This is evident in Rawls' (1999) conception of the rule of law. It must, however, be noted that Rawls (1999) was not trying to explain what the connection is between the rule of law and democracy per se, nor was Fuller (1969), the former being concerned with an overall scheme of justice and fairness in society, that includes, but is not limited to democracy, whilst the latter was interested in explaining the 'internal morality of law' and the efficacy of a legal system in order to coerce behaviour. Before the relationship between liberalism, democracy and rule of law is explored in full, it is necessary to complete the proposed conceptual typology with

[60] Also see section 2.3.

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which I will attempt to investigate whether there are identifiable contending interpretations of the rule of law in South Africa.

3.8 Contending Interpretations of the Rule of Law: A Theoretical Model

Creating a dichotomous model based on the discussion of the rule of law presented above appears to be straightforward — on the one hand there is the formal conception and on the other the substantive conception. However, creating a dichotomy to incorporate into the theories of culture and democracy espoused earlier is not as simple, for as Radin (1992) argues, both conceptions of rule of law share certain legal precepts and philosophical stances. It is not a case of formal conceptions of rule of law being incompatible with substantive conceptions, or vice versa — even a substantive conception of the rule of law needs to conform to certain legal principles such as generality, consistency, and non-retroactivity to name a few. It is also conceivable that a substantive conception of the rule of law, with the goal of creating an impartial, rule-based, predictable and equal society for every individual is nearly indistinguishable from a purely formal conception of the rule of law. I would therefore rather argue, in concurrence with Tamanaha (2004) and Radin (1992), that any conception of the rule of law includes both formal and substantive elements. It is only when the values of the substantive conception of the rule of law cross certain boundaries, or hold certain specific values, that the distinction between the two conceptions becomes contentious. The issue is that both formal and substantive formulations of the rule of law include the idea that rules are applied to achieve specific ends. It is the nature of these 'ends' that give rise to an incompatibility between the two conceptions of the rule of law. It is not a case of one conception being void of moral value and the other suffering from an overload of moral baggage. It is rather a case of conceptions of the rule of law containing contending values with relation to the goals or ends of the rule of law which are incompatible with one another. It is only when the rule of law has a certain 'substance', a specific set of values, a specific goal, that it becomes incompatible with that which is commonly understood to fall under the rule of law in modern political science discourse on the subject.

The central issue is therefore to establish which values and beliefs attributed to the rule of law lead to tension. Which values and beliefs give rise to this colliding and contending view of the rule of law to gain expression? I propose that in the South African context any conception

of the rule of law will tend to be substantive to a certain degree. The apartheid system is too clear a reminder of what can be achieved with a morally contested and procedurally skewed conception and practice of the rule of law. The conception of the rule of law found in the Constitution is therefore one that is inherently loaded with certain values and societal goals, but one which, very importantly, subscribes to the formal and minimal requirements of the formal conception of the rule of law.

I propose that contending views of the rule of law arise due to contrasting beliefs regarding the 'ends' or 'goals' the rule of law should strive to achieve, and more specifically what constitutes liberty[61] and equality within these 'goals' or 'ends'. If the liberty held dear is that of negative liberty, problems will not arise. However, if the notion of liberty associated with rule of law is that of positive liberty, problems may occur as this involves notions of degree and worth of liberty. Positive liberty requires more than an institutional safeguarding of an individual's ability to pursue a conception of the good. In order to be realised it requires intervention by the state. Such an intervention will inevitably favour one conception of the good above another. Another factor that may cause problems is the notion of equality to which is subscribed. Tension also occurs when substantive equality is subscribed to instead of formal equality since formal equality requires state neutrality whilst substantive equality requires active intervention by the state to realise equality. In section 2.3 it was argued that negative liberty and formal equality are linked to individual orientated ideals, whilst positive liberty and substantive equality are community orientated ideals.

I therefore propose that contending conceptions of the rule of law arise due to differences in three key aspects:

- whether stakeholders see the rule of law as either serving the interests of all individuals in society or that of specific communities or collectivities. All individuals are either treated equally, or some individuals, collectivities, groups or communities are given preferential treatment based on their group affiliation. This element can also be framed around whether the individual or the community is afforded the most status in society;
- whether stake holders conceive the rule of law as promoting a specific conception of the good and whether the conception is one that affords primacy to a group or

[61] As discussed in section 2.3.

collectively, or whether the conception of the good pursued is that of creating a rule based society that affords every individual the opportunity to pursue their own conception of the good. In other words whether the good pursued allows for a plurality of conceptions of the good as held by individuals or whether the good is to be collectively determined (by the state or government);

- whether stakeholders envision the rule of law either as geared towards entrenching legal, social, political and economic norms for ensuring a stable society for tomorrow, or as a tool for righting past legal, social, political and economic wrongs. In this element the rule of law is perceived as being either orientated towards rewriting historic injustices (backward-looking) or as creating a predictable rule based society of the future (forward-looking).

These three aspects are closely related to one another and the distinction between them is that of conceptual clarity as they overlap in many senses. The first aspect refers to whether the rule of law holds more dearly the needs of individuals or the needs of a community or collectivities. Tension occurs when all individuals in society are not treated equally (formal equality) and when a conception of the rule of law appears to be favouring specific individuals based on their community affiliation and social, political or economic status (substantive equality). The term community refers to individuals who share a common cultural background; belief structure or race; social, political and economic condition or organisational, business and/or party affiliation. If the law is perceived as treating all individuals equally, regardless of their group affiliation, it is not incompatible with formal conceptions thereof, as the values espoused are those of individual liberty and the equal treatment of every member of society before the law (formal equality). However, if the law is perceived as favouring or preferentially treating specific communities, groups or collectivities, the law is involved in nurturing specific ends for specific people and consequently the state will be involved in ensuring that the group, collectivity or community can achieve this good (positive liberty). Such a view subscribes to the notion that individuals are not treated equally before the law, but treated differently depending on their social, economic and political status (substantive equality).

The second aspect refers to the goal associated with the rule of law. It refers to that which is envisioned to be achieved by maintaining a political system based on the rule of law, and refers to the manner in which the ‘public good’ is defined. It hinges on whether the

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application of the rule of law serves the goal of creating and maintaining a society based on rules and procedures where all individuals are allowed to pursue their conception of the good, or whether the goals are more specific in nature such as conferring political, social and economic power onto a specific community, group or collectivity, and then describing this objective as that of pursuing the public good. There is little reason for tension amongst individuals and their conceptions of the rule of law if the goal is the former, since it is merely furthering the notion of a predictable rule-based society which allows for moral pluralism or a plurality of conceptions of what the good is. However, if the goals are leaning towards the latter, in other words, if a conception of the rule of law is intended to create a political system which confers political, social and economic power onto a specific community, conflicts arise between individuals who do not agree on the goals of a system based on such an understanding of the rule of law. In a society where the rule of law has the goal of creating a legal and political system geared towards the needs of specific individuals and not all members of society, tension can arise between members of society over these goals.

The key point of contention in this element revolves on whether there is room for a plurality of conceptions of that which is to be considered good — moral pluralism, or the subscription to a specific and officially selected notion of the good. The state plays a central role in achieving the overarching goal associated within any conception of the rule of law. For those concerned with creating a rule-based society, the state serves the purposes of custodian of rights and fulfils the role of ensuring that all individuals are treated equally through maintaining a system of laws and rights. However, if the goal of rule of law is associated with material gains or a specific economic, political or social good, the state has a more active role in intervening in everyday social life. The state then becomes more than a mere guardian of rights — it becomes an active agent in the procurement and distribution of social, economic and political goods. Control of state apparatus consequently becomes an important issue. However, for those subscribing to a conception of rule of law which has the goal of a rule-based society, control of the state is inconsequential as it serves the needs of everyone in society. To those subscribing to a conception which holds dear an outcome-based society, control of state apparatus is essential in order to ensure that these goals are met. In such a conception the state is seen as the main vehicle for achieving these goals and the control over all organs of state becomes of paramount importance. Such a conception would be fundamentally and inherently anti-democratic through the denial of moral pluralism which is an essential element of democracy.

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The third aspect which will influence whether there are contentious opinions on the rule of law and possible divergent conceptions, centres on the notions of history and context. I propose that there are those individuals who will regard the rule of law as a future orientated institution focusing on the future goals of societal configuration and shaping the society of tomorrow without giving much consideration to historical context. This is in contrast to those who view the rule of law as focusing on correcting past injustices, the difference being centred on the role of history and context. Future orientated rule of law proponents will vest very little importance in past occurrences and context as it is forward-looking. Opposed to this are those stakeholders who place greater value in past context and historical events with the past having a significant influence on the manner in which these individuals will view the rule of law and, more specifically, what they wish to accomplish with it (backward-looking)[62].

In summary, on the one hand we therefore have a more formal conception of the rule of law that gives prominence to the individual, is future orientated and has, as the main goal, the creation and maintenance of a rule-based society which allows for moral pluralism. Consequently notions of justice, liberty, equality and fairness are centred on those of individual liberty and formal equality. The moral content of this approach is less loaded, that is to say, it is emptier in its political stance as the main virtue is in protecting and maximising individual rights. The social good is merely that of creating a society that is based on rules and accords the individual certain rights and freedoms. I will label this conception the *liberal rule of law*.

Liberal rule of law stands in contrast to a substantive conception of the rule of law which gives prominence to the community, is focused on addressing past wrongs and has as a main goal the creation and maintenance of a society based on social and tangible goods — not merely a structuring of the rules. Such a conception also subscribes to a specific notion of the 'good', namely the public good and does not allow for a plurality of conceptions. The moral content is therefore more heavily loaded with a specific political orientation as it purports to protect and advance the rights of specific people based on group affiliation. I will label this conception *social rule of law*. These conceptions are therefore both instrumental and substantive — the difference being that the liberal rule of law is more closely aligned to the

[62] The terms forward-looking and backward-looking are employed by Liebenberg, 2010 and Teitel, 2000 and are discussed in section 4.2.4.

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formal theories of the rule of law, whilst the social rule of law finds greater congruence with the substantive theories of rule of law. A summary of the contrasting elements is presented in table 3.3.

Table 3.3 Liberal and Social Rule of Law

Liberal rule of law	Social rule of law
• Individual-oriented	• Community or group-orientated
• Goal of rule of law subsumed by the notions of negative liberty and formal equality	• Goal of rule of law subsumed by positive liberty and substantive equality
• Emphasis on future	• Emphasis on past
• Rule-based society	• Substantive outcomes-based society
• History and context of little importance	• History and context of paramount importance
• Moral content: individual rights through rule-based society	• Moral content: communal rights through socially tangible goods
• Allows for a plurality of conceptions of the 'good', i.e. moral pluralism	• Subscribes to a specific conception of the good (public good), does not allow for moral pluralism

It should also be evident from the preceding paragraphs that there is a link between this conceptual distinction of rule of law and the dichotomous presentation of both culture and democracy as presented by Cohen (2004) and Gagiano and du Toit (1996), respectively. The reason is twofold — firstly, because the work at hand was influenced by these aforementioned authors in my attempt to make sense of the contemporary realities of the South African democracy. Secondly, my presentation of *liberal rule of law* and *social rule of law* is purposefully structured to fit in with the conceptualisations of democracy and culture in order to provide a robust and comprehensive model for interpreting the South African democracy by employing the concept of rule of law. Summarised in table 3.4 is the amalgamation of the three dichotomies of culture, democracy and the rule of law into a single model, or conceptual typology. This interpretive framework will be used to investigate possible diverging interpretations of the rule of law in South Africa through a specific case, namely the *AfriForum v Malema* hate speech case.

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Table 3.4 An Interpretive Framework

	Liberal Rule of Law	Social Rule of Law
Culture	• Low context: individual focus • Individual rights and liberties • Equality before the law, disembodied notion of justice • Future-orientated • Language void of context – communicative tool • Negotiation in good faith	• High Context: communal focus • Communal rights and liberties • Law linked to context and past favour is group affiliated • History plays an important role in shaping interactions • Language loaded with context • Negotiation in good will
Democracy	• Liberal: focus on individual freedom and autonomy • Autonomous state with separation of spheres of government • Goals of democracy are: 1. Create a rule-based society 2. Transform society to ensure individual autonomy 3. Create framework for future society based on individual rights	• Liberationist: focus on group welfare • State seen as vehicle for emancipation, amalgamation of spheres of government to concentrate power • Goals of democracy are: 1. Create a material outcomes-based society 2. Transform society to ensure welfare of specific group(s) 3. Create institutions to correct past wrongs and further group needs
Rule of law	• Individual of utmost importance • Negative liberty • Formal equality • Goal of rule of law is to create and maintain a rule-based society • Emphasis on future – focus on creating society for future with little importance placed in historical context • Allows for multiple conceptions of the good, moral pluralism	• Community of utmost importance • Positive liberty • Substantive equality • Goal of rule of law is to confer power, wealth and preference onto specific group • Emphasis on past – focus on rectifying injustices of the past and the importance of historical context • Subscribes to specific conception of the good, the 'public good'

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3.9 Summary

It has been argued in this chapter that ideas and values held by individuals may be of consequence as they influence an individual's conception of institutions within society. Individuals are influenced by their cultural heritage which shapes the manner in which mental models are constructed and institutions are manifested in society. The dichotomous definition of culture, democracy and rule of law are examples of how the institutions of democracy and rule of law can be differently conceived when viewed from differing cultural orientations. It was postulated that individuals from *high-context* cultures are more likely to hold a *liberationist* conception of democracy and subscribe to *social rule of law* whilst their *low-context* counterparts are more likely to hold a *liberal* view of democracy and subscribe to *liberal rule of law*. The binding thread between culture, democracy and rule of law are the conceptions of liberty and equality. *High-context* liberationists subscribe to positive liberty and substantive equality whilst *low-context* liberals hold dear negative liberty and formal equality.

The main goal of this theoretical exposition was to construct and put forward a conceptual model with which to interpret and analyse the selected case, namely the hate speech case of *AfriForum v Malema*. However, before such an analysis of the selected case can commence it is necessary to frame the argument presented in this dissertation within the broader political science literature and within the specific literature of the South African democracy and rule of law.

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Chapter 4: Rule of Law and Democracy in South Africa

4.1 Introduction

The goal of this chapter is to situate the research questions and the aim of the study in the broader political science literature on democracy and rule of law in South Africa. The chapter will also relate the conceptual typology developed in chapter three to the literature on rule of law and democracy in South Africa. The argument presented thus far relies on the premise that the South African democracy is the product of a negotiated settlement. This line of reasoning formed the basis for employing Cohen's (2004) cultural dichotomy in the theoretical model developed in chapter three. The argument advances the notion that ideas and conceptions of ideals, such as the rule of law and democracy, are relevant to the meaning invested into constitutional democracy in South Africa.

Relevant works found in the literature that have bearing on specific elements that resonate in the conceptual typology developed, and the argument presented in chapter three will be presented in order to ground the research questions in the literature on rule of law and democracy. This will be done by examining the extent to which the ANC and the population of South Africa (role-playing stakeholders) hold certain identifiable conceptions on key concepts such as equality, liberty, democracy and the rule of law. These conceptions were present during the negotiation process and were identified in elements of political rhetoric employed by the ANC during the negotiation. These conceptions will then be related to the conceptual typology developed in chapter three to investigate whether specific identifiable congruencies are present.

The institutional nature of rule of law and democracy is also explored in this chapter. The institutional arrangement that is referred to is that of state form and also the executive, legislative and judicial chambers of government and the manner in which they function and interact in South Africa. It will be explored whether the research question and conceptual typology can be grounded in the existing body of literature on democracy and the rule of law in South Africa. The purpose is twofold — firstly to highlight the relevance and criterion validity of the conceptual typology developed in chapter three with specific attention given to investigating whether the distinctions between the contending views on rule of law, as discussed in section 3.8, are identifiable within existing literature; secondly to contextualise

and situate the case study selected for this dissertation within the broader literature on the rule of law and democracy in South Africa and within public opinion in South Africa.

The first part of the chapter is devoted to highlighting that the Constitution of 1996 is the product of a negotiation process. The discussion is intended to highlight that there were two main competing camps during the negotiation process and that these camps had certain fundamental disagreements about certain elements which form part of the Constitution. This reference is specifically to the inclusion of ideals found in the Preamble and in Section 1 of the Constitution of 1996 (Act 108 of 1996). This includes the ideas of constructing a society based on democratic values, social justice and human rights; that the constitution lays the foundations for a democratic and open society where government is based on the will of the people. Section 1 further states that South Africa is a democratic state founded on the values of achieving equality and the rule of law (Act 108 of 1996).

It must be noted that numerous studies concerned with interpreting the meaning and values of the Constitution can be found within the field of legal studies. This study is, however, not concerned with arguments relating to adjudication or juridical interpretation, i.e. jurisprudence. The overarching aim of the study is to investigate how a certain aspect of the Constitution, the rule of law, is interpreted by some political actors and stakeholders. The rule of law, as the preceding pages can attest, can however not be seen in isolation and is linked to both theories and practice of liberal democracies. The section on the discussion of the Constitution of 1996 as a complete document is therefore rather short, as the overarching goal of the study at hand is to explore the manner in which some elements of the Constitution of 1996 are interpreted by certain role-playing stakeholders. Section 4.2.4 will however, highlight that the South African Constitution is different and unique in many ways, and that as a document it can be interpreted as advancing a specific notion of democracy.

Thereafter the themes of democracy and rule of law are dealt with within the South African context. This dissertation investigates whether there are identifiable and contending views of the rule of law in the South African democracy and if such views can be systematically described at the hand of the conceptual typology developed in chapter three. The discussion on the rule of law and democracy is therefore not a complete exposition of all the relevant, viable and available arguments which can be related to the broad topics of rule of law and democracy. The discussion in this chapter is intended to act as a contextual bridge between

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the theoretical argument and conceptual typology developed thus far and the case study to be presented in chapter five by investigating whether the conceptual typology can be grounded in the existing body of research.

The nature of the research question necessitates that attention is given to opinions and views of role-playing stakeholders. The relationship between rule of law and democracy is such that certain institutional arrangements must also be discussed in order to shed light on the manner in which the rule of law and democracy gain expression in the South African context. In this chapter the discussion on the rule of law and democracy will therefore be constructed around these axes of opinions, not only of the ANC but also of the public of South Africa as well as the institutional arrangements. The chapter will conclude with a brief exploration into how members of the public understand notions of democracy and the rule of law by exploring public opinion works on the subjects.

4.2 South Africa's Transition Period

The first democratic election with universal adult suffrage was held on the 27th of April 1994 and it was a watershed moment in the history of the Republic of South Africa. The account of the negotiated transition which will be presented in the following paragraphs will provide a brief overview of the negotiation process. The discussion will highlight a few elements which are relevant to the argument presented in this dissertation.

4.2.1 Contextualising the Negotiations

The negotiation process started as early as the mid 1980's in the form of secret meetings between state representatives, private citizens and ANC representatives with these meetings taking place outside of South Africa. The clandestine nature of these meetings was to such an extent that FW de Klerk was unaware that such engagements had taken place when he was elected as president in 1989. Official meetings between the ANC and the National Party (NP) first took place from 1985 onwards and were primarily between Nelson Mandela of the ANC, the then Director of National Intelligence Services, Niel Barnard, the Minister of Justice, Kobie Coetzee and the Minister of Constitutional Development and Planning, Chris Heunis and his successor, Gerrit Viljoen. These meetings were authorised by President Botha but

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were still cloaked in secrecy with the only constant interlocutor being Niel Barnard. Coupled with the start of clandestine negotiation is the argument put forward by de Klerk that there was a major ideological shift within the NP from the idea of 'separate development' to the notion of 'separate nations' which, according to de Klerk, signified the start of the NP's willingness to negotiate (Welsh, 2009:349-355). What is important to note is that the seeds of change had been sown by the mid 1980's and although formal negotiations only started near the end of 1980's and formally ended with the adoption of the Constitution of 1996, the entire process of negotiation lasted for roughly a decade.

Due to the uncertain starting period of negotiations, the various problems the negotiations faced from inception to completion and the numerous times it was close to collapse coupled with the general complex nature thereof, this study will not fully explore the entire process of negotiation. Works on the negotiation period which will be cited in the following pages include that of Butler (2009:110-122), Deegan (2001:61-81), Devenish (2005), Du Toit (2001), Ebrahim (1998), Gloppen (1997), Marais (2001), Sisk (1995), Spitz and Chaskalson (2000), Thompson (2001:221-296) and Welsh (2009:344-578).

Sisk (1995:56) notes that an important feature of the South African negotiation process was that it came about as a result of a mutually hurting stalemate. The National Executive Committee (NEC) of the ANC noted, in 1992, that even though the liberation movement had attained a high level of mass mobilisation and mass defiance, the NP led government still commanded powerful state and vast military resources. The NEC knew that the liberation movement could not attain a military victory over the NP led government and came to the conclusion that a negotiation process would be the best way to surmount the stalemate (Marais, 2001:86). Reforms from the NP government's side had been initiated throughout the 1980's with the NP being of the opinion that they would eventually emerge as the total victors through such reforms. However, the failure of the reforms changed the government's view (Sisk, 1995:67-71). By the early 1990's, both the NP led government and the ANC had come to the conclusion that the only way out of the mutually hurting stalemate was to engage in negotiations.

Another important element of the negotiations is that they took place in a particularly violent period in South Africa, with Gloppen (1997:6) arguing that the entire constitution-making process took place within the context of violence. The degree of violence was such that

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Ebrahim (1998:170) describes the Interim Constitution of 1993, finalised in the small hours of 18th November, as a "peace treaty". The political violence was most severe in KwaZulu-Natal, but many parts of the country also experienced intense political violence during this period. From 1984-1989 a total of 5 539 political fatalities were recorded which translates to an average of 923 political deaths per year. The period from 1990-1996 saw 17 749 political fatalities, this was an average of 2 535 political fatalities per year. Contrasted to the 470 people who lost their lives to political violence in 1997 and the 353 in 1998 (Du Toit, 2001:34), it is clear that the negotiation period experienced severe political violence which declined sharply after the adoption of the Constitution of 1996 and the formal end of negotiations. Not only was large-scale political violence a threat to the negotiation process, but three separate violent incidents stand out as being particularly influential in the negotiation process.

On the 17th of June 1992 forty-nine residents from Boipatong were killed by men from an Inkatha Freedom Party (IFP) aligned hostel with the ANC blaming Mr de Klerk and the government for the attacks and abandoning the multi-party talks leading to their collapse (Ebrahim, 1998:134). Ironically, it was another violent incident which took place on the 7th of September 1992 in Bisho, the capital of Ciskei, where 29 marchers were killed by homeland soldiers, which led to increased pressure on both the NP and the ANC to resume talks as both parties were blamed for the shooting (Du Toit, 2001:64). The third and perhaps most dramatic violent event which shook the negotiations to their core was the assassination of ANC stalwart Chris Hani on the 10th of April 1993 – Mr Hani was gunned down by two extremists in his driveway. It was largely Mr Mandela's televised address in which he pleaded for disciplined emotive expression that calmed the violence resulting from the assassination (Welsh, 2009:483).

Another striking feature of the negotiations for a constitutional settlement is that more time and effort was spent on negotiating the process for arriving at the Constitution than time was spent on negotiating the substance of the text (Ebrahim, 1998:4). The negotiation process saw multiple treaties and accords as well as bilateral agreements between the two most prominent parties, the ANC and the NP. After the unbanning of the ANC and other liberation movements and the release of Mr Nelson Mandela early in 1990, the peace process saw the signing of the Groote Schuur Accord on May 4th 1990, the Pretoria Minute agreed upon on the 6th of August 1990, the National Peace Accord signed on the 14th of September 1991, the

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Declaration of Intent signed at the first CODESA (A Convention For a Democratic South Africa) meeting on the 20th of December 1991 and the Record of Understanding signed on the 26th of September 1992 (Spitz and Chaskalson, 2000:xii; Ebrahim, 1998:657-670).

4.2.2 Constitutional Negotiations

Despite numerous treaties and agreements, near collapse and the complexities of the negotiation process it can be argued that the Interim Constitution was negotiated between 1991 and early 1994 with negotiations starting on the 20th of December 1991 at the World Trade Centre outside of Johannesburg in the form of CODESA. The Interim Constitution was officially enacted on 28th January 1994 (Basson 1995:xxi; Du Plessis and Corder, 1994:1; Ebrahim, 1998:102; Spitz and Chaskalson, 2000:44; Thompson, 2001:252). The negotiation agenda of CODESA included general constitutional principles, a constitution-making body or process, the transitional arrangements of interim government, the role of the international community and the future of the homeland territories (Ebrahim, 1998:98). Five working groups were established at the initial plenary of CODESA to address the problematic issues. The first working group dealt with issues pertaining to creating a climate for political participation and the role of the international community. The second working group grappled with constitutional principles and the constitution-making process. The third working group addressed the issue of an interim government whilst the fourth and fifth working groups dealt with the future of the homelands and time-frames, respectively (Ebrahim, 1998:103). All the working groups managed to reach agreements except for working group two with the specific point of deadlock being the process of adopting the Constitution and more specifically the percentages required to adopt the Constitution (Ebrahim, 1998:130). The deadlock of working group two led to the collapse of CODESA and as Ebrahim (1998:133) notes, the deadlock was essentially about the power to determine the final constitutional dispensation, in other words, a political battle for power.

A series of pacts and treaties between the ANC and NP enabled the parties to achieve sufficient consensus on the terms of the Interim Constitution in order to resume talks after the collapse of CODESA. The parties agreed to propose a Multiparty Negotiation Process (MPNP) which would provide a negotiation platform for negotiating the Interim Constitution. A critical factor in the negotiations from this point forward was that the term ‘sufficient consensus’ came to represent only the interests of the NP and ANC. If these two parties

agreed sufficiently, then negotiations and talks could continue (Ebrahim, 1998:144-150; Spitz and Chaskalson, 2000:34-5; Welsh, 2009:481-3). Although other parties were involved in the negotiation process, it was these two primary actors who decided on all major issues.

Despite the collapse of CODESA it was not a complete failure as it provided the parties involved in the negotiation much needed experience. The MPNP met early in April of 1993 and was structured differently from CODESA. There were no more working groups dealing with issues separately, but a Negotiating Council which reported to a Negotiating Forum. Another important innovation was the establishment of technical committees which were comprised of non-party political experts who considered and compiled reports. A major issue in the MPNP negotiations remained the notion of power sharing or a government of national unity. The bottom line for the NP was that they wished to be assured of involvement in government in the period after the first democratic election. This demand went against the ANC's bottom line of ensuring majority rule. The principle of national unity agreed upon was therefore a compromise that left both the ANC and NP somewhat dissatisfied. Another noteworthy issue dealt with at the MPNP was the issue of a federal and unitary state form, with the ANC favouring a strongly unitary state whilst the NP advocated a federal structure (Ebrahim 1998:151-6; Welsh, 2009:487).

On the 1st of June 1993 the MPNP set a date of 27th April 1994 for the first democratic elections. Apart from the election date, which set a strict time frame for the negotiations as the Interim Constitution was to be enacted following the election date, the MPNP also reached agreement on the following: the transitional executive authority; a constitution-making body; the number of provinces and their boundaries; and crucially, the MPNP published the first draft of the Interim Constitution on 26 July 1993 (Ebrahim, 1998:155-163; Spitz and Chaskalson, 2000:34-44; Welsh, 2009:487). An interesting factor regarding the first draft of the Interim Constitution, and every subsequent draft, is that no party was completely satisfied with every element thereof. The parties agreed to the drafts because each version had enough appeal to each party in order to continue negotiations (Ebrahim, 1998:159).

Spitz and Chaskalson (2000:42-4) argue that the beginning of July 1993 marks the end of petty politics and the beginning of drafting the substance of the Interim Constitution. In order for the final Interim Constitution to be published, the NP and ANC resolved important differences in what is known as the six-pack deal. Details included that the NP withdrew the

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call for minority veto power; the government of national unity would last five years; a single ballot would be used in the 1994 elections; the Constitutional Assembly (CA) would be able to adopt the final constitution by a 60% majority; changes to the provincial boundaries in the final constitution would require a two-thirds approval by the senate and provinces would be able to adopt their own constitutions after the elections if they were compliant to the Constitutional Principles.

Perhaps the most important element of the Interim Constitution drafted at the MPNP was the Constitutional Principles contained in schedule 4. The Constitutional Principles were key to the agreement between the ANC and NP. In total there were 34 Constitutional Principles that were negotiated from May 1993 to April 1994. These principles formed the basis upon which subsequent constitutional discussion and negotiations were to take place. Importantly, the Constitutional Principles agreed upon were placed outside the legislative reach of parliament and can be regarded as the guiding principles of the final constitution and the South African transition to constitutional democracy (Spitz and Chaskalson, 2000:67-86). The Interim Constitution was to come into effect on the 27th of April 1994 in order to set the stage for the CA to draft the final constitution. Despite the adoption of the Interim Constitution which included the 34 Constitutional Principles there remained disagreement on certain issues. Two very important problems facing negotiators were the debates regarding state form, unitary or federal, and the notion of majoritarian democracy proposed by the ANC contrasted to a system favoured by the NP which included the guarantee of minority rights.

The Constitution of 1996 was drafted between August 1994 and October 1996 by the CA. The composition of the CA was determined by the election results of 1994. This two-stage development of the constitution was a result of multiple talks between the parties involved in which the process of constitution-making was vigorously negotiated (Strand, 2001:47-8). The CA was comprised of 490 members, 400 from the national assembly and 90 from the senate. The ANC dominated proceedings with 312 members in the CA whilst the NP held 99 seats (Ebrahim 1998:177; Strand, 2001:47). The CA worked within the constraints set by schedule 4 of the Interim Constitution, namely the 34 Constitutional Principles. The principles represented a middle ground between the two extreme camps in that they were sufficiently precise to ensure the CA would not stray from fundamental principles agreed upon. The principles were, however, not so detailed as to constrain or pre-empt the CA in its work on the constitution (Ebrahim, 1998:178-9; Spitz and Chaskalson, 2000:77-80).

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Strand (2001) argues that the commonly held assumption that the contentious elements of the South African Constitution were settled with late amendments to the Interim Constitution in April of 1994, does not acknowledge the important work done by the CA. Strand (2001) argues that although the CA operated under institutional constraints set by the Interim Constitution, the CA did in fact reach major agreements with regards to the nature of democracy in South Africa. Contentious issues for the CA revolved around the bill of rights, the council of provinces, national and provincial competencies and powers, the administration and functioning of courts and issues pertaining to local government (Ebrahim, 1998:195). It is not my intention to discuss in full all the contentious issues with which the CA dealt, nor is it attempted to address the question of whether the most fundamental negotiations on the Constitution and democracy took place during the negotiation of the Interim or the final Constitutions. The intention is only to show that the negotiation was a long and contentious process with all the parties involved being forced to make concessions. It is also necessary to note that certain fundamental issues, such as the nature of the state form to be adopted, was a contentious issue throughout the negotiation process. Finally, the Constitution represented a compromise which, by definition, means that both parties were not fully satisfied with all the elements of the document since concessions were made by both sides.

The Constitution of 1996 was first adopted on the 8th of May of the same year. The document was submitted to the Constitutional Court (CC) for ratification shortly after it was adopted. On the 6th of September the CC delivered judgement on the submitted Constitution. The Court found that the Constitution failed to comply with the 34 constitutional principles agreed upon in eight respects. The Court also added that although there was a failure to comply with all the principles the issues of non-compliance should not pose significant problems to the CA which had produced a Constitution that had complied overwhelmingly with the Constitutional Principles. The judgement was seen as a victory for constitutional democracy and set an important precedent for the future of democracy in South Africa by respecting the judgment delivered by the CC. The acceptance of the judgment by the CC confirmed the CC as the highest authority in the South African democracy. This holds important implications for the rule of law and democracy in South Africa which will be discussed later in this chapter. The CA hastily worked to revise the Constitution and resubmitted the Constitution to the CC which certified the second draft on the 4th of

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December 1996 (Ebrahim, 1998:223-235). With the adoption of the Constitution of 1996, South Africa entered the era of constitutional democracy.

4.2.3 Different Camps

Even though the negotiation structures of CODESA, MPNP and the CA included multiple parties, the constitutional negotiations were largely dominated by the NP and ANC (Butler, 2009:112). It was previously mentioned that the resumption of the MPNP was based on bilateral agreements between the NP and ANC at which the notion of 'sufficient consensus' was agreed upon as a mechanism for moving negotiations forward. Sufficient consensus referred almost exclusively to consensus between the NP and ANC and was famously defined by Cyril Ramaphosa when he stated that if the ANC and the NP agree, everyone else could get 'stuffed' (Waldmeir, 1997:241). The full range of differences between the NP and ANC camps will not be presented. It should be noted that there were two main and contending camps and that the two parties held to fundamentally different ideas regarding the structuring of a democratic South Africa. Another noteworthy aspect of a post-negotiation South Africa is that the NP has disappeared from the South African political scene and that the ANC is the dominant party in South African party politics. The ANC is therefore the only 'main player' remaining after the negotiation and due to elective dominance is in a position to follow through with the goals and ideals held during the negotiation. Du Toit (1995:181-203; 2001:18) argues that the South African transition can be seen as a contest for hegemony between the ANC and NP. The two main parties involved in this contest had differing conceptions of democracy and the democratic unit (demos) i.e. 'the people' and the nature of the state.

The NP entered the negotiations with a view of democracy based on procedural justice and intended to establish a variant of liberal democracy which included the idea of power sharing. The NP viewed 'the people' as separate and distinct cultural and racial communities and hoped for a state model that would protect the interests of minority groups. The ANC's view of democracy was that of majoritarian democracy based on redistributive justice. For the ANC, 'the people' represented a single South African nation and the ANC envisioned an interventionary state capable of following through with redistributive justice through interventionist policies (Du Toit, 2001:18). For the ANC, the primary goal of the liberation

movement was to transfer power to the 'people' (Ebrahim, 1998:143; van Huyssteen, 2000:252).

Du Toit (2003:105) argues that major stakeholders in the negotiation process had conflicting ideas about the meanings, methods and goals of the negotiations. Du Toit (2003) uses Cohen's (2004) cultural model as a way of interpreting the views of the opposing camps during the negotiation process. The study at hand therefore aims to explicate the fundamental idea put forward by Du Toit (2001, 2003, 2004), that the parties involved had conflicting ideas about the very nature of what they were negotiating for and that these differences can be systematically described at the hand of a conceptual model or typology. Without presenting conclusive data, Du Toit offers the interpretation of the negotiated transition as an event where, even though both parties were talking about democracy, each party attached a fundamentally different set of meanings to the term, none of which were resolved during the constitutional talks (Du Toit, 2003:108). Another work which relies on the same logic is that of van Huyssteen (2000) wherein the author argues that the constitution-making process and the power placed in the CC had turned law into an arena of struggle over the nature of democracy. The battle in the legal arena took on the form of competing notions of constitutionalism which manifests in disagreement over meanings of the Constitution (van Huyssteen, 2000:245). This dissertation builds on this notion and will investigate whether there are identifiable contending views on the rule of law within the South African democracy in an empirical manner by applying the conceptual typology developed in chapter three to the *AfriForum v Malema* hate speech case.

The differences between the two major parties during the negotiations are clearly expressed in the battle over the appropriate state form – that of a unitary or federal arrangement. The ANC favoured a highly unitary state in order to address issues of social and economic inequality universally. The NP on the other hand strongly advocated a federal arrangement in order to ensure the devolution of power. For the ANC, a unitary state was crucial to achieving the goals of the liberation movement and uplifting people from the harsh economic and social realities apartheid had imposed upon them. A unitary state was also more in line with the notion of majoritarian democracy as favoured by the ANC. Such a state would also allow the ANC to achieve the main goal of the liberation movement, namely transferring power to the 'people' (Basson, 1995:xxi-iii; Butler, 2009:112; Deegan 2001:80, 90; Du Toit, 2001:15; Ebrahim 1998:143; Strand 2001:49; Thompson, 2001:252-7). During constitutional

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negotiations the two aforementioned problems, state form and the type or strand of democracy to be adopted, were major points of contention. There were other major obstacles during the negotiation phase but these two elements capture the essence of the differences between the ANC and NP which can be closely related to the analysis presented in this dissertation. The overarching question to be examined in this study is whether the fundamental differences between the negotiating parties still exist and whether they remain prevalent in shaping the political landscape in contemporary South Africa through contending interpretations of the rule of law.

Another work on the negotiation of the Constitution which highlights that contending views were held by the main parties involved is that of Gloppen (1997). The author argues that the differences over fundamental issues were a defining characteristic of the constitutional negotiation process (Gloppen, 1997:3). Gloppen (1997) analyses the constitutional negotiations from the perspective of the two dominant normative models on constitutionalism prevalent during constitutional negotiations. She identifies these models as the consociational and justice models of constitutionalism. The author argues that the views of the two main parties involved in the negotiation, the ANC and the NP, coincide with these normative models on constitutionalism. The ANC's focus on a majoritarian constitutional structure with the emphasis on social justice aligns the party to the justice model while the NP's preference for a federal state structure aligns the party to the consociational model (Gloppen, 1997:8).

The full scope of the two models presented by Gloppen (1997:58-170) will not be dealt with. The intention is to highlight that some of the defining characteristics of the differing constitutional models presented by Gloppen correspond to the conceptual typology developed in chapter three. Gloppen (1997:50, 95, 118) describes the constitutional models with relation to eight dimensions which she labels institutional set-up, interpretation of reality, central value, objective, nation-building, state-society relationships, constitutional domain and normative justification. Gloppen (1997:58-170) gives detailed accounts of the content of these dimensions and the manner in which they relate to the constitutional models she presents. Regarding the institutional set-up dimension, the justice model favoured by the ANC advocates a unitary state based on majoritarian decision making whilst the consociational model of the NP favours a federal state guaranteeing the protection of minorities. The dimensions which are of relevance to this study are the 'central value' and 'objective' dimensions within these models. The 'central value' of the model favoured by the

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ANC is that of social justice based on positive liberty with the 'objective' of this model being transformation. The consociational model's 'central value' is stability based on negative liberty with the main 'objective' being regulation.

The model developed in chapter three was done so independently from Gloppen's (1997) work. It is interesting to find another author, working on a similar topic, who identified elements which are similar to those presented in the conceptual typology developed in chapter three. The models presented by Gloppen (1997) and the conceptual typology presented in this study are not identical or similar in every respect. Gloppen's (1997) work differs in very important aspects from my own, very notably the notion of the collective and the individual which she casts on different sides of the conceptual divide. It is noteworthy that Gloppen (1997) also identifies the ANC's views with positive liberty and transformation whilst she lists negative liberty and regulation as representing the NP's argument. The conceptual typology developed in chapter three therefore shares with Gloppen (1997) the very important ideas revolving around the type of liberty involved and the goal of a democratic society.

Yet another work on the negotiated settlement which highlights the fundamental differences between the negotiating parties is that of Du Plessis and Corder (1994) which examines South Africa's Bill of Rights. The authors argue that the MPNP was influenced by ideological discord amongst the negotiating parties with this discord manifesting in some of the provisions included in the Bill of Rights as "…ostensible tensions or contradictions and in other instances as unsatisfactory compromises" (Du Plessis and Corder, 1994:23). The authors identify three main ideological tensions between *liberationism* and *libertarianism*, between *progressivism* and *traditionalism* and between *feminism* and *patriarchy*. The nature of the tension between the competing ideologies relates to the notion of different 'generation of rights'. First generation rights are concerned with individual freedom from interference by government. Second and third generation rights embody the idea of promoting and attaining a certain goal. Examples of first generation rights include freedom of speech, press and movement. Second and third generation rights include socio-economic and welfare rights. The main difference is that with regard to first generation rights governments must not act or infringe upon individuals' freedoms, whilst in second and third generation rights governments must actively pursue policies in order to attain the rights (Du Plessis and Corder, 1994:24).

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The full scope of the differences between the main ideologies identified by du Plessis and Corder (1994) will not be explored. Du Plessis and Corder (1994:25-33) note that *liberationism* emphasises equality and was characterised by the struggle against apartheid. *Liberationism*, although adhering to first generation rights, is orientated to promoting second and third generation rights with specific focus on socio-economic and social-welfare rights. *Libertarianism* on the other hand is focused on individual liberty and is primarily concerned with the protection of first generation rights. It should be evident that *liberationism* can be situated in notions of positive liberty whilst *libertarianism* is primarily concerned with areas that can be related to negative liberty. The similarities to the model developed in chapter three are again apparent through the normative priority attached to the specific strand, or notion, of liberty.

Throughout the preceding account it was argued that the negotiations were dominated by two main parties who held to fundamentally opposing ideas, values and beliefs on the issues under negotiation. These differences were not fully resolved during the negotiation period as the Constitution of 1996 was the result of significant and innovative compromises by the parties involved (Devenish, 2005:429). It is therefore plausible that the differences of conceptions of the certain elements of the Constitution are still present in contemporary South Africa and that different stakeholders and role-players may have different conceptions, values and beliefs of elements included in the Constitution. The work at hand is an attempt at empirically investigating this element of the South African democracy.

It is necessary that the reader retain the following summary from the preceding discussion. The two sides held opposing views on issues such as the goals and nature of democracy. This is expressed in Gloppen's (1997) and du Plessis and Corder's (1994) arguments and also in the actual differences which occurred during the negotiations which is poignantly captured by the battle over state form, unitary or federal, the democratic unit and the notion of the people. The models by Gloppen (1997) and du Plessis and Corder (1994) also highlight that the conceptual typology developed in chapter three shows some congruence with other works that developed a typology for interpreting the constitutional negotiations. It is therefore an exercise which demonstrates the criterion validity of the conceptual typology developed in chapter three, by relating it to other works. Furthermore, the ANC's views, as held during the negotiation, can be closely aligned to the *social rule of law* based on the normative priority

given to social justice, positive liberty, the role of the state and their belief in majoratarian democracy with the focus on social justice and redistribution.

4.2.4 The Constitution of 1996 and the Rule of Law

The discussion presented above on the negotiated transition was focused on conveying the notion that the South African settlement was a contested process which did not yield final and definitive agreements on the manner in which the South African democratic order should be structured. According to the preamble of the Constitution of 1996 the Constitution was adopted in order to establish a society based on democratic values, social justice and fundamental rights and laid the foundation for a democratic and open society based on the will of the people and equality before the law. The rule of law, the supremacy of the Constitution, dignity, achievement of equality and freedom are the founding provisions of the Republic of South Africa as enshrined in chapter one of the Constitution of 1996 (Act 108 of 1996). These concepts are however open to debate as there is no fixed meaning attached to them in the Constitution.

Both Devenish (2005:12) and Klare (1998:148-9) highlight the notion that the Constitution contains a wide range of values. Klare (1998) notes that despite the wide range of values contained in the Constitution, they cannot be treated as open-ended in the adjudication process and that judges and lawyers are bound by legal restraint in order to temper personal visions they hold. Or more simply stated in the words of retired Constitution Court judge Kentridge, "…the Constitution does not mean whatever we might wish it to mean" (State v Zuma, 1995 quoted in Klare, 1998:149). It is however not my intention to delve into the legal scholarly debates surrounding constitutional interpretation within the context of adjudication[63]. This dissertation is in the field of political science and is concerned with the views and opinions of political actors and therefore the primary concern is not with arguments in the field of jurisprudence, however enlightening they may be. The relevance of these works is not disputed they simply fall outside the scope of the current study. Some attention will however be devoted to briefly discussing the notion that the Constitution can be interpreted in differing ways and that the Constitution of 1996 is unique in a number of ways.

[63] See: Cockrell, 1996; Devenish, 2005; De Vos, 2001; Du Plessis and Corder ,1994 ch. 3; Froneman, 2005; Klare, 1998; Klug, 2000; Malherbe, 2008; Roux, 2009; Wesson and Du Plessis, 2008. The inclusion of justiciable socio-economic rights have generated academic discussion surrounding the separation of powers doctrine see: Davis, 2006b; Iles, 2004; Labuschagne, 2004; Liebenberg, 2010; Roux, 2005; Stewart, 2010.

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The Constitution of 1996 is unique in many respects, one of which being that it is the "…first constitution in the world to include entrenched and justiciable socio-economic rights…" alongside more traditional political and civil freedoms (Iles, 2004:449). The CC discussed the inclusion of socio-economic rights and the issue of justiciability in the First Certification judgement. The inclusion of socio-economic rights was objected to on the basis that the application of these rights conflicted with the principle of separation of powers enshrined in the Constitution of 1996. The CC acknowledged that the inclusion of socio-economic rights may result in courts making orders which have budgetary implications. However, the CC argued that when civil and political rights are enforced, the orders often have the same implications. The provisions of state benefits to those who were previously not beneficiaries under apartheid, implies the allocation of state resources in a specific manner in the South African context, in order for all citizens to realise their civil and political rights. The Court found that the inclusion of socio-economic rights does not breach the principle of the separation of powers, and argued that socioeconomic-rights would be included and be justiciable (Currie and de Waal, 2005:570-571).

The inclusion of justiciable socio-economic rights is not the only aspect which gives the South African Constitution a particular ideological leaning. Klare (1998:151) argues that the inclusion of values such as social justice, equality and redistribution casts the Constitution in a social democratic light and goes further to note that the Constitution includes several other ideals, such as gender equality, multiculturalism and an emphasis on participation which separates it from classical social democratic conceptions. It is argued by Budlender (2011:583) that the Constitution of 1996 "…contemplates a richer and 'thicker' form of democracy" than that of purely formal conceptions". Klare (1998) advocates a 'transformative' reading of the constitution which he labels 'post liberal'. Although the work by Klare (1998) is frequently cited and well known for advocating a transformative conception of the Constitution, the terminology employed by Klare (1998) is somewhat open-ended and contentious (Roux, 2009). Suffice to say that the argument put forward by Klare (1998) that the Constitution can be read as a transformative constitution, is not disputed and the notion that the Constitution of 1996 is concerned with transformation is found elsewhere in the literature (Budlender, 2005; Liebenberg, 2010; Motha, 2011; Roux, 2009).

Liebenberg (2010:25) also stresses the transformative nature of the Constitution and argues that it provides a legal framework with which to redress past injustices as well as to facilitate

the creation of a future society. The Constitution therefore simultaneously addresses both the past and the future. Teitel (2000, 1997) argues that this is the inherent dilemma that justice and law are faced with in transitional societies. Teitel (2000:215) states that "…the rule of law in established democracies is forward-looking and continuous in its directionality, law in transitional periods is both backward-looking and forward-looking, retrospective and prospective, continuous and discontinuous". Liebenberg (2010:27) contends that the Constitution cannot solely rely on righting past injustices and it is also forward-looking in that it "…aims at facilitating the construction of a new political, social and economic order 'based on democratic values, social justice and fundamental human rights.'" The Constitution does not, however, provide a detailed plan of how such a transformed society must be achieved except for the commitment to the ideals mentioned above (Liebenberg, 2010:29). Democracy in the view of the Constitution requires more than a minimalist notion of democracy which depends on regular elections — it represents a more substantive conception of democracy (Liebenberg, 2010:30-31).

The Constitution of 1996 also contains more traditional and standard elements which are relevant to the manner in which the rule of law gains expression and therefore has specific bearing on this dissertation. The Constitution of 1996 sets well-known institutional arrangements of the separation of powers (legislature, executive and judiciary) along with a justiciable bill of rights and a CC with powers of judicial review (Van Huyssteen, 2000:246). The Constitution of 1996 is therefore not unlike other constitutions in that it determines the location, distribution, exercise and limits of state power and authority (Devenish, 2005:2).

The Constitution differs from many others in another fundamental respect. Budlender (2005:17) contends that most constitutions are the result of changes which have already taken place and lay the foundational framework for society based on these changes. The South African Constitution differs in that it sets the scene for changes which have yet to come, for the transformation of society from apartheid to democracy with transformation being the fundamental premise upon which the Constitution of 1996 is built (Budlender, 2005:715-716). The inclusion of these unique features gives the constitution a certain 'social' leaning which is strengthened by the mention given to ideals of social justice which manifests in the inclusion of justiciable socio-economic rights, affirmative action and a limitation of rights clause.

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Yet another interesting feature of the Constitution of 1996 is the inclusion of the ideals of dignity, equality and freedom. Du Plessis (1997:12) notes that these words are mentioned numerous times throughout the text and are always listed in this specific order and that this is the order of importance of these ideals. Du Plessis (1997:12) notes that by listing human dignity ahead of equality and freedom, the Constitution allows for the mediation of ideological conflicts which could occur between equality and freedom, through interpretations of the ideal of dignity. It also alludes to the notion that unbridled equality and freedom does not necessarily advance dignity (Du Plessis, 1997:12). Furthermore, the Constitution also includes that the state must protect and promote the rights enshrined in the Bill of Rights. Du Plessis (1997:13) argues that the idea that the state must actively advance rights opens the door to state intervention in the private sphere. It is therefore plausible to justify certain interventions by the state, based on the pursuit of dignity as enshrined in the Constitution.

An element which has direct bearing to this dissertation is the inclusion of the rule of law ideal in the Constitution. The inclusion of the rule of law and supremacy of the constitution in the Constitution of 1996 was, however, not an entirely new experience for South Africa. Recall that it was mentioned in sections 2.3 and 3.7 that the relationship between democracy and rule of law is asymmetrical, that is the rule of law can exist without democracy, but democracy cannot exist without the rule of law. Dyzenhaus (2007:735) argues that the "…apartheid legal order implemented a racist ideology through law but was formally no less committed than the new order to both the supremacy of the constitution and the rule of law. If one ignored the ideology and focused on the formal features of the apartheid legal order, it replicated the constitutional structure of the British legal order". This is a good example of what is meant by earlier statements that the rule of law can exist without democracy and can accurately be described as 'rule by law'. Dyzenhaus (2007:737) notes that in the apartheid legal order most judges and lawyers subscribed to a formal conception of legality and law and what was lacking was a substantive conception of the law.

According to Dyzenhaus (2007:736) it is the content of the law and the nature of the ideology which informs it, that differentiates the post-apartheid constitutional order and rule of law from the previous regime through the guaranteed protection of certain rights and liberties. Dyzenhaus (2007:739) warns that merely substituting a formal conception for a substantive conception does not equate to a legal system that will necessarily uphold the ideals of

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equality and liberty. Dyzenhaus (2007:739) argues that "…a commitment to the substantive conception of the rule of law cannot settle contention about the rule of law, since the content of that commitment remains controversial". A further problem is captured by Mathews (1986:13) who notes that if the rule of law is too closely entwined with ideas of social justice, "… it will become a hapless victim to the fierce moral and ideological conflicts of our time". The problem is therefore that substantive notions of the rule of law could place the ideal under further pressure by entwining it with notions of the social good or social justice.

Dyzenhaus (2007) is capturing the essence of the problem relating to diverging conceptions of the rule of law discussed in chapter three, namely that the distinction between procedural and substantive conceptions of the rule of law is not as straight forward as one might assume. The distinction is not as simple as merely equating one view with moral emptiness, neutrality and good and the other with a morally contestable system. The issue is the very nature of what is included in the law. It is the specific substance of the rule of law that links a system to either the *liberal* or the *social rule of law* identified in chapter three. It should therefore be evident that the conceptual typology developed in chapter three has theoretical relevance for exploring differing conceptions of the rule of law in South Africa.

Regardless of the values, meanings and content that could be associated with the ideal of the rule of law, the CC has developed a doctrine of the rule of law since its inception (Venter, 2010:57.) According to Venter (2010:57-58) the CC has subsumed the rule of law under the concept of the constitutional state and has gradually spelt out its elements as:

> …the supremacy of the Constitution over all law and all actions of state, the acknowledgement and protection of fundamental rights through the independent authority of judiciary to enforce the Bill of Rights and the Constitution, the maintenance of the separation of powers, the requirement that all government action be legally justified, the state's duty to protect fundamental rights, the promotion of legal certainty, the maintenance of democracy, the application of a specific set of legal principles and the guidance of all organs of state by an objective normative system of values.

This can therefore be seen as the practical meaning of the rule of law within the context of South Africa's constitutional democracy developed by the CC through judgments it has delivered. It is therefore plausible that all actions or inactions of the government and the state

that have direct or indirect bearing on these elements listed, can therefore be seen as relating to the rule of law in South Africa.

4.2.5 Summary

It should be evident from the preceding paragraphs that the Constitution was a result of a long negotiation process which was dominated by two main ideological camps. Many ideals included in the Constitution of 1996 found in the Preamble and Section 1, such as the notion of a 'democratic society' and rule of law, are contestable and no clear and definitive meaning was agreed upon in the negotiation process. Furthermore, the final Constitution is unique in a number of ways; it set the tone for a future society based on the idea of transformation and it includes the ideals of social justice and equality which lends it a certain social hue. The Constitution calls for a more robust, thicker or substantive definition of democracy than merely procedural notions of the concept.

Various authors have found that there are certain identifiable ideals and conceptions highlighted in the negotiation process, which align the ANC views and opinions to the *social rule of law* presented in chapter three — the emphasis on a unitary state capable of strongly influencing a democratic society and conceptions of majoritarian democracy which, per definition, favours a specific group and not individuals as captured by the ANC's wish to transfer power to the people, both of which find congruence in the *liberationist* strand of democracy subsumed under the *social rule of law*. Furthermore, ideas of social justice based on positive conceptions of liberty and the notion of substantive equality all find congruence in conceptions of liberty and equality as described under the ambit of *social rule of law* as developed in chapter three.

It is also important to note that only one of the two main role-players in the negotiation process remain on the South African political scene. The ANC's views, ideals and opinions are therefore of greater relevance as it is the ruling party and dominant political player in South Africa politics. The departure of the NP and dominance of the ANC means that the ANC is in a position to follow through with its political and ideological agenda as subscribed to during the negotiation. The ANC is however obliged to do so within the framework created by the Constitution. As was mentioned, the Constitution is concerned with transforming South Africa. The Constitution is not a completely value-free document and is identified

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closely with social values due to the focus on transformation, social justice and equality. The ANC must therefore, if the rule of law and constitutional democracy are to be maintained, follow its democratic project within the transformative framework created by the Constitution. It must also be taken into account that the Constitution does allow for such a project. The important element is that even though the Constitution envisions a form of democracy and rule of law that is more interventionist and inspired by past historical injustices to some groups, the Constitution requires that this project of transforming South Africa cannot be done to the detriment of any people or groups. All people and groups still have to be treated with dignity, equality and justice. The next task is to explore how this process of transformation has been unfolding in contemporary South Africa.

4.3 Rule of Law and Democracy in South Africa

The following paragraphs will briefly describe the rule of law and democracy in South Africa. As was mentioned in the introductory paragraphs of this chapter, the focus will be on opinions and views of political stakeholders and role-players and also on institutional arrangements associated with the rule of law and democracy — it is therefore not an attempt at presenting all the material relating to the rule of law and democracy. The focus of this dissertation is to investigate if there are diverging interpretations of the rule of law within the South African democracy and if these can be systematically described at the hand of the conceptual typology developed in chapter three. The discussion on rule of law and democracy therefore focuses on the opinions of stakeholders and on the institutional arrangements associated with democracy and the rule of law.

The primary stakeholders that this study is concerned with are firstly the ANC, and secondly the population of South Africa. The ANC is regarded as the primary stakeholder for three reasons. Firstly, the ANC is listed as a respondent in the *AfriForum v Malema* hate speech case that is used as the case study in this dissertation. Secondly, the ANC is the main political player in South African politics and dominates the South African political scene on both party and institutional levels. There is a vast range of literature in political science which focuses on the ANC, ranging from, but not limited to the ANC's role as a dominant political party and the effects this may have on multiparty democracy (Butler, 2005; De Jager, 2009, 2012; Giliomee, Myburg and Schlemmer, 2001; Hoeane, 2005; Kotzé and García-Rivero, 2008;

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Lodge, 2004, 2006; Malan 2006), the internal nature, functioning and ideologies of the ANC as both a governing political party and a liberation movement (Bond, 2007; Booysen, 2011; Butler, 2003, 2007; Feinstein, 2009; Gumede, 2008 (a and b); Lotshwao, 2009; McKinley, 2001; Prevost, 2006; Suttner, 2003) and scholarship concerning the political economy developed by the ANC (Bond, 2000; Marais, 2001). Thirdly, the ANC is the only one of the two main parties left over from the negotiation process since the disappearance of the NP from the political scene. The ANC can therefore impose its understandings and opinions, as held during the negotiation, on the South African democracy. This is largely as a result of the electoral dominance enjoyed by the ANC and not as a result of the ideological orientation of the party. The focus of the analysis presented in this dissertation is, however, only with specific elements relating to opinions and views that the organisation may hold, that are relevant to elements found within the research questions and conceptual typology developed in chapter three. What follows is therefore not an attempt to describe the full variance and scope found within ANC ideology nor is it an attempt to investigate the nature or role of the ANC within the South African democracy.

The population of South Africa is seen as a stakeholder because democracy is a form of government which provides for a plurality of ideas as held by the population. Even if the population is not a respondent in the case selected, the 'demos' or democratic unit, is of utmost importance not only in normative theories on democracy, but also in the more practical application of democratic government. The discussion on the rule of law and democracy therefore not only focuses on the opinions of the ANC but also on that of the people of South Africa. The discussion presented here also touches on the more structural elements relating to the rule of law, such as the role, functioning and relationship of the executive, legislature and judiciary as well as notions of state form.

4.3.1 Democracy and Rule of Law

Freedom House is a well-known organisation that aims at ranking different democratic governments. South Africa, Mauritius, Namibia and Botswana are the only countries in sub-Saharan Africa to be given a rating of 'free' by Freedom House as of 2012 (Freedom House, 2012a). In 2012 South Africa had a 'freedom rating' of 2, with both dimensions used by Freedom House, civil liberties and political rights, achieving a rating of 2 (Freedom House,

2012b)[64]. De Jager (2012:150) notes that Freedom House's rating for South Africa in the 'political rights' category declined from a rating of 1 to 2 due to the ANC's dominance. Such a decrease in score could have implications for the quality of democracy enjoyed in South Africa. Since 1994 the ANC has enjoyed an unchallenged electoral dominance in South African party politics. The National Assembly of South Africa consists of 400 seats, in 1994 the ANC won 252, in 1999, 266, in 2004, 279 and in 2009, 264 of these seats (De Jager, 2012:154). The ANC has, since the inception of democracy, never held less than 62% of the parliamentary seats. The ANC is therefore the dominant political player in both the executive (Muriaas, 2011) and legislative chambers of government. This dominance is more than numerical in nature. Alence (2004:84) notes that the executive can rely on the legislature to ratify all of its proposals. As of 2004, parliament had passed all 907 pieces of legislation proposed by the executive, which were all supported by the ANC with voting revealing near perfect party discipline. Although framing the democratic debate in South Africa solely in the light of single party dominance is not without its critics (Sheperd, 2009), it remains a practically and theoretically justifiable manner in which to frame debates on democracy and the rule of law in South Africa.

Similar to studies measuring and quantifying democracy, there are those that aim to do so for the rule of law. The Mo Ibrahim Foundation constructs an index of good governance in Africa of which 'safety and rule of law' is used as an indicator for the construction of the good governance index. Overall, South Africa scores 71 in the governance index and is ranked 5th in Africa. With regards to the rule of law specifically, South Africa scores 72 and is ranked 7th in Africa (Mo Ibrahim, 2012)[65]. Another organisation that measures the rule of law is the World Justice Project which constructs a comprehensive index of the rule of law by taking eight factors into account. The scores range from 0-1, with 1 being the highest. Presented in table 4.1 is South Africa's rule of law score as well as South Africa's ranking globally, regionally, in sub-Saharan Africa, and within the income group that South Africa falls.

[64] Freedom House ranks civil liberties and political rights on a scale of 1-7 with 1 being regarded as free and 7 not-free (Freedom House, 2012b).
[65] The Mo Ibrahim Foundation scores countries from 0-100 with 100 being the highest score.

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Table 4.1 South Africa's Rule of Law Ranking

WJP* Rule of Law Index Factors		Score	Global Ranking	Regional Ranking	Income Group Ranking
Factor 1	Limited Government Powers	0.62	34/97	3/18	5/30
Factor 2	Absence of Corruption	0.50	49/97	2/18	14/30
Factor 3	Order and Security	0.56	88/97	16/18	26/30
Factor 4	Fundamental Rights	0.64	40/97	2/18	11/30
Factor 5	Open Government	0.61	27/97	2/18	5/30
Factor 6	Regulatory Enforcement	0.54	42/97	4/18	12/30
Factor 7	Civil Justice	0.55	46/97	6/18	13/30
Factor 8	Criminal Justice	0.49	48/97	3/18	13/30

*World Justice Project (Source: Agrast, Botero, Martinez, Ponce and Pratt, 2012:138)

South Africa scores relatively well in the checks on government power and open government dimensions within the global context. Throughout all the categories except order and security, largely as a result of crime, South Africa is highly ranked in Sub-Saharan Africa. Crime, a relatively ineffective criminal justice system and poor conditions in correctional facilities bring South Africa's scores down in these categories (Agrast, Botero, Martinez, Ponce and Pratt, 2012:53). Based on these quantitative measures and normative definitions South Africa complies with notions of a liberal democratic state which subscribes to the rule of law.

However, Venter (2010:45) warns that there are indications of serious challenges to the liberal democratic foundations upon which South African democracy has been built and that ignoring these challenges could be a serious threat. Venter (2010:65-6) includes indicators of progress and regression of constitutional democracy and the principle of rule of law being:

> The promotion or violation of economic freedom; the utilisation or further marginalisation in the public domain of available expertise; the improvement or continued weakening of the educational system; the rational or partisan selection of candidates for appointment to key positions, such as the judiciary and the (Chapter 9) 'State Institutions Supporting Constitutional Democracy' and the empowerment or reduction of the efficiency of those institutions; a constructive response to or [sic] authoritarian dismissal of democratic opposition to government action.

Similarly, Welz (2010:304-6) notes that certain developments in South Africa can be construed as posing threats to the rule of law and the administration of justice. Welz (2010) argues that genuine threats are not concerned with political statements, filibustering or even personal attacks on judges. Rather, threats to the rule of law and the administration take the

form of attempts to diminish the power and independence of the judiciary which can be found in resolutions on the transformation of the judiciary and proposed justice bills. Welz's (2010) primary concern is with two proposed pieces of legislation, the Constitution Fourteenth Amendment Bill and the Superior Courts Bill. The wording contained in the proposed drafts of the bills was problematic since the proposed bills, as they were then worded, increased executive and political involvement in judicial matters and undermine judicial independence. The issue is that institutions that uphold democracy and the rule of law have become vulnerable to political influence. Welz (2010:325-7) concludes that recent developments suggest that the judicial institution has come under a direct and sustained attack from the ANC and that such actions weaken democracy and the rule of law.

When considering the judicial institution in South Africa it is necessary to also consider the JSC. The JSC's functions are to "…select fit and proper persons for appointment as judges and to investigate complaints about judicial officers" (Department of Justice and Constitutional Development, 2012a). The JSC nominates candidates from which the President appoints judges. The JSC is comprised of up to 25 members of which 15 are political in nature, either from the National Assembly, the National Council of Provinces or Cabinet (Act 108 of 1996). The process of appointment of judges has become severely politicised in South Africa with the JSC coming under frequent criticism for the manner in which it conducts the affairs of judicial appointments (Cibane, 2013; Smuts, 2013; Tolsi, 2013). Considering the JSC is comprised of a majority of political appointments, this is not a surprising development nor is it unique within modern democracies with the United States being a good example. What is relevant in South Africa is that the ruling ANC has a disproportionate amount of influence in the selection of judges and that this can be seen as a threat to the independence of the judiciary.

Labuschagne (2009) comes to a similar conclusion as Welz (2010) in examining two political developments which have an impact on the rule of law and economic development. The two developments under consideration are the independence of the judiciary and the proposed Appropriation Bill which affects property rights. Labuschagne (2009) notes that changes to both these aspects could have detrimental effects on the rule of law and economic development. Jeffery (2013) argues that the revised edition of the Expropriation Bill of 2013 is unconstitutional as it undermines Sections 25, 26(3) and 34 of the Constitution. The government has proposed that the new Bill is required to reach the land reform targets.

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Jeffery (2013) notes that such a claim is unfounded — most land reform beneficiaries have settled for financial compensation; 50% to 90% of land reform projects have failed; and there is ample land available on the market for reform projects. The Bill, she concludes, "…is a draconian measure giving all state agencies the power to take from miners, farmers, firms and ordinary people their most important asset […]" without providing adequate compensation (Jeffery, 2013:9).

Venter (2010) argues that the reasons for constitutional deterioration of liberal democracy can be found in the constitution-making process. The author argues the ANC's conception of democracy, and by correlation the rule of law, is informed by a specific view of democracy, namely through the lens of the National Democratic Revolution (NDR). The NDR, which is the theory of democracy subscribed to by the ANC, forms a crucial element in the Tripartite Alliance between the ANC, South African Communist party (SACP) and Congress of South African Trade Unions (COSATU) (Venter, 2010:60). The work by Venter (2010) highlights that the manner in which the ANC conceives certain elements central to democracy and rule of law, could be important for how a democratic society in South Africa takes shape. Some attention will now be given to the ANC's conceptions of certain elements crucial to constitutional democracy.

4.3.2 The ANC's Conceptions of Democracy

It is necessary to acknowledge a major problem in presenting the debate on rule of law and democracy from a perspective that views the ANC as representing a unified ideological platform before continuing the discussion which relies on conceptions of a political party. Many authors comment on the diverse nature of competing ideological camps within the ANC (De Jager, 2009: Dubow, 2000; Feinstein, 2009; Gumede, 2007; McKinley, 2001; Prevost, 2006; Reddy, 2010; Silke, 2006; Suttner, 2003). The extent of factionalism is such that it led to the establishment of a breakaway political party, the Congress of the People (COPE) in 2008 by former ANC members Mosiuoa Lekota, Mbhanzima Shilowa and Mluleki George. The divisions within the ANC and COSATU and the SACP regularly make news headlines such as the recent disagreements over the proposed National Development Plan highlight (Marrian, 2013). Regardless of these problems, there is still an official party line which provides guidelines for this, and other studies, to explore the nature of concepts such as the ANC's views on democracy, equality, transformation and the rule of law. An

example of such a study is the work by Pretorius (2006) wherein the author presents the ANC's conception of democracy as reflected in ANC documents. Pretorius (2006:746) argues that such an exposition is meant to describe a defensible position, and is "…not intended to support some sort of 'objectively valid' understanding of 'how the ANC itself thinks' or what 'meaning' its leaders or its members themselves attach to *democracy*". Further grounds for relying on the ANC's views of democracy and related concepts is that the ANC voluntarily joined the *AfriForum v Malema* hate speech case alongside Mr Malema, which is the case selected as for case study in this dissertation.

As was mentioned in section 4.2.4, transformation is an important and unique theme in the Constitution. Transformation also forms an important component of the political landscape in contemporary South Africa and is a recurring theme in the ANC's discourse on democracy. Transformation is a key element of the NDR which can be seen as the manner in which the ANC defines democracy, at least to a certain extent (Pretorius, 2006:748; Venter, 2010:63). Crucial to understanding the NDR is the basis upon which it is built and this includes specific conceptions of liberty and equality.

Hudson (2000) examines politics of transformation with relation to the role of liberal individualist and collectivist conceptions of the good. Hudson (2000:94) notes that liberal theory relies on a conception of liberty that is "…individual, negative and pluralist". Such a perspective holds that there are multiple conceptions of the good compatible with liberal theory as long as such a conception does not hinder others from pursuing their vision of the good. It is therefore a pluralist conception which relies on the notion that individuals must not be interfered with (negative liberty) in their pursuit of a desired life goal. According to Hudson (2000) the transformation project espoused by the ANC cannot be accommodated in such a view of liberty. The transformation project articulated by the ANC envisions society as a "…collective unit of agency…" pursuing a specific conception of the good (Hudson, 2000:96). The good subscribed to under such a view is not that of creating a society of autonomous individuals each striving for their own conception of the good, but a society seeking a specific end-state (Hudson, 2000:96). Moreover, the collectivity is seen as a trans-individual entity that makes decision as a single unit and not as society comprised of autonomous individuals (Hudson, 2000:97). Individuals under the transformation project are seen as role-players who are concerned with shaping society as a whole. The transformation project therefore advocates a specific conception of the good which makes it incompatible

with the liberal perspective since the collective will determines that which is considered to be the good (Hudson, 2000:96).

Hudson (2000:98) notes that these are two incommensurable conceptions of freedom and the public good. The one prioritises the equal distribution of individual freedom whilst the other emphasises collective self-determination. The issue is however not to adjudicate whether one conception is better or more just than the other. The issue is that the collectivist interpretation necessitates that the state in South Africa pursue a specific conception of the public good. The state is not a neutral referee state, but rather a partisan one which actively pursues certain specified policies and practices in order to achieve the collectivist and specific conception of the public good. Despite the use of state apparatus to achieve the collectivist goal, it does not necessarily, any more so than a purely liberal project, deny moral personality, equality or freedom. The transformation project does however rest on a specific understanding of the values of equality and freedom (Hudson, 2000:98-100).

Stacey (2003) echoes these sentiments in arguing that a specific communitarian understanding of equality underpins political rhetoric behind affirmative action policies and the Employment Equity Act. The ANC’s transformation policy relies on a conception of equality which is incompatible not only with formulations found in standard liberal democratic dispensations but also with that found in the Constitution of 1996. The ANC subscribes to a positive conception of equality which requires individuals to adopt a collectively determined good (Stacey, 2003:133-4). Stacey (2003:138-9) argues that the ANC’s transformation project cannot be justified in terms of negative liberal conceptions of equality that emphasises state neutrality and negative liberty. The outcomes-based nature of affirmative action, which in South Africa favours a specified majority over a specified minority, values the rights of an identified group above that of all individuals in society and has a clear communitarian justification. Those who do not form part of this collectivity have severely limited capability to pursue their freedom and desired life goal. Stacey (2003:140) argues that the ANC’s conception of equality is based on positive liberty and communitarian good. The ANC’s transformation project is therefore based on positive conceptions of equality which entails that the individual’s will is secondary to that of the collective (Stacey, 2003:142).

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The key point for Stacey (2003:145) is that the ANC's prioritisation of the collective over the individual means that the ANC's notion of equality is incompatible with the equality enshrined in the Constitution. According to Stacey (2003:145) the equality enshrined in the Constitution claims to be acceptable to the people of South Africa, the ANC's version of the ideal is conceived as favouring a specific community and not all individuals in society and is therefore incompatible with the ideal as found in the Constitution. Stacey (2003:146) concludes that the transformation project and affirmative action are in violation of the Constitutional right to equality and equal liberty. The transformation project can, according to Stacey (2003:146), be placed within the conceptual framework of positive liberty and equality.

The works by Hudson (2000) and Stacey (2003) argue that the ANC's conception of liberty and equality are geared towards serving the needs of a specific community. Primacy is not afforded to all individuals within society, but to individuals who are members of a specific community. These works cited show that conceptions of equality and liberty, as held by the ANC, are closely aligned to those identified in *social rule of law* presented in chapter three. More specifically, the notion that the community is of greater importance than the individual is the first element of the *social rule of law,* as identified and presented in section 3.8.

These conceptions on equality and liberty are also relevant as they form the ideological basis for another key concept in ANC discourse, namely the NDR. It was previously mentioned that the ANC subscribed to the notion of the NDR (Butler, 2005; Hudson, 2009; Pretorius, 2006; Venter, 2010) which is premised on the conceptions of equality and liberty as presented in the preceding paragraphs (Hudson, 2009:404; Pretorius, 2006:262).

Crucial to this study is the NDR which forms the basis for the manner in which the ANC conceptualises democracy. The NDR is a theory of democracy, as was previously mentioned, and includes notions of the demos and societal structures. The NDR has been a part of ANC discourse since the 1960's and originates from the attempts of communist intellectuals to align global theory of socialism with that of a liberation movement. It is not a communist concept per se, but has strong socialist leanings (Butler, 2005:725; Hudson, 2009:403-4). As such, the NDR includes a specific conception of democracy, the demos or people, the democratic state and the goals of democracy which are all strongly influenced by socialist ideals. Importantly, the NDR remains a relevant element of ANC rhetoric with the party

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reiterating the importance of the NDR in the 2012 *Strategy and Tactics* document (ANC, 2012). The ANC adopted a preface to the 2007 *Strategy and Tactics* document at the 53rd National Conference held at Mangaung in the Free State in 2012 reiterating the commitment to the resolutions and aims adopted in the 2007 document (ANC, 2012).

In an illuminating article, Pretorius (2006) offers an interpretation of the ANC's conception of democracy[66]. Pretorius (2006:747) argues that even though the ANC proclaims to adhere to standard precepts of liberal-democratic theory, such as recognising a system of multi-party democracy, the separation of powers and the rule of law, the ANC's conception of democracy entails more than these standard elements (Pretorius, 2006:747). Importantly, the ANC's conception of democracy includes substantive elements that go beyond mere formal or procedural conceptions of democracy and this is captured by the ANC's commitment to the NDR (Pretorius, 2006:747). The NDR is defined as:

> …a process of struggle that seeks the transfer of power to the people. When we talk of power we mean political, social and economic control. The NDR has been understood in terms of phases at which certain objectives should be achieved. The objectives of [the] NDR include the transformation of South Africa into a non-racial, non-sexist, democratic and united South Africa where all organs of the state are controlled by the people. As a basic principle, the NDR looks at the national question in South Africa. It looks at removing the barriers that have been set by apartheid in terms of black people and Africans' (in particular) access to the economy and services (ANC, 1996a quoted in Pretorius, 2006:747).

The goals of the NDR include the transformation of South Africa into a democratic society and aims at controlling all organs of state and addressing the national question which involves, as per the definition quoted above, redressing past injustices and privileging Africans in particular. The state plays a central role in achieving these ends. The role of the state is captured in the following:

> The most important current defining feature of the South African democratic state is that it champions the aspirations of the majority who have been disadvantaged by the

[66] Most of the quotations of ANC documents contained in the following paragraphs are found in the study by Pretorius (2006). However, when I have changed how they appear in Pretorius's (2006) work by either omitting or lengthening quotations from ANC documents, I have not referenced the documents as secondary sources. I do however still wish to acknowledge that many of the quotes of ANC documents in the following pages are found in Pretorius (2006), albeit in a different form.

> many decades of undemocratic rule. Its primary task is to work for the emancipation of the black majority, the working people, the urban poor, the rural poor, the women, the youth and the disabled. It is the task of this democratic state to champion the course of these people in such a way that the most basic aspirations of this majority assumes the status of hegemony which informs and guides policy and practice of all the institutions of government and state. […] The democratic state should also address the important issue of the just and correct resolution of the national question, which question colonialism and Apartheid elevated to a special position of prominence [sic], both theoretically and in practice (ANC, 1996b).

There are three elements of the above quotations which require further elaboration, the motive forces, the national question and the notion of hegemony. The concepts of motive forces and the national question form integral parts of the definition of both the NDR and the role of the state. The national question in ANC lexicon is understood as follows:

> In the South African context, the national question is not principally about the rights of minorities or ethnically motivated grievances (this statement is not intended to diminish the importance of the rights of minorities). It is, in fact, principally about the liberation of the african [sic] people.
>
> According to the Morogoro conference: 'The main content of the present stage of the South African revolution is the liberation of the largest and most oppressed group - the african [sic] people'. Hence, the main measure of the progress made on the national question is the extent and depth of the liberation of african [sic] people in particular - and blacks in general. This point must not be lost as a result of the excessive discourse in the media about 'minority fears' (ANC, 2005 quoted in Pretorius, 2006:750-1).

The people in the view of the NDR are primarily the black majority and Africans in particular but it also accommodates a wider range of people, through the 'motive forces', such as democratic whites, workers, the unemployed and the black middle class to name a few (Pretorius, 2006:748-9). The motive forces includes a variety of groups and are understood to constitute

> "…the African majority and blacks in general, democratic whites and in class terms … the unemployed and landless rural masses; unskilled and semi-skilled workers;

> professionals, entrepreneurs and small business operators... black women, ... African women, ... the working class ... the unemployed ... women ... the black middle class (also the middle strata and petty bourgeoisie) ... black business /capitalists ... the youth" (ANC, 2000 quoted in Pretorius, 2006:749).

Despite the plurality inherent in such a definition of the motive forces, the motive forces specifically refers to "…the black masses, those classes and strata that objectively and systematically stand to gain from the victory and consolidation of the NDR" (ANC, 2002 quoted in Pretorius, 2006:749).

One final point which requires elaboration is the notion of hegemony, the achievement of which is a task of the state, as per the definition of the state quoted above. The NDR advances the notion of achieving the hegemony of majority aspirations. The hegemony referred to in the NDR is more than a mere capturing and controlling of all state apparatus, and includes the hegemony of ideas. The NDR seeks to claim and control all institutions that are considered to be ideological apparatus which includes universities and policy institutions (Pretorius, 2006:749-50). The meaning of hegemony is captured in a 1998 document entitled, *The State, Property Relations and Social Transformation* which states:

> An important element in any social transformation is the capacity of the forces undertaking the process to exercise hegemony of ideas. As in other areas of transformation, this remains a contested terrain; not only within the context of the role of the state; but also from the point of view of whether the progressive movement is able to set the agenda - whether its ideas are the "dominant ideas" within society as a whole (ANC, 1998).

De Jager (2009:286) also comments that the ANC seeks to entrench ideological hegemony through a stratagem which the ANC labels the 'battle of ideas'. As is noted by De Jager (2009:286) a battle necessarily implies that there will be a loser. The ANC defines this battle as the need to

> …vigorously communicate the ANC's outlook and values (developmental state, collective rights, values of caring and community solidarity, *ubuntu*, non-sexism, etc.) versus the current mainstream . . . ideological outlook (neo-liberalism, a weak and passive state, and overemphasis on individual rights, market fundamentalism, etc.) (ANC, 2007 quoted in De Jager, 2009:286).

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In considering the conception of democracy espoused by the ANC, Pretorius (2006:751) argues that:

> …the ANC's conception of *democracy* is one that defines *the majority* and, thus, the *people* to be 'the black and more particularly the African majority'. This implies a distinctly contradictory conception. It is contradictory because the conception both recognises the ultimate equality in rights of *all citizens* but simultaneously privileges *the majority* in terms of, in particular, those allocative functions of the state which are of material (i.e. economic) significance. The privileging (as manifested primarily in the policies of affirmative action and black economic empowerment) is justified by the ANC with reference to historical legacies of colonialism and apartheid.

The NDR emphasises that the ANC has a commitment to allocating the goods that are achieved with democracy to the black, and more particularly, the African majority. This, Pretorius (2006:762) claims, can be seen in both definitions of the NDR and the National Question. The privileging of a specific group is justified based on historically structured disadvantages that the majority is faced with (Pretorius, 2006:762). This is an understandable proposition, as non-whites suffered terribly under apartheid. What is slightly more difficult to justify is the NDR's aspiration to hegemony. Hegemony is understood to imply, both in an overt and covert manner, the ideological domination of a particular class or group over another (Pretorius, 2006:762). The goal of "hegemony of ideas" is therefore in direct contravention to the pluralism inherent in democratic theory, unless democracy is defined in terms of ideological uniformity, which it is not. It should also be noted that the ANC does not subscribe to the notion that the population is homogenous, as the ANC readily recognises different groups and strata within the population. What the ANC does, however, accomplish by subscribing to a notion of hegemony, is tasking itself as the organisation which defines the people's interests and leads its followers to the "…proper understanding of all the interests of the people" (Pretorius, 2006:762). The ANC defines itself as the true and objective determiner of the people's interests which is justified both in the organisation's history of liberation movement and leader in the fight against apartheid as well as in the electoral dominance enjoyed by the party. This notion is tied up in the rhetoric of participatory democracy and hegemony, both broad and vague terms which are used in different contexts and with different meanings (Pretorius, 2006:762).

As argued above, the ANC posits itself as the true determiner of the public good. It should be evident that, through its definitions of the democracy, the ANC has a specific conception of the good. This conception privileges a specific group of people. The ANC's conceptions therefore align closely with the second element of *social rule of law* developed in section 3.8, namely that that the conception of rule of law includes a specific notion of the public good which does not allow all individuals in society to pursue their conceptions of the good. It is the ANC's pursuit of hegemony, not only of state institutions and centres of powers, but also of 'ideas' which indicates that the ANC does not subscribe to the notion of moral plurality. That is, hegemony implies that there is only one notion of the good, determined by the ANC, and that this will, due to the use of terms such as 'hegemony' and 'battle of ideas', be pursued at the expense of other notions of the good.

Furthermore, the notion that the entire purpose of democracy is geared towards righting past wrongs, and not creating a stable society for the future, finds further congruence with the third element of the *social rule of law* developed in section 3.8. The ANC wishes to rectify past injustices through the process of democracy and does not aim at creating a rule-based society for the future. Other elements that align the ANC's views with the notion of *social rule of law* can be found in the conceptions of the state, that of an interventionist state capable of righting past wrongs, and the people (demos) as primarily black South Africans, or a specific group and not all individuals. These notions are all closely tied to the *liberationis*t strand of democracy which falls under the *social rule of law* as identified in chapter three.

Butler (2005) offers interesting arguments on the nature of the NDR. It should be evident from the above sections that the NDR contains certain contradictory elements. For example, the people are seen as being composed of different groups, yet are also defined in particular terms as being the black majority. Similarly, the NDR claims to support a wide range of aspirations, but advances notions of the hegemony of ideas and also defines the public good in a specific manner. For Butler (2005:726), this ambiguity inherent in the NDR is no coincidence and the author argues that the vague nature of the NDR allows it to fulfil two very important goals within the ANC and the Tripartite Alliance.

> Firstly, NDR allows the movement to maintain an overarching unity by prolonging the teleology of struggle. […] The commitment to an overarching project holds the ANC together in the face of immediate divergences of interests and ideology, while the NDR's proliferation of nebulous phases, stages, and time frames allows

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contestation over the purposes of the movement to be continually moderated and deflected (Butler, 2005:726).

The second goal of the NDR ties into the first; according to Butler (2005:726) the NDR creates an "…intellectual framework through which substantive political argument and accommodation…" of diverse intellectual and ideological protagonists is facilitated. The Tripartite Alliance, which consists of the ANC, COSATU and the SACP, is founded on the common commitment to the NDR. The SACP uses the NDR to advance the anti-capitalist nature of the ANC's liberation struggle as well as using the NDR to highlight the shortcomings of economic liberalisation and democratisation (Butler, 2005:726). The SACP also uses the NDR to guard against factions on both the far left and right of the spectrum and frequently employs NDR rhetoric in mitigating conflicts that arise in the Tripartite Alliance between COSATU, SACP and the ANC (Butler, 2005:726-7).

4.3.3 Summary

There are a number of reasons why the brief description of equality, freedom and the NDR are relevant. Firstly, it shows that there are identifiable values that can be associated with the conceptions of liberty, equality and democracy as subscribed to within ANC rhetoric. The ANC's conceptions of liberty and equality are closely aligned to how the concepts are defined within the *social rule of law* as explained in chapter three. The brief summation of the NDR also shows that the ANC views democracy in a specific light. This definition is not that of standard western-liberal definitions that accommodate pluralism nor is it entirely in line with the Constitution of 1996, which although it stresses that past injustices should be corrected, also highlights the importance of honouring *everyone's* fundamental rights. The ANC's view of democracy can be labelled as a *liberationist* conception through the goals of democracy, the role of the state in the democratic project and the pursuit of hegemony. The focus on material inequality and the re-aligning of society based on substantive issues further links it to the *liberationist* strand of democracy present in the *social rule of law* model. The ANC, by casting itself as the supreme determiner of truth, is relying on a conception of positive liberty as was discussed in section 2.3.1. The ANC reduces the individual to a member of the collective and purports to know what the supreme or ultimate good is to which there must be strived. Such a conception of the good relies on positive liberty captured in the *social rule of law*. The demos within ANC rhetoric of democracy, despite allowing for a

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plurality of categories, is geared towards serving the needs of a specific community, that of the black majority. The party can furthermore be closely aligned to constitutive elements described under the *social rule of law* developed in the conceptual typology based on other studies in the field of political science on the ANC's views of equality, liberty and democracy

The final function of this exposition is that it highlights that there are works, other than this study, which also focus on ideas, values and conceptions of role-playing stakeholders such as the ANC. These studies are all employing the same basic rationale found in this dissertation and although they might not explicitly mention it as such, all of these studies are referring to values and beliefs the ANC associates with concepts such as democracy, equality and liberty. As was mentioned previously, the rule of law and democracy are intertwined and the institutional arrangements are also of importance in how the rule of law gains expression in liberal democracies, these aspects shall now receive attention.

4.3.4 The ANC and the Institutional Framework of Rule of Law and Democracy

Just as the ANC has specific conceptions regarding democracy and associated concepts of equality and freedom, there are similar identifiable trends vis-à-vis the ANC and the institutional framework of the South African democracy. The institutional framework is a reference to state form and also to the executive, legislative and judicial chambers of government. The ANC's opposition to a federal state form was noted in the section dealing with the constitutional negotiations. The South African state form that resulted from the negotiation process can be described as a "unitary state with federal features" (De Jager, 2012:152). There are other authors who come to similar conclusions on the nature of South Africa's state form as possessing both unitary and federal characteristics (Butler, 2009:117; Coetzee and Wessels, 2003:130; Malherbe, 2008:432-5). This study is however not overtly concerned with an accurate description of state form — relevant to this dissertation are the ANC's views or understanding of the manner in which the state form should gain expression in democratic South Africa. The ANC, through the process of transformation as captured in the NDR, seeks to centralise power of all state institutions (Southall, 2005; Butler, 2005) and the party actively pursues the extension of its influence in "…all levels of power in the public service, military, intelligence services, parastatals and regulatory bodies" (Butler, 2005:720).

This is captured, in part, in the explanation of the strategic tasks of the democratic state:

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> The democratic forces must understand that the old state is incapable of transforming itself. It can neither be the instrument of its own abolition or fundamental transformation, nor can this process occur spontaneously. This task must be carried out consciously by the victorious revolutionary forces. Any revolutionary movement that does not understand and act on this is condemned to fail in its objectives and will end up being corrupted by and absorbed into the system it sought to overthrow. The democratic state must therefore consists [sic] of the following elements: a constitutional framework defining the nature, purpose and parameters of governance; elected national, provincial and local legislatures with representatives drawn from competing political parties; executive bodies (`governments`) drawn from these legislatures, state departments, security organs (police, defence, prisons, intelligence), the judicial system; state corporations; regulatory bodies and other permanent or temporary statutory bodies. In order to fundamentally transform the state and the socio-economic organisation of society, the democratic forces must effect structural changes of the state machinery; personnel changes affecting the civil service and transform the political and ideological orientation of the individuals and institutions that make up the machinery of the state (ANC, 2000).

The drive towards centralisation and total control of state apparatus can be partially attributed to the ANC's views on achieving democracy. However, it must also be noted that the fusion of the legislative and executive bodies is also partly the result of Westminster type systems (Butler, 2005:720). Although the separation of powers doctrine is not expressly referred to in the founding values of the Constitution, the doctrine permeates through the Constitution and has been recognised by the courts (Roux, 2005:2-3). In the South African context, the fusion of executive and legislature is closer to complete than partial due to the ANC's elective dominance (Alence, 2004; Butler, 2005; Muriaas, 2011). South Africa is not unique in this regard with Labuschagne (2004:99), Devenish (2005) and de Vries (2006:47) noting that the fusion of the executive and legislative chambers is common in newly democratised states. The net result of the fusion of legislative and executive chambers of government, regardless of the origin, is what has been labelled as the judicialization of politics. This was discussed in section 1.6 and refers to the notion that the judiciary has become a crucially important institution in modern liberal democracies as it is tasked with maintaining the legal order of the government structure. Consequently, the independence of the judiciary becomes

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paramount if the legislative and executive chambers of government are not completely independent.

Roux (2005) argues that the independence of the judiciary has played a key role in establishing newly democratic regimes. It was highlighted in section 4.2.4 that the inclusion of socio-economic rights also has implications regarding the separation of powers doctrine as the adjudication of socio-economic rights may have policy implications. The concern regarding the independence of the courts plays out in the field of jurisprudence and falls outside the scope of this study. What this dissertation is concerned with in relation to the separation of powers, and more specifically the independence of the judiciary, hinges on political problems of judicial independence.

Labuschagne (2004) argues that the fusion of executive and legislative chambers undermines the separation of powers doctrine in South Africa. However, the dominance of the executive over the legislative is somewhat mitigated by the stronger judicial authority and substantial judicial review given to the courts in the new constitutional era. This institutional arrangement allows the courts to act as an "institutionalised watchdog" and enables the judicial institution to prevent encroachments against the principle of the separation of powers as embedded in the Constitution (Labuschagne, 2004:100). De Vries (2006) questions this assertion by arguing that although the judicial institution is separate from the executive and legislative, the judiciary lacks true power and can therefore not fulfil its function as originally intended in conceptions of *trias politica*. It must be acknowledged that these debates on the separation of power include different notions of how the principle can be defined and the manner in which it functions in real-world democracies. Regardless of theoretical and conceptual complications, which will be somewhat bypassed in this section, the judiciary plays an important role in the South African democracy due to the fusion of executive and legislative chambers of government.

In light of the discussion of the ANC's conceptions of democracy and related elements, with specific reference to transformation, it should be evident that the judicial institution also be included in conceptions of transformation. The number of scholarly works revolving around the issue of the transformation of the judiciary can attest to the importance of the subject, at least in academic circles (Budlender, 2005; Dugard, 2008; Mothupi, 2006; Wesson and Du

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Plessis, 2008)[67]. The judicial institution plays an important part in upholding the rule of law, regardless of which conception of the rule of law is subscribed to, since the judiciary acts as an institutionalised watchdog. Issues relating to its transformation, which is essentially a political project, are therefore of utmost importance when considering the rule of law in the South African democracy.

The ANC's notion of transformation is, however, not the only reason that the judiciary will be subject to transformation. Budlender (2005:715-6) contends that transformation is a key theme in the Constitution and that this implies that the judiciary must also be transformed. Transformation of the judiciary can, according to Budlender (2005:716), have three meanings. The first is the transformation of the judiciary in demographic terms in order to more accurately reflect the population of South Africa. Secondly, the judiciary can be transformed with respect to underlying attitudes and must embrace the principles of the new legal order. The third notion is perhaps the most contentious and refers to the notion that the judiciary must transform in order to be more responsive to the goals of the democratically elected government. Wesson and Du Plessis (2008) identify similar, but more extensive, meanings associated with judicial transformation. Wesson and Du Plessis (2008:189) argue that the judicial transformation can refer to the process of judicial appointment, underlying attitudes held by the judiciary, greater judicial accountability and a more efficient judiciary.

The argument for the transformation of the judiciary in demographic terms holds that it is of utmost importance as the judges need to reflect the broader society they are presiding over. This demographic transformation will, or so it is claimed, increase the confidence of the public in the judiciary as the institution is more representative of them. Public confidence is essential if the courts are to fulfil their constitutional functions. This is especially relevant in the South African society characterised by racial divisions. Furthermore, a diverse bench will increase the plurality of perspectives held by judges and enhance the quality of judicial decision making (Budlender, 2005:716-7; Wesson and Du Plessis, 2008:194-5). The main problem with this line of argument is that it assumes that racially diverse identities will be identical to a plurality of perspectives.

[67] For other works relating to the role of the judiciary in South Africa, see: Davis, 2006b; De Vries, 2006; Labuschagne, 2004; Malherbe, 2008; Roux, 2005.

The transformation of judicial attitudes is crucial to facilitating the creation of the society as envisioned by the Constitution of 1996 (Wesson and Du Plessis, 2008:200). According to Budlender (2005:718) what is required is transformative jurisprudence that is rooted in the fundamental values found in the Constitution. This calls for a purposive approach of the interpretation of common law, statutes and the Constitution (Budlender, 2005:719). However, such an approach is laden with risks, for as Budlender (2005:719) notes it immediately raises the question of whose purpose should such a form of jurisprudence serve. Furthermore, such an approach does not stipulate exactly what the purpose is. Transformation in this sense is therefore somewhat open ended and is a contestable term.

Such a view of transformation impacts on the third manner of defining transformation of the judiciary as identified by Budlender (2005). This is the notion that the judiciary must, in pursuing the transformative project, be responsive to the goals of the democratically elected government (Budlender, 2005:719). The judiciary must be committed to the social transformation that the constitution promises and requires, and not that which the current ruling party seeks to accomplish. The standard strived for is that of purporting a view of transformation as subsumed in the Constitution, not a view of transformation grounded in party rhetoric (Budlender, 2005:179-20). "What has to be guarded against is any explicit or implicit suggestion that judges or magistrates should ignore or bend the law in order to comply with either the new national ethos, or with what the government will find convenient" (Budlender, 2005:720). Such an interpretation of transformation works counter to the transformation project envisioned by the Constitution, and will result in a judiciary merely rubber-stamping or conforming to the government's needs. Transformation holds the inherent risk that the judiciary may be manipulated by those who seek a compliant judiciary and that this can be done in the name of transformation (Budlender, 2005:711).

The issue of the transformation of the judiciary is an important one with respect to the rule of law and democracy in South Africa. The appointment process of judges and the conduct of the JSC is frequently in the news for the manner in which it conducts its affairs, as was briefly discussed in section 4.3.1. Although the details of these issues are not of primary concern to this dissertation, it is necessary for now only to take note that the issue of transformation of the judiciary resonates in the Constitution and also in political party rhetoric. The transformation of the judiciary, the appointment of judges and the conduct of the JSC is a highly politicised aspect of the South African democracy, not only due to the

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nature of the South African transformation project as encapsulated in the Constitution, but also due to the fusion of the executive and legislative which casts the judicial branch as the last truly independent arm of government.

4.3.5 Popular Conceptions of Democracy and the Rule of Law in South Africa

The intention of this section is to highlight that there are identifiable trends in public opinion on democracy and the rule of law in South Africa. The goal is not to offer a full exposition of public opinion literature, nor to make arguments regarding the effect or consequences that such opinions might hold for democracy in South Africa. The intention is simply to show that, within the literature on public opinion, there are identifiable trends. The purpose is to show that the public, or demos in South Africa, has certain views that may be related to the conceptual typology developed in chapter three. The purpose is not to make definitive statements about the nature, implications or causes of public opinion. Another note on works on public opinion worth considering is that of the meaning which can be read into them. Works on public opinion only 'measure what they measure' in the sense that one can only make statements about which questions or items are posed to respondents. Furthermore, there are various ways in which to measure, for example, support for democracy and the rule of law. This varies from one study to the next and depends on the operationalisation of concepts, whether respondents understand the items posed to them and other factors such as the language the survey was conducted in, sampling method, composition of the sample and many more. This is not to say that public opinion works have no merit or value, it is only that one must be circumspect of the meaning one invests into the results of such works.

Regardless of the conceptual pitfalls associated with public opinion works, certain trends, such as they exist, are largely polarised along racial lines with Gibson (2009a:136) noting that "…on many (if not most) political issues, South African 'public opinion' as a unitary whole does not exist". Gibson (2009a:136) highlights that there are interracial differences in political opinions, attitudes, values and behaviours in a range of subjects which include, political tolerance (Gibson, 2004), truth and reconciliation (Ferree, 2006; Piombo and Nijzink, 2006), party support and voting behaviour (Seekings and Nattrass, 2005), economic matters, poverty and inequality (Kladermans, Roelfs and Olivier, 2001; Roberts, 2006) and political participation and civil society involvement. The exact origin or reason for such racial differences is not the topic of discussion but one can safely conclude that both the legacy of

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apartheid as well as the gross nature of economic inequality in South Africa are contributing factors.

There are certain identifiable trends in public opinion on democracy in general and specifically on the rule of law. Bratton and Mattes (2001) investigated whether support for democracy in Africa is intrinsic or instrumental. The authors argue that intrinsic support for democracy is a commitment to democracy regardless of social or economic conditions, whilst instrumental support hinges on the government's ability to provide substantive ends, such as jobs or basic services (Bratton and Mattes, 2001:448). The authors found that without material gains being awarded to them, many South Africans would stop supporting a democratic regime (Bratton and Mattes, 2001:454-5). Bratton and Mattes (2001:455) argue that in South Africa there is a large disparity amongst racial groups in their support for democracy. Africans tend to equate democracy with the provision of material benefits, such as jobs, houses and increased incomes — their support for democracy is therefore instrumental. White South Africans tend to support democracy in intrinsic terms, supporting the procedural aspects of democracy, with specific focus on the protection of minority rights, regular elections, free speech and party competition. "And while many South Africans of all races say they accept the necessity of redistributing jobs, houses and incomes, blacks seem to focus more on 'equality of results' while whites stress 'equality of opportunity'" (Bratton and Mattes, 2001:455).

Although the work by Bratton and Mattes (2001) was conducted more than a decade ago, the findings are still relevant in present day South Africa within public opinion literature, with many contemporary works on public opinion on democracy coming to roughly the same conclusions or building further on the findings of Bratton and Mattes (2001). Mattes (2012) investigates support for democracy amongst the post-apartheid generation or the 'born-frees' as he refers to them. One of the conclusions he reaches is that "…South Africa's democracy remains as dependant on performance-based 'specific' support as ever" (Mattes, 2012:151). Zuern (2009) employs a similar dichotomy to that of Bratton and Mattes (2001) which she labels procedural and substantive democracy in her work which investigates endorsement of democracy in South Africa. Zuern (2009) finds that a substantive approach proves to be more fruitful than a procedural one in understanding South African perspectives on democracy. Davids and Hadland (2008) explore satisfaction amongst South Africans in democracy. Davids and Hadland (2008:277) find that "…South Africans seem satisfied with the way

democracy is working if the overall life circumstances of all citizens are good, if their own situation is improving and if they have trust in institutions". These works therefore highlight that framing the debate on public opinion by employing dichotomies such as procedural and substantive democracy, and the instrumental and intrinsic support for democracy, are both theoretically and empirically relevant. That is to say, arguing that South Africans equate democracy to certain tangible economic, social and political goods is a defensible argument based on the findings of public opinion works. These works highlight that for many South Africans democracy is a means to an end, namely economic and social betterment. Since dichotomies such as these have a degree of congruence with the theoretical model developed in chapter three, I shall revisit the topic below.

With relation to the institutional characteristics of the South African democracy, Gibson and Caldeira (2003) examined the relationship between the legitimacy of the South African CC and the acceptance of the Court's decisions by the public. The authors found that the majority of South Africans have ambivalent attitudes towards the CC. At the time of their study, the CC enjoyed marginal majority support with most South Africans trusting the CC. It is however hypothesised that if the CC were to make unpopular decisions, it would face a crisis of legitimacy (Gibson and Caldeira, 2003:9). The authors concluded that the CC did not, at the time of their survey, enjoy broad institutional legitimacy and had not developed into an institution that could increase trust in democratic institutions (Gibson and Caldeira, 2003:23). Another work on the legitimacy of the courts, which used data from 1996/7, 2001 and 2004, conducted by Gibson (2009b:250) found that the CC enjoyed only low to moderate levels of legitimacy amongst the public. Gibson (2009b:231) did, however, find that the CC and the parliament of South Africa were slowly building legitimacy. Interestingly, white South Africans show less support in both the CC and parliament, lagging significantly behind the other racial categories (Gibson, 2009b:230).

There are other works which indicate that attitudes towards the institutions of the courts may be changing with support for the legitimacy of the courts improving. A study by Carter (2011) using Afrobarometer data found that 70% of respondents felt that the courts were legitimate institutions, a higher rating achieved than that of the police (66%) and tax department (60%). In addition, courts enjoyed a high level of legitimacy amongst South Africans of all races. Carter (2011:20) concludes that state legitimacy is highest amongst respondents if the state protects individual rights and adheres to a strong sense of the rule of

law. Du Toit and Kotzé (2011:50-1) found that in 2006 public confidence in the CC and courts in general were at 66% and 64.7%, respectively, a higher ranking than parliament which enjoyed 63.7% confidence. Amongst elites the picture is somewhat different with 88.4% of elites showing confidence in the CC, which is the institution that enjoyed the most confidence, while courts in general garnered 60% confidence, a lower ranking than parliament which enjoyed 64.4% confidence.

It should therefore be evident that no definitive statements can be made regarding popular acceptance, support or legitimacy of courts and parliament, which are the institutions associated with the rule of law. One is however, able to glean from these studies and their findings that support for the legal institutions in South Africa out-scores support for the parliament, in many, but not all, studies. Relevant to the work at hand is that even though the level of support for such institutions is not as high or robust as it could be, there is some indication that support for these institutions is indeed increasing (Carter, 2011; Du Toit and Kotzé, 2011; Gibson, 2009b).

Public opinion works that deal specifically with popular opinions on the rule of law are highly relevant to this dissertation. There are a number of such works to be found within the literature. Gibson and Gouws (1997) explored public opinion on the rule of law through views of respondents on four items, in the form of statements, with respondents' disagreement to the statements signalling support for the rule of law. The statements employed in the study were: *Sometimes it might be better to ignore the law and solve problems immediately rather than wait for a legal solution; It's all right to get around the law as long as you don't actually break it; In times of emergency, the government ought to be able to suspend law in order to solve pressing social problems;* and *It is not necessary to obey the laws of government that I did not vote for* (Gibson and Gouws, 1997:179). Gibson and Gouws (1997:188) concluded that in South Africa, based on the outcome of the study, support for the rule of law is not particularly strong. Based on their findings the authors conclude that citizens tend to believe that the law can be manipulated, ignored or bypassed if the law fails to produce the desired outcome. Furthermore, there are significant differences in attitudes towards the rule of law between racial groups, with white South Africans showing a stronger attachment to the rule of law and legal universalism than black South Africans (Gibson and Gouws, 1997:188).

Gibson (2009a) used the exact same items in a 2004 survey to gauge public opinion on the rule of law. It must, however, be noted that this was subsumed in a work primarily concerned with public opinion on various land reform issues. Gibson (2009a:158) comes to a similar conclusion as he and Gouws did in 1997 with regards to these statements, concluding that the average support for legal universalism and the rule of law is fairly limited in South Africa. Furthermore:

> Interracial differences in support for the rule of law in South Africa are substantial […]. Black South Africans endorse significantly fewer of the rule of law statements, especially compared to white South Africans. Both coloured South Africans and South Africans of Asian origin are also substantially more committed to the rule of law than black South Africans. The data also indicate that whites are significantly more supportive of the rule of law than the other two racial minorities in the country, although the difference is not nearly as great as that between black and white South Africans (Gibson, 2009a:158).

An important aspect of analysing public opinion on the rule of law is that it is very difficult to measure it accurately. Gibson (2009a:157) argues that accurately measuring opinions on the rule of law is difficult. This is, according to Gibson (2009a:157), because

> [f]ew people are likely to reject the rule of law in principle. Survey questions that ask people whether they agree that rulers ought not to act arbitrarily or capriciously or that citizens should be free to ignore the law are unlikely to be of much use in tapping popular commitments to the rule of law. Instead, the difficult test of support for the rule of law involves the juxtaposition of law and some other valued principle. Questions are most useful when they force people to weigh the relative value of two principles; only when supporting the rule of law involves some cost can we begin to gauge how valuable the rule of law is to people.

A political and policy issue that could provide a good case for measuring public opinion on rule of law is that of land reform. Land reform is an extremely emotive issue in South Africa and has a strong historic, social and political context. Furthermore, the land issues are "…fairly salient to South Africa and constitute a vital political challenge to the country" (Gibson, 2009a:143). The land reform issue therefore provides an adequate political problem against which opinions on rule of law can be gauged. It must be noted that this was not the aim of Gibson's (2009a) work. Rather, Gibson (2009a) investigates support for redistributive

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land reform policy in South Africa. Gibson (2009a:135) finds that land redistribution is a symbolic issue for most black South Africans which is "…grounded in values connected to land as a symbol and in concern for the historical injustices of apartheid and colonialism". There are, however, a number of relevant findings in the work by Gibson (2009a) which have direct bearing on this dissertation.

Gibson (2009a:137) notes that a significant political finding of his work is that extreme racial polarisation on almost all aspects of the land issue is prevalent. Interestingly, there exists little division amongst black respondents on the basis of class or material interests. Furthermore, Africans attach far greater importance to land reform than their white, Asian or coloured countrymen. Amongst the latter three categories, only a quarter to a third rank land ownership and redistribution as very important. In contrast, the majority of black South Africans ranked land reform and redistribution as a very important problem (Gibson, 2009a:140). Another important point of difference is that black South Africans

> …express markedly weaker support for the sanctity of private property than do other South Africans. For example, blacks are much more likely to assert that community rights should trump individual rights when it comes to land (although a plurality of coloured people also assert this view). With no exception, blacks are always more weakly committed to private property rights than other racial groups in South Africa. Perhaps most unsettling is the finding that more than a third of the black respondents agree that all white-owned land in South Africa ought to be taken away without compensation by the government (Gibson, 2009a:155).

These lengthy quotations from a single study on public opinion on land reform have been included to emphasise that South Africans feel strongly about land issues. The study highlights that stark difference in opinion between the racial groups, with white and black South Africans having fundamentally different views on the land issue. In addition, black South Africans tend to favour land reform and redistribution policies due to the value and historical significance they attach to land. Taking this into account, there is an important finding within Gibson's (2009a:149-150) work. Gibson (2009a:149) explored alternative land policy attitudes by investigating public opinion on the criteria which land policy ought to be

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based on[68]. Interestingly, "South Africans of every race believe it quite important that land policy should be based strictly on the law. […] And it is noteworthy that large proportions of respondents rate this as a factor of highest importance" (Gibson, 2009a:149). Gibson (2009a:149) attributes this importance attached to the law on the effects which emanated from the lawless land-grabs in Zimbabwe. Although such an explanation may indeed be correct, there could be another way of accounting for the anomalous finding within Gibson's (2009a) study.

Swart (2010) examines public opinion on land reform with specific reference to the rule of law. The study makes use of three sets of surveys. Two surveys were conducted in 2004 and 2007 by Ipsos-Markinor amongst the general population and a third survey was carried out amongst elites in 2007. The study consisted of four items, framed as statements posed to respondents. The respondents were required to list their level of agreement on a five point Lickert scale. The items used were: *All land whites own they stole from blacks; landowners who dispute land claims by going to court are racist; landowners who dispute land claims by going to court are blocking transformation;* and *landowners who dispute land claims by going to court are fairly using the rights awarded them by the constitution.*

Analyses of the responses to these statements provide a unique insight into opinion on the rule of law because the items, with the exception of the first one, ask the respondents to weigh the rights of landowners going to court against whether they perceive landowners as racist, blocking transformation and fairly using their constitutional rights. The statements therefore juxtapose the procedural element of rule of law, the act of going to court, against opinions and perceptions of racism, compliance with the democratic goal of transformation and the constitutional rights of landowners to dispute land claims in court. The last item, which weighs the right of landowners going to court against perceptions of the act of disputing land claims in court as a constitutional right, is believed to capture the notion of the procedural aspects of the rule of law most accurately (Swart, 2010:125-8). The research findings delivered some interesting results.

[68] The available criteria that respondents could list as criteria that land policy ought to be based on were: making up for past injustices; reduce unequal access to land; ensuring hardest workers get more; strictly follow the law; ensuring those suffering most get more and taking away land unfairly acquired (Gibson, 2009a: 150).

As with the other studies referenced above, there is a strong racial dimension in the responses to the statements with black and white South Africans tending to have opposed views and coloured and Indian respondents placing somewhere between these extremes. Black South Africans showed a high level of agreement to the first three statements with over 70% of black respondents agreeing to the statement *all land whites own they stole from blacks* in both the 2004 and 2007 surveys. This is contrasted to the less than 10% of white respondents who agreed to the statement in both surveys. For the coloured and Indian respondents less than 40% of the respondents agreed to the statement in both surveys. Amongst elites, slightly less than 25% agreed with the statement with parliamentarians showing the highest levels of agreement at 39.9% (Swart, 2010:130).

The second and third statements also showed a strong racial dimension to responses, but not to such a strong degree as the first statement. Black South Africans showed a high level of agreement to the statement, *landowners who dispute land claims by going to court are racist*, with 44% in 2004 and 51% in 2007. This can be contrasted to the level of agreement amongst whites, 8% in 2004 and 9% in 2007; coloureds, 19% in 2004 and 27% in 2007 and Indian respondents at 19% in both 2004 and 2007. Responses to the statement *landowners who dispute land claims by going to court are blocking transformation also* showed a strong racial element. Black respondents again had the highest level of agreement to the statement at 48% in 2004 and 50% in 2007, with coloured respondents showing a 23% and 26% agreement in 2004 and 2007, respectively while 22% of Indian respondents agreed to the statement in 2004 and 20% in 2007. White respondents again showed the lowest levels of agreement at 9% and 8% in 2004 and 2007, respectively. Elite responses to these statements were much closer to the white, coloured and Indian respondents with elites showing a 12.5% agreement to the second statement and a 24.6% to the third. Parliamentarians showed the highest level of agreement to these statements at 23.6% and 43.7% for the second and third statements respectively (Swart, 2010:135-40; 145-50).

The truly interesting results are, however, to be found in the responses to the last statement, *landowners who dispute land claims by going to court are fairly using the rights awarded to them by the constitution*. Regardless of race, the majority of respondents agreed with this statement. It is the only statement which showed no statistical significance between recorded responses and the race of the respondent. Amongst black respondents, 50% agreed in 2004 and 55% in 2007; for coloured respondents the results in 2004 and 2007 were 60% and 66%

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respectively whilst the Indian respondents listed 53% and 56% agreement in 2004 and 2007, respectively. White South Africans showed the highest level of agreement at 68% and 61% in 2004 and 2007 respectively. Amongst elites the responses were overwhelmingly in agreement with the statement at 85% (Swart, 2010:140-5).

It is my opinion that these results and those of other studies referred to in the previous pages can be interpreted by using the conceptual typology developed in chapter three. The study by Swart (2010) found a high degree of racial differences in levels of agreement to statements except for the responses to the last statement which is concerned with constitutional rights, with which most South Africans, regardless of race, agreed. It is plausible that respondents who have fundamentally opposed views to all the statements, except the last one, could point to the notion that South Africans, regardless of race, place great value and importance on constitutional rights. The fact that respondents are strongly divided based on race regarding all the other statements could indicate that although most South Africans believe in the Constitution and in the importance of protecting constitutional rights, they attach fundamentally different values to their belief in the Constitution. That is to say, even respondents who believe landowners are thieves, and that those who dispute land claims by going to court are racists and are blocking transformation, still believe that these landowners, of whom they have an overwhelmingly negative opinion, have a Constitutional right to dispute land claims in court. Taken together with the work by Gibson (2009a) showing that South Africans wish land reform to follow the law, as well as the works by Carter (2011), Du Toit and Kotzé (2011) and Gibson (2009b) which demonstrate that South Africans have faith in the intuitions associated with the rule of law, an argument can be made that although South Africans believe in the rule of law, they may attach fundamentally divergent values to this belief.

I am not arguing that the theoretical model explains or accounts for all the variance in public opinion, nor that the works cited provides concrete evidence of the relevance of the conceptual typology. I am merely noting that, within the works on public opinion, the developed conceptual typology of the rule of law may offer a defensible description of the divergence found in public opinion. The work by Swart (2010) shows that South Africans have contrasting views on the relationship between the rule of law and transformation, with many black respondents being of the opinion that going to court to dispute land claims blocks transformation. This can be interpreted, due to the nature of the statement, that black South

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Africans favour the substantive elements of democracy and rule of law (transformation) above the purely procedural elements of being allowed to contest claims in court. Furthermore, many black South Africans feel that contesting claims in court is a negative or unfair action due to the fact that they view this as a racist action. Favour is therefore shown to a particular conception of fairness, one which favours a particular group or community, the landless, above the right of landowners to contest claims in court, a right which can be viewed as representing the notion of the universal protection everyone should enjoy under the rule of law. Both of these statements therefore show a degree of congruence with elements identified under the *social rule of law*. It shows a particular preference for the goal of democracy, that it should favour the project of transformation. It also indicates a tendency amongst those surveyed to view the rule of law as being geared towards placing the needs of the landless above those of landowners. Finally, due to these opinions, it can be argued that this conception of the rule of law is geared towards rectifying past injustices such as unfair land acquisition. The findings therefore resonate with the elements identified in section 3.8. The views of the black respondents, with their preference for a specific group and a specific outcome of democracy, are therefore more closely aligned to the notion of *social rule of law*.

4.4 Summary

The aim of this chapter was to situate the conceptual typology developed in chapter three in the broader literature on democracy and the rule of law in South Africa. This was done by establishing that it is possible to identify specific ideological orientations of the parties that were present during the negotiation. It was also found that the views subscribed to by the ANC during the negotiation process finds congruence in the idea of *social rule of law* as developed in chapter three based on a number of analysts' interpretation of the ANC's views on the role of the state, the type of democracy advocated and the advancement thereof. It was subsequently concluded that the ANC holds specific and identifiable opinions and views of concepts of liberty, equality and democracy and that all of these resonate in the *social rule of law* as developed in chapter three.

It was, however, noted that the Constitution of 1996 does have a distinct social orientation with the inclusion of social justice and redistributive equality as well as other elements. It must therefore be noted that although the ANC's conceptions can be captured by the *social*

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rule of law, such conceptions are not completely incompatible with the Constitution of 1996. It was also shown that certain views subscribed to by the ANC, very notably those of equality and liberty, are considered by some as being incompatible with the Constitution. This further strengthens the ties of the ANC's views to that of the *social rule of law*.

The chapter concluded with a brief review of how the public, or demos, view democracy. It was shown that the majority of South Africans view democracy in a substantive light which focuses on tangible social and economic goods. Democracy, for the majority of South Africans, is not a rule-based society which gives every individual the right to pursue their life choices. Democracy is seen rather as a means of escaping the hardships imposed upon them during apartheid. This is labelled as an instrumental or substantive conception of democracy. Such a view of democracy has strong ties with the *liberationist* strand of democracy identified to fall under the *social rule of law*. It was also investigated whether South Africans subscribe to a specific conception of the rule of law based on public opinion works on the rule of law. It was shown that certain groups of South Africans tend to view the rule of law in a manner that is consistent with the *social rule of law*. Based on these works, it is plausible that some South Africans tend to favour an understanding of the rule of law which is closely aligned to that of the *social rule of law*.

The goal of this chapter was ultimately to link the conceptual typology to the broader literature on rule of law and democracy in South Africa. This was largely an exercise based on secondary works which served the purpose of highlighting the criterion validity of the conceptual typology. The task remaining is to apply the conceptual typology to a specific case and to determine, by means of empirical investigation, the external validity of the conceptual typology.

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Chapter 5: The Hate Speech Case

5.1 Introduction

The aim of this chapter is to present the case selected for this study — the hate-speech case which involved Mr Malema, the ANC, AfriForum and TAU-SA. A summary of the events of the case was given in section 1.1. It is however, important to first justify why the selected case can be considered as a viable case for applying the conceptual typology. In part, the exploration of the case itself will serve as a legitimating and validating exercise. Regardless, there are certain elements which do make the hate-speech case an appropriate and relevant case for investigating whether there are identifiable, contending and divergent interpretations of the rule of law present in South Africa.

Before an exposition of the selected case can commence, it must be remembered that the goal of this dissertation is to investigate if there are contending conceptions of the rule of law. Law and the rule of law were not strictly defined in a legal sense. Law was instead defined as the interlocking of three elements, interests, institutions and ideologies (Meierhenrich, 2009:56). The definition of rule of law was one put forward by Kahn (2001) which defines the rule of law as a matrix of beliefs and a means of making sense of everyday life. It is therefore not a strictly legal definition of the ideal. Rather, it was argued that conceptions, or mental models, influence the manner in which role-playing stakeholders form conceptions of the rule of law. Classical and legally orientated definitions of rule of law, as put forward by Fuller (1969) and Rawls (1999), were subsequently provided to show that there are differences in the constitutive elements that make up differing conceptions of the rule of law. I purposefully did not allow the argument to become embroiled in debates within the legal field regarding definitions and conceptions of the law and the rule of law.

A conceptual typology was developed from these works with which to identify beliefs, values and ideas associated with, or conceptions of, the rule of law. Based on other works, I formulated a conceptual typology which highlights the differences between, what I labelled *social-* and *liberal rule of law*, and that the difference between them hinges on three key elements. These are firstly, the role of the community and the individual in society and more specifically whether the community or the individual is afforded the most status and/or

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importance in society; secondly, the nature of the public good, whether it serves all individuals equally (plurality of conceptions) or whether a specific conception thereof is advanced that emphasises the needs of a specific community; and finally, the conception of time and history, whether the law and the rule of law is thought to advance future needs or whether the past is of more importance, in other words is the rule of law forward- or backward-looking[69]. The essence that this dissertation focuses on has been alluded to by other authors. O'Donnell (2004) touches on this when he refers to the "essence" of the rule of law, as does Weingast (1997) when arguing that it is "something beyond laws" which gives credence to the principle of rule of law. Dyzenhaus (2007:741) also notes an apparent danger or threat to the rule of law when he argues that "…tensions about jurisdictions and conceptions of the rule of law continue, not only because the question of the content of the rule of law is controversial, but also because in South Africa that controversy is inevitably affected by the politics of transformation". Dyzenhaus (2007:753) also argues that "…serious concerns have arisen about the government's commitment to the rule of law, on any conception of that rule".

In order to explore this problem it is therefore not necessary that the case selected bears directly on the ideal of the rule of law as this study is interested in the exploration of attitudes and beliefs, and not judgments, statutes and legal procedures (jurisprudence). However, there are certain requirements which need to be met in order for the selected event or case to be deemed an applicable and relevant case for an inquiry into the values, ideals and beliefs associated with conceptions of the rule of law and to ensure that the selected case addresses validity concerns adequately. It is proposed that the selected case must therefore: first, be based on a legal procedure, or dispute, to ensure that the case can be related to the rule of law in a procedural and therefore universal sense; second, involve a legally protected aspect of everyday life, preferably an inalienable right such as constitutionally protected civil or political rights; third, have political significance and be sufficiently politically charged to be salient in the public sphere/domain; fourth, involve important role-playing stakeholders in the South African democracy; fifth, play out in the public domain and have broader social significance; sixth, have clearly visible, identifiable and divergent views on an issue as expressed by the involved parties, namely the variance of opinion; and lastly have a clearly delimited scope in terms of the time-frame and issue it encompasses.

[69] As discussed in section 4.2.4.

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The hate-speech case which involved AfriForum, TAU-SA, Mr Malema and the ANC fulfils all the requirements set out above. The hate speech case was settled in a court of law through legal procedure; it was concerned with constitutionally protected civil liberties (freedom of speech and the right to equality and dignity); the case was politically significant and involved important political role players in the ANC and ANCYL and played out in the public domain; the hate speech case involved the important issues of minority rights and civil liberties and can therefore be considered an important political and social issue; the hate speech case created clear fault lines in public and stakeholder opinion, with a clear variance in opinion; and the hate speech case has a clearly defined time frame and scope. These elements will become clear as the discussion of the nature of the events and the presentation of the arguments put forward by the parties are explored. This chapter will also serve as an exercise in validity and legitimacy of the case selected.

It must also be noted that, based on the criteria listed above, there are a number of other cases within South Africa that could be viable for such an inquiry. Many cases were considered for this study including the nature and functioning of the JSC; the arms deal corruption saga and the alleged corruption case involving President Jacob Zuma and Judge Hlope; the political and legal problem of the Protection of Information Bill and issues and problems pertaining to the independence of the judiciary and the separation of powers. These cases all suffered from certain fundamental shortcomings which cast their applicability and relevance for such an inquiry in doubt. They suffer from not having a clearly demarcated time-span or scope and the material that can be considered is not clearly defined. In short, they are too open-ended.

Another significant aspect to be considered is the manner in which freedom of speech and hate speech function within other constitutional democracies. Such an inquiry is, however largely dealt with in the field of legal studies and jurisprudence, and therefore falls outside the scope of the current work[70] since this work is not an exercise in jurisprudence or legal scholarship.

[70] See Farrior, 1996; Primstone, 1999.

5.2 The Hate Speech Case

This study wishes only to examine whether there are identifiable contending interpretations of the rule of law, and if these can be systematically described. It is the intention in this study to establish whether the constitutive elements of the developed conceptual typology find congruence with a specific case, the *AfriForum v Malema* hate speech case. It is not an exercise in directionality, or in the arbitration of which party in the case was right or wrong. Concerns are not with issues that took up a great many pages in the court transcript and heads of argument, such as whether the words in question are a song, or a chant[71], what the exact meaning of the words are, whether there is a link between the song and farm killings, the nature of harm or the intent of the parties involved. The right, correct or just interpretation of the relevant laws are not the issue at hand. It is only the meaning of the rule of law, as expressed through the beliefs and values that can be identified in the arguments advanced by all parties concerned in this specific case that is of relevance to this study.

The first and most important order of business is to establish that this case is an appropriate example for the investigation of contending interpretations of the rule of law present in South Africa. This hinges on a number of key factors, which I will elaborate upon as the unpacking of the case proceeds. Firstly, there needs to be known, identifiable and understandable laws regulating hate speech and freedom of speech. Secondly, there needs to be a known and identifiable legal precedent, in order for the parties involved to predict, within a degree of reasonableness, whether their actions are in violation of these laws. That is to say, if there is a legal precedent for solving what is in essence a political problem, then actions that run counter to these precedents and laws, can give adequate insight into the manner in which the parties involved understand the rule of law. This is done is section 5.2.1 and 5.2.2.

It must also be noted that this dissertation is not principally concerned with Mr Malema[72], AfriForum, the TAU-SA or the ANC in their personal and institutional capacities. It is not about Mr Malema's utterances or his political views and the rhetoric which emanated from him or his personal views. The parties involved are merely representative of two opposing views on the hate speech case. The one side of the argument, represented by AfriFroum and the TAU-SA, contends that the uttering of the words is hate speech which impinges on the

[71] The words song and chant will be used interchangeably throughout the chapter.
[72] For detailed account of Mr Malema, see Forde, 2011.

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rights of a specific minority group. The other side, represented by the ANC and Mr Malema, holds that the words under consideration are not hate speech and should be protected as they are merely an expression of freedom of speech. It therefore stands to reason that much of what was offered as evidence by the parties, by means of justification for their stance, is irrelevant.

5.2.1 The Song and the Involved Parties

The exact meaning, history and nature of the song (whether it is a song or chant) was a much argued point in the litigation process and will be discussed in detail at various points in the chapter as I present the unfolding of the case. For now, it is however helpful if one knows what the words were and what they mean in a literal sense. The words in question as reported in the judgement are:

> 1. Awudubula (i) bhulu.
> 2. Dubula amabhunu baya raypha.
> 3. They are scared the cowards you should "shoot the *Boer*" the farmer! They rob these dogs (*AfriForum v Malema*, 2011:29-31).

All parties involved accepted that Mr Malema had uttered these words. The literal meaning of the words, although never admitted to openly by the respondents, was not disputed. Mr Malema admitted to singing the words in the colloquial language. What was challenged by the ANC and Mr Malema, was that the words had another meaning which needs to be considered within the context in which the words were uttered, and that this meaning has to do with the historical context of liberation songs (*AfriForum v Malema,* 2011:30-31).

The parties involved in the litigation procedure were the first complainant, AfriForum and the second complainant, TAU-SA. AfriForum is a civil rights organisation which is also aligned to the trade union Solidarity. AfriForum aims at advancing the aims of minority groups in society (AfriForum, 2013) and even though it is not publicly stated, usually represents the interests of the white minority group, known as the Afrikaners. TAU-SA is a member-bound agricultural union which represents the agricultural interests of commercial farmers. It is the oldest agricultural union in South Africa, established in 1897. Historically it represented the old Transvaal region (thus the name, TAU), but is currently an organisation with

representation at national level. Its membership at the time of trial was about 6 000 individuals who were directly or indirectly involved with agricultural activities. Their members are predominantly white Afrikaners but the organisation also includes farmers from other racial groups (Court Transcript, 2011, Vol.4:478). The first respondent was Mr Julius Sello Malema, the then president of the ANCYL, the second respondent the ANC. The *Amicus Curiae,* was the Vereniging van Regslui van Afrikaans[73].

On the issue of the parties involved in the litigation process, there is an interesting element which needs to be discussed as it adds to the validity of the selected case. Initially, AfriForum launched a complaint of hate speech against two respondents, Mr Malema and the ANC on the 12th of March 2010. The ANC was originally joined to the case as a result of the complaint laid against them by AfriForum. However, AfriForum subsequently withdrew the formal complaint against the ANC via a formal withdrawal as a result of a statement made by the President of the ANC and the Republic of South Africa, Jacob Zuma on the 10th of April 2010 (Court Transcript, 2011, Vol.2:250-253). The statement issued by President Zuma to the media stated the following:

> We place a high premium on order, stability and the rule of law in the country. That is why the ruling party took the step this week of calling for restraint from all its structures and members. Anyone who then goes against that statement is undermining the leadership authority of the ANC, and that cannot be accepted. When the ANC has made such a statement, it is totally out of order for us to continue as if such a statement was not made. Certainly there must be consequences for such behaviour. We have done this because of the need to respect a high court ruling relating to a particular liberation song. We also recognise that this song, in the current environment, could be misunderstood by those not familiar with the context and content of our struggle. In making this call, we do not intend in any way to diminish the proud history of struggle against apartheid. We do recognise that we have a

[73] "An *amicus curiae* assists the court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation, but believes that the court's decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the court because of its expertise on or interest in the matter before the court. It chooses the side it wishes to join, unless requested by the court to urge a particular position. An *amicus*, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs" (*Hoffmann v South African Airways*, 2000:44-45).

> responsibility to act in a way that reduces the potential for tension, and encourages unity. Our Constitution enshrines the independence of the judiciary and the rule of law. We must recognise the role of the judiciary as the final arbiter in disputes in society. The dignity and decorum of the institution must always be protected and defended. There are procedures that one should follow to challenge court decisions. Defiance of these procedures should not be tolerated. It would make mockery of our judicial system. It should be noted that to appeal a court decision is not to defy it (Presidency, 2010).

The statement was made in reference to a Court Order made by Judge Halgryn on the 26th of March 2010, effectively barring the song in question from being sung and making the singing thereof a criminal offence. Despite the formal withdrawal by AfriForum of the complaint against the ANC as a result of this statement, the ANC still chose to be party to the case. Mr Gwede Mantashe, then secretary general of the ANC, stated that there were many reasons for the ANC remaining joined to the proceedings. He stated that the song in question is "an ANC song". Another reason given by Mr Mantashe is that the song was the subject of another case wherein Judge Halgryn found the lyrics '*Dubula Ibhunu*' to constitute hate speech and declared the singing of the words unconstitutional and unlawful through means of a Court Order. The ANC had applied for leave to appeal in that case and on the same basis wanted to be joined to the *AfriForum v Malema* case. I shall return to the Halgryn case presently. The final reason that the ANC sought leave to become a party to the case is that any order regarding the song by Judge Lamont (the acting judge in the *AfriForum v Malema* case heard in the Equality Court) would, according to Mr Mantashe, have an effect on the ANC and all the members and not just on Mr Malema (*AfriForum v Malema* Case File, 2011:6). AfriForum responded arguing that no relief was sought against the ANC, and that it therefore had no reason to be party to the case (*AfriForum v Malema* Case File, 2011:11-13). Mr Mantashe, in his responding affidavit, argued that there were numerous reasons why the ANC should be allowed to join the case. The original complaint by AfriForum had cited the ANC as a relevant party and accordingly AfriForum was mistaken in assuming that withdrawing the complaint, seeking no relief from the ANC and arguing that the ANC had no substantial interest in the outcome was sufficient grounds for the ANC not to be a party. Furthermore, Mr Malema was a member of the ANC and was the head of the ANCYL at the time and the ANC therefore had a vested interest in the matter (*AfriForum v Malema* Case File, 2011:17-19).

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The legal merits of these arguments are not of concern to the argument presented in this dissertation. Relevant however, is that an essentially political issue was referred to the legal system. Du Plessis and Gevers (2010) noted that President Zuma's stance on the matter was to let the courts decide on what was essentially a political matter. Harber (2011) also argued that the hate speech case involving Mr Malema was a political issue and should have been dealt with by the political party and not by the courts. Although Judge Lamont allowed the ANC to join the *AfriForum v Malema* case, he noted that it would have been unlikely that the ANC would have been allowed to join in a normal court as it would have been unlikely that the ANC would have been able to establish "direct and substantial interest" (Rabkin, 2011a).

Another matter involving the ANC as an interested party has to do with a different case which involved similar lyrics. The Halgryn judgement, mentioned previously, is a case which involved two individuals, Mr Harmse and Mr Vawda (*ANC and Others v Harmse and Another*, 2011) and is relevant for two reasons. Firstly, it involves the same words as in the *AfriForum v Malema* case, and secondly, as mentioned by Mr Mantashe, the ANC *sought leave to appeal a court order* based on the argument that it was an affected party. I will not explore the *ANC and Others v Harmse and Another* case in totality, although I believe the judgment given in the application for leave to appeal make for interesting and relevant reading. I wish only to highlight the manner in which the ANC sought leave to appeal in the *ANC and Others v Harmse and Another* case, as it was cited by Mr Mantashe as being relevant to the *AfriForum v Malema* case.

The *ANC and Others v Harmse and Another* case involved two individuals who, acting in their capacity as individuals, approached the court to settle an urgent dispute. The first applicant in the dispute was Mr Harmse who brought an urgent application against Mr Vawda. Mr Vawda had made his intentions clear to display a banner during a peaceful march arranged by the Protection of our Constitution Organisation which was scheduled to be held on the 9th of April 2010 in which both individuals would take part. Mr Vawda wanted to display the words "*Dubula Ibunu*" on the banner and wanted to bring people along to shout this chant. Mr Harmse felt that such actions constituted hate speech and therefore sought the urgent order on the 26th of March 2010. During the day of 26th March, the parties involved settled the matter out of court and requested that the court make their settlement agreement an Order of Court (*ANC and Others v Harmse and Another*, 2011:3). Judge Halgryn granted this request. The Order of Court, *made by consent*, reads as follows:

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> 1. That the utterances and/or publication of the words "*Dubula Ibhunu*" is unconstitutional and unlawful. "*Dubula Ibhunu*" translated means "Shoot the *Boer*/White man".
> 2. That the publication and chanting of the words "*Dubuhla Ibhunu*", *prima facie* satisfies the crime of incitement (*ANC and Others v Harmse and Another*, 2011:4).

At the time of handing down the court order, Judge Halgryn considered the matter to be settled, until, as he states, he "…was confronted by such a furore in the press that it left me quite perplexed…" (*ANC and Others v Harmse and Another*, 2011:4-5). The matter seemed simple to him and the reaction it elicited from the public and media was rather inexplicable. Judge Halgryn made an order, not a judgment, by consent of the parties involved. The ANC then sought leave to appeal the settlement, even though it was not an affected party. Procedurally speaking, this is not the standard practise. The ANC's attorneys sent Judge Halgryn a letter wherein they requested leave to appeal the Court order on the grounds that they were representing the "public interest" (*ANC and Others v Harmse and Another*, 2011:7). The sentiment of Judge Halgryn to this request was such:

> The almost casual way, in which I am requested to furnish reasons to someone who was not a party to a matter, in which I granted an Order by agreement, *is rather ungallant, to put it mildly. There is no attempt, let alone under oath, (as it ought properly to have been done),* to show that the Applicant [read ANC] has standing for approaching me in this manner, save for the bold statement that an application for leave to appeal will be made "…in the public interest…" Moreover, the fact that I granted an Order by agreement, (which is undoubtedly known by the Applicant[read ANC]), in itself, is sufficiently compelling not to be obliged to furnish reasons (own emphasis added) (*ANC and Others v Harmse and Another*, 2011:7).

It is clear to me that Judge Halgryn was rather unsatisfied at the ANC's disregard for the procedural elements involved in approaching the Court on the issue of becoming an interested party that wishes to appeal. Judge Halgryn noted that it is significant that a party shows its standing under oath, and the ANC's neglect to do so is not to be taken lightly (*ANC and Others v Harmse and Another*, 2011:8). In reviewing his order, Judge Halgryn amends the order to include the words "to commit murder" as the Judge found that there is no crime such as incitement. He concedes that this was an oversight on his part and therefore he amended the order (*ANC and Others v Harmse and Another*, 2011:47).

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The first important aspect of this case is that in the *AfriForum v Malema* case, the ANC decided of its own accord, to remain an involved party. That is to say, the ANC was not legally obligated to remain a party to the case after AfriForum had withdrawn its initial complaint against the organisation. The ANC joined the case based on the reasons advanced in the affidavit and presented above. The second important aspect of this case is the manner in which the ANC decided to join another case, which the party argues is relevant to the *AfriForum v Malema* case. The *ANC and Others v Harmse and Another* case was a dispute settled between two individuals, without the ANC being involved. The ANC failed to respect procedural elements relating to the process of becoming an involved party and to the process of filing an appeal against a court order. The ANC cited "public interest" as the reason for the party to be joined to the dispute. The irritation of the Judge is clearly visible when studying the judgement. The ANC's disregard of procedural aspects as well as its insistence to be joined in the case are, in my opinion, compelling grounds for arguing that they have a specific view of the rule of law. I shall return to this notion at the conclusion of the following section.

5.2.2 The Constitution, the Equality Court, Relevant Legislation and Legal Precedents

The relevant sections of the Constitution with relation to hate speech mentioned in chapter one of this dissertation are the Preamble, Sections 1, 2 and 16 which deals specifically with hate speech. Within the South African context, the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), deals specifically with discrimination. The act also sets measures in place to create special courts which deal with issues of discrimination, namely the Equality Courts.

It is significant that the case was decided in the Equality Court as these courts differ substantially from normal courts of law. The Equality Court, as mentioned by Judge Lamont, has a high degree of flexibility with relation to specific legal procedures such as pleadings and prayers, as it is primarily a court of an inquisitorial nature rather than an accusatorial nature as is the case in other courts (Court Transcript, 2011, Vol.1:59). Furthermore, there is greater leniency regarding evidence permitted in the Equality Court than in other courts of law. Judge Lamont was of the opinion that in order for the parties to dispute the case they needed to "fully and completely ventilate the issues" (*AfriForum v Malema*, 2011:34). As such, evidence in the form of speeches made during the trial, documents containing hearsay

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matters and testimony by witnesses on issues falling far outside the ambit of the issue before the Court, was allowed. The Judge also allowed the public to view the trial by televising events and also by a television screen erected outside the Court (*AfriForum v Malema*, 2011:34).

Equality Courts are a direct result of PEPUDA (Act 4 of 2000) which came into effect in September 2000. The main objectives of the act are to fulfil South Africa's obligations to international treaties; to promote equality and to prevent and prohibit unfair discrimination, hate speech and harassment (Department of Justice and Constitutional Development, 2012b).

The relevant sections of PEPUDA (Act 4 of 2000) are sections 10, 11, 12 and 13 which state:

10. Prohibition of hate speech

(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-

(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred.

11. Prohibition of harassment

No person may subject any person to harassment

12. Prohibition of dissemination and publication of information that unfairly discriminates

2. No person may—

(a) disseminate or broadcast any information:

(b) publish or display any advertisement or notice,

that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.

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13. Burden of proof

(1) If the complainant makes out a *prima facie* case of discrimination—

(a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged: or

(b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.

(2) If the discrimination did take place—

(a) on a ground in paragraph (a) of the definition of 'prohibited grounds', then it is unfair, unless the respondent proves that the discrimination is fair;

(b) on a ground in paragraph (b) of the definition of 'prohibited grounds', then it is unfair-

(i) if one or more of the conditions set out in paragraph (b) of the definition of 'prohibited grounds' is established; and

(ii) unless the respondent proves that the discrimination is fair.

The relevant case law, as highlighted by the complainants, respondents and the *Amicus Curiae* in their heads of argument is rather substantial and detailed discussion falls outside the scope of the current study. It is, however, relevant to clarify the manner in which hate speech and freedom of speech has gained expression in South Africa. Hate speech and freedom of speech in South Africa differ substantially from that of other constitutional democracies such as the United States of America where freedom of speech is an incontestable and unequivocal right. The CC ruled that in South Africa, freedom of speech is inherently different:

> …the corresponding provision in our Constitution, is wholly different in style and significantly different in content. It is carefully worded, enumerating specific instances of the freedom and is immediately followed by a number of material limitations in the succeeding subsection. Moreover, the Constitution, in its opening statement and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression (*State v Mamabolo*,2001).

Freedom of speech is therefore not an inalienable right in South Africa and great care must be taken not to offend people or groups who might take objection to certain utterances. The key difference centres on how the 'harm principle' is interpreted in the South African context. In a 2002 CC case, it was found by the CC that the harm principle in South Africa does not just pertain to physical harm. The CC found that grounds for limiting freedom of expression are justifiable in the interests of human dignity and equality, which are founding provisions of the Constitution. Furthermore, there is a "critical need" for South Africans to promote human dignity, equality and freedom. The CC found that expression that advocates hatred and stereotyping is harmful to the achievement of these fundamental Constitutional values (*Islamic Unity Convention v Independent Broadcasting Authority and Others*, 2002:30). This interpretation of the harm principle was echoed in another case, also involving Mr Malema. In *Sonke Gender Justice Network v Malema* (2010:7) the Court also found that harm is not just direct physical harm, but extends to an attack on dignity.

An extremely relevant case to the hate speech case involving AfriForum and Mr Malema involves a 2003 appeal case to the SAHRC. The appeal involved the chanting of the slogan, "kill the *boer*, kill the farmer". This case was frequently mentioned during the trial proceedings of the *AfriForum v Malema* case, due to the similarities of the slogans chanted and the words used. Ultimately though, in a pure legal sense, the words and the slogan are not identical and must not be confused. However, the similarity between the cases is based on the fact that the same law governing whether it can be construed as hate speech applied to both cases, namely PEPUDA (Act 4 of 2000). The 2003 SAHRC appeals committee found that the words "kill the *boer*, kill the farmer" do constitute hate speech. Importantly, however, is the manner in which the 'harm principle' was defined. It was found that harm has a broader definition than physical harm and includes psychological and emotional harm (*Freedom Front v Others*, 2003:15).

The relevance of citing the legal procedural elements, the relevant legislation and the relevant case law, is that these highlight critical elements for the rationale of interpreting the hate speech case as exemplifying contending conceptions of the rule of law. Firstly, in section 5.2.1 it was highlighted that Judge Halgryn noted that the ANC showed a lack of respect for an important procedural element involving court proceedings. The ANC sought leave to appeal a case in which it was not an affected party and also in contravention with procedural norms. The justification for this disregard was that the ANC acted in the "public interest".

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This, in my opinion, highlights that the ANC attaches specific values as to how the ideal of the rule of law should gain expression. This also serves as a justification for the hate speech case being a good example for the investigation of contending interpretations of the rule of law because had the ANC subscribed to a formal conception thereof, they would not have acted in contravention with procedural norms.

Secondly, the manner in which the interpretation of hate speech and freedom of expression are legislated within the legal framework in South Africa, as highlighted by PEPUDA (Act 4 of 2000), is significantly different to that of other constitutional democracies. In South Africa, it is not about the intention of the person who utters the words, nor is it about pure physical harm. The legal framework is set up to cater for the manner in which people might perceive words, regardless of intent. Furthermore, the notion of harm is not limited to physical harm, but extends to psychological harm and is guided by the right of all people to dignity and equality as enshrined in the Constitution. As is mentioned by Du Plessis (1997), the right to dignity is more important than the right to equality and freedom in the South African Constitution. The legal framework was publicly known, and the ANC had been involved in cases relating to these laws. It can be safely assumed that the ANC and Mr Malema were well aware of the manner in which the legal framework regarding hate speech and freedom of expression takes effect in South Africa. Despite this, the ANC nevertheless decided to support Mr Malema, even after the case against the ANC was withdrawn. This highlights, once again, that the ANC may hold a different conception of the rule of law, for if they subscribed to a formal view it is possible that they would not have chosen to become a party to the *AfriForum v Malema* case.

Finally, there are numerous cases, as cited above, which involved hate speech in South Africa. Not only have there been judgements on hate speech, but the ANC and Mr Malema have been involved parties in some of these cases. It is therefore highly likely that the ANC and Mr Malema were aware of the legal precedents set through other cases involving hate speech and freedom of expression. Despite this knowledge, the ANC decided to become a party to the *AfriForum v Malema* case. It cannot be accepted that the ANC acted without knowledge of procedural elements, legal precedents and previous judgements. This, in my opinion, is sufficient grounds for arguing that the ANC holds a specific conception of the rule of law which is fundamentally different from standard Western liberal, or formal, conceptions

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of the ideal. The issues regarding the validity of the selected case as representing contending interpretations of the rule of law will be further discussed in section 5.3.

5.2.3 The Events and Reporting in the Media

Mr Malema admitted to singing and/or chanting the words in question in the colloquial language (not English) on or about the 3rd of March 2010 on the occasion of Mr Malema's private birthday party at his private residence in Polokwane; on the 9th of March 2010 at the University of Johannesburg; on the 22nd of March 2010 during a public address at Mafikeng in celebration of Human Rights Day and on 26th of March 2010 at Rustenburg (*AfriForum v Malema*, 2011:29-31). Judge Lamont noted that on one occasion, according to evidence presented in a video Mr Malema added the words, "shoot the *Boer*/farmer. Shoot the *Boer* the farmer. Shoot to kill. Shoot to kill" (*AfriForum v Malema*, 2011:36). It is therefore a matter of court record that Mr Malema sang these words, on these occasions, and admitted to doing so.

The occasions where the song was sung were, however, not similar with relation to the audience involved and by extension, the parties affected. On the 3rd of March, the song was sung at a private gathering which consisted of people invited by Mr Malema. On the 9th of March the audience was different as the song was sung at the University of Johannesburg in front of a multi-racial, multi-facetted audience consisting primarily of young people who most likely did not participate in the struggle against apartheid. The audience can be regarded as having represented a cross section of the public of South Africa. On the occasions of the 22nd and 26th of March at Mafikeng on Human Rights Day and at Rustenburg, respectively, the audience included largely persons who had participated in the struggle against apartheid and who were likely more like-minded to Mr Malema. Judge Lamont found that at all the events, except for Mr Malema's private birthday party, the press was invited to attend and it would have been anticipated by Mr Malema and the organisers that the press would publish what took place at these events. It must therefore be accepted that many people of South Africa, including white Afrikaners could have known, or could come to know of, the singing of the song (*AfriForum v Malema*, 2011:47-49).

After Malema sang the song on the 9th of March at the University of Johannesburg, several papers published articles about the incident. According to the judgment (*AfriForum v*

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Malema, 2011:40-41), articles concerning the chanting of the song at the University of Johannesburg were published in the Mercury, The Star, Diamond Field Advertiser, Die Beeld and The Sowetan. Similar articles also appeared in The Business Day and the Mail and Guardian[74]. It is safe to say that the singing of the song at the University of Johannesburg caused widespread response from the press which in turn led the public to become aware of the singing of the song and its content, since the song was translated into English and Afrikaans by the press.

Another important point to take note of is that the press coverage also linked the song sung, which included the lyrics "shoot the *boer*" with a song sung by the ANC in 2003 which contained the lyrics "kill the *boer*" and which was deemed to be hate speech by the SAHRC. It is noted in the judgement that this connection is first attributed to an article published on the 12th of March by the Daily Dispatch (*AfriForum v Malema*, 2011:41). Other articles also made this link between the "shoot the *boer*" and "kill the *boer*" and on the 15th of March the Herald newspaper published that Malema had sung "kill the *boer*, kill the farmer". On the 23rd of March, Die Burger published an article on the singing of the song "shoot the *boers*" by Mr Malema on 22nd March Human Rights Day celebration. Judge Lamont notes that articles relating to the singing of the song appeared in many papers from the 23rd of March onwards (*AfriForum v Malema*, 2011:41-43).

A specific event which received media attention was Mr Malema's apparent defiance of a court order handed down on the 26th of March by Judge Halgryn which effectively made the utterances under consideration a criminal offence. Judge Lamont noted that publications in the Press after the 26th of March were largely centred on the interdict granted by Judge Halgryn (*AfriForum v Malema*, 2011:44-45). Some papers commented that the singing of the song, on a visit to Zimbabwe, was in defiance of the court order handed down by Judge Halgryn. Judge Lamont did not agree with such a sentiment stating that Mr Malema had honoured the order concerning the song because the singing took place in another country. However, Judge Lamont noted that it was still relevant that Mr Malema sang the song. This is because at the time, society had become polarised on the issue along racial and linguistic lines. One side was represented by ANC supporters who had struggled against apartheid,

[74] See section 1.1

whilst the other side was represented by those perceiving themselves as the target audience, especially white Afrikaners (*AfriForum v Malema*, 2011:45-46).

Judge Lamont found:

> It is apparent that:
>
> 1. there was a high degree of publicity around the song and Malema's singing of it,
> 2. the translation of the song was rendered in English as being "*shoot the Boer/farmer*",
> 3. in the public eye the wording as translated was linked to the statement and song which had previously been sung by Peter Mokaba "*Kill the farmer kill the Boer*",
> 4. a section of society was outraged by the fact that the song had been sung and sung repeatedly (*AfriForum v Malema*, 2011:44).

Furthermore, Judge Lamont stated that:

> Until the media published the words as translated the words in the song had no effect. No one complained. No one felt threatened. This could have happened either because:-
>
> 1. The song was innocuous and related to an incitement to destroy the regime in the originally accepted primary meaning,
> 2. The target group was ignorant of,
>
>   2.1 the literal translated meaning
>
>   2.2 the fact that the song had been sung at all (*AfriForum v Malema*, 2011:47).

It is important to note that the press played an important role in spreading awareness of the song. It is also relevant that the public, largely due to media reports, equated the words under consideration in the *AfriForum v Malema* case to those of the case which took place in 2003. It is therefore highly likely that the ANC was aware of the confusion in the public domain. Mr Mantashe, the ANC general secretary at the time, is reported to have made a public statement wherein he highlighted that the words in the *AfriForum v Malema* case, were not the same as the ones from the 2003 case (*AfriForum v Malema*, 2011:42). It must also be noted that the media reported incorrectly that Mr Malema had defied the court order handed down by Judge Halgryn on the 26th of March, since Mr Malema's singing of the song in Zimbabwe had been ruled permissible. The misreporting of news is not a unique

phenomenon. The South African press should have been more sensitive towards the issue it was reporting. It might have been more prudent of the press to focus on disseminating news, rather than creating uproars and outcries. The actions of the media and the press are, however, not the subject of this study.

5.2.4 Arguments Presented in the Case

The original intention was to give both parties' arguments separately. After studying the material, which includes the judgment, heads of argument of the first and second complainant as well as the *Amicus Curiae*, written submission of the first and second respondents and the court transcriptions, it became apparent that this would not be the most logical and clear way to present the material. Rather, the proceedings of the trial are followed as they progressed. The court transcripts are dealt with first, thereafter the heads of argument of the first and second complainant. This is followed by the written submission of the first and second respondent. The account concludes with the judgement and the settlement which was reached.

5.2.4.1 The Case Proceedings

During the case, AfriForum called as witnesses Mr Roets and Dr Gray. The TAU-SA called Prof Goosen, Prof Bezuidenhout, Prof Kok and General van Zyl. The ANC called Mr Hanekom, Dr Serote, Mr Mantashe, Mr Chabane and Mr Malema. The following sections will describe the arguments presented and testimony of these witnesses.

During the opening address delivered by Mr Brassey, the advocate of AfriForum, he argued that the "…central element in this case is whether the chanting of facially racist words by a prominent political leader on public platforms in apparent breach of the law can be justified on the basis that they are or are believed to be a facet of the struggle against apartheid" (Court Transcript, 2011, Vol.1:68). AfriForum did not seek to establish a causal relationship between farm attacks and the song nor that the singing of the song caused physical harm. AfriForum's argument centred on the notion that the singing of the song was creating a hostile environment and was causing psychological harm to people who perceived the words as hate speech. It was argued that the phrases in question were aimed at a specific group of people, namely white Afrikaans speaking South Africans and more specifically Afrikaners

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(Court Transcript, 2011, Vol.1:80-84). Mr Brassey argued that the ANC sought to escape the primary meaning of the words by assigning a secondary meaning to them which would justify the continued singing of the song. One meaning was to place the song in historical context of the liberation struggle against the apartheid regime and place the focus on the historical, as opposed to the contemporary significance of the song and the words. The second meaning sought by the ANC was to argue that the language used was trying to make a contemporary point through using language of a historical nature to resist the oppressor or the regime (Court Transcript, 2001, Vol.1:80-82). In order to further their case, AfriForum called as their first witness Mr Ernst Roets, who was at the time the Deputy CEO of AfriForum and the National Chairperson of the Youth Division.

Much of the testimony and cross examination of Mr Roets concerned a meeting held between Mr Roets and other representatives of AfriForum and Mr Malema, Mr Floyd Shivambu, who was at the time a spokesperson for the ANCYL and Mr Stephen Ngubeni, then CEO of the National Youth Development Agency. The meeting was held on the 18th of March 2010 at Luthuli House (ANC headquarters). During the meeting it was explained to Mr Roets that the meaning of the song was misunderstood. According to Mr Roets, the explanation given to him was that the song was part of the liberation struggle and had historical significance and that AfriForum misunderstood this because they lacked understanding and respect of the ANC's history and culture. Furthermore, the song was not an attack on "*boere/ubhunu*" as white people or farmers, but that the word represented the apartheid government system (Court Transcript, 2001, Vol.1:115-121).

Another aspect of the meeting which was under discussion was a protest march which was arranged by AfriForum. The protest march was scheduled to take place on the 19th of March 2010 with protestors marching to Luthuli House in order to present a memorandum which included AfriForum's concerns and a list of fatalities from farm attacks. During the meeting Mr Shivambu, according to Mr Roets, said that the ANCYL would officially accept the memorandum to be delivered by AfriForum by way of a confirmation letter if AfriForum dropped the case against Mr Malema. Mr Roets declined, demanding a public apology by Mr Malema for his actions. Mr Malema declined and Mr Shivambu responded that they would not provide AfriForum with a confirmation letter for the memorandum and that the ANCYL would not officially accept such a memorandum. Mr Roets then stated that they would simply stand outside Luthuli House, read the document and leave it at the reception (Court

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Transcript, Vol.1:115-126). Mr Malema's response to this allegation is somewhat disconcerting. According to Mr Roets, Mr Malema leaned forward in his chair, and in a very serious tone said, "If you come to my office tomorrow what happened to the IFP in 1994 will happen to you". Mr Roets, unaware of the events which occurred in 1994, which involved the killing of IFP members marching to the ANC's headquarters, asked Mr Malema what happened, to which he responded, "Come tomorrow and we will see" (Court Transcript, 2011, Vol.1:126).

The threat issued by Mr Malema caused AfriForum to cancel the march, and instead turn it into a gathering held at Mary Fitzgerald Square, which had been the scheduled point of departure. AfriForum then sent a small delegation to Luthuli House, consisting of Mr Roets, Mr Kallie Kriel, then CEO of AfriForum and a few other popular Afrikaans musicians and public figures. Upon arriving at Luthuli House, the AfriForum delegation was greeted by policemen and people that Mr Roets described as, ANCYL members. The delegation from AfriForum wanted to leave the memorandum at the reception desk, but were barred from entering Luthuli House by ANCYL representatives and the members of the South African Police Service. The AfriForum delegation subsequently dropped the memorandum over the heads of the those barring their entry, as this was the closest they could get to the inside of Luthuli House. Mr Roets stated that the members of the ANCYL then threw the papers out, over the steps of Luthuli House. As the bundle was not bound the papers went in all directions, with some of the members of the ANCYL kicking and stomping on the papers (Court Transcript, 2011, Vol.1:128-131).

The cross-examination of Mr Roets by Mr Maleka, the ANC and Mr Malema's counsel, focused on the fact that other people, in other organisations, had also sung anti-apartheid songs but that they were not being taken to court by AfriForum. Mr Maleka notes, and this point does have some relevance, that AfriForum singled out Mr Malema. It was further argued by the counsel that AfriForum must not take the literal meaning of the words but that the words must be placed in historical context and that the word "*boer*" is not a reference to white people, but to the system of white racial oppression (Court Transcript, 2011, Vol.2:179-182).

The next witness in the case was Dr Annie-Marie Gray, a musicologist, who was called by AfriForum as an expert witness. Dr Gray testified that the words in question, as uttered by Mr

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Malema on the occasions in question, is not a song, but a chant. Dr Gray also emphasised that chants and songs formed an integral part of the liberation struggle and helped those involved in the struggle against apartheid to form unity and a sense of cohesion (Court Transcript, 2011, Vol.2:179-182). According to Dr Gray, and a point agreed to by Mr Malema and the ANC's counsel, liberation songs do not exist separately from the cultural and historical context of the liberation struggle and people who do not understand the language, history and cultural context of the liberation songs, do not fully understand their meaning (Court Transcript, 2011, Vol.3:351-353).

Dr Gray was the last witness that AfriForum called. Thereafter, TAU-SA presented their case. The main thrust of the case presented by TAU-SA was that the song had contemporary significance which must be placed in the South African context that includes high crime rates and extremely high rates of violent attacks and crimes on farms. Mr Du Plessis, the counsel of TAU-SA, also argued that the relevant laws and cases pertaining to hate speech start from the premise that it is those affected by the speech, not those uttering the speech, whose context is relevant. It is therefore not important what parties who utter objectionable words mean by them, but what a reasonable person could interpret them as meaning. The issue is not one of intent of the party uttering the words, but of perception of the complaining party (Court Transcript, 2011, Vol.4:351-353).

TAU-SA called several witnesses to explain and elaborate on the contemporary context wherein the chant should be placed. They called Prof Bezuidenhout, a criminologist, who testified that South Africa had one of the highest crime rates in the agricultural sector in the world. He also testified that farmers are eight times more likely to be the victims of murders and other violent crimes than anyone in South Africa (Court Transcript, 2011, Vol.3:395-418). The TAU- SA also called Professor Goosen, an expert in Afrikaner cultural history and the chairman of *Federasie vir Afrikaanse Kultuurvereniging* (FAK). Professor Goosen testified that Afrikaners are a minority cultural community, and that "*boer*s" are associated with the Afrikaner community. Professor Goosen's testimony relates to the manner in which Afrikaners as a cultural group interpret the word "*boer*", which is not a literal translation to farmer, nor a representative word for the apartheid system of government, but as a distinct cultural community (Court Transcript, 2011, Vol.4:437-467).

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The next witness called by TAU-SA was General Christiaan Hendrik van Zyl who testified as an expert witness on farming affairs in his capacity as the then Assistant General Manager of TAU-SA. General van Zyl was responsible for creating a comprehensive database of farm attacks resulting in fatalities from 1990 to the date of the trial, which was, to his knowledge, the only such database on farm attacks available at the time. His testimony was therefore aimed at highlighting the criminal statistics on farm attacks and to this end he testified that there had been 2 633 farm attacks between 1990 and 2010 resulting in 1 489 deaths (Court Transcript, 2011, Vol.4:479-481; 486). Thereafter the TAU-SA called Professor Johan Anton Kok, who was at the time the dean of the law faculty at University of Pretoria. The topic of Professor Kok's PhD dissertation was PEPUDA (Act 4 of 2000) (Court Transcript, 2011, Vol.4:508). His testimony centred on the notion that there is a disjuncture between the type of society PEPUDA (Act 4 of 2000) envisions, and the opinions of South Africans on certain elements. His 2001 dissertation included survey questions regarding the lyrics "kill the *boer*" and he found that the majority of those he surveyed thought it to be inappropriate lyrics (Court Transcript, 2011, Vol.4:508-516). The testimony of Prof Kok concluded the witnesses who had been called to argue the case of the first and second complainant. Hereafter, it was the ANC and Mr Malema's turn to argue their case.

To this end, several witnesses were called, the first of which was Mr Derek Hanekom, the then Deputy Minister of Science and Technology and member of cabinet (Court Transcript, 2011, Vol.5:562). Mr Hanekom was called to the stand as he is a white Afrikaans speaking South African, an active member of the liberation struggle and also a member of the ANC. The argument which was made is that he, as a member of the Afrikaner community, although he does not describe himself as an Afrikaner, did not feel threatened by the chant in question — and that if he, as a white Afrikaans person did not feel threatened, then other white South Africans need not feel threatened. Furthermore, Mr Hanekom testified that the liberation song is part of the African and liberation movements' culture. The chant, according to Mr Hankeom, must be viewed as part of the culture, heritage and history of Africans, and of other people who participated in the liberation movement. He therefore emphasised the historical context of the chant. Important to such a conception, the words "*inbhunu*" and/or "*ibhulu*" do not mean "*boer*" in a literal sense, nor are the words a reference to a cultural community, people or farmers who are known as "*boers*". Rather, it was argued, that the words have another meaning along with the literal meaning. The words represent the system of racial oppression of apartheid, and more specifically, the state machinery and security

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apparatus of the apartheid regime. This is also the primary way in which Mr Hanekom understands the words. Accordingly, the call to "shoot the *boers*" must not be interpreted literally, but must be seen as representing a call to people to destroy the system of oppression. The context is therefore wholly one of historical nature. Mr Hankeom also stressed that no harm was intended with singing the song and that the song did not mean to incite violence in any way (Court Transcript, 2011, Vol.5:564-76, 592, 614, 648).

The cross-examination of Mr Hanekom by Mr Brassey is long and fills 93 pages in the court transcript. The core of the cross-examination by Mr Brassey had to do with the interpretations, meanings and context of the words in question. Suffice to say, regardless of how the questions were formulated and posed, Mr Hanekom did not deviate from the explanation given above. Even when posed with the fact that Mr Malema had made the gesture of a gun with his hand and arm, Mr Hanekom stressed that gestures such as making a gun was a symbol against the oppressive regime and not intended to signify the shooting of people (Court Transcript, 2011, Vol.5:603-5). During the cross-examination by Mr Du Plessis, the occurrences were much the same. Mr Hanekom always stressed the historical context above the contemporary context. There is one interesting point I would like to mention which has bearing on the Constitution of 1996. Mr Du Plessis was asking Mr Hanekom about the ANC's view of the history on violence in the armed struggle and whether the ANC's policy towards violence had changed since coming into power. Mr Hanekom confirmed that the ANC's views on the use of violence had indeed changed. He stated that the ANC was the principle architect of the Constitution and that the ANC is guided by the Constitution — the Constitution is the ANC's reference for societal interactions and the ANC is furthermore guided by the Constitution in unambiguously promoting peace (Court Transcript, 2011, Vol.6:693). One can therefore conclude that the actions of the ANC regarding this case, according to ANC members, can be justified with reference to the Constitution. This would indicate a distinct and specific understanding of the values contained in the Constitution of 1996.

The next witness called by the respondents' legal representative was Dr Mongane Wally Serote, who had at the time recently transferred from being Chief Executive of Freedom Park, a national monument and memorial, to dealing with the President on issues of African Renaissance and indigenous knowledge systems (Court Transcript, 2011, Vol.6:752). Dr Serote told of the horrors suffered at the hands of the South African Defence Force amongst

exiles, such as himself, in other countries. Dr Serote explained that liberation songs were sung as part of the struggle against this state machinery and that singing songs is part of the African culture against white oppression. Dr Serote also testified that the words in question, "*dubula i'bhunu*" do not refer to farmers, but to the oppressive system and the security forces in particular (Court Transcript, 2011, Vol.6:752-8,771). Dr Serote also mentioned that the ANC is founded on the Freedom Charter and that part of the ANC's vision of democracy includes the pursuit of the NDR. According to Dr Serote, this revolution is on-going and part of its objectives is to educate South Africans. According to Dr Serote, the goal of the NDR is to eventually transform South Africa into a non-racist, non-sexist society (Court Transcript, 2011, Vol.6:807,850). The conception of the NDR, as expressed by Dr Serote, is markedly different from how it was discussed in chapter four of this dissertation.

Another important element which came to the fore during Dr Serote's testimony is the notion that the case represents the interests of separate communities within society. It is aptly summarised by Judge Lamont: "Social issues in this case is that a section of the community feels that it is wronged or hurt by another sector of community which claims a right to behave in the way that it does because of a number of reasons including heritage, the fact that there is no hurt intended that no hurt can be perceived" [sic] (Court Transcript, 2011, Vol.6:752-8,811).

The third witness called by the first and second respondents, was Mr Samson Gwede Mantashe, the then Secretary-General of the ANC. Mr Mantashe testified that, from his experience of speaking to Afrikaner communities, it was not the words sung which caused unease and fear amongst Afrikaners, but rather that the words were sung by Mr Malema. He labels this Malema-phobia (Court Transcript, 2011, Vol.7:856). During the cross-examination, Mr Brassey asked Mr Mantashe if he was aware of the withdrawal by AfriForum of the complaint against the ANC. Mr Mantashe acknowledged that the ANC was aware of this withdrawal. Mr Brassey then asked Mr Mantashe why the ANC had decided to become an intervening party and re-enter the litigation. The reason provided by Mr Mantashe is that the song in question is part of the history and heritage of the ANC and should therefore be protected. Mr Mantashe also confirmed that the word "*boers*" in the context under consideration does not refer to Afrikaners, but to the system of white racial oppression (Court Transcript, 2011, Vol.7:856-76). Mr Mantashe also stressed that the NDR is a process which is still developing within the South African context and forms an integral part of ANC policy

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and principles. Mr Mantashe stressed that it is important to educate white people who do not understand the NDR and liberation songs (Court Transcript, 2011, Vol.7:909). Mr Mantashe also commented on the nature of ANCYL leaders during cross-examination — asked if Mr Malema was a controversial figure, Mr Mantashe stated that he is yet to find a leader of the ANCYL who does not fit such a description. In addition, Mr Mantashe stated that the reason ANCYL leaders are controversial is because of their role as "incubators of ideas". It is natural, according to Mr Mantashe, for leaders of the ANCYL to take these ideas too far and in those cases to be restrained by the ANC (Court Transcript, 2011, Vol.8:951).

The penultimate witness called by respondents' council, was Mr Collins Chabane, who was then a minister in the Presidency and a member of the ANC National Executive Committee and the National Working Committee. Mr Chabane testified that he had recorded the song in question before the 2004 elections. Importantly, according to Mr Chabane, the song belongs to the community and not to any one person in particular (Court Transcript, 2011, Vol.8:955). Mr Chabane argued that fears and objections towards the song had to do with a misunderstanding of history. He also argued that such misunderstandings could also be a reflection of racial prejudices and ignorance. According to Mr Chabane, black South Africans and ANC members have been willing to forgive the white minority for crimes committed under apartheid and that misunderstandings of the meanings of the song by the white minority is in part, due to racial prejudices and misunderstanding of history (Court Transcript, 2011, Vol.8:957-961). Mr Chabane also noted that the song was a reference to the apartheid system and not to individuals or a specific community (Court Transcript, 2011, Vol.8:964).

The final witness called in the case was Mr Julius Sello Malema, the then president of the ANCYL. Mr Malema testified that when he addressed the gathering on the 22nd of March 2010, during the celebrations of Human Rights Day, he had explained that the song signified the history of the struggle and that it was not a call of action or an incitement to cause harm, but a way of remembering those who had fought in the struggle against apartheid. He also emphasised that he would not have given such an explanation under normal circumstances, but due to the attention the song had received in the media and possible misunderstandings he felt an explanation appropriate (Court Transcript, 2011, Vol.8:987-8). Mr Malema also noted that he explained to Mr Roets, during the meeting held on 19th March 2010, that the word "*boer*" does not refer to Afrikaners, farmers, a cultural community or people, but that it is a

reference to the apartheid system (Court Transcript, 2011, Vol.8:999). Mr Malema also denied the allegation made by Mr Roets that he had hinted that the AfriForum members attending the meeting should not lead a protest march to Luthuli House, as they would meet the same fate as the IFP supporters who had marched on Shell House in 1994 (Court Transcript, 2011, Vol.8:1000-1003; Vol.9:1118-1123). There is therefore contradictory evidence given by the two witnesses in this regard. The truth on this matter is never uncovered. However, what is significant is that AfriForum perceived the threat as credible enough to cancel the protest march and turn it into a protest gathering.

During cross-examination by Mr Brassey, Mr Malema stated that he does not want the song to be banned, because this would play into the "hands of the enemy" (Court Transcript, 2011, Vol.8:1022). Asked who the enemy is, Mr Malema responded by stating the enemy is the "murderous apartheid system" (Court Transcript, 2011, Vol.8:1023). The issue with such a line of reasoning is that this enemy has already been defeated, and this Mr Malema admitted. He, however, contended that the idea of banning liberation songs would be considered a victory for the enemy. It therefore appears that Mr Malema, in line with the previous witnesses, attached important values to the historical context, the context of the liberation movement, when interpreting contemporary events. According to Mr Malema, although the system was defeated in 1994, social and economic power has not yet transferred to the people (Court Transcript, 2011, Vol.8:1075). The enemy, one can assume, is therefore social and economic inequality or any form of oppression in social and economic terms. In my opinion, the issue of who the 'enemy' is, is never fully resolved. Even though it is interesting, it is not a matter of importance for the purposes of this study (Court Transcript, 2011, Vol.8:1043-5).

It was put to Mr Malema that the words uttered at the gatherings were translated and reported by the media. Mr Malema contended that it is the fault of the press for spreading the dissent, and not the song or words or his singing thereof, as the words and the song have separate meanings which must be understood in relation to and in context of history (Court Transcript, 2011, Vol.8:1052). During cross-examination, Mr Malema was asked about ways in which to mitigate the manner in which the song is perceived by significant segments of the population. Mr Malema, in his response, noted that AfriForum and its members, numbering around 10 000, are not a significant proportion of the population because they are so few in number (Court Transcript, 2011, Vol.8:1061). Such a response shows a disregard for the

interests and concerns of minority groups, which in this case was represented by the Afrikaner people.

Another way in which the notion of the 'enemy' is conveyed which may, according to the testimony given, be described as a system of inequality, is through the conception of the NDR as put forward by Mr Malema. Mr Malema stated that all South Africans who support progressive change will mobilise behind the NDR. The NDR is, according to Mr Malema, about the transfer of power from the minority to the majority and that this objective will be achieved through democracy as envisioned by the NDR. The NDR is, according to Mr Malema, neither socialist nor capitalist in character and has as the immediate goal delivering democracy to the oppressed. Mr Malema went further and stated that those who oppose the NDR must have their ideals "defeated". According to Mr Malema, it is time to revisit the compromises reached during constitutional negotiations and ensure that the NDR is pursued with greater vigour (Court Transcript, 2011, Vol.9:1093, 1130, 1132, 1135, 1145).

5.2.4.2 Summary of Arguments Presented

According to AfriForum, the essence of their case was whether Mr Malema's singing of the song in question could be construed by reasonable people to incite violence or denigrate against Afrikaners. AfriForum held that the words in the song referred to white people, and Afrikaners specifically, and that the singing of the song incited harm against these people. AfriForum argued that Mr Malema and the ANC contended that the words must be placed in the historical context of liberation and the liberation struggle and that the words do not have a literal meaning and are not meant to cause physical harm. AfriForum did not agree with this, and argued that the song did have a literal meaning within the contemporary context and that the song caused psychological harm to white Afrikaans speaking South Africans (Brassey and Engelbrecht, 2011:1-5). The contention by AfriForum was that the word "*ibhulu*" was a reference to white Afrikaans speakers, known as Afrikaners, and also to "*boer*s", who are not only white Afrikaans speakers, but also farmers. The ANC contended that this was an incorrect interpretation and that the word had a historical and specific meaning, namely the oppressive apartheid regime. Race plays a central part in the arguments advanced, with the witnesses called by the ANC regularly referring to the 'white' system of oppression (Brassey and Engelbrecht, 2011:10-15).

According to AfriForum, the ANC relied on the notion that the song is a liberation song which represents the history of the apartheid struggle against political, economic and social oppression. The lyrics merely reflect, according AfriForum's interpretation of the ANC's argument, the nature of the struggle. AfriForum contended that the ANC had sought to elevate AfriForum's complaint as an assault on history, which it was not. AfriForum noted that Mr Malema could have chosen from a wide range of songs, yet he continued to choose the particular song in question. According to AfriForum, the song is similar to the "kill the *boer*, kill the farmer" song and should be regarded as such. AfriForum argued that the reliance on only historical defence is incorrect, and that contemporary events, such as crime rates and particularly violent attacks on farmers must be considered as part of the context (Brassey and Engelbrecht, 2011:33-41).

AfriForum argued that the argument put forward by the ANC and Mr Malema, that the words are not meant literally, is insufficient as the words are, on face value, offensive towards Afrikaners. AfriForum contended that by perpetuating the historical meaning of the words as a reference to the apartheid regime, the ANC and Mr Malema are perpetuating racial stereotypes and spreading a history of hate and division because the utterances are associating white people with the system of oppression (Brassey and Engelbrecht, 2011:33-46).

An important element of the ANC and Mr Malema's defence, was that the singing of the song did not intend to incite violence or cause harm. As was shown in section 5.2.2, this is not relevant to how hate speech laws function in the South African context. This is a point which was stressed in AfriForum's case. According to AfriForum their case did not seek to prove that harm or incitement was caused by Mr Malema, but that a reasonable person could have construed the words as harmful. That is to say, the intention is irrelevant, how the words could have been perceived is what matters within the South African legal framework, and also within the case law. The ANC and Mr Malema also contended that Afrikaners are simply too sensitive to these words and that those who suffered under apartheid are still confronted with images that hark back to the apartheid regime, such as the *Voortrekker* Monument (Brassey and Engelbrecht, 2011:46-8).

In the written submission on behalf of the first and second respondent, it is contended that the case of hate speech is inconsistent. The respondents argued that Mr Malema had been targeted and that the nature of the lyrics was not the main issue and that the complaint was

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due to, what Mr Mantashe called, Malema-phobia (Maleka and Sikhakhane, 2011:1-3). According to the respondents, the complaint should have been dismissed because it took the song out of context, no evidence or proof was given that the singing of the song caused incitement to imminent harm, and that the claim refers only to one person. Furthermore, it was contended that if regard of the historical context is taken into account, then the song could not be considered hate speech. The respondents argued that the centre of the case had to do with the continued survival of liberation songs in post-apartheid South Africa. Liberation songs can only be understood within the historical context of the struggle against apartheid and that nothing material is relevant other than the historical context. The respondents held that declaring the words as hate speech could limit Mr Malema's Constitutional right to free speech. Furthermore, the contention is that the word "*ibhunu*" is used as a reference to the apartheid system within the context of liberation songs. The historical nature and significance of the song as a reference to the system of apartheid, or a system of white oppression, is a common theme (Maleka and Sikhakhane, 2011:3-12, 57-62).

According to the respondents, the songs were sung on ANC and ANCYL occasions and these occasions are appropriate for the singing of such songs. Furthermore, the words were sung in the vernacular and the complainants had to rely on translations and interpretations by the media in order to understand the songs (Maleka and Sikhakhane, 2011:15). The essence of the plea file by the ANC stated

> …that liberation songs are a heritage and are not sung with the intention to cause harm or incite violence. It also stated that the words "*ibhunu*" or "*amabhunu*" as used in the context of the anti-apartheid struggle referred to the system of *white oppression* rather than individuals or groups of individuals (own emphasis added) (Maleka and Sikhakhane, 2011:20).

The respondents also found it "noteworthy" that Mr Roets was the only leader of AfriForum who testified and contested the validity of AfriForum's claim of representing Afrikaners and argued that this is a false contention (Maleka and Sikhakhane, 2011:23-25, 34). With reference to the testimony of Dr Grey, the musicologist, the respondents agreed with the notion that liberation songs are part of black culture which is used as a communicating phenomenon. Furthermore, they agreed that the song was part of African communities who tend to use song as a form of communication. The respondents also agreed with Dr Grey that it would be difficult for those who are not part of the cultural context, and do not know the

language and history, to fully understand the words and their meaning. Those from western cultures, it was argued, do not understand the context and meaning due to their different cultural backgrounds (Maleka and Sikhakhane, 2011:42-43, 45, 48-9).

The respondents thereafter considered the evidence presented by TAU-SA which included testimony by Prof Goosen, General van Zyl, Prof Kok and Prof Bezuidenhout. The respondents contended that the TAU-SA's involvement in the case remained a mystery to them as the evidence presented by the TAU-SA was intended to advance the idea of a causal link between the words uttered and farm killings and that such an approach was abandoned by AfriForum. The respondents argued that the evidence presented by General van Zyl, Prof Kok and Prof Bezuidenhout is irrelevant as the farm killings and statistics thereof are wholly irrelevant to the case (Maleka and Sikhakhane, 2011:52-55). The respondents maintained that the liberation songs form part of African culture and the cultural life of the liberation movement and that the songs are a part of the history and heritage of the struggle movement (Maleka and Sikhakhane, 2011:60-63).

The respondents stated that the

> …complaint by Afri-Forum [sic] is a symptom of a lack of understanding of the history and role of song in the anti-apartheid struggle and it is accordingly mistaken to suggest that the utterances in the song constitute objectionable utterances or hate speech. […] We have drawn attention to the above evidence to show that the repeated *claim that there is a section of our community which is scared by the liberation song at issues in these proceedings is fundamentally flawed. That claim assumes that those on behalf of the claims purportedly asserted are ignorant.* As has been stated by, amongst others, Dr Serote, our country cannot be ruled by ignorance" (own emphasis added) (Maleka and Sikhakhane, 2011:68-69).

5.2.5 The Outcome: Judgement and Mediation Agreement

Judge Lamont ruled that the words in the song/chant constituted hate speech. Judge Lamont found that the context and manner wherein Mr Malema had sung the song and exploited the publicity he received was the cause for how the song was received by the public (*AfriForum v Malema*, 2011:53). Judge Lamont held that the apartheid regime was destroyed and finds the response from Mr Malema, that the song is a reference to the apartheid regime which lives on

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through social, economic and political inequalities, invalid. Judge Lamont stated that the Equality Act does not allow justification on the basis of historic practise which might be construed as hurtful by a segment of the population (*AfriForum v Malema*, 2011:53).

In summary, Judge Lamont found that:

> Publication of the words at a political rally must be treated as a publication to the nation. The intention of the person who utters the words is irrelevant.[…] The singing of the song by Malema constituted hate speech. The words, whether sung in the original language or not, mean: shoot the *boer* farmer, they rape us, they are scared the cowards, they rob these dogs. The words are published of, and concerning a recognizable, if not precisely identifiable grouping in society. The words undermine their dignity, are discriminatory and harmful. No justification exists allowing the words to be sung (*AfriForum v Malema*, 2011:60-2).

After the judgement was handed down, the ANC announced its intent to appeal against the judgement (Rabkin, 2011b; Rabkin, 2011c; Mthembu, 2011b). Before the appeal could be heard in the SCA, the parties signed a meditation agreement on the 30th of October 2012. Some of the terms of the mediation agreement include that:

- The words and the song constitute hate speech
- The parties agree that it is crucial to mutually recognize and respect the right of all communities to celebrate and protect their cultural heritage and freedom.
- The parties recognize that certain words in certain struggle songs may be experienced as hurtful by members of minority communities.
- Therefore, in the interest of promoting reconciliation and to avoid inter-community friction, and recognizing that the lyrics of certain songs are often inspired by circumstances of a particular historical period of struggle which in certain instances may no longer be applicable, the ANC and Mr Malema commit to counselling and encouraging their respective leadership and supporters to act with restraint to avoid the experience of such hurt.
- The parties commit to deepening dialogue among leaders and supporters of their respective organizations and formations to promote understanding of their respective cultural heritages and for the purpose of contributing to the development of a future common South African heritage.

- The parties commit to continued formal dialogue amongst leaders of the ANC and leaders of AfriForum and TAU-SA and other role players to promote understanding of their respective cultural heritages and aspirations.
- The ANC and Mr Malema undertake upon the signing hereof to withdraw their Appeal to the SCA with no order as to costs.
- The parties agree that this Mediation Agreement will be made an Order of the Court substituting the Equality Court Order (Mediation Agreement, 2012).

5.3 Contending Interpretations of the Rule of Law: *AfriForum v Malema*

The first issue to address before applying the conceptual typology is to answer the following question: Can the *AfriForum v Malema* hate speech case be considered a valid example for exploring contending conceptions of the rule of law? This was addressed in sections 5.2.2 and 5.2.3. I believe it does for a number of reasons. Firstly, in a normative sense, the law can be considered as ruling if actions are consistent with norms (Maravall and Przeworski, 2003:1). Accordingly, it can be argued that the ideal of the rule of law is brought into question when actions and norms are inconsistent with each other. It is my contention that such inconsistencies are not a threat to the rule of law, but are merely examples of contending interpretations thereof. In the *AfriForum v Malema* hate speech case, the actions of Mr Malema and the ANC are in direct contravention with certain legal norms regarding hate speech legislation and how they function in the South African context as was shown in section 5.2.2.

It was argued in section 5.2.2, that in South Africa, hate speech legislation functions differently to that of other constitutional and liberal democracies. In the South African context, the emphasis is on the dignity and equality of all people — those who make statements and those who hear them. PEPUDA (Act 4 of 2000) was drafted specifically to give an institutional backing to how cases involving discrimination should be regulated and went further to create the Equality Courts which specifically deal with these issues. Another important element is the manner in which the harm principle functions. Harm, in the South African context, is not only limited to physical harm and violence, but also pertains to psychological degradation, intimidation and harm. Psychological harm is defined not in terms

of the manner in which the party who utters objectionable phrases intends them, but the manner in which the phrases are interpreted by the parties hearing them.

The next logical step would be to state that, every time a party (person, organisation, government department) acts in contravention of the legal norms, it does not mean that the rule of law is disregarded, as this would be akin to being found guilty before a trial takes place. The difference is however that, with specific relation to hate speech, there are clear and known norms as articulated through previous cases, as to how the principle of freedom of speech and hate speech are interpreted and gain expression in the South African context. Furthermore, the parties involved in the *AfriForum v Malema* case, namely Mr Malema and the ANC, have been involved in other hate speech cases.

On the 15th of March 2010, during the events which would lead to the *AfriForum v Malema* hate speech case and before some of Mr Malema's utterances were made, judgement was delivered in the *Sonke Gender Justice Network v Malema* (2010) case wherein it was found that Mr Malema had committed hate speech. The specifics need not concern us, what need concern us is that it was made known, through a judgment involving Mr Malema that harm includes psychological harm — it is the manner in which his words are perceived by those who hear them and not his intentions that are relevant. Hate speech legislation, and the manner in which the law rules in this regard was therefore clearly known to Mr Malema. Yet he continued to act as if no judgement had been delivered regarding hate speech.

The ANC may be similarly criticised. In 2003, the ANC was involved in a hate speech case, through the late Mr Peter Mokaba, involving similar words and a similar chant. The song and the words were indeed so similar that the mention of it was frequently made during the *AfriForum v Malema* court proceedings and parallels were drawn by the media. The similarity was of such a nature that Mr Mantashe made a public statement reiterating that the words, even though similar, were different. Strictly speaking the words are not the same, but as is noted in the judgement by Judge Lamont, on some occasions Mr Malema deliberately chanted "kiss the *boer*", knowing full well of the similarity between the cases and relying on the crowds he was chanting to, to make the link (*AfriForum v Malema*, 2010:55-56). Mr Malema stated during cross-examination that he was aware of, and respected, the 2003 SAHRC finding on hate speech (Court Transcript, 2011, Vol.8:1041). It can therefore be safely concluded that the ANC was fully aware of the 2003 decision.

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Both the ANC and Mr Malema therefore appear to have acted in contravention of how the law rules with regards to hate speech and freedom of speech in South Africa, in other words, they acted in contravention to legal norms. One would therefore be able to argue that the law did not rule in the sense that legal principles and previous norms were ignored. This dissertation, however, takes a different approach. It is not that these actions show a disregard or lack of respect for the rule of law but rather that this is an adequate example that there are different values, beliefs and ideals attached to the idea of the rule of law. In other words, actions that can be construed as showing a disregard for the rule of law can also be viewed as an expression of different understandings of what the rule of law is. The conceptual typology developed in chapter three offers a means of interpreting these beliefs associated with the rule of law. I will investigate, having shown that the hate speech case may be considered as an adequate case for contending interpretations, if the model developed finds congruence in the case, or more simply stated can one make sense of the actions of the parties involved in the *AfriForum v Malema* case by applying the conceptual typology.

5.3.1 Applying the Conceptual Typology

The arguments presented by the complainants in the hate speech case, AfriForum and TAU-SA, will be considered first. The complainants' case was justified on very narrow, legal grounds — the issue was that Mr Malema was acting in contravention of the regulations of hate speech under the terms of PEPUDA (Act 4 of 2000). The complainants did not seek to justify their claim based on cultural or historical significance or importance of their rights. They did seek to protect a minority group, white Afrikaans speaking South Africans, by relying on PEPUDA (Act 4 of 2000) which was created to protect all people from harassment.

The complainants relied on the notion of formal equality, that is, that all people and groups, regardless of race, culture or community affiliation, should be treated equally and should receive equal protection under the law. The complainants did not seek to purport to know what specific notion of 'right or wrong' should be ascribed to, they merely wanted the legislative framework as it existed at the time, to be applied equally to all groups. The complainants emphasised the contemporary, and not historical, context within South Africa. To this end, the high levels of crime and farm attacks were mentioned as the context wherein the hate speech must be considered. The complainants placed, relative to the respondents, far

less emphasis on the context wherein the case should be situated. The complainants are therefore more closely aligned to the *low-context* cultural orientation which falls under the *liberal rule of law* as described in section 3.8. During his testimony, Mr Roets, the representative of AfriForum, also noted that the song sung by Mr Malema had no place in a post-apartheid democratic South Africa (Court Transcript, 2011, Vol.2:147). The complainants' belief is therefore that the actions of the respondent are not in line with the manner in which they understand a democratic society to function. It can be inferred that democracy, as envisioned by the complainants, should respect the rights of dignity, equality and freedom all groups equally and that it is future-orientated. These are elements which can align the complainants' perspective to the *liberal rule of law* as discussed in section 3.8.

The focus of the complainants' argument is therefore on creating the society as envisioned in the formal, written text of the Constitution of 1996 and PEPUDA (Act 4 of 2000). The complainants emphasise the future-oriented element of the rule of law. Within such an argument, the goal is to ensure that society is structured along a rule-based manner as is set out in the relevant legislation and Constitution. The view of democracy is consistent with a society which respects the rights of all citizens equally regardless of their group affiliation. The complainants place a high value on all individuals and communities being treated equally before the law and on the forward looking emphasis of the Constitution as protecting the rights of all individuals regardless of group affiliation. One can therefore argue that the conception of the complainants of the rule of law, based on the beliefs and values subsumed in their argument in this case, shows a high level of congruence with that identified as *liberal rule of law* in section 3.8. This is most acutely expressed in the emphasis on the equality of all people and the impartial application of the legal framework.

There are a number of striking features which become apparent when considering the arguments advanced by the respondents. The first is that the respondents insisted, through all the witnesses called by them, that the liberation song under question must be placed in the historical context of the liberation movement which took place against the white oppressor. Culture and, by association, group affiliation plays an integral part of the argument advanced by the respondents. The entire case presented by the respondents was built upon the notion that the song in question must be viewed in a specific historical and cultural context. The song, according to them, symbolises the struggle against the white apartheid government, overwhelmingly fought against by black South Africans who suffered under the oppressive

regime. The respondents furthermore placed the song within the African culture which, according to them, has an important role in the preservation of life experiences through song. It was argued that the song is an important part of how people from the African community and culture remember and celebrate their history. It is not the contemporary context which is of importance to them, but the historic context. Contemporary context and the literal meaning of the words are inconsequential to their argument. This notion finds a high level of congruency within the *high-context* cultural model put forward by Cohen (2004) which falls under the *social rule of law*.

The respondents also argued that a failure to understand this specific historical and cultural context of the song is reflective of some segments of society, implied as being the white Afrikaans speaking sectors of society, being ignorant of this specific cultural and historic heritage. The belief in historical significance as well as historical and cultural context is, in my opinion, indicative of a deeper belief. It shows that the respondents purport to know which version of history should be remembered. They are assigning themselves as the determiners of that which should be considered relevant historical and cultural context and that this context can only be understood from their perspective of history and culture. The respondents are in effect saying that one specific group or community's conception of history and context is superordinate to that of another community's conception. There is no allowance for a plurality of conceptions of history and context. This is expressed in the written submission of the respondents and highlighted in the preceding discussion of the events which took place in court. This is therefore a means in which the ANC exercises the "hegemony of ideas". It is also expressed in Mr Malema's dismissive view of AfriForum's claim to represent Afrikaner interests when he argues that AfriForum are too few in number to be relevant. It is furthermore expressed in the dismissive manner in which the contemporary context sketched by the respondents, with regards to the context of crime and violent crimes on farms, is dismissed out of hand as being irrelevant to the matter brought before the court. The respondents therefore are setting themselves as the true determiner of history and contemporary context, and claim that such a view is the only relevant view. Denying the relevance of a plurality of possible conceptions of history and context, places the ANC within the *liberationist* strand of democracy in which one specific groups' view of what is considered important for society is emphasised. Such a conception of democracy falls under the *social rule of law*.

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Importantly, the ANC relates these beliefs to the Constitution. Mr Hanekom testified that the ANC was the main architect of the Constitution — he did not refer to it as a settlement embodying a compromise, which it was. He contended that all the actions and beliefs of the ANC are grounded in, and are consistent with, the Constitution. Mr Mantashe stated that Mr Malema is the incubator of ideas. In this case, the ideas being incubated were supported by the ANC. The ANC substantiates this view through arguing that white South Africans are not remorseful enough of past events, or that they are ignorant of the past. This is nonetheless, if true, not a logically sound reason to favour one conception of history above another. The ANC is purporting to know, and trying to advance that their conception of history, context and contemporary events is relevant and justifiable based on their conception of the Constitution. The implication is therefore, that any other conception of history, culture and context is not only different from theirs, but is inconsistent with the South African Constitution — the ANC, and no other party, decides what the Constitution means. The ANC is therefore, as expressed in this case, not allowing for a plurality of conceptions of history and context. This further aligns the ANC and Mr Malema to the *social rule of law* as discussed in section 3.8. The ANC is, in essence, not allowing for a plurality of conceptions of the good, notions of equality and history. This is consistent with the findings by Stacey (2003) and Hudson (2000) as discussed in section 4.3.2.

The ANC is therefore claiming to know what is in the best interest of society with regards to this particular case. The relevant context privileges their conception of history and culture above that of minority groups. There is therefore an unequal treatment of individuals in society based on their cultural or group affiliation. Such a view of context and history finds a high degree of congruence in that which Cohen (2004) labels *high-context* cultures that I have linked to *social rule of law*. The respondents also make explicit mention of their interpretation being influenced by their cultural background. They contend that it is a shared African culture which, according to them, places a specific and significant importance on the role of liberation songs in forming contemporary conceptions of society. The ANC places greater importance on historical significance, than on contemporary events when interpreting the values and beliefs subsumed in the Constitution as is expressed in the hate speech case. They therefore favour the backward-looking nature of the Constitution, instead of giving equal importance to the future-looking nature of the Constitution. This aligns them with *the social rule of law* conception.

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The respondents also make repeated mention of the NDR. Before I discuss this, I think it is relevant to take note that the notions of the NDR were not a topic for all the witnesses during cross-examination. Notably, the complainants' legal representatives did not follow a line of questioning with Mr Hanekom which would allow the discussion to go towards the NDR. After studying the relevant material, it can be contended that this is not coincidental. Mr Hanekom is far too shrewd and theoretically and conceptually equipped in the field of political philosophy to allow himself to be cornered by legal practitioners on the subject of the NDR. The same can however not be said of Mr Malema and it is no coincidence that most of the references during the court case to the NDR came from the cross examination of Mr Malema. Regardless of Mr Malema's theoretical prowess, or lack thereof, in the field of political theory, he was, in his capacity as head of the ANCYL, the "incubator of ideas". This is how Mr Mantashe referred to him. Mr Mantashe emphasises the importance of educating white South Africans on the NDR. The NDR was discussed in detail in the previous chapter, and it is not my intention to repeat what has been said. It is, however, relevant when applying the conceptual typology since the witnesses called by the ANC made mention of the NDR during their cross-examination. The NDR, with its focus on a particular group or community (black South Africans); its pursuit of hegemony of ideas which by definition denies moral plurality; and the focus on righting past injustices (backward-looking) finds congruence with notions of *liberationists* perspectives on democracy, and is aligned to the *social rule of law* as discussed in sections 4.3.

The final element of the respondents' case which must be considered is their conception of the legal framework which relates to freedom of speech and hate speech. The respondents contended that when interpreting the relevant provisions in PEPUDA (Act 4 of 2000), the historical context is of more significance than the contemporary context. PEPUDA (Act 4 of 2000) has not been interpreted in this manner in other relevant cases regarding hate speech. The respondents also clung to a very narrow and minimalist definition of the 'harm principle' focusing their argument on the notion of physical harm and the incitement of physical violence. This is also not the manner in which the legal framework has gained expression in South Africa. The ANC and Mr Malema's conception gives prominence to historical and cultural context above contemporary context. The respondents argued that the legal framework must be interpreted within a historical context of the liberation struggle. Such a conception has a high degree of congruence with the notion of the *social rule of law* as developed in chapter three.

The three elements which enable one to differentiate between *liberal and social rule of law*, as described in section 3.8 are identifiable in the *AfriForum v Malema* case as described above. The ANC does not see the legal framework pertaining to hate speech as furthering the needs of all individuals within society. Rather, the ANC has a specific view of how this legislation should gain expression which actively favours the interests of a specific group. The ANC appears to be content with the idea that such a conception occurs at the expense of a minority group, which in this case is the white Afrikaans speaking sector of the South African society. The ANC also views the laws created to protect people against hate speech as being contextualised on past occurrences and history. According to the ANC, the history of the struggle against apartheid is of more importance than the contemporary situation in which the laws were created and wherein they operate. The law in such a conception is geared towards the past and is seen as a tool for maintaining a specific history in the minds of society. It is not conceived of as a tool for creating a rule-based society for tomorrow. Finally, through the hate speech saga, the ANC purports to know the right or desirable conception of history. Although it is not exactly the same as the public good, it is akin to notions of the public good in that the ANC sets itself up as the true determiner of that which is relevant history and context. It is not a view which allows for a plurality of conceptions. Any conception of history and context which does not align with that of the ANC is consequently seen as an incorrect conception of our past. All of these elements place the ANC's conception of the rule of law within the *social rule of law*.

5.4 Evaluating the Conceptual Typology and Addressing Validity Concerns

Based on the findings it can be argued that AfriForum subscribes to *liberal rule of law* as developed in chapter three. This is deduced based on the importance given to contemporary context above that of historical context, the focus on formal equality, and the emphasis on equal treatment of all groups before the law; all of which highlight the importance of the manner in which legal procedures and precedents have gained expression in South Africa which focuses on the right to dignity, equality and freedom of all individuals. In contrast it can be argued that the findings above indicate that the ANC subscribes to the notion of *social rule of law*, based on the specific importance attached to history and historical context, the prominence of a specific group's (the majority's) conception of history, and the law being viewed as backward-looking rather than forward-looking in that the conception favours

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historical context rather than contemporary events. The three elements which were thought to explain the variance between *liberal-* and *social rule of law*: whether importance is given to the status of the individual or the community; the conception of the public good as being collectively determined or allowing for a plurality of conceptions; and whether the rule of law is forward- or backward looking, as described in section 3.8, can therefore be validated by the findings in this case study. Mr Malema and the ANC continually favoured a specific conception of history and context which favours a specific group above another. Within such a conception it is the community and not all individuals, who are of the most importance. In addition, the ANC and Mr Malema interpreted the legal framework and the law as ensuring that the past gains precedent over the future (backward-looking). Therefore, the categories identified in the conceptual typology find resonance in the arguments advanced by both respondents and complainants in the hate speech case. Application of the conceptual typology has therefore addressed very important issues relating to external validity which was a major validity concern for this study.

The opinions of the ANC which were analysed by means of the conceptual typology can also be linked to other studies dealing with the ANC's conception of democracy in South Africa. The link between the conceptual typology and the broader literature on rule of law and democracy in South Africa, which was examined in chapter four, can now be further substantiated based on the empirical findings of this study. Notions of particular conceptions of equality and the good, as highlighted by Hudson (2000) and Stacey (2003) respectively as well as notions of hegemony reported by Pretorius (2006) as subscribed to by the ANC all resonate in the *AfriForum v Malema* hate speech case as identified through the application of the conceptual typology. It was shown that the conceptual typology resonates in other qualitative works also concerned with exploring democracy and the rule of law in South Africa. The conceptual typology was validated and verified by both empirically analytical and conceptual means. In doing so, the critical issues pertaining to criterion validity, highlighted as an important validity concern, have been addressed.

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Chapter 6: Conclusion

6.1 Summary of Findings

The aim of this study was to determine if there are contending interpretations of the rule of law in South Africa and if present, whether such conceptions can be systematically described. In order to achieve this aim, conceptions of the ideal of the rule of law were traced back to their medieval roots and it was highlighted that conceptions of the ideal underwent significant changes. It was contended that contemporary conceptions of the rule of law are strongly influenced by social and liberal ideals that emphasise different elements of the rule of law. Social ideals give prominence to the community, substantive equality and positive liberty whilst liberal ideals focus on the individual, formal equality and negative liberty.

A conceptual typology of the rule of law was constructed based on these fundamental and contending differences. It was proposed that such a conceptual typology can be grounded in existing theories of culture, democracy and the rule of law and that, taken together, it can provide the basis for a comprehensive conceptual typology of conceptions of the rule of law. Two conceptions of the rule of law, *liberal rule of law* and *social rule of law,* were identified with the key differences between these conceptions hinging on the status of the individual and the community; allowances for moral pluralism or subscription to a specific conception or notion of the good; and finally whether the past or the future is seen as more important.

It was subsequently shown that the South African democracy is the product of a negotiated settlement that culminated in the creation of the Constitution of 1996. It was highlighted that the Constitution places a specific emphasis on the transformation of South Africa in order to right the injustices of the past. Furthermore, the Constitution envisions a strand of democracy that is more social in character than that of purely formal or minimal conceptions thereof. Although the Constitution creates a framework wherein transformation of society must take place, the Constitution notably does not stipulate the exact manner in which such a project of transformation is to be achieved.

It was then shown, by relying on other published works, that the ANC subscribes to a specific notion of democracy which incorporates specific ideas such as hegemony, an interventionist

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state, specific conceptions of the composition of the demos or people and that these notions are based on specific conceptions of equality and liberty. It was furthermore shown, again by relying on other published works, that the ANC subscribes to a specific notion of the manner in which transformation is to be achieved through specific conceptions of the ideals listed above. These conceptions of democracy and transformation are captured under the ANC's national project, the NDR. It was found that the conceptual typology developed in chapter three can be linked to these works which deal with the ANC's conception of democracy based on the elements which delineate *social* and *liberal rule of law* conceptions. In sum, it was found that the conceptual typology developed in chapter three has a level of congruence with other works and that the conceptual typology is theoretically and conceptually defensible. In doing so, concerns regarding criterion validity were also addressed.

It was subsequently investigated whether the conceptual typology developed could be validated in an analytical manner. It was found that, by exploring the *AfriForum v Malema* hate speech case, the conceptual typology developed does find resonance in a specific case. It was shown that the constitutive elements that differentiate social and liberal conceptions of the rule of law were identifiable in this specific case. The conceptual typology was therefore validated based on empirical findings and in doing so it strengthened the conceptual and theoretical linkages discussed in chapter four. It was also shown that the ANC's conception of the rule of law can be closely aligned to what was labelled the *social rule of law* based on the status given to the community over the individual; a disregard for moral pluralism and finally a focus on past occurrences and injustices rather than on the future-orientated elements of the rule of law. Furthermore, it was shown that AfriForum subscribes to a *liberal rule of law* conception by subscribing to formal equality, emphasising the rights of minority groups and by extension, allowing for moral plurality, and adhering to a belief that the legal framework should be applied in a consistent manner. In doing so, I also addressed issues which have bearing on the external validity of the conceptual typology as discussed in chapter one.

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6.2 Conclusions

The main research question that this study sought to address was: *Are there contending interpretations of the rule of law in the politics of the South African democracy as held by role-playing stakeholders?* I believe that the answer to this question can be returned in the positive. Yes, there are identifiable, contrasting and contending interpretations of the rule of law present in the South African democracy. This is evident not only in the case study, as represented by the opposing sides, but also resonates within the broader literature on works dealing with democracy and related topics in the South African context.

The secondary research question was: *Is the rule of law interpreted in social-, liberal- or other conceptions in the politics of the South African democracy by role-playing stakeholders?* It was found in chapter five that the views of the ANC find a strong correlation with the *social rule of law* as developed in the conceptual typology in chapter three. This is not only evident based on the empirical component of the study, but also resonates in other works which investigate whether the ANC subscribes to specific conceptions of democracy and related concepts[75]. Furthermore, it was highlighted in chapter five that AfriForum's views find strong correlation to the *liberal rule of law* identified in the conceptual typology.

It can therefore be concluded that there are contending interpretations of the rule of law in the South African democracy, and that such conceptions can be analytically and systematically described at the hand of the conceptual typology developed. In chapter one it was mentioned that it must first be established whether there are rival and contending interpretations of the rule of law before claims can be made about the effects such competing interpretations could pose for the future on the South African democracy. Tentative conclusions about the possible impact can therefore now be postulated.

The idea that contending interpretations of the rule of law could have implications for the nature of democracy enjoyed by South Africans is based on the rationale that the rule of law is a crucial element of democracy. This notion was discussed in section 3.5 and it was proposed that the rule of law forms the basis upon which other institutions are constructed.

[75] Section 4.3.2 mentions that the ANC does not represent an ideologically uniform party, however, inferences can be drawn from official party documents as to the overarching ideological stance of the ANC. As noted by Pretorius (2006: 746) the goal is to highlight a defensible position, not an objectively valid perspective of the ANC as a whole.

Both Dahl (1971) and O'Donnell (2001), in their definitions of democracy, highlight the importance of there being rules and of the rules being followed. Therefore, one can conclude that if there is no agreement on what constitutes the rule of law, in other words if there is no conceptual agreement amongst role-playing stakeholders, then there can be no agreement on the fundamental premise upon which constitutional democracy is built.

Another conclusion that can be reached based on the empirical findings of this study is that the certain elements of the Constitution have remained, and might continue to remain, perpetually contested. This research has shown that there are contending interpretations of the rule of law and that there is no national consensus amongst role-playing stakeholders in the politics of South Africa on the precise meaning of this aspect of the Constitution.

From these conclusions a number of inferences could be drawn. Firstly, if there is no consensus on what exactly the rule of law is then there can be no agreement on how to structure a democratic South Africa of the future as the rule of law is a fundamental element of the Constitution of 1996. Such a lack of consensus could make the task of consolidating South Africa's democracy all the more difficult. South Africans from all spheres of society should therefore remain vigilant in protecting our Constitution and our fledgling democracy.

Secondly, the *social rule of law* interpretation could provide political analysts with a way of understanding of certain contemporary political events. President Zuma is yet to comply with a court order by the SCA in which he has been ordered to release information from the NPA on why corruption charges against him were dropped in 2009. It is possible that such actions can be more fruitfully understood by interpreting the rule of law through the *social rule of law* paradigm.

Thirdly, the *social rule of law* interpretation of the ideal provides a greater scope of values than the liberal counterpart. This can have both negative and positive effect. Negative effects include that politicians and role-playing stakeholders can employ a broader and more value-loaded interpretation of the rule of law to justify a wide range of actions which could be considered dangerous to our democracy. Such actions include instances of non-compliance as mentioned above, but also allows for a wide scope in pursuing certain policy directives such as more drastic land reform policies or more stringent affirmative action measures. The danger is, because a *social rule of law* interpretation allows for greater scope in values to be

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subsumed under the ideal of rule of law, certain role-playing stakeholders and politicians could engage in inherently anti-democratic behaviour, such as encroachments on individual rights and freedoms, yet cloak it in the rhetoric of *social rule of law*.

However, it is equally possible that future leaders of the ANC or another governing party might be cut from a different cloth. If such political leaders are elected, a *social rule of law* interpretation of the ideal would allow for greater scope in pursuing policies that are required in order to right the injustices of the past and also to better the lives of millions of South Africans. It is conceivable that a greater range of values to be included in the rule of law could allow leaders to more actively pursue the ideals of dignity, equality and freedom, the cornerstones of our democratic dispensation. Some might criticize such an outlook as overly positive, especially when considering the current political climate where our President does not comply with court orders, yet it remains a possibility. However, the danger remains that the meaning of the rule of law is determined by the party in power, and such a path fraught with danger.

6.3 Validity Concerns

It is not the intention to repeat all that has been stated regarding validity (face, criterion and external) concerns throughout this study. I only wish to highlight that issues of validity have been dealt with extensively throughout this dissertation. Concerns regarding face and criterion validity were dealt with in sections 3.8, 5.2.1, 5.2.2, 5.3 and 5.4. It should also be noted that chapter four, in discussing other published works on democracy, the rule of law and the ANC's conception of related concepts as well as public opinion of these concepts, addresses issues and problems relating to the criterion validity of the conceptual typology which was developed in chapter three. Chapter five, the empirical component of the study, addressed concerns relating to both criterion and external validity of the conceptual typology. Even though concerns regarding criterion validity and external validity have been addressed in a comprehensive manner it must, however, be kept in mind that face validity, as is mentioned by Bailey (1987:68), is ultimately a matter of judgement and can never be fully satisfied.

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6.4 Summary of Contributions

The main contribution of the study is that of theory building. The study proposed a conceptual typology for the interpretation of the meaning that certain role-playing stakeholders invest in the rule of law which forms an important element of the Constitution of 1996. The conceptual typology developed in this study provides a concise, empirically descriptive, robust and comprehensive mechanism for analysing conceptions of the rule of law. The three elements which were thought to account for the difference in *liberal-* and *social rule of law* were identified as being present in the *AfriForum v Malema* hate speech case, the case study selected for this dissertation. A contribution to the theoretical understanding of the rule of law in South Africa has been made by highlighting the face, criterion and external validity as well as the applicability of the conceptual typology through means of empirical investigation.

Furthermore, concerns regarding the criterion and external validly of the measuring instrument were dealt with by validating the conceptual typology by means of empirical investigation. The conceptual typology developed in this study improves on previous dichotomous models for interpreting democracy and the rule of law in South Africa as discussed in chapter three. The conceptual typology developed in this study provides a more accurate distinction between categories and gives a more detailed description of the object under study — that of the rule of law. The conceptual typology finds congruence not only with other works in the field of political science, but also through empirical investigation, and as such a valuable contribution has been made to the body of work concerned with democracy and the rule of law in South Africa.

This study has achieved this in an original and empirically descriptive manner. It has addressed a gap in the literature which has been alluded to by other authors, but never fully described. This is the element of the rule of law which is referred to by O'Donnell (2004) as the "essence" of the rule of law, by Weingast (1997) as "something beyond laws" and by Dyzenhaus (2007) as the "nature of the substance" of the rule of law which was mentioned previously in sections 1.6, 1.7 and 5.1. This study, by framing the debate as conceptions of the rule of law, offers an empirically defensible description of this elusive element of the rule of law.

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It is envisioned that the main contribution of this study will be to provide other scholars, authors, researchers, academics and those concerned with the rule of law a concise, robust, comprehensive and empirically viable conceptual typology with which to interpret political events which are concerned with the rule of law.

6.5 Suggestions for Further Research

This study found that there are contending and divergent interpretations or conceptions of the rule of law present in the South African democracy. The rule of law is a very important institution in constitutional democracies. A topic for future studies could be to explore what possible implications such contesting interpretations could hold for the future of South Africa's democracy. As briefly mentioned, if there are contentious conceptions of fundamental key components of our democracy these could pose serious issues for the continuation of constitutional democracy in South Africa. The project of democracy and transformation is open to a level of interpretation and would therefore allow for the pursuit of projects which are fundamentally anti-democratic, yet be justified in the guise of constitutional democracy. Exploring such questions fall outside the scope of this study but it is envisioned that this could be a major avenue for future research topics.

Another avenue for future research would be the investigation of the applicability of the conceptual typology to other cases within South Africa. The task would be to investigate whether similar conclusions would be reached if the conceptual typology is applied to other empirical cases which would, in turn, increase the analytical and empirical accuracy of the conceptual typology. Specifically, this would increase the external validity of the conceptual typology and also increase its applicability as a conceptual measuring instrument since the level of analytical generalisation offered by the conceptual typology would increase. It is also conceivable that another type of conceptual typology could be constructed in order to address issues relating to the construct validity of the conceptual typology created in this study. This would require that a different conceptual typology be applied to the same case, namely the *AfriForum v Malema* case, to determine if similar conclusions can be reached.

On a similar note as the above, it is envisioned that the conceptual typology could be applied to other cases in both South Africa and other countries in order to further validate, or discard,

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its applicability. However, the conceptual typology need not be applied only to other developing or newly democratised countries, as it could also be applied to established democratic regimes in order to investigate if contending and divergent interpretations of the rule of law are present in such regimes. It would be interesting to determine if there are contending interpretations of the rule of law present in well-developed democracies, and if present, whether they can be described at the hand of the conceptual typology developed in this study.

Such works would also serve to create a benchmark against which to gauge or compare the conceptions of the rule of law present in South Africa. The conceptual typology, if applied to a wide range of regimes could provide a larger–basis and analytical platform for comparing different conceptions of the rule of law in different democratic regimes. Such comparative studies could be further linked to other works dealing with comparative research, an important and recognised form of research within political science.

Yet a further avenue of research would be to attempt to verify the conceptual typology through quantitative work. It was shown in chapter four that the model can be used to offer a defensible interpretation of variance found in public opinion works on democracy and the rule of law. It would be interesting to determine if research, which seeks specifically to operationalise the conceptual typology developed in this study, would be able to verify its applicability in quantitative works concerned with public opinion on the rule of law and democracy, not only in South Africa, but in other countries in Africa. It would also be interesting to investigate whether such quantitative analysis of the conceptual typology would be applicable to older well-established democratic regimes. The main difficulty of such quantitative works would lie in establishing an accurate operationalisation of the conceptual typology. It is, however, plausible that such an operationalisation could be achieved and that it would identify various new lines of inquiry.

It is also possible that the conceptual typology developed in this study could offer scholars concerned with, and working in the field of democratic consolidation, a concise yet robust tool with which to incorporate the rule of law in their studies. As the rule of law is usually glossed over in such studies, as was shown in this dissertation, it is plausible that the conceptual typology could assist such authors to gain a fundamentally deeper understanding

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of the rule of law, the importance of which is already recognised in democratic consolidation literature.

6.6 Final Remarks

The main conclusion of this study is that there are rival, competing and contending interpretations of the rule of law subscribed to by role-playing stakeholders in the South African democracy. It was found, through the empirical analysis in the form of the *AfriForum v Malema* hate speech case, that the ANC subscribes to a specific conception of the rule of law and that this conception can be labelled as a *social rule of law*.

Importantly, it was found that the conception adhered to by the ANC favours specific ideals. These include that status is afforded to the community and not the individual; the ANC assigns itself as the true determiner of the public good, history and context and does not allow for a plurality of such conceptions; and the ANC's conception of the rule of law is one which focuses on past injustices, rather than on future-orientated goals.

Such a conception, which was labelled the *social rule of law*, could have far reaching implications regarding the manner in which individuals can live their life and the sphere of freedom which individuals can expect to enjoy under constitutional democracy in South Africa. The *social rule of law* conception has negative implications regarding the manner in which the rights of minorities are protected and which freedoms they are to be afforded. Importantly, these implications are in fundamental contravention with the Constitution of 1996 if considered from the conception of *liberal rule of law*.

Irrespective of conceivable implications that can be drawn from this study, I find myself agreeing with a remark once made by Jan Smuts, that in South Africa, "the worst, like the best, never happens" (Smuts, 1973, quoted in Du Toit and Kotze, 2011:3).

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