Contending Interpretations of the Rule of Law in South Africa

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1.1 Background 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 within a similar context constituted hate speech (Freedom Front v SAHRC and Another, 2003). 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.

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1 This is an edited version of first chapter of my completed PhD.
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:

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 and appointment process of the Judicial Service Commission (JSC). 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). 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). 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 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 and that such a conception differs from standard liberal definitions of the term as it is understood in established democracies.
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 study 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.

Therefore, 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 law².

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)³ 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 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

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² 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.

³ Henceforth referred to only as AfriForum v Malema for the sake of brevity.
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.

The research design of this study is a multi-design as both theory-building and case study research designs are employed. 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 (case study) will subsequently be carried out to determine whether this conceptual typology can be applied to a specific case.

1.5 The Rule of Law, Democracy and Culture

This work 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. I rely on the definition of the rule of law as put forward by Kahn (2001). 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 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 second theoretical starting point is that the rule of law and democracy are completely intertwined. This 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”. Other authors have also noted the strong link between rule of law and democracy (Zakaria, 1997; Tamanaha, 2004).

From these theoretical starting positions this study will put forward a conception of rule of law that includes notions of culture and democracy. One of the goals of this study is to shed light on an elusive element of the rule of law, 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 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.
1.6 Conceptual Typology


It is my contention 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 stakeholders 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 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).

1.7 The Hate Speech Case

The purpose of the case study element is 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 chant⁴, 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.

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⁴ The words song and chant will be used interchangeably.
## An Interpretive Framework

<table>
<thead>
<tr>
<th>Liberal Rule of Law</th>
<th>Social Rule of Law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Culture</strong></td>
<td></td>
</tr>
<tr>
<td>Low context: individual focus</td>
<td>High Context: communal focus</td>
</tr>
<tr>
<td>Individual rights and liberties</td>
<td>Communal rights and liberties</td>
</tr>
<tr>
<td>Equality before the law, disembodied notion of justice</td>
<td>Law linked to context and past favour is group affiliated</td>
</tr>
<tr>
<td>Future-orientated</td>
<td>History plays an important role in shaping interactions</td>
</tr>
<tr>
<td>Language void of context – communicative tool</td>
<td>Language loaded with context</td>
</tr>
<tr>
<td>Negotiation in good faith</td>
<td>Negotiation in good will</td>
</tr>
<tr>
<td><strong>Democracy</strong></td>
<td></td>
</tr>
<tr>
<td>Liberal: focus on individual freedom and autonomy</td>
<td>Liberationist: focus on group welfare</td>
</tr>
<tr>
<td>Autonomous state with separation of spheres of government</td>
<td>State seen as vehicle for emancipation, amalgamation of spheres of government to concentrate power</td>
</tr>
<tr>
<td>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</td>
<td>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</td>
</tr>
<tr>
<td><strong>Rule of law</strong></td>
<td></td>
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<tr>
<td>Individual of utmost importance</td>
<td>Community of utmost importance</td>
</tr>
<tr>
<td>Negative liberty</td>
<td>Positive liberty</td>
</tr>
<tr>
<td>Formal equality</td>
<td>Substantive equality</td>
</tr>
<tr>
<td>Goal of rule of law is to create and maintain a rule-based society</td>
<td>Goal of rule of law is to confer power, wealth and preference onto specific group</td>
</tr>
<tr>
<td>Emphasis on future – focus on creating society for future with little importance placed in historical context</td>
<td>Emphasis on past – focus on rectifying injustices of the past and the importance of historical context</td>
</tr>
<tr>
<td>Allows for multiple conceptions of the good, moral pluralism</td>
<td>Subscribes to specific conception of the good, the ‘public good’</td>
</tr>
</tbody>
</table>
1.8 The Song, Involved Parties

The words in question as reported in the judgement are:

1. Awudubula (i) bhulu.
2. Dubula amabhungu 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.

1.9 Findings

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 Prevention of Unfair Discrimination (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 Afrikaners 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. 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.

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. 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 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 liberation 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.

Importantly, the ANC relates these beliefs to the Constitution. Mr Hanekom (then Deputy Minister of Science and Technology and member of cabinet) 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 (then Secretary-General of the ANC) 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. 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).

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.

The respondents also make repeated mention of the National Democratic Revolution (NDR). Mr Mantashe emphasises the importance of educating white South Africans on the NDR. 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*.

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.

The three elements which enable one to differentiate between *liberal and social rule of law*, 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

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5 The work by Pretorius (2006) brilliantly examines the ANC’s conceptions of the NDR, hegemony, democracy and notions of ‘the people’. Pretorius’s (2006) work was extremely influential in this study.
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.

Based on the findings it can be argued that AfriForum subscribes to liberal rule of law. 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 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, 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.

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 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.

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 that the views of the ANC find a strong correlation with the social rule of law as developed in the conceptual typology. 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. Furthermore, it was highlighted 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. 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. 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

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6 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.
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 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 is fraught with danger.
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