Authors: D Hulme and S Peté

VOX POPULI? VOX HUMBUG! – RISING TENSION BETWEEN THE SOUTH AFRICAN EXECUTIVE AND JUDICIARY CONSIDERED IN HISTORICAL CONTEXT – PART TWO[1]

ISSN 1727-3781

2012 VOLUME 15 No 5

http://dx.doi.org/10.4314/pelj.v15i5.2

VOX POPULI? VOX HUMBUG! – RISING TENSION BETWEEN THE SOUTH AFRICAN EXECUTIVE AND JUDICIARY CONSIDERED IN HISTORICAL CONTEXT – PART TWO[1]

D Hulme*

S Peté**

1 Introduction

Part One of this article traced the current rising tensions between the South African executive and the judiciary on the question of the separation of powers. The present situation in South Africa was then contrasted and compared with a clash which took place between the executive and judiciary in 17th century England. The broad implications of the clash between the English King James I and his Chief Justice Edward Coke were set out, together with their relevance to present-day South Africa.

In Part Two of this article the implications of the clash between James and Coke will be examined in greater detail. The important cases of *Prohibitions Del Roy* and *The Case of Proclamations* will be discussed, following which comparisons will be drawn with the current South African situation. The arguments put forward in these important cases will be linked to the contemporary anti-majoritarian thesis of Ronald Dworkin.

1 The phrase '*Vox Populi? Vox Humbug!'* used in the title of this article is borrowed from William Tecumseh Sherman, the American Civil War general who used it in relation to press reporting. It is adapted from the ancient adage '*Vox populi, vox Dei*' - 'The voice of the people [is] the voice of God', the origins of which are uncertain. However, an early example of its use was by Alcuin in 798 AD (Wikiquotes Date Unknown en.wikipedia.org

* David Hulme. BA, LLB, LLM (UKZN). Senior Lecturer of Law, School of Law, Howard College Campus, University of KwaZulu-Natal, Attorney of the High Court of South Africa. Email: hulmed@ukzn.ac.za.

** Stephen Peté. BA, LLB (UKZN), LLM (UCT), M Phil (University of Cambridge). Associate Professor, School of Law, Howard College Campus, University of KwaZulu-Natal, Attorney of the High Court of South Africa. Email: pete@ukzn.ac.za.

2 The case of *Prohibitions Del Roy* 1607

Prohibitions Del Roy[2] is a seminal case, as it sets a precedent for the judicial review of executive action, and is uncompromising on the question of the separation of powers in relation to the courts. Remarkably, it achieved this in an era when neither the tenure nor indeed the head of a judge was secure. The judge in this matter was Sir Edward Coke, a personality of enormous importance in Anglo-American constitutional history. Notwithstanding the fact that the decision in the case represents a practical validation of the separation of powers, Coke did not endorse any discernible concept of the separation of powers or even constitutionalism for that matter.[3] Coke's approach to constitutional issues is rather typical of English constitutional history, which tends to be 'short' on theory and 'long' on precedent.[4] At the time of the *Del Roy* case in 1607, Edward Coke was Chief Justice of the Court of Common Pleas. In 1612 he was 'promoted' to be chief justice of the King's Bench in order to remove him from the Court of Common Pleas, where his decisions had displeased King James. Coke was finally dismissed by James in 1616 for his various attempts to limit James' use of the royal prerogative. Later, as a member of parliament Coke was to clash with the monarch again, and was briefly imprisoned in the Tower of London for his activities. It was as an MP in 1628 that Coke was to draft the 'Petition of Right', another of the primary documents of English constitutional law, and its production constituted one of the steps in the path leading to the English Civil War of 1642-1651.[5]

2 *Prohibitions Del Roy* 1607 77 ER 1342.

3 Stoner *Common Law* 27-29.

4 It is characteristic of English constitutional law that very few of its innovations or developments were based on principle or considered in advance. Whilst constitutional institutions, rights and liberties certainly were created, developed or extended, the process tended to be more concerned with 'correcting manifest wrongs than proclaiming evident rights'. See Ackroyd *History of England* 173. Doctrine emerged piecemeal and in retrospect. For instance, *Magna Carta* was a 'miscellaneous and haphazard collection of principles taken from canon law and common law and custom equally', containing no central doctrine and designed to deal with the specific abuses of John I. See Ackroyd *History of England* 173. Furthermore, much occurred as a result of chance events rather than planning based on principle. There are many examples, but they include the subsequent survival of *Magna Carta* after its creation in 1215, and the creation of the House of Commons by Simon De Montfort in 1265. See Hindley *Magna Carta* xvii; Ackroyd *History of England* 172-174; 199-200.

5 Stoner *Common Law* 15-16. Coke's earlier career included service as an MP and speaker of the House of Commons, as well as Attorney General under both Elizabeth I and James. His activities in the latter office included the prosecution of Sir Walter Raleigh. By the time of the Petition of Right, the monarch was James' son Charles I.

Coke was a somewhat contradictory, if not controversial figure, referred to by contemporaries as 'tough old Coke'.[6] His world view was shaped by a profound fascination with that combination of 'reason and authority' which in his mind comprised the English Common Law,[7] together with a passionate belief in the liberties of England as contained in *Magna Carta*.[8] He wrote his own treatise on the Common Law, in what he called the 'Institutes'.

Prohibitions Del Roy involves what would now be called a declarator.[9] It seems that a matter involving a land dispute was heard by the king, who had given judgment. This judgment was later 'repealed', as the hearing of such a matter by the king 'did not belong to the common law'. No indication is given of which court reversed the judgment. Nonetheless, the reversal resulted in the king's seeking clarity with regard to his authority to hear cases and give judgment in legal disputes. Before approaching the courts for clarity, James had obtained advice regarding his judicial powers from Richard Bancroft, the Archbishop of Canterbury. This advice was much to the King's liking, namely: [10]

> Concerning the high commission[11] or in any other case in which there is not express authority in law, the King himself may decide it in his Royal person; and that the Judges are but the delegates of the King, and that the King may take what causes he shall please to determine, from the determination of the Judges, and may determine them himself. And the Archbishop said, that this was clear in divinity, that such authority belongs to the King by the word of God in the Scripture.

This view, as can be seen from the 'Trew Law' extract quoted in Part One of this article, is in keeping with the manner in which James viewed the function of judges.

6 Stoner *Common Law* 16.
7 Stoner *Common Law* 23.
8 Stoner *Common Law* 21.
9 Because of the setting, which appears to have been James' court rather than in a formal tribunal, the case has the appearance of an opinion rather than a formal court pronouncement. However, it was not unusual at the time for officials to exercise their functions for the convenience of the monarch, in his presence.
10 *Prohibitions Del Roy* 1607 77 ER 1342. Note that early cases such as *Prohibtions Del Roy* lack any system of paragraph referencing.
11 The High Commission together with the infamous Court of the Star Chamber were the two special courts of prerogative - the High Commission for ecclesiastical matters and the Star Chamber designed to try certain offences using less formal procedure than the common law courts. An extension of the Privy Council, the Star Chamber, tended to be used for certain charges against high-ranking members of society. In Stuart times, the Star Chamber came to be abused as a secretive court in which the opponents of the monarch were prosecuted with little chance of acquittal. See Britannica Date Unknown www.britannica.com. See also Prosser and Sharp *Short Constitutional History* 114-116.

He was supported in this view by certain courtiers, including none other than Francis Bacon, who was made Attorney General in 1613, and later made Lord Chancellor in 1618. Bacon contended that judges should be 'lions under the throne'.[12]

Chief Justice Coke, with the support of the other judges,[13] expressed his surprise at the Archbishop's advice - citing authority to the contrary. Regarding the monarch's judicial powers, Coke made the following three points:[14] First, the King "in his own person" was ineligible to hear any matter in any court of justice. In these courts judgment had to be given by the judges "according to the law and custom of England". Secondly, however, the king had a limited judicial role when sitting in the Upper House of Parliament. In the House of Lords, provided he had the assent of the "Lords Spiritual and Temporal", he could reverse a decision of the King's Bench on appeal.[15] Thirdly, Coke held that the king could sit in the Court of the Star Chamber, "but this was to consult with the justices, upon certain questions proposed to them, and not *in judicio*".[16]

In general, Coke relies on specific authorities for his pronouncements, although he extends the scope of the rule relied on in certain instances.[17] In this practice his

12 Churchill *History of the English Speaking Peoples*.

13 These presumably included the part-time judges of the Exchequer. Although Judge Coke was Chief Justice of the Court of Common Pleas at the time, he asserts that "all the judges of England" were present at the time he rendered his opinion to King James; the implication being that this included not only the judges of the Court of Common Pleas but also the judges of the other 'superior' (or royal as opposed to local) court benches - although he might be referring only to the three Common Law Courts. Coke also asserts that all the judges were in agreement with his opinion. Coke exemplifies some of the matters which the king might not hear, and these include criminal offences which were beyond the jurisdiction of the Court of Common Pleas, indicating that Coke's judgment related to the court system as a whole and not merely to the court of which he was Chief Justice.

14 Since in a sense the judgment deals with jurisdiction and only incidentally with the separation of powers, it is a little hard to understand without some knowledge of seventeenth century English court structure. The three English superior courts of Common Law at that time were the Court of Common Pleas, which dealt with private disputes between parties; the King's Bench, which dealt with criminal matters; and the Exchequer of Pleas, which dealt with financial matters - although the jurisdictional boundaries were somewhat blurred. The use of the common law in these courts contrasted with the practice of the Chancery, which with regard to its judicial duties became a court of equity. Other entities within the royal administration such as the Admiralty also possessed limited judicial authority. See Prosser and Sharp *Short Constitutional History* 41, 66, 96.

15 The situation was somewhat 'messy' to say the least, in that the areas of jurisdiction between the courts was by no means watertight, and the King's Bench acted as a court of appeal for the Court of Common Pleas.

16 *Prohibitions Del Roy* 1607 77 ER 1342.

17 Good examples are the 'due process' clauses in *Magna Carta*, which originally were intended to apply to 'free men' only and not to serfs; see *inter alia*, sections 20, 36, 38 and 39 of *Magna*

approach is probably both unwitting and correct, as rights had developed, extending beyond their original context throughout English history. Nevertheless it seems that Coke was not above 'gilding the lily' in his quest to assert that his authority was truly ancient. He claims that:

> ... no King after the Conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the Courts of Justice...

Interestingly, he does not cite any authority for this particular proposition - which is clearly wrong. In fact, the 11th and 12th century Norman and Angevin kings of England[18] had no qualms about sitting in judgment, and the very name 'court' indicates the royal origin of the judicial organ of government. The king originally exercised all elements of governance; the executive, the legislative and, more particularly in this context, the judicial function in his royal court. It was only with the onset of judicial specialisation from the late 12th century as well as the early 13th century requirement in *Magna Carta* that the Court of Common pleas remain in one place instead of progressing with the king as part of his entourage - that the monarch began to separate himself from the judicial function.[19] It is true that by 1607 the courts were separate from the executive, as Coke indicates, and, from Coke's perspective, had been so from time immemorial. Nonetheless, the separation of the executive function exercised on behalf of the person of the monarch from the judicial function had been a gradual development, a fact of which Coke may not have been aware. It is also possible that the mind-set of the judge prevented him from perceiving or admitting that this development had been gradual, as he tended to think on the basis of precedent rather than principle. At no point does the judge argue on the basis of the separation of powers, even though there is classical precedent for this.[20] The theory had yet to be formulated on a formal basis, although as it will be seen from the 17th century cases under examination in this article, the

Carta. Coke makes no such distinction when he refers to *Magna Carta*. In this he was not wrong, as the feudal society which *Magna Carta* strongly reflects no longer existed in the 17th century, by which time *Magna Carta* was perceived to contain rights of general application.

18 These monarchs began with William I in 1066 and ended arguably with the loss of the Angevin Empire and the death of John I in 1216, although the Angevin Plantagenets continued to rule England, its British dependencies, and the surviving Angevin territory - namely Gascony.

19 See Prosser and Sharp *Short Constitutional History* 32, 37-43. See also article 17 of *Magna Carta*: "Common pleas shall not follow our court, but shall be held in some fixed place".

20 Stoner *Common Law* 28.

concept already existed on a practical, if somewhat incomplete and contested basis in England at this time.[21] Coke's arguments are not based on mere blind adherence to precedent, however. They are also based on reason and a practical application of the rule of law.

Coke's deployment of reason in argument becomes more evident in his next pronouncement, which was that "the King cannot arrest any man..... for the party cannot have remedy against the King; so if the King give any judgment, what remedy can the party have". This is very close to arguing that the king may not be a judge in his own cause. Coke further asserts that for the same reason the king may not arrest anyone on suspicion of treason or felony. He also relies for authority on *Magna Carta*[22] and other authorities including the statutes of Edward III, which provide for due process and presentment before justices prior to arrest.[23]

The record of the case ends with a classic passage in defence of the rule of law:

> ... then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debed esse sub homine, sed sub Deo et lege* [That the King ought not to be under any man but under God and the law].

It is worth recalling that this pronouncement was made at a time when the precise limits of royal powers were contested, and the monarchy not above attempting to

21 It is for this reason that Montesquieu makes reference to England as an exemplifier of the concepts he has under discussion in *Spirit of the Laws*.

22 *Magna Carta*, article 39: "No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." (In this instance the reference in the judgment is not specifically to article 39 of *Magna Carta*, but this passage would seem to be the best suited to Coke's argument).

23 Arrest undoubtedly included incarceration - probably the real aspect of harm in any situation of arrest.

extend it illegally. Furthermore, as the abrupt termination of Coke's judicial career in 1616 for crossing James one time too many illustrates, judges did not enjoy security of tenure.[24] Finally, notwithstanding limited legal safeguards, at that time it was not uncommon for those who opposed the monarch to lose their heads. The statement encapsulates Coke's view of the value and role of law. Decisions made on the basis of Solomonic wisdom and reason on its own are essentially arbitrary, no matter how 'endowed with excellent science, and great endowments of nature' the decision-maker might be. To make a legal decision which conforms to law, the application of some objective criteria external to the decision-maker is required. For Coke, this 'golden metwand' or measuring stick is the law. Courts do not make decisions by using natural reason but by application of a special 'artificial' reason. This is based on both a theoretical and practical knowledge of the law, which can be acquired only through "long study and experience" in its use. As will become apparent below, the concept of the law's acting as a 'golden metwand' lies at the root of contemporary arguments against simple majoritarian theories of democracy, and in favour of theories which promote constrained constitutional democracy.

3 *The Case of Proclamations* 1611[25]

Proclamations del Roy was by no means the only case involving friction between Judge Coke and King James. *The Case of Proclamations* of 1610 did not involve a contest between the king and the courts over their respective powers or jurisdiction. Nevertheless, like *Del Roy* it was an instance of the executive having its area of authority restricted to conform with what would now be referred to as the separation of powers. Furthermore, it was another example of the executive being frustrated in its intentions by the courts - a frustration which is apparently shared by the current South African executive.[26]

24 This would come only with the *Act of Settlement* of 1701 which, *inter alia*, provided for the independence of the judiciary by ensuring that judges might keep their appointments '*quamdiu se bene gesserint*'. From this point on the monarch would not be able to remove them from the bench or interfere with their salaries. They might be removed from the bench only for bad behaviour and on the vote of a joint sitting of both Houses of Parliament.

25 *The Case of Proclamations* 1610 77 ER 1352.

26 It is interesting to note that Coke was also involved in an important case concerning the judicial review of legislation. This was the well-known case of *Thomas Bonham v College of Physicians* 1610 77 ER 638, 652 (CP). The latter case is controversial, as it includes passages such as the following: "… it appears in our books, that in many cases, the common law will controul Acts of

The case involved James' wishing to prohibit the construction of new buildings in and about London by way of proclamation. The issue was if it was permissible for the king to create legal prohibitions in this manner. Despite several instances of the king's ostensibly having made law by way of proclamation in the period before this matter came up for decision, the practice had been challenged. The king's advisors were clearly aware that it was legally questionable and also that a judicial decision endorsing the use of the practice in future would create a new precedent. Although the courts themselves appeared to have enforced such proclamations on occasion in the past, Coke pointed out that the indictments in such cases made reference to the law rather than any royal proclamation.[27] In any event, as Coke noted, "*melius est recurrere, quam male currere".*[28] In other words, that it would be better to reconsider any practices that had mistakenly arisen rather than to continue them in breach of the law.

Coke wished to have time to confer with his brother judges and "then to make an advised answer according to law and reason". However, he was pressed by the king's advisors to deliver an immediate and supportive opinion, which Coke strongly resisted. Although his resistance to this pressure is of no immediate relevance to the case itself, it reveals Coke's approach to the creation of new precedents, which is germane to his approach to the law, and worth examining: [29]

> The Lord Chancellor said, that every precedent had first a commencement, and that he would advise the Judges to maintain the power and prerogative of the King; and in cases in which there is no authority and precedent, to leave it to the King to order in it, according to his wisdom, and for the good of his subjects ... and all concluded that it should be necessary at that time to confirm the King's prerogative with our opinions, although that there were not any former precedent or authority in law: for every precedent ought to have a commencement.

Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Acts to be void ..." However, the meaning of Coke's words is contested with regard to whether he intended that legislation could be reviewed by the courts in the American fashion using the common law as a standard, or whether he merely intended review to be limited to the sort of grounds for review permitted in administrative law. This case was particularly influential in the early development of American jurisprudence.

27 "... indictments conclude, *contra leges et statuta*; but I never heard an indictment to conclude, *contra regiam proclamationem*".

28 A literal translation is: 'It is better to run back than to run badly'. An interpretation of the meaning would be: 'It is better to revise something than do it badly'. The authors express their heartfelt thanks to Professor John Hilton of the Department of Classics at the University of KwaZulu-Natal for his generous assistance with the translation.

29 The literal meaning is: 'deliberation must be long for something that must be decided once'.

> To which I answered, that true it is that every precedent hath a commencement; but when authority and precedent is wanting, there is need of great consideration, before that any thing of novelty shall be established, and to provide that this be not against the law of the land: for I said, that the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament. But at this time I only desired to have a time of consideration and conference with my brothers, for *deliberandum est diu, quod statuendum est semel*.

Coke's resistance to being 'railroaded' into a quick decision and his insistence on being allowed to deliberate on the issues are perhaps one of the first examples of judicial resistance to an executive attempting to overstep the legitimate limits of its power. Furthermore, his insistence on deliberation before giving an immediate response and that 'any thing of novelty' should not contravene the law is entirely consistent with his view that law and reason ought to operate as a 'metwand'. His insistence that parliament should be the creator of any new law is also notable. If there was to be a 'metwand' that guided the decisions of the courts or the decisions of the executive for that matter, it ought not to be of the executive's construction. Neither should it be possible for the executive to amend the 'metwand.' Whatever else, it seems certain that Coke had no intention 'in cases in which there is no authority and precedent, to leave it to the King to order in it, according to his wisdom'.

Having conferred with his brother judges, Coke found that: [30]

> ... the King by his proclamation of other ways cannot change any part of the common law, or statute law, or the customs of the realm, ... also the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law, and to make an offence which was not; for *ubi non est lex, ibi non est transgression*: ergo, that which cannot be punished without proclamation, cannot be punished with it.

Coke went on to indicate the role of royal proclamations, which it seems would be to serve more or less the purpose which regulations serve today. Therefore the King could set penalties provided the common law already provided that some activity

30 Although Coke was not above twisting the meaning of any original authority, including some idiosyncratic Latin translations, there is early authority dating back to before *Magna Carta*, and therefore before the creation of parliament, to the effect that the monarch may not create any law which alters the common law. In feudal times this was probably observed more in the breach than in the observance. See Prosser and Sharp *Short Constitutional History* 3.

was unlawful and constituted an offence. Coke emphasised that: "... the law of England is divided into three parts, common law, statute law, and custom; but the King's proclamation is none of them…' All in all, Coke's decision was a slap in the face for the King, and severely limited his royal prerogative. The judgment is a classic endorsement of the doctrine of legality and the rule of law. Although there is no overt reference to the separation of powers, the case certainly enforces this important principle of constitutional democracy.

4 Comparing 17th Century England with 21st Century South Africa

At first blush any insights into the doctrine of the separation of powers which may be gained by comparing the clash between a monarch aspiring to absolute power and his Chief Justice in 17th century England, with the present friction between the executive and judiciary in contemporary South Africa, may seem to be limited. After all, the clash in England took place at a time when the doctrine of the divine right of kings was influential and English democratic institutions were still at a relatively early stage of their development. Despite the conceptual and temporal distance between 17th century England and present-day South Africa, however, the problems faced by these two societies were/are not entirely dissimilar. Like 17th century England, present-day South Africa is in the early stages of its democratic development. Democratic institutions are vulnerable and democratic practices not yet deeply entrenched. Friction seems inevitable as different centres of power jostle for position. Comparing the contentions of the respective executives of these two societies on the one hand and the arguments advanced by their respective judiciaries on the other is instructive.

Both James I and Jacob Zuma regard the source of their authority to be self-evident and irrefutable. James, working from the premise of the divine right of kings, believes that he is duly anointed by God. Zuma, working from the premise of a simple majoritarian concept of democracy, believes his authority to be derived directly from 'the people'.[31] Each of these claims to authority is potent within its respective context.

31 Zuma is reported (direct quotes) to have stated, *inter alia*, as follows: "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 must not get a sense that there are those who wish to co-govern

At a time when society was in transition from the pre-modern to the modern, James' appeal to God still resonated with power. In post-apartheid South Africa, Zuma's reliance on the authority of 'the people' carries the *imprimatur* once enjoyed exclusively by holy writ. Indeed, Zuma has gone as far as to claim divine anointment for his particular political party:[32]

> When you vote for the ANC, you are also choosing to go to heaven. When you don't vote for the ANC you should know that you are choosing that man who carries a fork ... who cooks people. When you are carrying an ANC membership card, you are blessed. When you get up there, there are different cards used but when you have an ANC card, you will be let through to go to heaven .. When [Jesus] fetches us we will find [those in heaven] wearing black, green and gold [the ANC colours] ... the holy ones belong to the ANC.

Whether or not Zuma was serious in the views set out above, his appeal to the divine certainly resonates with the arguments put forward by James discussed earlier. This curious mixture of appealing both to the people and the divine, a combination of modern and pre-modern-style arguments, is perhaps best captured by the old adage '*Vox populi, vox Dei*' - 'The voice of the people [is] the voice of God'.[33]

Claims to authority from either God or 'the people' may be interrogated on a number of levels. At a superficial level, it may be argued that the claims of both James and Zuma rely heavily on fiction. One need hardly convince a modern audience that James' appeal to divine authority was based on fantasy. Although James' appeal to God was taken more seriously in his own time, even then it was open to challenge by members of the parliamentary gentry, many of whom regarded the doctrine of the divine right of kings as a fiction.[34] At present, claims to divine authority as made by Zuma in the quotation set out above appear simply bizarre. Claims to authority from

---

the country through the courts, when they have not won the popular vote during elections. We also wish to reiterate our view that there is a need to distinguish the areas of responsibility between the judiciary and the elected branches of the state, especially with regards (sic) to policy formulation. Our view is that the executive, as elected officials, has the sole discretion to decide policies for government." See Hartley 2011 www.bdlive.co.za.

32 Ngalwa 2011 www.timeslive.co.za.

33 The origin of the adage is not clear. It is referenced in a letter of Alcuin to Charlemagne of 798, but was clearly already in use. In the context of Zuma's claim to democratic authority and the authors' reliance on Dworkin's constitutional arguments, Alcuin's full statement is beguilingly apposite: 'And those people should not be listened to who keep saying the voice of the people is the voice of God, since the riotousness of the crowd is always very close to madness.' See Wikiquotes Date Unknown en.wikipedia.org.

34 Indeed, his son's persistence in this doctrine resulted in civil war and his son's beheading.

'the people' are more persuasive in the modern world, but upon further examination it may be argued that such claims are also based on a fiction. In the first place, it is clear that the executive does not derive its authority directly from the people but from the National Assembly.[35] The president has no direct mandate from the electorate, but is dependent on the National Assembly for democratic legitimacy. Even his indirect democratic mandate, derived from his election by the National Assembly, is open to question. Members of Parliament are not given *carte blanche* in choosing who to elect as President, but have to follow instructions from their political parties. In reality today, the South African presidential 'candidate' is chosen by the 4500 odd members of the elective conference of the African National Congress.[36] Furthermore, it may even be argued that the members of the National Assembly do not have direct electoral support, since they are appointed by parties which assign them to the seats each party is allotted in proportion to its share of the popular vote. Add to this the relatively low number of citizens who actually vote as a percentage of the total citizenry, and it becomes clear that the National Assembly can be said to reflect the will of 'the people' in an indirect sense only.[37] All things considered, when it comes to claims by the South African executive to democratic authority derived from 'the people', General WT Sherman's adaptation of the adage set out in the previous paragraph may be more accurate than is generally admitted: '*vox populi, vox* humbug'![38]

Apart from the arguments set out above, there is, potentially, a more fundamental problem with the arguments put forward by both James and Zuma. It may be argued, perhaps, that both James and Zuma misread the legal, political and economic history of the time at which they were/are living. James' arrival in a politically precocious England found him out of touch with a society well into a transition from the pre-modern to the modern world. Monarchy in England was limited and a practical form

35 The president is voted into office by the National Assembly at its first meeting after a general election. See s 86 *Constitution of the Republic of South Africa,* 1996.

36 The elective conference members, in turn, are selected by the party. See De Vos 2012 constitutionallyspeaking.co.za.

37 The total number of votes cast nationally at the 2009 general elections was 17,919,966 out of a total population of 49,991,300. See IEC 2009 www.elections.org.za; Statistics SA 2009 www.statssa.gov.za.

38 Although he used it in a somewhat different context. William Tecumseh Sherman, the American Civil War general, loathed newspaper reporters and the newspaper-reading public, which he regarded as being 'the unthinking herd' (Baron 1987 www.nytimes.com).

of social contract was in operation.[39] The economy reflected the growing power of the gentry and the middle class. In the light of these legal, political and economic realities, James' commitment to the doctrine of the divine right of kings was significantly out of place. Quite simply put, he was on the wrong side of history. Conversely, Edward Coke, James' antagonist in the two cases discussed earlier, articulates a view more in tune with the reality of the time. Coke's commitment to the rule of law, his view that the customs, statutes and common law of England were a 'metwand' which served to guide and constrain the executive, were to prove more enduring than James' outdated belief in the divine right of kings. As to the arguments put forward by Jacob Zuma in contemporary South Africa, his appeal to the authority of 'the people' is not as clearly out of touch with contemporary South African realities as James' appeal to divine right was out of touch with the realities of 17th century England. Nevertheless, it may be argued that there is a significant disjuncture between Zuma's views and current global political and economic realities - at least to the extent that Western liberal democracy may still be said to be the dominant political and economic force in today's world. Implicit in Zuma's appeal to 'the people' is a commitment to a simple form of majoritarian democracy, which may be contrasted with more 'constrained' views of democracy.[40] The arguments in favour of the latter view can best be articulated with reference to the work of the legal philosopher Ronald Dworkin.[41]

39 Fully articulated theories of social contract were to be formulated later during this century by theorists such as Thomas Hobbes and John Locke. It had already been noted by political writers of the 15th (Sir John Fortescue in 1469) and 16th centuries (Sir Thomas Smith in 1589), however, that the English government consisted of what would be called a limited monarchy today.

40 On 13 September 2012 a verbal spat in the South African Parliament seemed to confirm a somewhat simplistic majoritarian view of democracy on the part of President Zuma. Addressing Members of Parliament, President Zuma was reported to have stated, *inter alia*, as follows: 'You have more rights because you're a majority; you have less rights because you're a minority. That's how democracy works …' See Sapa 2012 www.timeslive.co.za. This comment provoked an uproar from the opposition members of parliament on the grounds the president did not properly understand the principles of democracy.

41 In a brief article such as this it is not possible to deal with each and every conception of democracy which may be said to provide an alternative to the simple 'majoritarian' conception thereof. We deal with just one such alternative in the form of Ronald Dworkin's classic liberal conception of constitutional democracy. While Dworkin's theory is not undisputed (see, for example, Karl Klare's much quoted essay (Klare 1998 *SAJHR*), it is submitted that it stands in the centre of the theoretical mainstream, acting as an important foundation stone underpinning modern global, liberal and 'Western-style' conceptions of democracy. In addition to its status as a 'classic' theoretical justification of modern liberal constitutionalism, Dworkin's work speaks directly to the issue of 'majoritarian democracy' vs 'constitutional democracy', making it a useful comparative tool. South Africa's current democracy may not, in all respects, follow the model of a classic 'liberal democracy', but it is submitted that it is strongly rooted in a liberal ethos. Theunis Roux, for example, explains his view on the nature of South Africa's Constitution as follows: 'If

Ronald Dworkin is, perhaps, the preeminent defender of liberal constitutional democracy alive today. Dworkin's theory of what constitutes a true liberal constitutional democracy provides an interesting contemporary counterpoint to Coke's early idea that the English common law is a 'golden metwand' which of necessity constrains and guides the powers of the king. It also provides a strong counter to arguments in favour of a simple majoritarian view of democracy such as that put forward by President Jacob Zuma. In his seminal work *Freedom's Law*, Dworkin uses the metaphor of a 'sail' to describe the Constitution of the United States of America:[42]

> The Constitution is America's moral sail, and we must hold to the courage of the conviction that fills it, the conviction that we can all be equal citizens of a moral republic. That is a noble faith, and only optimism can redeem it.

Dworkin argues in favour of a 'moral reading' of the American Constitution. This treats the constitution 'as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments.'[43] Indeed, Dworkin believes that there is no alternative but to read the constitution in this way. An unavoidable consequence is that political morality is brought into the heart of constitutional law.[44]

Acknowledging that political morality lies at the heart of constitutional interpretation comes with a cost. If a small group of unelected judges are given the task of constitutional interpretation (as is the case in the United States of America and South Africa) Dworkin's argument in favour of a 'moral reading' seems, on the surface at least, to invite controversy. As Dworkin states:[45]

> It seems grotesquely to constrict the moral sovereignty of the people themselves - to take out of their hands, and remit to a professional elite, exactly the great and defining issues of political morality that the people have the right and the responsibility to decide for themselves.

---

pressed, I would say that the Constitution is a liberal constitution of a particular type – certainly not a classic liberal constitution, but one that reflects the more statist and communitarian tradition within liberalism, and connects it with the indigenous African philosophy of ubuntu.' (Roux 2009 *Stell L R* 280)

42 See Dworkin *Freedom's Law* 38.

43 Dworkin *Freedom's Law* 3.

44 Dworkin *Freedom's Law* 2.

45 Dworkin *Freedom's Law* 4.

It is for precisely the reason set out above that in countries like the United States of America, which have adopted a justiciable constitution, tensions are bound to arise between the executive and the judiciary when they differ on what the constitution requires. It is only natural for the executive to feel that it represents the democratic will of the people and to resent any curbs put in place by an unelected judiciary. Dworkin provides a number of historical examples of resentments on the part of past US presidents towards the judiciary.[46] The key question, of course, is whether or not these resentments are justified. Although at first sight it may seem to be undemocratic for judges to have the power to set aside what a majority thinks is right and just, Dworkin asks if this is, in fact, the case. His somewhat counterintuitive answer is that it is not the case. He insists that, on a proper understanding of what 'democracy' entails, there is nothing inherently undemocratic about a small group of judges having the last word on what the constitution requires.[47]

How then should we understand the requirements of a 'democracy'? As a crucial starting point Dworkin distinguishes between two conceptions of democracy: a "constitutional conception of democracy" and a simple "majoritarian conception of democracy". According to Dworkin, the latter conception holds that "it is a defining goal of democracy that collective decisions always or normally be those that a majority or plurality of citizens would favour if fully informed or rational."[48] 'Constitutional democracy', on the other hand, holds that the defining aim of democracy is 'that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect.'[49] Dworkin prefers the latter conception

46 In relation to President Eisenhower Dworkin states: 'When Dwight Eisenhower, who denounced what he called judicial activism, retired from office in 1961, he told a reporter that he had made only two big mistakes as President – and that they were both on the Supreme Court.' (see: Dworkin *Freedom's Law* 5). In relation to Presidents Reagan and Bush, Dworkin states: 'Presidents Ronald Reagan and George Bush were both profound in their outrage at the "usurpation" of the people's privileges. They said they were determined to appoint judges who would respect rather than defy the people's will.' (see Dworkin *Freedom's Law* 5).

47 He states as follows: 'I do not mean that there is no democracy unless judges have the power to set aside what a majority thinks is right and just. Many institutional arrangements are compatible with the moral reading, including some that do not give judges the power they have in the American structure. But none of these varied arrangements is in principle more democratic than others. Democracy does not insist on judges having the last word, but it does not insist that they must not have it.' (see Dworkin *Freedom's Law* 7).

48 Dworkin *Freedom's Law* 17.

49 Dworkin *Freedom's Law* 17.

to the former - i.e. what he calls the 'constitutional conception of democracy' to the simple 'majoritarian conception of democracy'. The reasons for Dworkin's aversion to 'majoritarian democracy' are crucially important for the purposes of this article, since they serve to counter arguments raised by members of the ruling African National Congress and its alliance partners that judicial constraint of the executive is out of order because the executive has the mandate of the majority within South African society.

Dworkin believes that a 'true democracy' (i.e. a democracy defined according to the 'constitutional conception' which takes as its essence the equal status of all citizens) requires all individuals within society, including the members of minority groups, to be in a position to claim 'moral membership' of the entire group. For Dworkin all the members of a 'true democracy' must be 'moral members' of the society in question. 'Moral membership' does not simply mean that one is in possession of equal voting rights together with all the other members of one's society - but something more. What it means is that one's society meets certain 'democratic conditions' which can also be called the 'conditions of moral membership'.[50] A 'true democracy' can exist only where government defers to these 'democratic conditions', which place constraints upon the powers of the government.

It is not possible to discuss in detail each of the 'democratic conditions' which Dworkin considers essential to the existence of a 'true democracy'. For the purposes of this article, however, it is useful to focus on certain 'relational conditions' identified by Dworkin, which form part of the said 'democratic conditions'. These relational conditions describe how a genuine political community must treat an individual if that individual is to be what Dworkin calls a true 'moral member' of that community. Unless all members of a community are true 'moral members' of that community, that community cannot be counted as a 'true democracy'. But what does it mean to be counted as a 'moral member' of a particular community? Dworkin maintains that: 'A political community cannot count anyone as a moral member unless it gives that

50 Dworkin points out that: 'German Jews were not moral members of the political community that tried to exterminate them, though they had votes in the elections that led to Hitler's Chancellorship, and the Holocaust was therefore not part of their self-government, even if a majority of Germans would have approved it.' (see Dworkin *Freedom's Law* 23).

person a *part* in any collective decision, a *stake* in it, and *independence* from it.'[51] The second and third requirements - i.e. that each moral member must have a 'stake in' as well as 'independence from' the collective decisions of his or her community - are of particular interest, and it is worth quoting Dworkin at some length on each of these points. In relation to the first point, i.e. that each moral member must have a 'stake' in the collective decisions of his or her community, Dworkin states:[52]

> [T]he political process of a genuine community must express some *bona fide* conception of equal concern for the interests of all members, which means that political decisions that affect the distribution of wealth, benefits, and burdens must be consistent with equal concern for all. Moral membership involves reciprocity: a person is not a member unless he is treated as a member by others, which means that they treat the consequences of any collective decision for his life as equally significant a reason for or against that decision as are comparable consequences for the life of anyone else. So the communal conception of democracy explains an intuition many of us share: that a society in which the majority shows contempt for the needs and prospects of some minority is illegitimate as well as unjust.

In relation to the second point, i.e. that each moral member must be 'independent' from the collective decisions of his or her community, Dworkin explains that:[53]

> The root idea we are now exploring - that individual freedom is furthered by collective self-government - assumes that the members of a political community can appropriately regard themselves as partners in a joint venture, like members of a football team or orchestra in whose work and fate all share, even when that venture is conducted in ways they do not endorse. That idea is nonsense unless it can be accepted by people with self-respect, and whether it can be depends on which kinds of decisions the collective venture is thought competent to make. An orchestra's conductor can decide, for example, how the orchestra will interpret a particular piece: there must be a decision of that issue binding on all, and the conductor is the only one placed to make it. No musician sacrifices anything essential to his control over his own life, and hence to his self-respect, in accepting that someone else has that responsibility, but it would plainly be otherwise if the conductor tried to dictate not only how a violinist should play under his direction, but what standards of taste the violinist should try to cultivate.

Both of the ideas explored by Dworkin in the quotations set out above (i.e. having a 'stake in' as well as 'independence from' the collective decisions of one's community) mean that, in a true democracy of the type Dworkin advocates, the power of the majority in society to dictate to the minority in society is strictly limited. This in turn means that the powers of the executive, even though it may have been elected by a

51 Dworkin *Freedom's Law* 24.
52 Dworkin *Freedom's Law* 25.
53 Dworkin *Freedom's Law* 25-26.

majority of the people in society, will be limited. In Dworkin's view, a true democracy is necessarily a limited democracy and he rejects completely the majoritarian conception of democracy:[54]

> We must set the majoritarian premise aside, and with it the majoritarian conception of democracy. It is not a defensible conception of what true democracy is ...

For Dworkin a 'true democracy' is, in the final analysis, a community of independent individuals.[55] Within such a democracy executive power is limited, despite the fact that the members of the executive may have been voted into office (although only indirectly in the case of South Africa) by a large majority of the people. After all, it stands to reason that if the power of the majority within a 'true democracy' is limited, then the power of any executive elected (directly or indirectly) by the majority in such a democracy must also be limited. Furthermore, there is nothing inherently undemocratic about a small group of judges enforcing the democratic limitations on the power of the executive, as long as the democratic limitations are effectively enforced. In fact, the democratic limitations on the power of the executive enhance the truly democratic character of a society. As Dworkin states in his most recent work *Justice for Hedgehogs*:[56]

> … a majority has no moral authority to decide anything unless the institutions through which it governs are sufficiently legitimate. Judicial review is one possible … strategy for improving a government's legitimacy - by protecting a minority's

54 Dworkin *Freedom's Law* 31. Dworkin's famous mentor Herbert Hart makes an analogous point when he states: 'It seems fatally easy to believe that loyalty to democratic principles entails acceptance of what may be termed moral populism: the view that the majority have the moral right to dictate how all shall live. This is a misunderstanding of democracy which still menaces individual liberty … The central mistake is the failure to distinguish the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with that power is beyond criticism and must never be resisted. No one can be a democrat who does not accept the first of these, but no democrat need accept the second. Mill and many others have combined a belief in a democracy as the best - or least harmful - form of rule with the passionate conviction that there are many things which not even a democratic government may do. This combination of attitudes makes good sense, because, though a democrat is committed to the belief that democracy is better than other forms of government, he is not committed to the belief that it is perfect or infallible or never to be resisted.' (Hart *Law, Liberty and Morality* 79-80).

55 Dworkin states as follows: 'Someone who believes in his own responsibility for the central values of his life cannot yield that to a group even if he has an equal vote in its deliberations. A genuine political community must therefore be a community of independent moral agents. It must not dictate what its citizens think about matters of political or moral or ethical judgment, but must, on the contrary, provide circumstances that encourage them to arrive at beliefs on those matters through their own reflective and finally individual conviction.' (see Dworkin *Freedom's Law* 26).

56 Dworkin *Justice for Hedgehogs* 385.

ethical independence, for instance - and in that way securing a majority's moral title to impose its will on other matters.

5 Conclusion

A firm separation of powers between the executive and the judiciary is one of the fundamental cornerstones upon which the grand edifice which we call 'liberal constitutional democracy' is built. For better or worse, it is this model of democracy which South Africa adopted in 1994 as the country emerged from the totalitarian grip of apartheid. As the historical examples discussed in this article have shown, a distinguishing feature in the historical development of liberal constitutional democracy has been the fact that the judiciary has won for itself the right to adjudicate and finally decide upon the extent of its own powers, as well as those of the legislature and the executive. Any undue interference by the executive with this basic principle would be a cause for grave concern among those South Africans deeply committed to liberal constitutional democracy.

In seventeenth-century England the appeal of King James I to authority based upon divine right was still extremely powerful. Social, political and economic forces at work in English society, however, were to favour the theory of the social contract over Stuart absolutism. The balance of social, political and economic forces in present-day South Africa is not entirely clear. Whether or not a simple 'majoritarian conception' of democracy will prevail over what Ronald Dworkin refers to as a 'constitutional conception' of democracy is open to question.

Bibliography

Ackroyd *History of England*

Ackroyd P *Foundation: The History of England Volume 1* (Pan London 2012)

Churchill *History of the English Speaking Peoples*

Churchill WS *A History of the English Speaking Peoples - 5 The Civil War 1603-49* (Cassell London 1965)

Dworkin *Freedom's Law*

Dworkin R *Freedom's Law* (Oxford University Press Oxford 1996)

Dworkin *Justice for Hedgehogs*

Dworkin R *Justice for Hedgehogs* (Belknap Press of Harvard University Press Cambridge, Mass 2011)

Hart *Law, Liberty and Morality*

Hart HLA *Law, Liberty and Morality* (Stanford University Press Stanford CA 1963)

Hindley *Magna Carta*

Hindley G *Magna Carta* (Running Press London 2008)

Klare 1998 *SAJHR*

Klare K "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146-188

Prosser and Sharp *Short Constitutional History*

Prosser CW and Sharp M *A Short Constitutional History of England* (Longmans, Green London 1938 & 1941)

Roux 2009 *Stell L R*

Roux T "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference" 2009 *Stell L R* 258-285

Stoner *Common Law*

Stoner JR *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (University Press of Kansas Lawrence, Kan 1992)

Register of legislation

Constitution of the Republic of South Africa, 1996

Register of cases

Prohibitions Del Roy 1607 77 ER 1342
The Case of Proclamations 1610 77 ER 1352
Thomas Bonham v College of Physicians 1610 77 ER 638 (CP)

Register of internet sources

Baron 1987 www.nytimes.com

Baron J 'Sherman Letters Show Civil War General Regarded Reporters as 'Spies'' *New York Times* 21 June 1987 www.nytimes.com/1987/06/21/us/sherman-letters-show-civil-war-general-regarded-reporters-as-spies.html?pagewanted=all&src=pm [date of use 17 Sep 2012]

Britannica Date Unknown www.britannica.com

Britannica Encyclopaedia Online Date Unknown Court of the Star Chamber www.britannica.com/EBchecked/topic/563475/Court-of-Star-Chamber [date of use 17 Sep 2012]

De Vos 2012 constitutionallyspeaking.co.za

De Vos P 2012 NEC should not Conflate the Party and the State constitutionallyspeaking.co.za/nec-should-not-conflate-the-party-and-the-state/ [date of use 15 Aug 2012]

Hartley 2011 www.bdlive.co.za

Hartley W 'Executive superior to courts, says Zuma' *Business Day* 2 November 2011 www.bdlive.co.za/articles/2011/11/02/executive-superior-to-courts-says-zuma [date of use 17 Sep 2012]

IEC 2009 www.elections.org.za

IEC 2009 National and Provincial Elections Results www.elections.org.za/content/Pages/LGE_NPE_Reports/Reports.aspx?lEEtypeID=1&id=1426&name=Elections [date of use 17 Sep 2012]

Sapa 2012 www.timeslive.co.za

Sapa "You have less rights because you're a minority': Zuma' *Times Live* 13 September 2012 www.timeslive.co.za/politics/2012/09/13/you-have-less-rights-because-you-re-a-minority-zuma [date of use 17 Sep 2012]

Statistics SA 2009 www.statssa.gov.za

Statistics SA 2009 Population Statistics www.statssa.gov.za/publications/populationstats.asp [date of use 17 Sep 2012]

Ngalwa 2011 www.timeslive.co.za

Ngalwa S 'God is on the ANC's side, Zuma tells crowd' Times Live 5 February 2011 www.timeslive.co.za/sundaytimes/article895148.ece/God-is-on-the-ANCs-side-Zuma-tells-crowd [date of use 17 Sep 2012]

Wikiquotes Date Unknown en.wikipedia.org

Wikiquotes Date Unknown Vox Populi en.wikipedia.org/wiki/Vox_populi [date of use 17 Sep 2012]

List of abbreviations

IEC	Independent Electoral Commission
SAJHR	South African Journal on Human Rights
Stell L R	Stellenbosch Law Review

VOX POPULI? VOX HUMBUG! – RISING TENSION BETWEEN THE SOUTH AFRICAN EXECUTIVE AND JUDICIARY CONSIDERED IN HISTORICAL CONTEXT – PART TWO[1]

D Hulme*

S Peté**

SUMMARY

Part One of this article traced rising tensions between the South African executive and the judiciary on the question of the separation of powers. This situation was then contrasted and compared with a clash which took place in the 17th century between King James I of England and Chief Justice Edward Coke. In Part Two of this article attention is focused on two specific cases which arose out of the clash between James and Coke - *Prohibitions Del Roy* and *The Case of Proclamations*. The article then turns to a discussion of the lessons which can be drawn from these cases. The arguments which were raised in the cases are contrasted and compared with more contemporary arguments advanced in the context of the present conflict between the South African executive and the judiciary. The views of Ronald Dworkin comparing 'majoritarian' and 'constitutional' conceptions of democracy are examined in the context of this debate. Tentative conclusions are then drawn and warnings issued of the negative consequences for South Africa if the potential conflict between the executive and the judiciary is not properly resolved.

---

1 The phrase '*Vox Populi? Vox Humbug!'* used in the title of this article is borrowed from William Tecumseh Sherman, the American Civil War general who used it in relation to press reporting. It is adapted from the ancient adage '*Vox populi, vox Dei*' - 'The voice of the people [is] the voice of God', the origins of which are uncertain. However, an early example of its use was by Alcuin in 798 AD (Wikiquotes Date Unknown en.wikipedia.org).

* David Hulme. BA, LLB, LLM (UKZN). Senior Lecturer of Law, School of Law, Howard College Campus, University of KwaZulu-Natal, Attorney of the High Court of South Africa. Email: hulmed@ukzn.ac.za.

** Stephen Peté. BA, LLB (UKZN), LLM (UCT), M Phil (University of Cambridge). Associate Professor, School of Law, Howard College Campus, University of KwaZulu-Natal, Attorney of the High Court of South Africa. Email: pete@ukzn.ac.za.

KEYWORDS: constitutional democracy; separation of powers; majoritarian democracy; Golden Metwand; James I; Edward Coke; Jacob Zuma; executive; judiciary; Ronald Dworkin; rule of law