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Opinionista Pierre de Vos

On arson, police violence and student protest in a constitutional democracy

- Pierre de Vos
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Protest action at the University of Cape Town (UCT) and at other Universities around the country over the past two weeks have thrown into sharp relief different attitudes towards the limits of “tolerable” political protest in a constitutional democracy. Do you believe that it is only morally permissible to protest in a relatively peaceful (if

disruptive) way, or do you believe it may (in certain contexts and in the heat of the moment) also be morally permissible to break the law and to commit criminal acts during protest action?

When some Gauteng residents started a campaign to boycott the payment of their e-toll accounts because they objected to the wisdom of funding the upgrade of highways through an electronic payment system, I pointed out that they were encouraging motorists to break the law. I argued at the time (<http://constitutionallyspeaking.co.za/e-toll-civil-disobedience-reveals-lack-of-respect-for-democracy/>) that this refusal to obey a constitutionally valid law passed by a democratic government, displayed a worrying lack of respect for (and understanding of) democracy.

Citizens who embrace democratic governance will normally not deliberately and in an orchestrated manner take part in unlawful activity or support others who take part in such unlawful activity. When the democratic government decides that certain activities may cause harm to others or may harm society more broadly and must thus be criminalised, it would probably be more difficult for citizens who support democracy to justify support for such activity.

That is why democratic citizens will not normally engage in (or support) arson attacks or take part in other forms of criminal behaviour. Most democratic citizens will also be appalled by the action of individuals who take the law into their own hands and assault protesting fellow students, thus committing the criminal offense of assault. Nor will they support police action when police officers use excessive force (and hence act in a criminal manner) during protest action.

In a constitutional democracy in which the governing party garnered more than 60% of the votes during free and fair elections, it would be difficult to sustain an argument that the constitutional democracy, the government in power or the institutions established by it, are illegitimate.

It would also be tricky to construct a plausible argument that it is morally justified in a constitutional democracy to engage in criminal acts – as long as those acts were aimed at achieving a legitimate end. (I imagine it would be relatively easy to construct such an argument in relation to an undemocratic and oppressive regime.)

You can, of course, argue that overwhelming democratic support for a government and its institutions do not render the government wise or its institutions responsive to the needs of the majority of the country's people. Democracy is sometimes confusing, ugly and messy. Moreover, democracy does not always produce just and fair results. In fact, it can produce outcomes that appear, at best, to be unfair or unjust and, at worst, oppressive and deeply destructive.

Even more troubling for a constitutional lawyer invested in constitutional democracy is the fact that democracy often works better for the economically and socially powerful or politically well-connected than for the economically and socially marginalised.

Your race (being white), sex (being male), class (being middle-class), sexual orientation (being straight), level of formal education (having or working towards a University degree) or perceived elite status (being a student at UCT or Wits instead of UWC or TUT) may all in different ways amplify your democratic voice.

You may be more likely to be able to drum up support from other citizens and to be heard and listened to by those who wield power (in government, in institutions like Universities, in the media) if you are perceived to be privileged (or are in fact privileged) because of one or more of the factors listed above.

You may be confronted with a world in which your concerns may seem to count for less than the concerns of the more privileged, in which *you* may be treated as if you count for less than a person who is more privileged or perceived to be more privileged.

This state of affairs is evidently unfair. The provisions contained in a justiciable Bill of Rights attempt to address this unfairness. When such a Bill of Rights is framed in language that aspires to address structural inequality, language that allows and even prods the government of the day to work towards the creation of a substantively fair society (as the South African Bill of Rights does), the democratically elected government has a wide discretion to fulfil its mandate to serve *all* the people by taking steps that would enable the socially and economically marginalised to participate meaningfully in the democracy and the address the structural inequality in society.

However, a constitutional democracy does not and cannot guarantee that an elected government with a democratic mandate indeed takes radical steps to begin to eradicate the structural inequalities and the unfairness in society. The elected government and the institutions created by it are the primary drivers of effective and lasting change; not the Constitution or even the courts. But sometimes governments get elected and re-elected even when it acts in ways that some of us might find deeply problematic.

For example, despite overseeing the Marikana massacre in which 34 mineworkers were gunned down by the South African Police Service, the mandate of the current government was nevertheless renewed with the overwhelming support of 62% of those who cast a vote in the 2014 national election. Despite overseeing and managing a shockingly unequal education system and seemingly not doing enough to address these unconscionable educational inequalities, the governing party has been overwhelmingly voted back into power in several successive elections.

Twenty-two years after the formal end of racial segregation and apartheid, many students (almost all poor and black) are still being excluded from access to higher education because of no fault of their own. Many institutions of higher learning remain inhospitable to black students and are reluctant to embrace radical change, leading to alienation and despair among many black students.

Individuals who are impatient with the lack of change in a society or a specific institution might begin to question the legitimacy of the constitutional democracy and the democratically elected government and may argue that the laws adopted and enforced by the democratic government need not be obeyed. Others might not question the legitimacy of the system and the elected government but might support unlawful acts if such acts are aimed at achieving an important end.

It is at this point that those who might find the current state of affairs profoundly unjust but do not question the legitimacy of the system and the elected government will part ways with those who believe the unjust state of affairs requires radical action (even if unlawful) or those who believe that the will of the majority has become irrelevant and hence that the government (and the institutions created by it and laws adopted by it) are illegitimate and worthy of contempt.

I belong to the former group. As such I would argue that in a legitimate constitutional democracy we have a duty to work more or less within the democratic system and its laws to garner support for our cause. We can recognise that the system has flaws, can work towards circumventing or overcoming those flaws, and yet can still work more or less in terms of the rules established by the system, rules explicitly or implicitly endorsed by the vast majority of citizens through their vote.

Respect for the choices made by a majority of the electorate is not always easy. I imagine if I had lived in the USA I would really have struggled to accept the election of George W Bush as President of America. (I am, of course, referring to the second election and not the first illegitimate election.) Yet, I would be hesitant to dismiss an entire system as illegitimate when that system still enjoys support from the majority of citizens.

Thus, I would never support arguments that President Jacob Zuma is an illegitimate President. To hold otherwise would be to show contempt for the will of the majority of citizens and for democracy itself.

This view is premised on the notion that constitutional democracy is not an end in itself but a means to an end. The democracy can be used for bad ends or good ends. Citizens, through their vote and through active citizenship, can play a decisive role in deciding whether the democracy achieves laudable goals.

Constitutional democracy demands much of engaged citizens. I would argue that it demands of us to think strategically and in a principled manner about what we can do to make the system fairer and how to counter the disproportionate influence of those with social or economic power over the democratic process.

It demands creativity, resilience and imagination and a strategic vision of how to win public support in the face of powerful vested interests. Surely in a constitutional democracy the most effective way to bring about change is to garner mass support for your cause from people in different strata of life.

I suspect that this is exactly why the Fees Must Fall (FMF) movement was at least partly successful. It started off without mass support but gradually managed to win over various constituencies – including the governing party. The creativity and imagination I talk of was also amply demonstrated by the building of the shack by Rhodes Must Fall (RMF) students on UCT campus as it provided an arresting visual metaphor for the RMF cause and (perhaps partly because this was done at UCT, a perceived elite institution situated in a big city) ample publicity for the cause in the media.

I therefore believe that the burning of paintings, of vehicles and especially of the office of the Vice Chancellor at UCT by individuals perceived to be associated with RMF was highly problematic for two interrelated reasons.

First, engaging in criminal acts was strategically unwise as it alienated many individuals and groups whose support could have strengthened the campaign. It took attention away from the cause and drew attention to tactics. It is telling that after the acts of arson occurred the media attention moved away from the substantive issues and focused on the arson. It is also telling that unlike the severe criticism levelled from all quarters at the police after its use of excessive force in dispersing students outside Parliament last year during the FMF march, hardly anyone accused private security or police from using excessive force against students this time around.

Second, for anyone like me who believes in constitutional democracy, who accepts the legitimacy of the government and institutions endorsed by an overwhelming majority of voters (even when I disagree with its conduct), and who fears the possible authoritarian consequences of endorsing arguments about ends justifying means, there is a principled problem with resorting to criminal acts in order to advance your struggle.

Unless you believe ends justify means or that the democracy itself is illegitimate and that all the laws and institutions created and maintained by it must be overthrown or destroyed, it is difficult not to view the action as unprincipled and undemocratic.

I have no doubt that a few readers will vehemently disagree with the views advanced here (as is their right). I attempted (perhaps imperfectly) to express my views without repeating the usual slogans and without demonising those with whom I disagree. I have attempted to do so because I believe (perhaps naively) that it remains possible in a constitutional democracy for all of us to reflect, to listen, to debate and – if it comes to that – to make up (or change) our minds about issues of principle and of strategy and tactics. **DM**

- Pierre de Vos



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Pierre De Vos teaches Constitutional law at the University of Cape Town Law Faculty, where he serves as deputy dean and as the Claude Leon Foundation Chair in Constitutional Governance. He writes a regular blog, entitled 'Constitutionally Speaking', in which he attempts to mix one part righteous anger, one part cold legal reasoning and one part irreverence to help keep South Africans informed about Constitutional and other legal developments related to the democracy.

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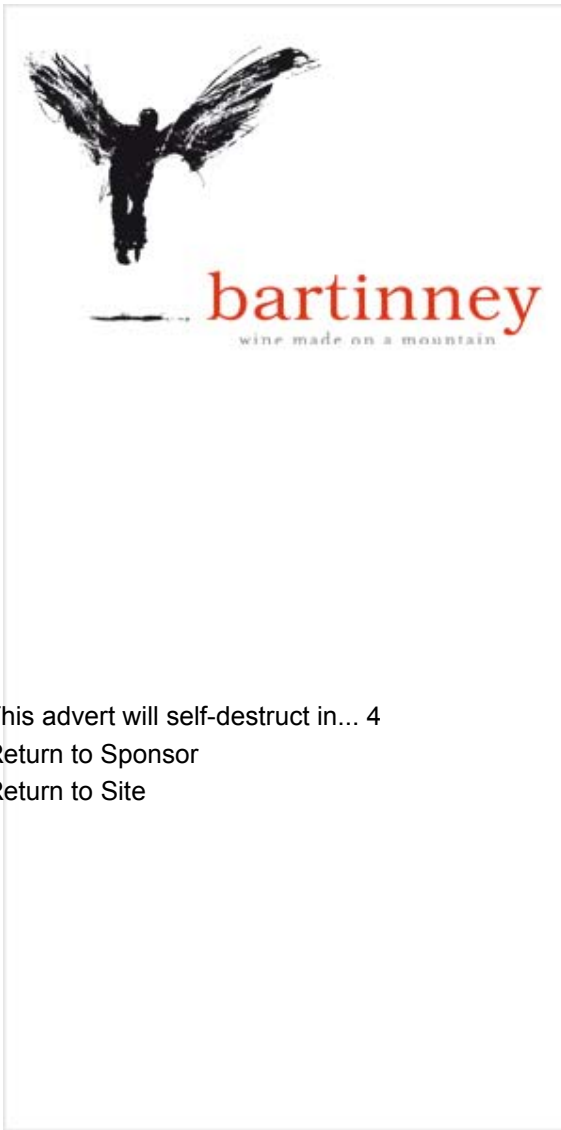
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