

Chapter 10

Democracy

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10.1 Introduction*

Democracy is a noun permanently in search of a qualifying adjective. The core idea — that decisions affecting the members of a political community should be taken by the members themselves, or at least by elected representatives whose power to make those decisions ultimately derives from the members — is more or less settled. Even this relatively simple statement, however, does not fit many political systems that are widely regarded as democratic. Constitutional democracies by definition immunize certain decisions from popular control, but are not undemocratic for that reason alone.¹ And liberal democracies, by restricting the legitimate scope of collective decision-making, define the boundary between public and private power in a way that, for social democrats, seems to ignore the impact of certain types of private decision on the wider political community. But in this case, too, few would deny that liberal democracies are nevertheless democratic.²

Adding to the complexity is political theory's propensity, every five years or so, to add a new qualifying adjective to the mix in an attempt either to describe existing democratic systems more accurately or to set out an ideal form of democracy to which existing systems should aspire. In this way, the traditional lexicon of liberal v social and direct v representative democracy has been expanded by such terms as

1 For the democratic objection to judicial review, see § 10.2(d) *infra*.

2 There is, of course, plenty of room for debate about whether such systems could be made more democratic when measured against an idealized conception of democracy. See § 10.2(c) *infra*.

'pluralist',³ participatory,⁴ 'deliberative',⁵ 'associative',⁶ 'consociational',⁷ 'reflective'⁸ and, inevitably, 'radical'⁹ democracy.

When the preamble to the Final Constitution declares as one of its objectives the establishment of 'a society based on democratic values', one may therefore be

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forgiven for mouthing a respectful 'yes, but'. Like meat and poison, democracy has a way of meaning different things to different people.¹⁰ At a purely textual level, the word democracy, when used in the Final Constitution, is qualified by four adjectives:

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- 3 See RA Dahl *Dilemmas of Pluralist Democracy* (1982) 1 (Arguing that 'the fundamental problem of pluralist democracy' is that 'autonomous organizations' are necessary to the democratic process, but may also work against the public good and 'weaken or destroy democracy'.)
 - 4 See C Pateman *Participation and Democratic Theory* (1970); CB Macpherson *The Life and Times of Liberal Democracy* (1977) 93-115.
 - 5 See J Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* trans W Rehg (1996); A Gutmann & D Thompson *Democracy and Disagreement* (1996); J Elster (ed) *Deliberative Democracy* (1998); S Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (1999).
 - 6 See P Hirst *Associative Democracy: New Forms of Economic and Social Governance* (1994)(Arguing that late-twentieth-century representative democracy needs to be supplemented by self-governing voluntary associations.)
 - 7 See A Lijphart *Democracy in Plural Societies: A Comparative Exploration* (1982)(Examining a form of democracy in which elites in a pluralist society co-operate in the interests of stable democratic government.)
 - 8 See R Goodin *Reflective Democracy* (2003).
 - 9 See D Trend *Radical Democracy: Identity, Citizenship, and the State* (1996); C Mouffe 'Radical Democracy: Modern or Post-modern?' in A Ross (ed) *Universal Abandon? The Politics of Postmodernism* (1988) 41-44 (Describing the project of radical democracy as being an attempt to 'expand [democracy's] sphere of applicability to new social relations'.)
 - 10 Cf Plato *The Republic* (2nd Edition, trans D Lee 1974) Book VIII.557d (Democracy is 'just the place to go constitution-hunting'.)

'representative',¹¹ 'participatory',¹² 'constitutional',¹³ and 'multi-party'.¹⁴ And democracy itself is variously used to mean a system of government,¹⁵ a form of society,¹⁶ a principle,¹⁷ and a set of values.¹⁸ Democracy is, at one point, also referred to as a 'culture' that can be 'deepen[ed]' by the adoption of 'Charters of Rights'¹⁹— the very antithesis of democracy if the core idea is left unqualified.

Given that the various forms of democracy in political theory are either ideal types or deliberately partial accounts of what this term means, it is not surprising that the Final Constitution should have hedged its bets in this way — to have chosen as its blueprint just one of the existing 'models'²⁰ of democracy would have been artificial and unnecessary. Instead, what the Constitutional Assembly did was to sketch the contours of a peculiarly South African form of democracy, leaving it to the legislature and the judiciary to fill in the details. The task that this chapter sets itself is to describe those contours and, where possible, to identify sharp edges and hard boundaries that may be said to constitute South African democracy's justiciable core.

The chapter begins by distinguishing the most important forms of democracy in political theory — direct and representative democracy — and then discusses some of the main contemporary accounts of representative democracy, modern democracy's pre-eminent form. The central tension running through contemporary democratic theory, it is argued, is the tension between theories that purport to offer strictly descriptive accounts of actually existing democracy, and normative accounts that seek to extend our understanding of the ideal form of democracy in the modern nation-state. This theoretical distinction tracks a distinction between a shallow and a deep conception of democracy that is also present in South African constitutional law.

11 FC ss 57(1)(b), 70(1)(b), 116(1)(b).

12 FC ss 57(1)(b), 70(1)(b), 116(1)(b).

13 FC s 181(1).

14 FC s 236.

15 FC ss 1(d), 152(1)(a).

16 FC preamble and ss 36(1), 39(1) (a), 59(2), 72(2), 118(2).

17 FC s 195(1).

18 FC preamble and ss 7(1), 195(1).

19 FC s 234.

20 On use of 'models' in this context, see D Held *Models of Democracy* (2nd Edition, 1996) and Macpherson (*supra*) at 3 (Defining the term 'model' when used in this context as 'a theoretical construction intended to exhibit and explain the real relations, underlying the appearances, between or within the phenomena under study'.)

§ 10.3 analyses the express references to democracy in the Final Constitution and the case law interpreting these provisions. Although the express references do not tell us all that there is to know about the Final Constitution's conception of

democracy, they nevertheless provide a useful starting point. Cases turning on these references have required the courts to define the term 'democracy' in different contexts, and in this way a considerable body of black letter law has begun to develop.

§ 10.4 builds on this analysis by examining the case law in relation to a group of fundamental rights that both democratic theory and the courts suggest is integral to the Final Constitution's conception of democracy. The particular rights examined are the right to freedom of expression, political rights, and socio-economic rights. Cases decided under these rights frequently comment on the place of the right in the Final Constitution's overarching scheme for South African democracy, and therefore tell us more about what that scheme entails.

In conclusion, § 10.5 converts the assessment of the Final Constitution's conception of democracy in § 10.3 and § 10.4 into a statement of the principle of democracy in South African constitutional law. Despite the contested nature of democracy in political theory, it is possible to state this principle in a fairly precise way. The main argument in § 10.5 is that, while the principle of democracy discernible in the constitutional text is unquestionably a deep one, the courts have not always given effect to this principle, often preferring a shallower interpretation in politically sensitive cases. This does not yet mean that the principle of democracy discernible in the constitutional text needs to be restated, but it does call for a re-examination of the importance of this principle in cases in which the political stakes are high.

10.2 Democracy in political theory

The overview of democracy given in this section is necessarily truncated, and does not pretend to offer any original insights into the theoretical tradition here described.²¹ Rather, the aim of this section is to give some indication of the ideas that lie behind the main forms of democracy in political theory, focusing on those forms to which express or implied reference is made in the Final Constitution. In the absence of any detailed judicial treatment of this issue, it is necessary to attempt at least a thumbnail sketch of the terrain, and to refer the reader to the literature for further study.

The secondary aim of this section is to create a normative framework from which to assess the South African courts' treatment of democracy in the cases discussed in § 10.3 and § 10.4. The Final Constitution's vision for South African democracy is both an amalgam and a particularization to South African conditions of the various forms of democracy in political theory. Without knowing what those forms are, it is impossible to understand the theoretical approaches on which the Final Constitution draws or the contribution it makes to our understanding of how the democratic ideal may be realized in practice.

The section starts by setting out the two most basic forms of democracy identified in political theory — direct and representative democracy. These two

21 For one of the most comprehensive accounts, see D Held *Models of Democracy* (2nd Edition, 1996).

forms are based on a simple empirical distinction between political systems in which the people rule themselves and systems in which the expression of the people's will is mediated by their elected representatives. As an actually existing political system, direct democracy is very rare. Indeed, this form of democracy is said to have existed as a fully functioning system only in the fifth-century BC, in the city-state of Athens, and in certain other isolated and relatively short-lived polities.²² Direct democracy nevertheless remains an important form of democracy in political theory, as a normative ideal, and also because aspects of this form of democracy can be seen in the provision made in modern democratic constitutions for referenda, the right to freedom of assembly and greater citizen participation in local government.

With these exceptions, all modern democracies are essentially representative in form, meaning that their commitment to the democratic ideal consists in the arrangements they make for elected representatives to take collective decisions on citizens' behalf, and the institutions through which citizens exert control over their elected representatives. When contemporary democratic theorists present alternative models of democracy, therefore, they generally do not mean to contest the place of representative democracy as the pre-eminent modern form of democracy, but rather to stress different aspects of democracy, either as a normative correction on the representative model, or as an attempt more accurately to describe its actual mode of operation. As indicated in § 10.1, the list of these contemporary accounts is long and ever growing. From among this list, however, three forms have emerged as the most important: pluralist, participatory and deliberative democracy. In addition to these three, constitutional democracy has, in the last thirty years or so, begun to receive increasing attention as a distinct form of democracy in its own right, one that may contain some or all of the elements of the other forms, but which nevertheless has unique features that are worthy of separate categorization.

(a) Direct democracy

Direct democracy may be defined as a system of government in which major decisions are taken by the members of the political community themselves, without mediation by elected representatives. As noted above, such a system has only ever existed in its pure form in the ancient city-state of Athens and certain other isolated and relatively short-lived polities. As a normative ideal, however, direct democracy figures in the influential contributions to democratic theory made by Jean-Jacques Rousseau, Karl Marx and Friedrich Engels.²³ It is also possible for direct democracy to be implemented in subsidiary institutions within an overarching system of representative democracy.

The received account of Athenian direct democracy, though in certain respects 'conjectural',²⁴ is that, in the fifth century BC, this form of democracy was practised

22 The other examples of actually existing direct democracy typically given in the literature are the medieval Italian city-states, the Paris Commune of 1871, and contemporary New England town meetings (particularly in Vermont). See Dahl *On Democracy* (supra) at 110-112.

23 See D Held *Models of Democracy* (2nd Edition, 1996).

24 See D Lee 'Translator's Introduction' in Plato (supra) at 9, 26.

in a city-state comprised of about 30 000–45 000 citizens.²⁵ Since neither slaves nor women were counted as citizens, the Athenian system was not democratic in the modern sense. Nevertheless, it is held up as a unique historical example of a system in which fundamental political decisions were taken directly by the citizen body, or Assembly. The Assembly met about 40 times a year with quorum of 6 000.²⁶ Routine business, including the setting of the agenda for Assembly meetings, was undertaken by a Council of Five Hundred, split into ten Committees of 50. The Committees were not representative bodies as such since election to them was by lot, restricted to one year at a time, and to two years per citizen in total.²⁷ Athenian democracy also had no bureaucracy in the modern sense of a permanent class of people responsible for implementing (and thereby capable of influencing) policy. Rather, all decisions were taken by the Assembly after deliberation in plenary session.

The Athenian model of democracy was famously attacked by Plato in *The Republic*.²⁸ After identifying democracy as one of four 'imperfect' forms of society, Plato dialogically describes how democracies emerge from the collapse of oligarchies, 'when the poor win, kill or exile their opponents, and give the rest equal civil rights and opportunities of office'.²⁹ These, by modern standards, fairly welcome events are sarcastically dismissed by Plato as the harbingers of a political system in which everyone is free to do what they like, and in which leaders respond to the whims of the people at the expense of the public interest. 'Democracy,' Plato writes, 'doesn't mind what the habits and backgrounds of its politicians are; provided they profess themselves the people's friends, they are duly honoured . . . It's an agreeable anarchic form of society, with plenty of variety, which treats all men as equal, whether they are equal or not.'³⁰

Elements of the direct democratic model were revived in the Italian city-republics of the sixteenth century,³¹ but the sheer size and complexity of the modern nation-state has militated against the survival of this model as an actually existing political system. Nevertheless, direct democracy remains an important theoretical construct, most notably in the work of Rousseau, Marx and Engels.³² Rousseau's *Social Contract*, first published in 1762,³³ attempted to revive the ideal of direct

25 Ibid; Held (supra) at 15.

26 Held (supra) at 21. Lee writes that the Assembly met 'in theory . . . ten times a year; in practice a good deal more often, though probably never more than once a week'. Lee (supra) at 26.

27 Lee (supra) at 27.

28 See Held (supra) at 29.

29 Plato (supra) at Book VIII.557a.

30 Ibid at Book VIII.558c.

31 Held (supra) at 40-43.

32 Ibid at 33-34.

democracy even as the conditions for its practical realization were fast disappearing. Under the influence of his experience of Geneva, a 'city-state of peasant proprietors',³⁴ Rousseau argued that, since the central value of democracy was the educative process undergone by citizens in the course of participating in collective decision-making, any system that did not give citizens a direct role in such decision-making was not truly democratic. Although his argument has been misunderstood as requiring the totalitarian submission of the individual interest to the 'general will',³⁵ revisionist accounts of Rousseau's work have re-emphasized the liberal leanings of his core idea, namely, that direct participation in collective decision-making allows individuals to see the way in which their sectarian interests are ultimately best served by the pursuit of the public interest.³⁶ In Rousseau's famous and controversial phrase, citizens can in this way be 'forced to be free'.³⁷

This view of the central value of citizen participation necessarily drew Rousseau into a rejection of representative democracy. In his words:

Sovereignty cannot be represented, for the same reason that it cannot be alienated; its essence is the general will, and will cannot be represented — either it is the general will or it is something else; there is no intermediate possibility. Thus the people's deputies are not, and could not be, its representatives; they are merely its agents; and they cannot decide anything finally. Any law which the people has not ratified in person is void; it is not law at all. The English people believes itself to be free; it is gravely mistaken; it is free only during the election of Members of Parliament; as soon as the Members are elected, the people is enslaved; it is nothing. In the brief moments of its freedom, the English people makes such a use of that freedom that it deserves to lose it.³⁸

In this characteristically uncompromising passage, Rousseau's devotion to the ideal of citizen participation leads him to dismiss representative democracy as a sham, a mere illusion, in which citizens pretend to themselves that they exercise control over their elected representatives, but in which, in reality, they hand over control of collective decision-making to people who do not necessarily have the public interest at heart.

Like Rousseau's city-state of Geneva, Marx and Engels used an actually existing, albeit short-lived, example of direct democracy — the Paris Commune of 1871 — to inform their theoretical understanding of what an ideal form of democracy might look like.³⁹ In *The Civil War in France*, Marx eulogized the

33 This chapter refers to the 1968 Penguin edition.

34 Pateman (supra) at 27.

35 The most famous example of this is Isaiah Berlin's charge that Rousseau's model has 'tyrannical implications'. See Held (supra) at 61 referring to I Berlin *Four Essays on Liberty* (1969) 162-64.

36 See, especially, C Pateman *Participation and Democratic Theory* (1970).

37 Rousseau (supra) at 64.

38 Ibid at 141 (partly quoted in Held (supra) at 58).

39 In his Introduction to Marx's *The Civil War in France* (1891)(reprinted in the Lawrence and Wishart edition of *Karl Marx and Friedrich Engels: Selected Works* (1968) 237), Engels referred to the Paris

organizational structure of the Paris Commune as follows:

The Commune was formed of the municipal councillors, chosen by universal suffrage in the various wards of the town, responsible and revocable at short terms. The majority of its members were naturally working men, or acknowledged by representatives of the working class. The Commune was to be a working, not a parliamentary, body, executive and legislative at the same time.⁴⁰

Marx's rejection of the liberal doctrine of separation of powers, which is implicit in this passage, is elsewhere made explicit. In reflecting on the Paris Commune's unfulfilled plans for expansion of the model on a national scale, for example, Marx wrote:

The judicial functionaries were to be divested of that sham independence which had but served to mask their abject subserviency to all succeeding governments to which, in turn, they had taken, and broken, the oaths of allegiance. Like the rest of public servants, magistrates and judges were to be elective, responsible, and revocable.⁴¹

Although the Paris Commune lasted for only two months, and never attained the status of national government, Marx speculated that the model could have been extrapolated on a national scale in France by the formation of similar communes in all the major urban and rural centres, unified under a 'Communal constitution'.⁴² Dispensing with representative government,⁴³ the proposed system would have operated by direct election to local communes, with the communes in turn electing representatives to central political organs.⁴⁴

Though not unworkable as a form of party-political organization,⁴⁵ the model of the Paris Commune, when translated into a system of government, is incompatible with representative democracy and the liberal doctrine of separation of powers. By stipulating that all state institutions should be directly accountable to the

Commune as a practical example of what the desired 'dictatorship of the proletariat' might look like. Ibid at 247. According to Engels, the Commune's most significant decisions, during its short period in power from 28 March to 28 May 1871, were that it 'filled all posts — administrative, judicial and educational — by election on the basis of universal suffrage of all concerned, subject to the right of recall at any time by the same electors', and that it restricted the wages of administrative officials to the same level as the wages received by 'other workers'. Ibid at 246.

40 Marx *The Civil War in France* (supra) at 274.

41 Ibid at 275.

42 Ibid.

43 Marx's rejection of representative government is very reminiscent of Rousseau: 'Instead of deciding once in three or six years which member of the ruling class was to misrepresent the people in Parliament, universal suffrage was to serve the people, constituted in Communes . . .'. Marx (supra) at 275.

44 See Held (supra) at 145 (Describing this system of government as one in which the people rule through a "pyramid" structure of direct (or delegative) democracy'.)

45 See Macpherson (supra) at 112-14.

electorate,⁴⁶ Marx and Engels excluded the possibility of horizontal checks and balances between state institutions. They also placed tremendous faith in the capacity of human beings to pursue long-term political projects over time.

The fundamental difficulty faced by all theories of direct democracy is the sheer complexity of collective decision-making in the modern nation-state. As noted above, Rousseau's model was constructed in deliberate denial of the changing social and economic circumstances of eighteenth-century Europe. From the perspective of the twenty-first century, his rejection of the legitimacy of representative decision-making seems quaint and other-worldly. In the same way, the

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failure of the communist states in Eastern Europe, which were at least in theory an attempt to implement the Marxist-Leninist model of direct democracy, has been attributed in part to the inability of these states in the end to compete with the post-industrial, technologically advanced states of Western Europe and North America.

The ideal of direct democracy, of course, survives in a subsidiary form in many modern constitutions, most notably in the right to freedom of assembly, and the provision made for the holding of referenda and a greater degree of citizen participation in local government. In the United States, for example, institutional provision is made for three kinds of direct democracy: the initiative (in terms of which a prescribed minimum number of voters may file a petition proposing legislation or a constitutional amendment); the referendum (in terms of which state legislatures may put a legislative proposal to voters for their approval); and the recall (in which a prescribed minimum number of voters may file a petition demanding that the continued tenure in office of an elected public official be put to the vote).⁴⁷ Other modern constitutions contain similar arrangements.⁴⁸ The role and influence of all these institutions, however, is carefully circumscribed, and their presence generally does not detract from the representative thrust of the main institutional arrangements.

(b) Representative democracy

Representative democracy is typically justified as a concession to the impossibility of achieving direct democracy in the modern nation-state.⁴⁹ This justification masks two curiosities about representative democracy that are worth noting: (a) the emergence of this form of democracy as an actually existing system of government is a surprisingly recent phenomenon, dating back to the emergence of liberal democracy in the late eighteenth century, and reaching its current form only in the first quarter of the twentieth century; and (b) many of the theoretical accounts of representative democracy, though beginning with the traditional, pragmatic justification, ultimately defend a conception of democracy in which the modern

46 Held (supra) at 146.

47 See TE Cronin *Direct Democracy: The Politics of Initiative, Referendum and Recall* (1999) 2.

48 See, for example, FC ss 84(2)(g) and 127.

49 See, for example, JS Mill 'Considerations on Representative Government' in JS Mill *On Liberty and Other Essays* J Gray (ed) (1991) (Mill 'Considerations') 203, 248.

nation-state is a necessary condition for, rather than a practical constraint on, the achievement of 'true' or 'genuine' democracy.

As to the first point, most accounts place the rise of liberal democracy (and representative democracy as its practical embodiment) at the end of the eighteenth century.⁵⁰ Between this time and the direct democracy practised in the city-state of Athens there was a long period during which democracy all but

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disappeared as an actually existing political system.⁵¹ Not only that, but democracy was for much of this period a pejorative term used to describe allegedly disordered societies in which no better form of government could be found than mob rule.⁵²

The social, political and economic changes that made possible the re-emergence of democracy in the late eighteenth century are too complex to describe here, but essentially have to do with the emergence of an independent class of property owners capable of demanding and winning political freedom from royal authority, and the simultaneous unification in Western Europe of previously fragmented principalities into linguistically and culturally homogeneous nation-states.⁵³ Just as direct democracy is identified with the city-state governments of ancient Greece, so, too, representative democracy is inextricably tied to the emergence of this new form of polity. The connection between representative democracy and the modern nation-state explains, in turn, why one of the central cleavages running through democratic theory is that between theorists who appear to lament the passing of the city-state, and those who view the modern nation-state as a form of political organization that provides new opportunities for democracy, and hence new possibilities for the development of human freedom.

Even after the emergence of the nation-state in the late eighteenth century, the full maturation of representative democracy took another hundred years, with the vote being extended to all adult men in Western Europe and North America in the late nineteenth century, and to women only at the beginning of the twentieth century.⁵⁴ During this time, institutions that had developed at the end of monarchical rule as a means of giving the propertied classes a greater say in government, were gradually extended to the entire population according to the principle of political equality.⁵⁵

50 See Macpherson (supra) at 20; J Dunn *Western Political Theory in the Face of the Future* (Revised Edition, 1993) 6.

51 The only exception being the medieval Italian city-states, which disappeared during the Renaissance. Dahl *Democracy and its Critics* (supra) at 213.

52 See Dunn (supra) at 1-28.

53 See Dahl *Democracy and its Critics* (supra) at 213. Dahl also discusses, in the same work, the conditions favourable to the emergence of polyarchy, which he argues is a precondition for democracy in the modern nation-state. Ibid at 221-22, 244-64.

54 Ibid at 234-39.

55 Ibid at 216.

Although it had important precursors in the work of Locke,⁵⁶ Montesquieu,⁵⁷ Madison,⁵⁸ and the utilitarian theory of James Mill and Jeremy Bentham, the classic liberal statement of the nature and benefits of representative democracy is John Stuart Mill's *Considerations on Representative Government*.⁵⁹ This work,

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appearing as it did in the second half of the nineteenth century, was intended both as an argument in support of the extension of the franchise then underway in Great Britain, and also as a statement about the possibility of democracy in the modern nation-state. Representative government, in Mill's cautious definition, is a system in which 'the whole people, or *some numerous portion of them*, exercise through deputies periodically elected by themselves, the ultimate controlling power, which, in every constitution, must reside somewhere' (emphasis added).⁶⁰ Mill's qualification of what is today understood as a necessary precondition for democracy — universal adult suffrage — is indicative of the age in which he was writing. At the time of the publication of the *Considerations* in 1861, voting rights in Great Britain were still restricted to the propertied class, and absolutely denied to women.⁶¹ Nevertheless, the kernel of the modern idea of representative democracy is contained in Mill's definition, namely, the notion of democracy as a political system in which the people voluntarily exchange their power to govern themselves for the power to control those whom they elect to govern them.

The impetus behind Mill's theory is most easily understood in contradistinction to that of Rousseau. Although he shared Rousseau's concern for, and indeed insistence upon, the educative effects of citizen participation in politics,⁶² Mill was more sanguine than Rousseau about the possibilities of indirect citizen participation. Rejecting the notion that the giving up of control leads necessarily to enslavement, Mill argued that representative democracy was preferable to all other forms of government. Whilst authoritarian societies might be able to outperform representative democracies over the short term, their inability to produce public-spirited citizens made them less attractive over the long term.⁶³ As for Rousseau's objection that voting in a representative system was an illusion that masked the

56 *Two Treatises of Government* (1689).

57 *De l'Esprit des Lois* (1748).

58 See Held (supra) at 91-92 (On Madison's importance as translator of Locke and Montesquieu); Dahl *Democracy and its Critics* (supra) at 218 (Madison's importance to democratic theory is his argument that increasing the size of a state good for democracy).

59 JS Mill *Considerations on Representative Government* (1861).

60 Mill 'Considerations' (supra) at 269.

61 For Mill's attitude on the representation of women, see 'The Subjection of Women' in Mill (supra) at 471.

62 See Mill 'Considerations' (supra) at 210 (Arguing that representative government is 'of little value, and may be a mere instrument of tyranny or intrigue, when the generality of electors are not sufficiently interested in their own government to give their vote, or, if they vote at all, do not bestow their suffrages on public grounds. . .'). On the similarities between Rousseau and Mill, see Pateman (supra) at 29-30.

reality of elite domination, Mill argued that it was possible for democracy to be 'learned' at the local level,⁶⁴ and for this learning to be translated onto the national stage.⁶⁵ In addition, there was a range of institutions available to

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representative government by means of which the people could retain control of their elected representatives: competition between political parties, the separation of powers and, most important of all, freedom of the press.⁶⁶

The distinctly modern turn in Mill's argument was therefore to transform the (somewhat weak) justification of representative democracy as a pragmatic concession to the impossibility of direct democracy into a claim that representative democracy might actually improve on all other known forms of government. As David Held puts it: 'The conclusion Mill draws is that a representative government, the scope and power of which is tightly restricted by the principle of liberty, and *laissez-faire*, the principle of which should govern economic relations in general, are the essential conditions of "free communities" and "brilliant prosperity".'⁶⁷

Representative democracy is today the basic form of democracy in every country considered to be democratic. The so-called 'third wave' of democracy, in which this form of government has spread out from its origins in Western Europe and North America to the rest of the world, has thus seen the proliferation of a common set of political institutions, including universal adult suffrage, regular elections, the right to free political participation and freedom of the press. The link between the globalization of democracy and the spread of formal political equality secured by individual rights is explored in § 10.2(d).

(c) Contemporary accounts of democracy

Given the pre-eminence of representative democracy as modern democracy's practical form, the overriding concern of democratic theory today is to describe the operation of actually existing democratic systems and, in so doing, to identify weaknesses and deviations from the democratic ideal. Although the lexicon is vast, two main schools of thought may be identified: participatory democracy, which is

63 Mill 'Considerations' (supra) at 238-256.

64 Pateman (supra) at 31 quoting JS Mill *Essays on Politics and Culture* (G Himmelfarb (ed)) (1963) 186.

65 Mill's theory is marred by his ambivalence on the property-based franchise. Interestingly, much of this ambivalence has to do with Mill's doubts about whether the propertyless were truly capable of benefiting by the educative power of the vote, a view which, if propounded today, would be deeply offensive. See, for example, Mill's distinctly elitist argument that '[a] representative constitution is a means of bringing the general standard of intelligence and honesty existing in the community, and the individual intellect and virtue of its wisest members, more directly to bear upon the government, and investing them with greater influence in it, than they would in general have under any other mode of organization'. Mill 'Considerations' (supra) at 228-29. Elsewhere, however, Mill argues forcefully in favour of the impossibility of cross-class representation, ie the notion that it is possible for an elected representative from the propertied class fairly to represent the views and interests of workers. Ibid at 246.

66 Mill 'Considerations' (supra) at 210.

67 Held (supra) at 104.

associated with the work of Carole Pateman, and deliberative democracy, the main theorists of which are Jürgen Habermas and, in the English-speaking world, Amy Gutmann and Dennis Thompson. Neither of these schools is intended as a direct challenge to representative democracy. Nevertheless, both stress certain deficiencies in the representative model than can be traced back to the ideal of direct democracy.

Before summarizing the ideas underpinning these two schools, it is necessary first to say something about the two most influential attempts to describe and (in part) defend actually existing representative democracy: Joseph Schumpeter's competitive elitist model, and Robert A Dahl's conception of democracy as 'polyarchy'.

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(i) Pluralist democracy

Although he did not himself use the term, Schumpeter is credited with the theoretical move that led to the still-dominant conception of democracy as 'pluralism', that is, the notion that, far from being the expression of the 'general will', voting in a democracy is essentially about the aggregation of diverse interests under the banner of political parties. The conceptual shift that made this view of democracy possible was, in Schumpeter's words, to 'reverse the roles' played in democratic theory by 'the selection of the representatives' and the 'deciding of issues by the electorate'.⁶⁸ According to Schumpeter, the problem with 'the classical doctrine of democracy' was that it assumed that the people were more active and engaged in politics than they actually were, and that voting was a method through which parliamentarians could be mandated to represent the people's opinions on specific issues.⁶⁹ If, on the contrary, one assumed that democracy was a value-neutral *method* for producing stable government,⁷⁰ then the primary role of the people could be seen to be the selection of representatives. On this approach, democracy was simply 'that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote'.⁷¹ And democracy's claim to our allegiance, in turn, was not that it was ideally preferable to any other political system, but that historically it had proven to be more successful in producing stable governments than any other system.⁷²

68 JA Schumpeter *Capitalism, Socialism and Democracy* (1943) 269.

69 Ibid.

70 Cf Macpherson (supra) at 86 (Macpherson characterizes the central justificatory claim of the pluralist model as being the bringing about of 'an optimum of equilibrium of the supply and demand for political goods'.)

71 Schumpeter (supra) at 269. Not surprisingly, this definition leads Schumpeter to dismiss proportional representation as practically 'unworkable'. Ibid at 272-73.

72 Note how this definition provides a cynical answer to Plato's cynicism about democracy in *The Republic*. Just as Plato dismissed democracy for failing to produce efficient government, so Schumpeter endorses it, not for its inherent qualities, but for its relative effectiveness under modern conditions.

In explaining his theory, Schumpeter analogized the role of political parties to that of firms in the marketplace. Just as 'department store[s]' compete for custom by offering different brands of goods for sale, Schumpeter argued, so do political parties compete for office by gathering together 'a stock of principles or planks' that they deem likely to attract a majority of votes.⁷³ It was principally this idea that the main theorist of pluralism, Robert A Dahl, extrapolated in his notion of democracy as 'polyarchy', or 'rule by the many'.⁷⁴ For Dahl, like Schumpeter,

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the task of political theory was to describe and explain actually existing democratic systems, rather than philosophize about democracy's ideal form.⁷⁵ But Dahl was more optimistic than Schumpeter about the prospects for direct citizen participation in politics, mainly because his empirical research revealed the existence of intermediate sites of power, between the governors and the governed, where competing interests could be asserted and mediated.⁷⁶ Stressing the importance to democracy of a shared 'political culture',⁷⁷ Dahl argued that the mid-twentieth-century welfare states of North America and Western Europe were best described as political systems in which a diverse range of minority interests competed for power. Unlike Schumpeter, therefore, Dahl's conception of democracy is not an elitist one in which a largely passive citizenry chooses between members of a self-appointed political class. Rather, democracy is secured by the dispersion of interests in advanced capitalist societies, and underpinned by societal consensus regarding the range of permissible government action.

There is some dispute in the literature as to whether Schumpeter and Dahl made normative claims for their theories in the sense that they contended not only that they provided the best descriptive account of contemporary democracies, but also that the democratic systems they were describing were better than any others.⁷⁸ Certainly, both Schumpeter and Dahl seem to make the pragmatic claim that the 'competitive elitist' or 'pluralist' form of democracy is the only *workable* form of democracy in advanced capitalist societies. In addition, critics of Schumpeter in

73 See Schumpeter (*supra*) at 283. See also Pateman (*supra*) at 4.

74 RA Dahl *On Democracy* (1998) 90. See also RA Dahl *A Preface to Democratic Theory* (1956) 133 (Arguing that democracy may be distinguished from dictatorship by the 'number, size, and diversity of the minorities whose preferences will influence the outcome of governmental decisions'); RA Dahl *Democracy and its Critics* (1989) 220 (Defining polyarchy as a 'political order' in which '[c]itizenship is extended to a relatively high proportion of adults, and the rights of citizenship include the opportunity to oppose and vote out the highest officials in government'.) For a discussion of Dahl's contribution to political theory, see Held (*supra*) at 206-208. For other major works in the pluralist canon, see SM Lipset *Political Man* (1960); DB Truman *The Governmental Process* (1951).

75 Dahl did, however, begin to do this in his later work, such as *On Democracy* (*supra*).

76 See, especially, RA Dahl *Who Governs? Democracy and Power in an American City* (1961) (Examining operation of democratic politics in situation of social and economic inequality in New Haven, Connecticut, and finding that power was dispersed between different sites.)

77 See Held (*supra*) at 207.

78 See Macpherson (*supra*) at 82-86; Pateman (*supra*) at 8-10; Dunn (*supra*) at 26-27; Held (*supra*) at 178.

particular have pointed to passages in which descriptive claims appear to shade into normative claims about the value of passive citizenship or, conversely, the dangers of active citizen participation in politics.⁷⁹

Despite these criticisms, neither of the two critical schools that have come to challenge pluralism in recent years has been able to improve on the descriptive power of pluralism as applied to actually existing democratic systems. On the contrary, the theorists of both participatory and deliberative democracy have in their turn been criticized for their overly optimistic assumptions about the capacity of individuals in advanced capitalist societies to overcome their selfish, welfare-maximizing desires. As CB Macpherson has argued, the central challenge facing those critical of status-quo representative democracy is to overcome an

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apparent 'vicious circle'. On the one hand, in order to improve the quality of democracy, citizens need to develop a sense of themselves as something more than passive consumers of political goods. On the other hand, in order to change this perception, advanced capitalist societies first need to change in ways that encourage greater citizen participation in politics.⁸⁰ This paradox leaves theorists of participatory and deliberative democracy occasionally looking like utopian dreamers, however much more palatable their models may be to the democratic purist.⁸¹

(ii) Participatory democracy

The leading contemporary democratic theorist, David Held, classifies participatory democracy along with direct democracy as part of the same model.⁸² And, indeed, there is an obvious relationship between these two forms of democracy, with both stressing the value of citizen participation in the making of collective decisions. What, then, is the difference? By most accounts, participatory democracy in its contemporary guise is as an attempt to re-inject elements of direct democracy into modern systems of representative democracy. In this sense, participatory democracy is essentially about the question whether, and if so, how, citizens should be given the right to participate in the making of decisions that affect them, notwithstanding the fact that the basic form of political organization in the modern nation-state is, and is likely to remain, representative democracy.⁸³ By contrast, direct democracy stands apart from representative democracy as a pre-modern form of democracy

79 Held (supra) at 209 (Citing G Duncan & S Lukes 'The New Democracy' in S Lukes (ed) *Essays in Social Theory* (1963) 40-47.) See, eg, Schumpeter's discussion of Napoleon's 'master strokes' in solving various problems relating to religious freedom in post-revolutionary France. Schumpeter (supra) at 255-56. This discussion, part of his critique of the 'classical doctrine of democracy', ends with a more general conclusion that 'government for the people' (ie by a benevolent military dictator) might sometimes produce better outcomes than 'government by the people'. Ibid at 256.

80 Macpherson (supra) at 100.

81 Cf Dunn (supra) at 27 (Dunn concludes his assessment of participatory democracy and pluralism by saying that they represent the two less than satisfactory alternative forms of democracy existing today, 'one dismally ideological [pluralism] and the other fairly blatantly Utopian [participatory democracy]'.)

82 Held (supra) at 6.

83 As we have seen, in Schumpeter's account, representative democracy in its pure form restricts participation in politics to voting. Cf Pateman (supra) at 5.

that is unlikely to be re-instantiated as the basic form of government in any polity that we know of, notwithstanding the residual role played by such institutions as the referendum and the right to freedom of assembly.

According to its chief theoretical exponent, Carole Pateman, participatory democracy returned to prominence in the 1960s in the context of New Left student politics in Europe and North America.⁸⁴ Before this time, this model had been suppressed by the belief that modern bureaucratic states were incompatible with mass participation and the related view that, where it had occurred, mass participation in politics had tended towards totalitarianism rather than democracy.⁸⁵ In particular, Schumpeter's attack on the 'classical' doctrine of democracy had successfully demonized participatory theory as resting on unrealistic assumptions about the actual extent of citizen participation in politics.⁸⁶

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Against this background, Pateman's work was devoted to demonstrating that Schumpeter had misrepresented the importance accorded to participation in the 'classical tradition', and to rehabilitating the theoretical importance of, among others, Rousseau and Mill. For Pateman, '[u]ntil the theory of participatory democracy has been examined in detail and the possibilities for its empirical realisation assessed, we do not know how much "unfinished business", or of what sort, remains for democratic theory.'⁸⁷

Unfortunately for Pateman, the main empirical evidence she enlists in support of this argument, an upbeat study of 'workers' self-management in [1960s] Yugoslavia',⁸⁸ now looks a little dated. John Dunn, for one, dismisses her work with a quintessentially English putdown, suggesting in a footnote that we should consult Pateman's book '[f]or a clear, if somewhat innocent, exposition of the merits of participatory democracy'.⁸⁹ According to a more sympathetic critic, CB Macpherson, the central problem with this approach is that the two virtues of participation — promoting a more active citizenry and reducing social and economic inequality — are also its prerequisites.⁹⁰ This leads to the 'vicious circle' described earlier in which the realization of participatory democracy is hindered by the difficulty of creating conditions conducive to citizen support for the idea. Macpherson is not completely pessimistic, however, and finds some solace in the thought that the main threats to the stability of the liberal-democratic status quo might provide 'loopholes' in the circle capable of prompting a change for the better.⁹¹ The best route to a more participatory form of democracy, he concludes, is to retain the present

84 Ibid at 1. See also CB McPherson *The Life and Times of Liberal Democracy* (1977) 93.

85 Pateman (supra) at 2-3.

86 Ibid at 4.

87 Pateman (supra) at 21.

88 Ibid at 85-102.

89 Dunn (supra) at 28 n68.

90 Macpherson (supra) at 99-100.

representative system, and to rely on political parties to encourage citizen participation in their internal structures.⁹²

(iii) Deliberative democracy

Deliberative and participatory democracy are superficially similar since both can be seen as a reaction against the tendency of modern representative democracies to produce passive citizens, whose power to control their elected representatives is reduced to their right to participate in periodic elections. The distinction between these two forms of democracy, however, is the view propounded by theorists of deliberative democracy that a particular form of participation — deliberation — may legitimate collective decisions even in the presence of fundamental moral disagreement. Participatory democracy, by contrast, often appears

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naively to assume, as in Rousseau's work, that sufficient, or the right kind of, participation, will eventually produce agreement between citizens on a single right decision most conformable with the public interest.

The seminal thinker in the field of deliberative democracy is the German social theorist, Jürgen Habermas.⁹³ In the last twenty years all of Habermas's major works have been translated into English, and his ideas have in this way become part of the Anglo-American tradition of thinking about democracy. Even (or perhaps especially) in translation, however, Habermas's work remains impenetrable to the casual reader. According to Jon Elster, the main idea for which Habermas's version of deliberative democracy stands is that 'democracy revolves around the transformation rather than simply the aggregation of preferences'.⁹⁴ As Elster notes, this idea is not entirely new, since it was present in early accounts of Athenian democracy,⁹⁵ and also, as we have seen, in Rousseau and Mill's notion of the educative value of citizen participation in politics.⁹⁶ What distinguishes Habermas's account of democracy from these other accounts is the emphasis it places on the *legitimizing* function of deliberation. This point can be seen most clearly, Elster argues, in contradistinction to the Marxist model of delegative democracy, which assumes that the citizen's mandate, once given at the local level, can be transmitted unchanged to the national level, with national delegates voting purely according to the mandate they receive from below. For Habermas, the problem with this model is that it denies both

91 Ibid at 101. The three main threats that Macpherson refers to are: the unsustainability, for environmental reasons, of current levels of economic growth; a growth in 'neighbourhood and community movements and associations' and 'movements for democratic participation in decision-making at the workplace'; and the logical need for capitalism to spread access to consumer goods to a greater proportion of the world's population. Ibid at 102-108.

92 Ibid at 112-14.

93 See J Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans W Rehg, 1996).

94 J Elster (ed) *Deliberative Democracy* (1998) 1.

95 Ibid at 1.

96 Ibid at 3-4.

the possibility and the legitimacy of preference transformation through discussion.⁹⁷ In order to be legitimate, Habermas argues, 'political choice must be the outcome of *deliberation about ends among free, equal and rational agents*'.⁹⁸

The most influential attempt in English thus far to set out the case for deliberative democracy is Amy Gutmann and Dennis Thompson's *Democracy and Disagreement*.⁹⁹ According to these authors, the main contemporary challenge to democracy in the United States is 'the problem of moral disagreement', by which they mean 'conflicts about fundamental values'.¹⁰⁰ Citing the controversy over abortion, Gutmann and Thompson question the extent to which the reference of this issue to the courts, and the United States Supreme Court in particular, has promoted the ideal of democracy. The liberal constitutionalist approach

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to the resolution of fundamental moral disagreements, they argue, tends to de-emphasize and therefore de-capacitate the role of citizen participation in politics. The proper response to this challenge is to seek ways in which the idea and practice of 'moral discussion in public life' can be re-introduced.¹⁰¹

In Gutmann and Thompson's account, the core idea of deliberative democracy is that, 'when citizens or their representatives disagree morally, they should continue to reason together to reach mutually acceptable decisions'.¹⁰² For this reason, deliberative democracy is best seen as a proceduralist model of democracy, ie, a model of democracy that is concerned with how political decisions are taken rather than the substantive moral values that democracy should serve, or the ends it should seek to achieve. This approach requires citizens and their representatives to deliberate in a way that is somewhere in between 'impartiality' and 'prudence'.¹⁰³

The three principles of deliberative democracy, according to Gutmann and Thompson, are reciprocity (the duty to deliberate in the manner just described), publicity (the need for reasons to be made public) and accountability (the duty of reason-givers to account to the immediate electorate and their moral constituency, including 'citizens of other countries and members of future generations').¹⁰⁴ The first principle requires citizens to deliberate in such a way that they can offer justifications to people who reasonably disagree with them. 'Citizens who reason

97 Elster (supra) at 3.

98 Ibid at 5.

99 A Gutmann & D Thompson *Democracy and Disagreement* (1996). See also A Gutmann & D Thompson 'Democratic Disagreement' in S Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (1999) 243-49 (Reply to their critics). For another Anglo-American take on deliberative democracy, see J Cohen 'Deliberation and Democratic Legitimacy' in D Estlund (ed) *Democracy* (2002) 87 (previously published in A Hamlin & P Pettit (eds) *The Good Polity* (1989)).

100 Gutmann & Thompson *Democracy and Disagreement* (supra) at 1.

101 Gutmann & Thompson *Democracy and Disagreement* (supra).

102 Ibid.

103 Ibid at 2.

reciprocally can recognize that a position is worthy of moral respect even where they think it is morally wrong.¹⁰⁵ This principle also means that citizens should 'try to accommodate the moral convictions of their opponents to the greatest extent possible, without compromising their own moral convictions'.¹⁰⁶ Gutmann and Thompson qualify this position by arguing that the duty to deliberate in this way does not apply to all disagreements, but only to deliberative disagreements, by which they mean disagreements between two views, each of which is worthy of moral respect (such as the contending views on abortion). Other disagreements, they argue, may be 'non-deliberative', such as the disagreement between people who think that racial discrimination is justified and people who think that it is not. Where one of the contending views is not worthy of moral respect, Gutmann and Thompson argue, no duty to deliberate in the required manner arises.¹⁰⁷

In anticipation of the discussion of constitutional democracy in § 10.2(d), it is worth emphasizing that Gutmann and Thompson's conception of deliberative democracy leads them to reject the exclusive role of courts in deciding certain policy questions, such as those pertaining to what they call the 'middle democratic' issues of health policy, affirmative action and euthanasia.¹⁰⁸ The problem

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with the exclusive settlement of these questions by the courts is not just that this is potentially undemocratic, but that it deprives citizens of the opportunity to debate these questions, and therefore of the opportunity to develop as citizens.

The longstanding criticism of deliberative democracy is that a commitment to submit political decisions to public discussion can allow for the influence of rhetoric and demagogy, and that such discussion, at best, neither improves nor detracts from the quality of collective decision-making.¹⁰⁹ The theory also appears to depend for its practical realization on a pre-existing equality of deliberative power, meaning some measure of educational and social and economic equality between deliberators. Without this, even consensual outcomes might be distorted by the greater capacity of certain deliberators to articulate their interests in terms acceptable to the rules of deliberative democratic engagement. Like the challenge posed to participatory democracy at the end of the last subsection, therefore, there appears to be a circularity problem with deliberative democracy, in as much as the conditions for the realization of this ideal appear to depend on changes to the status quo that the commitment to deliberative democracy itself will not be able to bring about.¹¹⁰

(d) Constitutional democracy

104 Ibid at 8.

105 Ibid at 2-3.

106 Ibid at 3.

107 Ibid

108 See Gutmann & Thompson 'Democratic Disagreement' (supra) at 4-5.

109 Elster (supra) at 1-2.

Unlike the other terms considered thus far, 'constitutional democracy' is a purely descriptive term, not associated with any particular theorist, but used to connote a political system in which the people's power to make collective decisions is constrained by a written constitution, or at least a received set of institutional practices that is regarded as being incapable of ordinary amendment. Usually, but not necessarily, the power to decide whether the people, acting through the political branches, have deviated from the terms of the constitution is vested in the judiciary, and usually but not necessarily, the judiciary exercises this power on the authority of a supreme-law bill of rights. Understood in this way, 'constitutional democracy' is the binary opposite of the term 'parliamentary sovereignty', which connotes a political system in which the legislature has the final word in the event of inter-branch conflict over the constitutionality of a collective decision.

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An apparent paradox surrounding the 'third wave' of democracy that has swept through the world in the last thirty years is that the newly democratic states have mostly rejected parliamentary sovereignty in favour of constitutional democracy. On the majoritarian conception of democracy, this does not make sense. When a political community moves from a long period of totalitarianism to democracy it is to be expected that the people should initially be jealous of their newfound power to make collective decisions. Instead, the third wave of democracy is associated with a simultaneous 'global expansion of judicial power'.¹¹¹

One possible explanation is that the curtailment of democracy, if that is indeed what judicial review amounts to, is a necessary condition for the spread of at least some kind of democracy. Something like this explanation is given by Tom Ginsburg in his study of the emerging role of constitutional courts in Asia. According to Ginsburg, the institution of judicial review, by providing 'insurance' to prospective electoral losers, can persuade warring factions to commit to the democratic process.¹¹²

A second possible explanation is contained in Dahl's work on polyarchy, to which reference has already been made.¹¹³ Polyarchy, in Dahl's usage, is not equivalent to democracy, but rather a set of institutions necessary to the emergence and maintenance of modern democratic systems.¹¹⁴ '[O]ne of the most striking differences between polyarchy and all earlier democratic and republican systems,'

110 Various other criticisms of Gutmann and Thompson's work in particular can be found in Macedo (supra). Frederick Schauer, for example, argues that: '[t]he central anomaly in [Gutmann and Thompson's] argument . . . is the tension between, on the one hand, the nonideal world that they rightly claim gives rise to the problems they address and, on the other, the idealized dimension of the solution they propose for resolving or at least managing those problems.' F Schauer 'Talking as a Decision Procedure' in Macedo (supra) at 17, 22. Michael Walzer, in turn, lists a number of examples of *legitimate, non-deliberative* practices in democratic politics, including political education, mass organization and demonstration, the issuing of statements, bargaining, voting, and debate without any attempt to reach agreement. M Walzer 'Deliberation, and What Else?' in Macdeo (supra) at 58. In the end, most of the criticisms of deliberative democracy come down to the practical impossibility of introducing this form of decision-making in modern democratic politics, which appears rather to be dominated by the pursuit of sectarian interests and political power. I Shapiro 'Enough of Deliberation: Politics is about Interests and Power' in Macdeo (supra) at 28.

111 See C N Tate & T Vallinder (eds) *The Global Expansion of Judicial Power* (1995).

112 T Ginsburg *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003).

113 See § 10.2(c)(i) supra.

Dahl writes, 'is the astounding expansion of individual rights that has occurred in countries with polyarchal government'.¹¹⁵ Dahl would thus agree with Ginsburg that the enforcement of individual rights is naturally associated with the spread of democracy.¹¹⁶ What Dahl adds is the idea that rights are not just a form of insurance, but also an ongoing means of dealing with the complexity of decision-making in the modern nation-state.¹¹⁷ Recall that the rise of representative democracy is closely associated with the emergence of this form of polity, and that one of the central questions of contemporary democratic theory concerns how representative democracy is to retain its legitimacy when citizen participation in politics is effectively reduced to the right to participate in periodic elections. One possible answer to this question, Dahl argues, is that judicially enforced rights make up for what is lost. In place of direct participation in collective decision-making, citizens today participate in the political process as rights-bearers.¹¹⁸ Rights both secure their membership of the political community and carve out 'a sphere of personal freedom that participation in collective decisions cannot'.¹¹⁹ In this sense, the judicial enforcement of individual rights is a

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precondition for democracy, and there is thus no contradiction between the twin processes of democratization and the 'global expansion of judicial power'.

Whereas Ginsburg's view is explicitly premised on the assumption that rights detract from democracy, Dahl's argument sidesteps this question somewhat by arguing that the institutions of polyarchy that depend on judicial review, such as freedom of expression and the right to free and fair elections, 'are necessary to the *highest feasible attainment of the democratic process* in the [modern nation-state]' (emphasis added).¹²⁰ This approach is sufficient for Dahl's purposes, since his main aim is to defend status-quo political systems in North America and Western Europe against the charge that they have departed too far from the democratic ideal. For purposes of this chapter, however, this question cannot be avoided. The Final Constitution establishes a constitutional democracy with a justiciable Bill of Rights and an independent judiciary. It is therefore necessary to ask: Do rights detract from democracy? And, if so, are constitutional democracies really democratic?

The extensive literature on this topic, under the rubric of the 'counter-majoritarian dilemma', is canvassed elsewhere in this work.¹²¹ The concern of this chapter is with a sub-component of this question, namely whether, as a matter of classification, the institution of judicial review can be said to render a political system undemocratic.

114 Dahl *Democracy and Its Critics* (supra) at 221-22.

115 Ibid at 219.

116 See also Dahl *On Democracy* (supra) at 48-50.

117 Dahl *Democracy and its Critics* (supra) at 220.

118 Ibid.

119 Ibid.

120 Dahl *Democracy and its Critics* (supra) at 220.

This question was the subject of a well-known exchange between Ronald Dworkin and Jeremy Waldron. In the opening chapter of *Freedom's Law*,¹²² Dworkin argues that, far from detracting from democracy, judicial review under a supreme-law Bill of Rights may in fact enhance it. For Dworkin, there is no such thing as the counter-majoritarian dilemma, and law professors who devote their scholarly lives to finding an 'interpretive strategy' between originalism and 'the moral reading' of the constitution are wasting their time.¹²³ Building on John Hart Ely's work,¹²⁴ Dworkin asserts that not just political rights, but also other rights which ensure that individuals are treated with 'equal concern and respect' are essential to the legitimacy of majority decision-making. When a majority infringes these rights, whether intentionally or inadvertently, the exercise of majoritarian power is illegitimate.¹²⁵ The 'constitutional conception of democracy', in other words, 'presupposes democratic conditions', or what Dworkin calls 'the conditions of moral membership in a political community'.¹²⁶ If these conditions are *not* met, 'no democracy exists'.¹²⁷

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In responding to this argument, Waldron's starting point is to concede that '[t]he idea of democracy is not incompatible with the idea of individual rights' and that 'there cannot be a democracy unless individuals possess and regularly exercise . . . the right to participate in the making of the laws'.¹²⁸ But, Waldron says, Dworkin is wrong to argue that there is no 'loss to democracy' when an unelected body, such as a court, imposes its view of what the conditions of democracy are.¹²⁹ On the contrary, there is always a trade-off between rights and democracy, even where a court, in striking down legislation on the grounds that it undermines democracy, makes the right decision. This is because any such decision, if taken by a non-democratic body, entails 'a loss in self-government'.¹³⁰ Although the fact that a court makes the right decision may mitigate this loss, it does not mean that there is no

121 See S Sibanda & A Stein 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, September 2006) Chapter 12. See also S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34

122 R Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (1996) ('*Freedom's Law*').

123 *Ibid* at 14.

124 JH Ely *Democracy and Distrust: A Theory of Judicial Review* (1980).

125 Dworkin *Freedom's Law* (supra) at 1-37.

126 *Ibid* at 23-24.

127 *Ibid* at 24.

128 J Waldron *Law and Disagreement* (1999) 282.

129 *Ibid* at 285-87, 302.

loss.¹³¹ Conversely, where such a decision is taken by a democratic body, and a mistake is made, 'it is not silly for citizens to comfort themselves with the thought that at least they made their *own* mistake about democracy rather than having someone else's mistake foisted upon them'.¹³²

Even Waldron, however, the most strident recent defender of the 'dignity of legislation',¹³³ does not go so far as to argue that judicial review under a supreme-law Bill of Rights renders a political system undemocratic. At most, he argues that the presence of this institution renders a system less democratic. Nor does Waldron argue that political systems in which judicial review plays a role are more or less *just* than systems in which this is not the case. This question, Waldron argues, when asked in relation to any actually existing political system, involves a counterfactual, and hence is incapable of meaningful proof either way.¹³⁴

We are left, therefore, with two main conclusions: (a) judicial review under a supreme-law bill of rights forms an integral part of many political systems that are widely regarded as democratic, and, indeed, the popularity of judicial review as a device to control state power may be said to have contributed to the 'third wave' of democracy experienced during the latter part of the last century; (b) even if judicial review detracts from democracy, as it certainly does from the simple majoritarian conception of democracy, this does not mean that political systems in which this institution plays a prominent role are not democratic.

As a rider to these two conclusions, we might add that, if the question is framed in the way Dahl frames it, as being whether judicial review is a necessary condition for the emergence and maintenance of some kind of democracy, albeit a less than perfect kind, then the answer is certainly 'yes'. The contribution to

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democratic theory made by judicial review on the American model is precisely this — that for democracy to endure, it must be saved from its excesses.¹³⁵

10.3 Constitutional provisions referring to democracy

This section considers the text of, and judicial commentary on, the various provisions in the Final Constitution in which direct reference is made to democracy. Although the Final Constitution's vision for South African democracy is obviously

130 Ibid at 293.

131 Ibid.

132 Ibid at 293-94.

133 J Waldron *The Dignity of Legislation* (1999).

134 Waldron *Law and Disagreement* (supra) at 287-89.

135 Cf Aristotle *The Politics* (Revised Edition trans TA Sinclair 1981) Book VI.v. Aristotle argues that the best way of preserving any form of government is to make it less extreme: 'We shall know not to regard as a democratic (or oligarchic) measure any measure which will make the whole as democratic (or oligarchic) as it is possible to be, but only that measure which will make it *last* as a democracy (or oligarchy) for as long as possible.'

more complex than this, and is in the end conveyed through the entire constitutional text, consideration of the direct references to democracy provides a useful starting point.

(a) The preamble

The preamble to the Final Constitution, in setting out the purposes for which it was adopted, makes three direct references to democracy, each of which is tied to a different purpose. First, the preamble provides that one of the aims underlying the Final Constitution is to 'establish a society based on democratic values, social justice and fundamental human rights'. Secondly, the preamble commits the Final Constitution to 'lay[ing] the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law'. Thirdly, the preamble connects the adoption of the Final Constitution to the goal of 'build[ing] a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'.

The precise normative weight to be given to these provisions has not been considered, but is apparent from case law under the Interim Constitution.¹³⁶ In essence, the preamble, though not part of the operative provisions, may be taken into account in interpreting the rest of the Constitution. In *Soobramoney v Minister of Health, KwaZulu-Natal*, for example, the Court quoted the first part of the preamble in the course of explaining the role of socio-economic rights in combating poverty and inequality. This reference appears to have been intended to bolster the argument that there is no necessary conflict between the Final Constitution's commitment to democracy and the judicial enforcement of socio-economic

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rights.¹³⁷ Likewise, in *First National Bank*, the Court quoted the reference to 'democratic values' in the preamble when explaining the 'proportionate balance' that needs to be struck between 'protecting existing property rights' and 'serving the public interest'.¹³⁸

Other references to the preamble have been less determinate,¹³⁹ and no judgment to date has attempted anything like a comprehensive analysis of this part of the Final Constitution. In the absence of relevant case law, the preamble should be taken at face value, and its three direct references to democracy should be understood to mean that democracy is expected to fulfil at least three different functions.

136 See LM du Plessis *Re-interpretation of Statutes* (2003) 240-41 (Du Plessis observes that '[t]he Constitutional Court and, to a lesser extent high courts, have shown a readiness to rely on constitutional preambles for interpretive purposes without imposing the qualification that such reliance is warranted only where constitutional language lacks clarity and unambiguity'. Under the Interim Constitution, Du Plessis notes that the Court in *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 112 held that: 'The preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the rest that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purpose.')

137 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) at para 9.

138 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 50.

First, in providing that one of the purposes underlying the Final Constitution is 'to establish a society based on democratic values', the preamble suggests that democracy is something more than a system of government — a value-neutral set of procedures for achieving other valued ends. Democracy itself, the preamble implies, is a value system that demands our allegiance. Nor is this value-system limited in its application to the structure of state institutions and the way government conducts itself. Rather, the purpose behind the adoption of the Final Constitution is 'to establish a *society* based on democratic values' (emphasis added). The expectation, in other words, is that the Final Constitution's commitment to democracy will permeate all social relations, and inform all South Africans' dealings with each other,¹⁴⁰ whether as private citizens inter se or as civil servants appointed to serve the public interest.¹⁴¹ It is significant, too, that the reference to democracy in this part of the preamble is tied to 'social justice and fundamental rights', suggesting that these three concepts are to be the fundamental building blocks of South African society, and implying that there is no necessary contradiction between them.

Secondly, the preamble provides that, in the 'open and democratic society' which the Final Constitution is expected to establish, 'government is [to be] based on the will of the people and every citizen is [to be] equally protected by law'. This statement reiterates the core democratic idea with which this chapter

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began — with two modifications. In introducing at this early stage the concept of openness, and in juxtaposing the democratic principle alongside the principle of formal equality, this part of the preamble aligns the Final Constitution with the liberal tradition of thinking about democracy discussed in § 10.2. This does not mean that the Final Constitution's vision for democracy is limited to the liberal tradition,¹⁴² or that the Final Constitution does not seek to add to that tradition in any way. But it does mean that the conception of democracy in the Final Constitution, and the normative standard it seeks to impose, must develop out of the liberal tradition, rather than deviate from it.

139 See, eg, *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C), 2000 (2) BCLR 151 (C) at para 58 (Preamble to the Final Constitution cited without comment.); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 43 (Quoting the preamble in holding that '[f]airness requires a consideration of the interests of all of those who might be affected by the [court's] order'.); *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 1 (Referring to the preamble as recording South Africa's commitment to 'the attainment of social justice and the improvement of the quality of life of everyone'.); *Islamic Unity Convention Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at para 45 (Citing preamble in considering the fourth respondent's submission that the right to freedom of expression may be limited in the interests of 'building a united society'.)

140 Cf I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 14 n60.

141 FC s 195(1) provides that: 'Public administration must be governed by the democratic values and principles enshrined in the Constitution.' For discussion of FC s 195(1), see § 10.3 *infra*.

142 See *Democratic Alliance & Another v Masondo NO & Another* 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC) (Sachs J concurring). Sachs J contends that there are important parallels between the liberal tradition and the 'indigenous African tradition' of democracy, both of which stress the importance of participation and deliberation. *Ibid* at para 42. This decision, and Sachs J's judgment, are discussed in § 10.3(d) *infra*. See also *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), as discussed in § 10.4(a) *infra*.

Thirdly, in providing that the adoption of the Final Constitution is intended to serve the purpose of 'build[ing] a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations', the preamble acknowledges that, in the modern era, the fate of each democratic nation-state is tied to the rest. Apartheid stifled the democratic aspirations of the South African people. But it also hindered the spread of democracy in Africa. One of the secondary purposes of getting its own democratic house in order, this part of the preamble suggests, is to enable South Africa to make a contribution to the global struggle for democracy, social justice and the advancement of human rights.¹⁴³

In addition to these three direct references to democracy, the preamble stresses that the Final Constitution is itself a democratic document, made by 'the people of South Africa through [their] freely elected representatives'. Like the similar provision in the US Constitution, this formulation imports into South African constitutional law the justification of constitutionalism as a democratic 'precommitment' to the rules according to which democracy is to operate.¹⁴⁴ The Final Constitution's overarching approach to the tension between rights and democracy is discussed in § 10.3(c). For the moment, it is enough to note that the preamble openly embraces this tension in emphasizing the democratic pedigree of the document through which democratic politics are to be regulated.

(b) Founding provisions

FC s 1 provides that: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) . . . (d) Universal adult suffrage, a national common voters role, regular elections and a multi-party system of democratic

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government, to ensure accountability, responsiveness and openness.' This provision lays the foundation for a system of representative government on the liberal model. Universal adult suffrage, regular elections and the expression of preferences through the medium of political parties are all institutions that have evolved in particular historical settings within the tradition of thinking about democracy described in § 10.2. However, in providing that the purpose underlying these institutions is 'to ensure accountability, responsiveness and openness',¹⁴⁵ FC s 1(d) gives the idea of representative democracy an inflection that is incompatible with some interpretations of the liberal tradition. The insistence on 'responsiveness', for example, is irreconcilable with Schumpeter's competitive elitist model in which, as we have seen, citizens are depicted as passive consumers of political goods. On the contrary, what FC s 1(d) envisages is a system in which the institutions of representative democracy operate to ensure that the people's elected representatives are genuinely answerable to an active, informed and engaged citizenry.

143 See *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at para 222 (O'Regan J dissenting).

144 See S Holmes 'Precommitment and the Paradox of Democracy' in J Elster & R Slagstad (eds) *Constitutionalism and Democracy* (1988) 195.

145 FC s 1(d) is slightly ambiguous as to whether the phrase 'to ensure accountability, responsiveness and openness' qualifies the immediately preceding phrase — 'a multi-party system of democratic government' — or the entire provision. The presence of a comma after 'government' suggests the latter reading, which is the one preferred here. See § 10.5(a) *infra*.

In practice, of course, this conception of democracy may be hopelessly idealistic, and Schumpeter's model, for all we know, may be a more accurate description of actually existing democratic politics in South Africa. But this is not the point. As a matter of constitutional law, FC s 1(d) attributes a broader instrumental purpose to the familiar institutions of liberal democracy, and in so doing imposes a normative standard that would not be satisfied by the mere holding of elections and the operation of an essentially elitist multi-party political system.

But how, exactly, is this normative standard to be enforced? In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others*, the respondents argued that FC s 1(d) was not only directly justiciable, but that it posited an absolute right which was incapable of limitation under FC s 36.¹⁴⁶ The respondents, all of whom were prisoners, had been excluded by an amendment to the Electoral Act from participating in the 2004 general elections.¹⁴⁷ Although the respondents' case was in the main based on the contention that the amended provisions of the Act violated their voting rights in FC s 19(3)(a), they argued, in the alternative, that the amendments violated FC s 1(d), and that, since this provision gave rise to absolute rights, such violation could not be saved under FC s 36. The Constitutional Court rightly dismissed this argument: 'The values enunciated in section 1 of the Constitution', the Court held, 'are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves.'¹⁴⁸ The founding values, in other words, must be

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seen as interpretative guidelines, presumptions almost, which favour a certain way of understanding the South African constitutional project and, in the case of FC s 1(d), the nature of the democracy which that project seeks to promote.¹⁴⁹

There are two exceptions to this rule. First, in the event of an amendment to the Final Constitution, FC s 1(d) may be directly justiciable in so far as it may be used to determine the substantive category to which the amendment belongs. So much is clear from the *UDM*, in which the Court entertained an (ultimately unsuccessful) argument that, because it undermined South Africa's multi-party system of democratic government, the constitutional amendment at issue ought to have been passed according to the procedure laid down in FC s 74(1).¹⁵⁰ Secondly, FC s 1(d) may be directly relevant to the assessment of the constitutionality of a provincial constitution. In *Ex parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape, 1997*,¹⁵¹ the Constitutional Court was asked to strike down parts of the draft Western Cape Constitution on the

146 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) ('NICRO').

147 73 of 1998

148 Ibid at para 21.

149 C Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 13.

150 *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1213 (CC) ('UDM').

basis of FC s 1(d).¹⁵² The substance of the challenge was that, in providing that two of the 14 members of the provincial cabinet need not be members of the provincial parliament, ss 42 and 83 of the Western Cape Constitution, read with clause 1 of Annexure A to Schedule 3, contradicted 'the principles of democratic government entrenched in [FC] s 1(d)'.¹⁵³ Citing the *First Certification Judgment*, the Constitutional Court held that democratic systems based on the principle of separation of powers do not require that every member of the executive be an elected member of the legislature.¹⁵⁴ The foundational commitment to 'regular elections and a multi-party system of democratic government' in FC s 1(d), in other words, does not require either strict independence or interdependence between the legislature and the executive.¹⁵⁵

Given the limited frequency of provincial constitution-making, it can be expected that the content of FC s 1(d) will mainly be elaborated in judgments considering challenges to constitutional amendments, and then only in the event that there is some strategic purpose to be served in classifying the amendment as one that affects the founding values. Thus, in *UDM*, because the procedure for ordinary constitutional amendments had been followed, and because the African National Congress could not, at that stage, be assured of obtaining the requisite majorities prescribed in FC s 74(1) for constitutional amendments affecting the

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founding values, there was a strategic purpose in attempting to persuade the Court that the founding values were implicated, and, in particular, the foundational commitment to multi-party democracy. This argument, although in the end unsuccessful, at least required the *UDM* Court to comment on the constitutional conception of multi-party democracy in a way that adds to our understanding of this institution. Multi-party democracy, the *UDM* Court held, 'clearly excludes a one-party state, or a system of government in which a limited number of parties are entitled to compete for office'.¹⁵⁶ Rather, 'multi-party democracy contemplates a political order in which it is permissible for different political groups to organize, promote their views through public debate and participate in free and fair elections'.¹⁵⁷

151 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC) ('*Ex parte Speaker of the Western Cape Legislature*').

152 The direct challenge to a provincial constitution in this way is made possible by FC s 143(2)(a), which provides that a provincial constitution 'must comply with the values in section 1 and with Chapter 3'.

153 *Ex parte Speaker of the Western Cape Legislature* (supra) at para 62.

154 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 108.

155 *Ex parte Speaker of the Western Cape Legislature* (supra) at para 63.

156 *UDM* (supra) at para 24.

157 *Ibid* at para 26

In *UDM*, the Court was required to apply this definition to an assessment of the constitutionality of a constitutional amendment and related electoral reform legislation that purported to amend the then applicable proportional representation system. The package of legislation, which is discussed in detail elsewhere in this work,¹⁵⁸ sought to make it possible for members of Parliament, the provincial legislatures and municipal councils to cross the floor without losing their seats. The crisp question before the Court was whether the foundational commitment to multi-party democracy precluded the creation of an electoral system in which the outcome of an election could be altered by post-election floor-crossing. The applicants' argument was not that the existing proportional representation system was constitutionally entrenched, but that, where an electoral system is based on proportional representation, a provision prohibiting parliamentarians from defecting to other parties between elections is essential to multi-party democracy.¹⁵⁹ The Court's somewhat long and convoluted answer to this question came down to the assertion that floor-crossing in a proportional representation system, though it may frustrate the will of the electorate, does not undermine multi-party democracy.¹⁶⁰ The frustration of the will of the electorate, for its part, does not infringe FC s 19 (political rights), because all the rights in this section 'are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives.'¹⁶¹ And multi-party democracy is not undermined because FC s 1(d) does not prescribe a particular kind of electoral system.¹⁶²

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UDM is disappointing, not because the outcome was necessarily wrong, but because the Court repeatedly fails to engage with the values underlying democracy in South Africa, and because the decision, uncharacteristically for the Court, too frequently relies on assertion rather than reasoned argument. For example, the statement that, '[b]etween elections voters have no control over the conduct of their representatives', simply asserts a shallow, pluralist conception of democracy that is out of kilter with some of the Court's other decisions in this area and with the Final Constitution's vision for South African democracy. It *is* the case that the main form of control that voters have over their representatives under the Final Constitution is the right of recall. However, FC s 1(d), as noted above, prescribes a deeper conception of democracy, one that accords to the institutions of representative democracy the instrumental purpose of ensuring 'accountability, responsiveness and openness'. It is difficult to see how these values are served by a proportional representation system that allows people who were elected to represent a particular political party, and

158 See G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 29; C Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 13; S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 17.

159 *UDM* (supra) at para 30.

160 *Ibid* at para 53.

161 *Ibid* at para 49.

162 *Ibid* at para 35.

therefore a particular set of interests, to change parties between elections without any recourse to the electorate.

The *UDM* Court's reliance on the absence of any decision in foreign case law to the effect that proportional representation necessarily implies that members of a legislature are not permitted to defect equally fails to engage with the substantive values underlying democracy in South Africa.¹⁶³ The Final Constitution's vision for democracy is primarily a function of the constitutional text. The absence of foreign case law in which the lack of an anti-defection provision in a proportional representation system was found to be unconstitutional can only provide indirect evidence of what the commitment to multi-party democracy in South Africa entails. Such evidence is no substitute for a value-laden inquiry into the importance of multi-party democracy in South Africa. And yet such an inquiry is conspicuously absent from the Court's decision in *UDM*, notwithstanding an entire section ostensibly devoted to '[t]he anti-defection provision in the context of conditions in South Africa'.¹⁶⁴

We are left in the end with the sense that the Court's refusal in *UDM* to elaborate a sufficiently deep, substantive conception of democracy was attributable to the deference it perceived itself to owe to the legislature in cases of this nature. At the outset of the judgment the Court signals this basic approach by declaring:

This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional. It ought not to have been necessary to say this for that is true of all cases that come before this Court. We do so only because of some of the submissions made to us in argument, and the tenor of the public debate concerning the case which has taken place both before and since the hearing of the matter.¹⁶⁵

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The Court's reliance in this passage on a rigid distinction between law and politics is really just a signal of the level of deference it felt to be appropriate to the case. Law and politics are inevitably intertwined, and constitutional courts are seen in political theory, at least, as pre-eminently political institutions.¹⁶⁶ In rhetorically denying this, the Court in *UDM* was merely setting the standard of review that it intended to apply in the case. In finding that foreign case law did not support the striking down of the provisions, for example, the Court held: 'Where the law prohibits defection, that is a lawful prohibition, which must be enforced by the courts. But where it does not do so, courts cannot prohibit such conduct where the Legislature has chosen not to do so.'¹⁶⁷ All that this holding really means is that the detailed design of South Africa's electoral system is a political question that is reserved for the legislature to make. And the two-parted ratio that we should take away from *UDM*, in turn, is that: (a) the

163 *UDM* (supra) at para 35.

164 *Ibid* at paras 36-54.

165 *Ibid* at para 11.

166 See, for example, L Epstein, O Shvetsova & J Knight 'The Role of Constitutional Courts in the Establishment of Democratic Systems of Government' (2001) 35 *Law & Society Review* 117-63 (Attempting to model the strategic calculations made by the Russian Constitutional Court in relation to politically controversial decisions.)

commitment to multi-party democracy in FC s 1(d) does not guarantee a particular form of electoral system;¹⁶⁸ and (b) the commitment to multi-party democracy is not incompatible with a system of proportional representation in which members of the legislature are permitted to cross the floor between elections.

In addition to decisions on amendments to the Final Constitution, the extension of FC s 1(d) as an interpretative guide to the meaning of the rights enshrined in Chapter 2, and political rights in particular, has been determined in a number of voting rights cases. In *NICRO*, where this interpretative role was most clearly set out, FC s 1(d) did not go on to play a significant role in the interpretation of FC s 19(3)(a), mainly because the right to vote had plainly been violated. This, in turn, meant that the focus of the *NICRO* Court's attention fell on the limitations stage of the inquiry, and in particular on the question whether limiting the right of certain categories of prisoner to vote was reasonable and justifiable in an open and democratic society. In two other cases involving the right to vote, however, FC s 1(d) has been deployed as an interpretative guide in the manner suggested in *NICRO*. In *August v Electoral Commission*, which also involved prisoners, and which preceded and in many ways paved the way for the challenge in *NICRO*, the Court was asked to consider whether the Electoral Commission's failure to take positive steps to enable prisoners to vote in the 1999 general elections violated FC s 19(3)(a). The complication in *August* was that the Electoral Act at that time did not expressly disqualify prisoners from voting. The focus of the *August* Court's assessment thus fell on the first stage of the constitutional inquiry, since it was clear that, in the absence of a law of general application, the violation of the applicants' right to vote, once established, could not be justified. In this

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context, the Court devoted an entire paragraph to the importance and meaning of FC s 1(d), which is worth quoting in full:

Universal adult suffrage on a common voters' roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.¹⁶⁹

There are two main arguments running through this passage. First, the passage emphasizes that the Final Constitution's commitment to 'universal adult suffrage on a common voters roll' is no mere incantation of a foreign legal nostrum. Rather, it is a profound expression of South Africans' desire never to repeat the apartheid fallacy

167 *UDM* (supra) at para 35.

168 *Ibid* at para 29 (Holding that the omission from FC s 1(d) of any express reference to proportional representation, in contrast to Constitutional Principle VIII, means that this electoral system does not form part of the founding values.)

169 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 17.

that a minority of citizens should be entitled to dominate the majority by dividing the electorate into separate polities, each with its own voters' roll and distinct national identity. Secondly, the passage connects the right to vote to the development of human personality in ways that are very reminiscent of Mill's emphasis on the educative effects of citizen participation in politics. At the same time, however, the passage strips Mill's argument of its elitist contention that, though all should be entitled to vote, the vote of some (the better educated, the wealthy) should be more important than the vote of others (the uneducated, the poor). South African democracy, this passage makes clear, is one in which the principle of political equality is taken to its logical conclusion.

This part of *August* is quoted in full in *African Christian Democratic Party v Electoral Commission & Others*.¹⁷⁰ In *African Christian Democratic Party*, the applicant, a political party, had been excluded from participating in the 2006 municipal elections for the City of Cape Town on the grounds that it had failed to pay the deposit prescribed by ss 14 and 17 of the Local Government: Municipal Electoral Act.¹⁷¹ By agreement with the Electoral Commission, the applicant had made a central payment of a sum of money sufficient to cover the deposit required in respect of all the municipalities it sought to contest, but had not mentioned Cape Town in the list of municipalities that accompanied this payment. The question before the Court was whether the term 'deposit' in ss 14 and 17 necessarily meant an earmarked deposit in the sense that, when made, it

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should be specific to a named municipality. This question, the *African Christian Democratic Party* Court held, was essentially one of statutory interpretation. However, the passage in *August* was relevant to the extent that it suggested that a court, 'when interpreting provisions in electoral statutes', is required 'to seek to promote enfranchisement rather than disenfranchisement and participation rather than exclusion'.¹⁷² *African Christian Democratic Party* therefore confirms the holding in *NICRO* that, apart from the two exceptions discussed above, the role of the founding values is to act as a guide to the interpretation of legislation. In particular, where legislation seeks to regulate the right to vote, the role of FC s 1(d) is to act as a higher-norm presumption against an intention on the part of the legislature to exclude certain categories of people from voting.

In addition to the right to vote, FC s 1(d) has also featured as an interpretive guide in cases involving the right to freedom of expression,¹⁷³ the right to participate in the proceedings of municipal councils,¹⁷⁴ and the extra-territorial application of the Bill of Rights.¹⁷⁵ In *Khumalo & Others v Holomisa*, for example, FC s 1(d) was referred to in connection with the importance of the role of the media 'in ensuring that

170 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC) ('*African Christian Democratic Party*') at para 22.

171 Act 27 of 2000.

172 *African Christian Democratic Party* (supra) at para 23.

173 See, eg, *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) at para 45.

174 *Democratic Alliance v ANC & Others* 2003 (1) BCLR 25 (C) ('*Democratic Alliance v ANC*').

government is open, responsive and accountable to the people'.¹⁷⁶ And in *Democratic Alliance v ANC & Others*, following the Constitutional Court's decision in *UDM*, the Cape High Court held that FC s 1(d) does not prescribe proportional representation as the only 'fair' representative system compatible with multi-party democracy.¹⁷⁷

In the most recent decision to engage FC s 1(d)'s relationship to multi-party democracy, *Matatiele Municipality & Others v President of the Republic of South Africa & Others*,¹⁷⁸ the Constitutional Court considered FC s 1(d) in the course of interpreting FC s 155(3)(b). FC s 155(3)(b) provides that national legislation must 'establish criteria and procedures for the determination of municipal boundaries by an independent authority'. The Court re-iterated the view it had expressed in *Executive Council, Western Cape Legislature* that the purpose of establishing an independent authority to determine municipal boundaries was to 'guard against political interference'.¹⁷⁹ This, in turn, was necessary to protect 'our multi-party system of democratic government'.¹⁸⁰ The foundational commitment to multi-party

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democracy here supports a reading of FC s 155(3)(b) that would prevent the manipulation of municipal boundaries by a dominant political party to safeguard its position against later shifts in the balance of political power.

Sachs J's concurring judgment in *Matatiele* stressed a different aspect of FC s 1(d), namely the foundational commitment to 'accountability, responsiveness and openness'. The pursuit of these goals, Sachs J held, requires government to be candid when asked to explain the purpose behind a legislative proposal:¹⁸¹

[F]ar from the foundational values of the rule of law and of accountable government existing in discreet [sic] categories, they overlap and reinforce each other. Openness of government promotes both the rationality that the rule of law requires, and the accountability that multi-party democracy demands. In our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness.¹⁸²

175 See *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) ('*Kaunda*') (O'Regan J dissenting) at para 218.

176 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 23. For a discussion of this case, see § 10.4(a) *infra*.

177 *Democratic Alliance v ANC* (*supra*) at 38D-F, citing *UDM* (*supra*). For a discussion of this case in relation to FC s 160(8), see § 10.3(d)(ii) *infra*.

178 2006 (5) BCLR 622 (CC) ('*Matatiele*').

179 *Ibid* at para 41 quoting *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 50.

180 *Ibid*.

181 *Matatiele* (*supra*) at para 99.

182 *Ibid* at para 110.

This passage, like Sachs J's remarks in *August*, helpfully deepens our understanding of the Final Constitution's conception of democracy. In particular, it suggests that the exercise by Parliament of its democratic law-making power is only legitimate to the extent that the purposes it seeks to achieve are properly explained. Legislation, like all assertions of public power, must also of course be rational. But, Sachs J concludes, the requirement of transparency in law-making is likely to promote rationality as a matter of course.¹⁸³

(c) Democracy in the Bill of Rights: FC ss 7(1), 36(1) and 39(1)

There are three direct references to democracy in the Bill of Rights: FC 7(1) (the basic rights clause), FC s 36(1) (the general limitations clause) and FC s 39(1) (the interpretation clause). Together, these three provisions structure the way in which the tension between rights and democracy is to be managed in South African constitutional law.

FC s 7(1) provides that: 'The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'¹⁸⁴ Although the

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183 Although he does not say so, Sachs J's understanding of the authority of legislation comes close to Habermas's notion of communicative power, that is, the notion that the only legitimate form of political power in the modern nation-state is the power that is exercised consequent on rational deliberation in the public sphere. See J Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Trans W Rehg, 1996) 170 and W Outhwaite *Habermas: A Critical Introduction* (1994) 142.

184 In *Kaunda*, the Court held that FC s 7(1) means that the Bill of Rights enshrines the rights of South Africa's people only when they are literally *in* South Africa, and accordingly that the Bill of Rights has no extra-territorial application. *Kaunda* (supra) at para 37. The interesting aspect of *Kaunda* from the perspective of this chapter is that it placed the Court in the seemingly contradictory position of having to enforce constitutional rights in defence of persons charged with plotting the overthrow of the head of another sovereign state. The 69 applicants in *Kaunda* had been arrested in Zimbabwe on charges of participating in an attempted coup against the President of Equatorial Guinea. Amidst allegations of poor treatment and threatened extradition to Equatorial Guinea, where it was said they would face the death penalty, the applicants launched an urgent application in the Pretoria High Court demanding that the South African government seek their release and/or extradition to South Africa. The Constitutional Court's appeal ruling — that the Bill of Rights had no application to the case and that the Court should accordingly defer to the executive's judgment of how best to protect its citizens — seems to run counter to the preamble's concern with the way in which the quality of South African democracy impacts on the struggle for democracy in other countries, especially on the African continent. For this reason, O'Regan's J's dissenting judgment is to be preferred. In contrast to the majority, O'Regan J did not read FC s 7(1) as necessarily implying that the Bill of Rights has no extraterritorial effect. In any event, she reasoned, the case did not concern the extraterritorial application of the Bill of Rights, but rather whether the applicants' constitutional rights as citizens of South Africa entitled them to protection in the circumstances of the case. *Ibid* at para 230. This approach appears to be more in keeping with the preamble's commitment to 'build[ing] a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'. As noted in § 10.3(a), this commitment implies that there is a connection between the promotion of constitutional democracy in South Africa and the way South Africa relates to other sovereign states. This commitment cannot be fulfilled if the executive is not in principle bound by the Bill of Rights in the conduct of South Africa's international relations. For an extended discussion of the extraterritorial application of the Bill of Rights that largely accords with this view, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31. Other cases in which FC s 7(1) has been referred to include *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC) at para 32; *Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) at para 33; and *Van Dyk v National Commissioner, South African Police Service & Another* 2004 (4) SA 587 (T), 589I .

academic debate over the question whether judicial review under a supreme-law Bill of Rights necessarily detracts from democracy will no doubt continue, in relation to cases heard under the Final Constitution at least, FC s 7(1) comes down decisively in favour of the view that it does not. Far from detracting from democracy, FC s 7(1) asks us to accept, the rights in the Bill of Rights lie at the very heart of the Final Constitution's vision for South African democracy. Or, to put the point the other way round, no South African political system claiming to be democratic would be worthy of that name unless it respected the democratic values which the Bill of Rights affirms.¹⁸⁵

This approach to the rights-democracy tension resembles Dworkin's argument in *Freedom's Law*.¹⁸⁶ As we saw in § 10.2(d), for Dworkin, there is nothing at all undemocratic about a court being asked to enforce, against the will of the majority, rights that are constitutive of democracy. Provided the court reaches the right answer, this practice can only enhance democracy. In endorsing this view, FC s 7(1) distinguishes South African democracy from the account of that system given by Schumpeter, and, to a lesser extent, Dahl. The purpose underlying the commitment to democracy in the Final Constitution, FC s 7(1) implies, is not the maintenance of political stability, or some kind of best-that-we-can-do-under-the-circumstances democracy, but the promotion of a value-laden system of government based on human dignity, equality and freedom.¹⁸⁷

Of course, resolving the rights-democracy tension is not really this simple. Rights are in tension with democracy, and it will not always be readily apparent when a decision to vindicate a right against the will of the majority will serve the

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democratic values listed in FC s 7(1), and when it will not. But what FC s 7(1) decisively does do is to put beyond question the idea that there will be at least some occasions when the vindication of a right at the expense of majoritarian wishes will not be undemocratic. In practice, the way this system works is through the two-stage approach to judicial review.¹⁸⁸ Like the 1982 Canadian Charter of Rights and Freedoms, the Final Constitution envisages an adjudicatory model in which courts resolve the rights-democracy tension in concrete cases by deciding first whether the impugned law or conduct infringes a right in the Bill of Rights, and thereafter whether such infringement can be saved under the general limitations clause. In this

185 *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC).

186 R Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (1996).

187 R Dworkin *Law's Empire* (1986).

188 For a discussion of two-stage review, and the relationship between fundamental rights analysis and limitations analysis, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34. See, eg, *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 21; *S v Makwanyane & Another* 1995 (3) SA 391 (CC) ('Makwanyane') at paras 100-102; *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (6) BCLR 665 (CC) at para 54; *Coetzee v Government of the Republic of South Africa; Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Others* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) ('Coetzee') at para 9; *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 44; *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC) at para 9.

way, FC s 36(1) functions as a kind of democratic 'claw-back', allowing apparently rights-infringing law to be justified by reference to the very same values that FC s 7(1) says the Bill of Rights was adopted to affirm.

In order fully to appreciate this point, it is necessary to set out the first part of FC s 36(1) in full: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. The repetition of the democratic values listed in FC s 7(1), to which reference is also made in FC s 1(a), is deliberate. The only basis on which law that infringes a right in the Bill of Rights may be justified, FC s 36(1) tells us, is if that limitation can be said to be reasonable and justifiable in the sort of society that the Bill of Rights is committed to promoting. And what sort of society is that? Well, an 'open and democratic' society in which, whether it comes down in favour of the people's will or the right allegedly infringed, the resolution found for the rights-democracy tension must in the end promote the democratic values of 'human dignity, equality and freedom'.

It follows from this analysis that the case law applying FC s 36(1) is likely to tell us quite a bit about the Final Constitution's conception of democracy, or at least the Final Constitution's idea of what it means to live in an 'open and democratic society'.¹⁸⁹ And, indeed, a cursory examination of the law reports reveals this to be the case. In decision after decision in which the second stage of the constitutional inquiry has been reached, the courts have pronounced on this issue. In some cases, the courts' view is implicit in the holding of the case, in the form of a

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statement along the following lines: *In an open and democratic society based on human dignity, equality and freedom, it is (not) reasonable and justifiable to limit right X in the following circumstance*. In other cases, or in addition to holdings of this kind, the courts have expressly articulated what they think the Final Constitution's vision for an open and democratic society is. In, *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others*, for example, the Court remarked that '[t]he hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner'.¹⁹⁰

In this way, the courts' interpretation of the Final Constitution's vision of what it means to live in an open and democratic society is a function of everything they have said in all the cases in which the second stage of the constitutional inquiry has been reached. It would serve no useful purpose to summarize all of this

189 See D Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (1997) 3 (Arguing that the reference to 'an open and democratic society' in FC s 39(1) suggests that the drafters of the Final Constitution had in mind for South Africa something like Cass Sunstein's 'republic of reasons', or deliberative democracy, citing CR Sunstein *The Partial Constitution* (1993).)

190 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 95. In the preceding paragraph of the judgment the Court remarked: 'In an open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred.' See also *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC) ('*Moise*') at para 23 ('Untrammelled access to the courts is a fundamental right of every individual in an open and democratic society'.)

jurisprudence here.¹⁹¹ Some of the more important decisions may, however, be briefly mentioned. We know, for example, that the Final Constitution's vision for what it means to live in an open and democratic society does not encompass certain types of reverse onus provision.¹⁹² Nor is there space in that vision for the criminalization of sodomy between consenting adult males;¹⁹³ the disenfranchisement of prisoners serving sentences without the option of a fine;¹⁹⁴ the statutory restriction of the common-law prescription period for delictual claims against the state;¹⁹⁵ the detention and sale in execution of goods belonging to a third party to defray a customs debt;¹⁹⁶ the overbroad statutory authorization of lethal force in effecting an arrest;¹⁹⁷ the blanket criminal prohibition of nude performances on premises where liquor is sold;¹⁹⁸ and the sale of immovable property in execution of a judgment debt without judicial supervision.¹⁹⁹

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What the limitations analysis in all of these cases reveals is that the resolution of the rights-democracy tension in concrete cases can only be achieved by means of a value-laden inquiry. As Sachs J noted in *Coetzee v Government of the Republic of South Africa*, a case decided under the Interim Constitution:

[F]aithfulness to the Constitution is best achieved by locating the two-stage balancing process within a holistic, value-based and case-oriented framework. The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality. The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive

191 For such a summary, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

192 *S v Manamela & Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC).

193 *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC).

194 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) ('NICRO').

195 *Moise* (supra).

196 *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC).

197 *Ex parte Minister of Safety and Security & Others: In re S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) ('S v Walters').

198 *Phillips & Another v Director of Public Prosecutions (Witwatersrand) & Others* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC).

199 *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC).

the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct.²⁰⁰

It is easy to dismiss this passage as being somewhat idealistic. In fact, it goes to the heart of the constitutional project. What is often forgotten when thinking about the two-stage approach to constitutional adjudication is that both stages of the inquiry are driven by considerations of rights *and* democracy: the first stage because it involves an assessment of whether the *right* in question has been infringed, in a context in which FC s 7(1) provides that the 'Bill of Rights is a cornerstone of *democracy*' and 'affirms the *democratic* values of human dignity, equality and freedom'; and the second stage because it involves the assessment of whether the *right* has been reasonably and justifiably limited, measured against the standards of 'an open and *democratic* society based on human dignity, equality and freedom'.

In South African constitutional law, therefore, it is not conceptually possible for a right in the Bill of Rights to *conflict* with 'the democratic values of human dignity, equality and freedom'. Such conflict is conceptually impossible because all of the rights in the Bill of Rights are only enforceable to the extent that they affirm these values. If a court *were* to find a conflict between a particular right and these values it would by definition have made a mistake. We would be entitled to say: That cannot be what the right means because FC s 7(1) provides that all the rights in the Bill of Rights affirm the values that you say are in conflict with this right.

In summary: the paradigmatic case in which law or conduct is impugned under the Bill of Rights does not require the court to resolve a *conflict* between the right on which reliance is placed and democratic values. Rather, such a case requires the court to resolve the inevitable *tension* between rights and democracy in a way that best advances the constitutional project. That project must be understood as the gradual working out, on a case-by-case basis, of the optimal balance to be struck between the need to respect democracy, in the sense of the people's right to govern, and the need to 'respect, protect, promote and fulfil the rights in the Bill of Rights',²⁰¹ without which there would be no meaningful democracy. On this understanding of the constitutional project, the will of the majority on its own will

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never be a good enough reason to justify the limitation of a right. This is self-evidently the case where the will of the majority is deduced from public opinion polls.²⁰² But it is also the case where the will of the majority is expressed through duly enacted laws of general application. Unless those laws are found to be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom', the fact that they violate a right in the Bill of Rights will be fatal to their constitutionality.

FC s 39(1) fits into this scheme by providing that, '[w]hen interpreting the Bill of Rights, a court, tribunal or forum-(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. On the reading of the Final Constitution just advanced this provision is strictly speaking redundant since FC s 7(1) already tells us that the rights in the Bill of Rights are

200 Coetzee (supra) at para 46.

201 FC s 7(2).

202 Cf Makwanyane (supra) at para 88.

intended to affirm these values.²⁰³ A court doing justice to FC s 7(1) would therefore in any case be obliged to interpret the Bill of Rights in the manner suggested by FC s 39(1).²⁰⁴ But constitution-makers are allowed some repetition for effect, and, if nothing else, what FC s 7(1) does is to say that, even where the general limitations clause is not (yet) implicated, at the first stage of the constitutional inquiry, the same values that infuse the second stage of the inquiry must be referred to in deciding whether that stage should be reached.

(d) The powers and functions of Parliament, provincial legislatures and municipal councils

The centerpiece of the Final Constitution's commitment to democracy is to be found in the provisions dealing with the powers and functions of Parliament, the provincial legislatures and the municipal councils. As Sachs J remarked in *Matatiele*, '[d]emocratically elected by the nation, Parliament is the engine-house of our democracy.'²⁰⁵

That the basic form of South African democracy is representative government is confirmed by FC s 42(3), which provides:

The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.²⁰⁶

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The main function of the National Council of Provinces, in turn, is to represent provincial interests.²⁰⁷

The Final Constitution's provisions on national, provincial and local government legislative authority are discussed in detail elsewhere in this work.²⁰⁸ What this section does, instead, is to focus on three generic provisions that expressly refer to democracy and which are repeated in the various sections setting out the powers and functions of Parliament, provincial legislatures and municipal councils. The three generic provisions deal with legislative bodies' power to make rules and orders

203 But see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34 (Arguing that, because FC s 39 and FC s 36 invoke the same set of values, courts are obliged to acknowledge this 'unity of values' when engaged in both fundamental rights analysis and limitations analysis. They contend that arguments made here, in this chapter vis-à-vis FC s 7(1), reinforce a value-based approach to both stages of analysis.)

204 See *Walters* (supra) at para 26.

205 *Matatiele* (supra) at para 109.

206 See *King & Others v Attorneys Fidelity Fund Board of Control & Another* 2006 (1) SA 474 (SCA), 2006 (4) BCLR 442 (SCA) at para 20 (Summarizing various provisions relating to the National Assembly and concluding: '[t]hose are all facets of a National Assembly that belongs to the people, although its formal business is conducted through their representatives, and it is to an Assembly functioning in this way that the Constitution entrusts the power to legislate'.)

207 FC s 42(4).

concerning their business, participation by minority parties in legislative proceedings, and public access to legislative bodies.

(i) Rules and orders concerning legislative business must take account of representative and participatory democracy

FC s 57(1)(b) provides that the National Assembly may 'make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement'. This formulation is repeated in respect of the National Council of Provinces²⁰⁹ and provincial legislatures.²¹⁰ In *De Lille & Another v Speaker of the National Assembly*, the Cape High Court held that the 'suspension of a Member of the Assembly from Parliament for contempt is not consistent with the requirements of representative democracy [in FC s 57(1)(b), read with FC s 57(1)(a) and FC s 57(2)(b)]'.²¹¹ The main reason advanced in support of this holding was that such a punishment would not only 'penalise' the Member of Parliament in question, 'but also his or her party and those of the electorate who voted for that party who are entitled to be represented in the Assembly by their proportionate number of representatives'.²¹² The limitation in FC s 57(1)(b) on the National Assembly's power to regulate the way it conducts its business, in other words, means that the rules and orders regulating its business cannot be so drafted as to frustrate the principle of democracy. This is a classic instance of what John Hart Ely has called the 'democracy-reinforcing' function of judicial review.²¹³ Although the *De Lille* case was eventually decided by

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the Supreme Court of Appeal on a different basis,²¹⁴ the High Court's interpretation of FC s 57(1)(b) was not contradicted.

208 See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17; T Madlingozi & S Woolman 'Provincial Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 19.

209 FC s 70(1)(b).

210 FC s 116(1)(b). This provision was cited but not judicially considered in *In re: Constitutionality of the Mpumalanga Petitions Bill, 2000*. 2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC) at para 17. The equivalent provision in respect of municipal councils, FC s 160(6) makes no reference to democracy. FC s 160(6) was considered in *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others*. 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at paras 96-112.

211 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C) at para 27.

212 Ibid.

213 JH Ely *Democracy and Distrust: A Theory of Judicial Review* (1980).

214 See *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA) (Holding that the respondent's conduct was protected by parliamentary privilege — FC s 58(1).) The SCA's judgment in *De Lille* is discussed in Budlender (*supra*) at 17-39 — 17-40.

(ii) Participation by minority parties in proceedings of Parliament, provincial legislatures and municipal councils

FC s 57(2)(b) provides that the National Assembly's rules and orders must allow for 'participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy'. This formulation is repeated in respect of the National Council of Provinces,²¹⁵ provincial legislatures,²¹⁶ and municipal councils.²¹⁷ There have been two important decisions to date on the version of this provision that applies to minority party participation in the proceedings of a municipal council and its committees — FC s 160(8). In *Democratic Alliance v ANC & Others*,²¹⁸ which was handed down after the floor-crossing legislation at issue in *UDM*²¹⁹ had taken effect, the reconstitution of three committees of the City of Cape Town was challenged under FC s 160(8). The applicant, a minority political party, alleged that its representation on the City's reconstituted executive committee and two other committees was adversely disproportional to the number of seats it held in the municipal council. In argument, counsel conceded that the requirement in FC 160(8)(b) that the rights of members of a municipal council to participate in proceedings of the Council and those of its committees be 'consistent with democracy' would be satisfied by a first-past-the-post system in which the majority party took all the seats on the executive committee.²²⁰ The decision accordingly turned on the interpretation of FC s 160(8)(a), which provides that parties must be 'fairly represented' on committees of the Municipal Council.²²¹ On this issue the Cape High Court held that FC s 160(8)(a) confers a right to participate in such committees, rather than a right to demand that the composition of each committee be proportional to the parties' representation in the municipal council.²²²

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215 FC s 70(2)(c). See also FC s 61(3)(Providing that national legislation determining how provincial legislatures' delegates to the National Council of Provinces are to be selected must ensure minority party participation); FC s 70(2)(b) (Rules and orders governing participation of provinces in proceedings of National Council of Provinces must be 'consistent with democracy').

216 FC s 116(2)(b).

217 FC s 160(8).

218 2003 (1) BCLR 25 (C).

219 *United Democratic Movement & Others v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC)('UDM').

220 *Democratic Alliance v ANC & Others* 2003 (1) BCLR 25, 31D-F (C)('Democratic Alliance v ANC'). This aspect of the decision is criticized in § 10.5(c) *infra*.

221 *Democratic Alliance v ANC* (*supra*) at 31D-G.

222 *Ibid* at 37F.

Distinguishing *Democratic Party & Others v Brakpan Transitional Local Council & Others*,²²³ and citing *UDM*, the Court in *Democratic Alliance v ANC* held that 'the requirement of "fair representation" set by FC s 160(8)(a) can be met by a system of representation other than proportional representation or a system approximating one of proportional representation.'²²⁴ Later on in the judgment, the Court made it clear that its decision was strongly influenced by what it perceived to be the proper role of courts in 'political' cases. In cases of this nature, the Court held, a greater degree of judicial deference is in order.²²⁵

Two provisional conclusions may be drawn from the Cape High Court's decision in *Democratic Alliance v ANC*. First, it is clear that, where the Final Constitution refers to democracy *tout court*, rather than any particular form of democracy, there is a danger that the term 'democracy' will be understood as a reference to the majority-rule principle, rather than the deeper principle of democracy that appears to underlie the constitutional text as a whole. Secondly, the Court's reluctance to superimpose its own conception of democracy on FC s 160(8) illustrates the inherent difficulty in all cases where the principle of democracy is implicated. As the Court notes, cases of this type are by definition 'political', and therefore subject, if not to a formal political question doctrine, at least to more than the ordinary degree of deference. When this deferential approach is coupled with the contested nature of democracy itself, it may be expected that non-specific or unqualified references to democracy in the Final Constitution will rarely give rise to determinate rules, other than the requirement that the dispute should be resolved according to the wishes of the majority. On the other hand, where references to democracy are qualified, there may be a basis for more robust judicial intervention.

The Constitutional Court had an opportunity to consider FC s 160(8) in *Democratic Alliance & Another v Masondo NO & Another*.²²⁶ In *Masondo*, the issue was whether a mayoral committee established under s 60 of the Local Government: Municipal Structures Act 117 of 1998 was a committee as contemplated in FC s 160(8).²²⁷ Langa DCJ, writing for the majority, held that it was not, on two grounds: first, on the basis of a finding that the functions of mayoral committees

223 1999 (4) SA 339 (W), 1999 (6) BCLR 657 (W).

224 *Democratic Alliance v ANC* (supra) at 38E.

225 *Ibid* at 41B-F.

226 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC) ('*Masondo*').

227 Section 60 of the Structures Act provides that, where a municipal council has more than nine members, the executive mayor 'must appoint a mayoral committee from among the councillors to assist the executive mayor'. Section 60 is silent as to whether the committee must include councillors from minority parties. Note that the question posed in the second *Democratic Alliance* case is different from the one posed in the Cape High Court case. In the Cape High Court case the question was whether the composition of the executive committee of a municipal council must be proportional to the representation of parties in the council. In the second *Democratic Alliance* case the question was whether a mayoral committee, under an executive mayor system (which is different from the executive committee system) was a committee of the council at all, and therefore subject to FC s 160(8). The two decisions are accordingly distinguishable, and the Constitutional Court's decision in the second *Democratic Alliance* case must not be read as having overridden the Cape High Court's decision.

under the Structures Act were 'executive' not 'deliberative',²²⁸ and, secondly, by reason of the fact that a mayoral committee was not elected by the municipal council, but appointed by the executive mayor.²²⁹ In relation to the first point, the majority held that the Final Constitution was consistent in not requiring minority party representation on executive bodies, since the 'primary purpose' of such bodies was 'to ensure effective and efficient government and service delivery'.²³⁰ In relation to the second point, the majority held that there was a contextual basis for finding that the word 'committees' in FC 160(8) meant committees elected by the municipal council.²³¹ A mayoral committee was therefore 'simply not the type of committee contemplated by s 160(8)'.²³²

O'Regan J, whilst agreeing that FC s 160(8)(b) connotes simple majority rule, dissented on the basis that FC s 160(8)(a) requires a prior procedure in which the views of minority parties should at least be taken into account. In O'Regan J's view, 'the obligation of fair representation means that those decisions [ie majority decisions under FC s 160(8)(b)] are made only once the interests of non-majority parties have been aired'.²³³ Nor could the application of FC s 160(8) be said to depend on whether the mayoral committee was appointed by the municipal council or an executive mayor, as this would allow the subsection to be circumvented by the device of having all committees appointed in the latter way.²³⁴ Rather, since the purpose underlying FC s 160(8)(a) was to ensure that decisions of the council and its committees are preceded by 'deliberation', the real question was whether mayoral committees are 'involved in deliberative decision-making'.²³⁵ The fact that, in the case of local government, legislative and executive authority is vested in 'the same institution' (the municipal council) provided a strong indication that this was indeed the case.²³⁶ Summarizing her position, O'Regan J concluded:

[S]ection 160(8)(b) is clear that the principle of fair representation is always subject to democracy and the will of the majority. Members of the mayoral committee must therefore submit to that principle, as must all councillors. The principle established by section 16(8) is a principle which requires inclusive deliberation prior to decision-

228 *Masondo* (supra) at para 19.

229 *Ibid* at para 20.

230 *Ibid* at para 18, referring to FC ss 91 and 132.

231 *Ibid* at para 20, referring to FC ss 160(1)(c), 160(5)(b) and 160(6)(c).

232 *Ibid* at para 23.

233 *Ibid* at para 63.

234 *Ibid* at para 70.

235 *Ibid* at para 72.

236 *Ibid* at para 75.

making to enrich the quality of our democracy. It does not subvert the principle of democracy itself.²³⁷

The third judgment delivered in *Masondo*, by Sachs J, neatly split the difference between the majority and the minority position. Whilst agreeing with O'Regan J's conception of democracy as requiring more than mere lip-service to be paid to

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the notion of minority party participation and the value of deliberation,²³⁸ Sachs J nevertheless concurred in the majority judgment. For Sachs J, the key point was that the Final Constitution 'is silent on the question of the kind of executive leadership that councils may have'.²³⁹ The constitutional provisions on local government, Sachs J noted, lack the detail of — and the distinctions drawn in — the constitutional provisions on national and provincial legislative and executive authority.²⁴⁰ Whereas O'Regan J drew from this silence the inference that the legislative and executive functions of a municipal council are effectively fused, for Sachs J the absence of detailed constitutional rules meant that the legislature had a significant margin of appreciation in designing the system of local government. Unless it could be shown that the Structures Act, in providing for the executive mayor system, necessarily undermined the deeper conception of democracy that he shared with O'Regan J, there was no basis for striking down any of its provisions.²⁴¹ Rather, the question of whether the mayoral committee system in practice undermined democracy had to be approached on a case-by-case basis.²⁴²

O'Regan J and Sachs JJ's judgments in *Masondo* provide compelling examples of courts' capacity to give meaningful effect to the principle of democracy where the text of the Final Constitution prompts them to do so. The difference between the majority and the minority decision in this case lies in O'Regan J's preparedness to exploit the distinction in FC s 160(8) between the manner of participation in municipal council committees and the basis on which decisions are ultimately taken. As we have seen, the emphasis placed in the theoretical literature on the value of participation in political decision-making and the associated value of deliberation is never made to the exclusion of the majority-rule principle.²⁴³ None of the democratic theorists discussed in the previous section would thus argue that a modern democracy should be beholden to the impossible ideal of decision-making by consensus, or to exhaustive processes of participation that ultimately run counter to governmental efficiency. Rather, deliberation and participation in decision-making are stressed for the contribution these processes can make to better informed and

237 Ibid at para 78.

238 *Masondo* (supra) at paras 38 and 42 (Sachs J)

239 Ibid at para 48.

240 Ibid at para 47.

241 Ibid at para 49.

242 Ibid at para 50.

243 Ibid at para 38 (Sachs J).

more legitimate decisions. But there is always a tipping point at which participation and deliberation cease to be useful, and instead become counterproductive. O'Regan and Sachs JJ's judgments attempt to maintain this balance by reading FC s 160(8) in such a way as to ensure that, after adequate deliberation, the majority view must prevail. Had it carried the day, O'Regan J's judgment would arguably have contributed to the deepening of democracy in South Africa, since it would have helped to secure the conditions for multi-party participation in the entire local government system, rather than

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exempting an important part of that system — the functioning of mayoral committees where the executive mayor system applies — from the requirements of participatory and deliberative democracy.

(iii) Public access to and involvement in Parliament and the provincial legislatures

FC s 59(2) provides that the National Assembly 'may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society'. Once again this provision is replicated with respect to the National Council of Provinces in FC s 72(2) and provincial legislatures in FC s 118(2). None of these provisions has as yet been judicially considered. On their face, they acknowledge the value not so much of public participation in legislative decision-making as access to information about the inner workings of the democratic process. This value is promoted by conferring on the public a right to attend legislative committee hearings subject to a similar form of limitations analysis as that required FC s 36.

FC s 59(2) and its NCOP and provincial equivalents are complemented by FC ss 59(1), 72(1) and 118(1), all of which impose on the legislature concerned a positive duty: (a) 'to facilitate public involvement in the legislative and other processes of the legislature and its committees' and (b) to 'conduct its business in an open manner, and hold its sittings, and those of its committees, in public' subject to reasonable limitations. In *Matatiele Municipality & Others v President of the Republic of South African & Others*, the Constitutional Court remarked obiter that FC s 118(1)(a) may impose a duty on provincial legislatures, when considering a constitutional amendment under FC s 74(8), to entertain oral or written representations.²⁴⁴ Because this issue was not properly argued, however, the Court declined to decide it, ordering instead that it be canvassed at a subsequent hearing.²⁴⁵ For the same reason, the Court declined to comment on the correctness of the view expressed in *King & Others v Attorneys' Fidelity Fund Board of Control & Another* that '[t]he public may become "involved" in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes'.²⁴⁶

The question the Supreme Court of Appeal had to decide in *King* was whether an alleged violation by the National Assembly of its FC s 59(1)(a) obligation to 'facilitate

244 *Matatiele* (supra) at para 65.

245 *Ibid* at para 86.

246 2006 (1) SA 474 (SCA), 2006 (4) BCLR 462 (SCA) ('*King*') at para 22 (quoted and discussed in *Matatiele* (supra) at paras 64-65).

public involvement' in its 'processes' fell to be determined exclusively by the Constitutional Court by reason of FC s 167(4). This subsection provides that '[o]nly the Constitutional Court may- (a) . . . (e) 'decide that Parliament or the President has failed to fulfil a constitutional obligation'. The Supreme Court of Appeal answered this question in the affirmative, holding that the National Assembly's obligation under FC s 59(1)(a) was 'pre-eminently a "crucial political"

question' that the Final Constitution reserved for the Constitutional Court.²⁴⁷ The views expressed in *King* about the obligation imposed by FC s 59(1)(a) were, therefore, not intended as a comprehensive analysis of that provision, but rather as a statement of the *sort* of obligation that FC s 59(1)(a) imposed, for the limited purposes of deciding the jurisdictional question. Had the Supreme Court of Appeal been properly seized with the case, its interpretation of FC s 59(1)(a) might have been more robust, particularly when read alongside FC s 59(1)(b) and (2).²⁴⁸ These two provisions, after all, already secure the public's right not to be excluded from sittings of the National Assembly and its committees. FC s 59(1)(a) must therefore impose on the National Assembly a duty to do something more than this. Although the Supreme Court of Appeal was in principle correct to say that 'public involvement' is 'necessarily an inexact concept' and that the duty to facilitate it may be fulfilled in many ways, the juxtaposition of FC s 59(1)(a) alongside provisions that already secure the public's right of access to the National Assembly restricts the range of possible meanings that can be attributed to the phrase 'public involvement'. The only example the Supreme Court of Appeal gives of public involvement other than the right to make submissions is the suggestion that members of the public may have a right to be 'informed' of what the National Assembly is 'doing'.²⁴⁹ This is not a plausible reading of FC s 59(1)(a) if it is taken to mean that the National Assembly's obligations under this paragraph may be fulfilled by alerting the public to upcoming legislative proposals. The word 'involvement' connotes far more than the passive right to receive information. Rather, the plain meaning of 'involvement' is active participation in the affairs of the legislative body concerned, not necessarily accompanied by the right to influence the outcome of a particular process, but, at the very least, embracing the right to be heard.²⁵⁰ To argue, as the Supreme Court of Appeal did in *King*, that the fact that FC s 59(1)(a) gives rise to several possible obligations, and that the breach of just one of these obligations is therefore not conclusive, begs the question. The real question is whether FC s 59(1)(a) gives rise to a *core* obligation on the part of the National Assembly to entertain written or oral submissions from members of the public in respect of every legislative proposal that comes before it. On the facts in *King*, the public *had* been given this opportunity, although the appellants had not been directly consulted, and had not responded to any of the public calls for submissions. Had the Supreme Court of Appeal been

247 See *King* (supra) at para 23.

248 These two provisions are cited in *King* but are not considered. See *King* (supra) at para 19

249 See *King* (supra) at para 22.

250 The *South African Concise Oxford Dictionary* defines the verb 'involve' as meaning: '(of a situation or event) include as a necessary part or result; cause to experience or participate in an activity or situation'. For related considerations on rights of participation, see S Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43.

properly seized with the case, that factual finding would have been an adequate basis for dismissing the appellants' argument.

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A more detailed understanding of FC s 59(1)(a) and its cognates will emerge once the Constitutional Court gives judgment on the meaning of FC s 118(1)(a) in response to the further hearing in *Matatiele*.²⁵¹ Even in this case, however, the answer is likely to be partial, as the Constitutional Court's decision will be restricted to the obligation on a provincial legislature to facilitate public involvement in its processes when approving a constitutional amendment bill, as required by FC s 74(3)(b) read with FC s 74(8). It is apparent from the Constitutional Court's comments on *King* that the crucial question will be whether FC s 118(1)(a) imposes a duty to entertain written or oral submissions. If that question is decided in the affirmative, the next question will be whether the duty to entertain submissions always means oral submissions or sometimes just written submissions. The answer to this question, at least, is clear. Given the wide range of matters that come before the National Assembly, the NCOP and the provincial legislatures for consideration, FC s 59(1)(a) and its cognates cannot be read to imply a duty to entertain oral submissions in every case. No reasonable conception of democracy would require this. Rather, if it is found that FC s 59(1)(a) imposes a duty to entertain written or oral submissions, the choice between these two forms of public involvement should be left to the legislature, depending on the nature of the issue being discussed, the level of technical information required, the public importance of the issue, and the urgency of the need to decide it.

(e) Miscellaneous provisions

FC Chapter 9 is entitled 'State Institutions Supporting Constitutional Democracy'. FC s 181(1) goes on to provide a list of 'state institutions [that] strengthen constitutional democracy'.²⁵² This is the only provision in the Final Constitution in which the word 'democracy' is qualified by the adjective 'constitutional'. Although there can be little doubt that the system that the Final Constitution puts in place is

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a constitutional democracy, the term 'democracy' when used in the Final Constitution is either left unqualified or qualified by terms such as 'participatory' or

251 The NCOP's obligation under FC s 72(1)(a) is also due to be considered in the Court's judgment in *Doctors for Life International v Speaker of the National Assembly & Others*. CCT Case 12/05 (Heard on 21 February 2006).

252 Just how the state institutions supporting constitutional democracy are expected to perform their tasks is the subject of other chapters in this work. See M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 24A; S Woolman & Y Schutte 'Auditor General' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 24B; J Klaaren 'South African Human Rights Commission' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 24C; C Albertyn 'Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D; J White 'Independent Communications Authority of South Africa (ICASA)' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24E; S Woolman & J S Alullo 'Commission for the Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F;

'representative'. It would be wrong to read too much into this. The lack of any other references to 'constitutional democracy' simply confirms the fact that constitutional democracies, as indicated in § 10.2(d), are compatible with a number of different forms of democracy. The presence of a supreme-law bill of rights in a constitution does not mean that the political system concerned ceases to be a representative democracy, or that elements of participatory or deliberative democracy cannot be grafted onto the constitution. As we have seen, both Sachs and O'Regan JJ have been at pains to articulate a deep, in the sense of being participation and deliberation-rich, *constitutional* conception of democracy. It is this deep conception that the Chapter 9 institutions ought to be strengthening. If it were not, there would have been no reason to establish them.

Other provisions that refer directly to democracy include: FC s 152(1),²⁵³ FC s 195(1),²⁵⁴ FC s 234,²⁵⁵ and FC s 236.²⁵⁶

10.4 Constitutional rights shaping south african democracy

As we have seen, FC s 7(1) provides that the Bill of Rights 'affirms the democratic values of human dignity, equality and freedom'. In theory, therefore, every right in the Bill of Rights is integral to understanding the Final Constitution's vision for South African democracy, and a comprehensive treatment of this issue would need to look at the contribution made by each right in the Bill of Rights to the articulation of this vision.²⁵⁷ Such an undertaking is not possible

253 FC s 152(1) provides that one of objects of local government is to 'provide democratic and accountable government for local communities'. This provision was considered in *Masondo*. The *Masondo* Court held that FC s 152 sets two main objects for local government: 'the development and promotion of democracy', which 'involves ensuring that the will of the majority prevails and also that the views of the minority are considered'; and the object 'to ensure that government is efficient and effective in the rendering of services and the promotion of social and economic development'. *Masondo*. (supra) at para 17. The *Masondo* Court continued: 'The two purposes are mutually reinforcing — they give meaning to each other. They are both indispensable to the enormous task of reconstructing society in the functional areas of local government.' Ibid.

254 FC s 195(1) provides: 'Public administration must be governed by the democratic values and principles enshrined in the Constitution . . .' See *Rail Commuters Action Group & Others v Transnet t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at para 74 (Court held that the principle of accountability in the Final Constitution was an important consideration when deciding questions relating to the state's liability in delict.)

255 FC s 234 provides: 'In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.'

256 FC s 236 provides: 'To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.' See *UDM* (supra) at para 52 (Court referred to this provision and held that it was possible to devise an equitable political party funding system even where floor-crossing was allowed. It offered Germany as an example.)

257 On the interaction between the right to dignity and democracy, see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36, 36-13. On the relationship between the right to property and democracy, see *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 45.

within the confines of this chapter. To keep the discussion within reasonable bounds, this section concentrates on a small sample of rights that have come to be seen by democratic theory, and by the courts in South Africa, as being integral to the operation of a democratic system of government. For the most part, these rights are clustered together in one part of the Bill of Rights, FC ss 16-19, which covers respectively the right to freedom of expression; the right to freedom of assembly, demonstration, picket and petition; the right to freedom of association; and political rights. The clustering together of these rights is not co-incidental. As the Constitutional Court has observed, FC ss 16-19 are grouped together precisely because they share a common connection to the establishment and maintenance of the conditions necessary for democracy.²⁵⁸ Whilst all of these rights are equally important, this chapter engages only with the right to freedom of expression and political rights.

The other group of rights that is integral to democracy is the group of socio-economic rights in FC ss 25-29. The link between these rights and the maintenance of the conditions necessary for democracy is self-evident, but nonetheless not as well established in liberal constitutional theory as might be expected. Indeed, the inclusion of socio-economic rights as fully justiciable rights in the Final Constitution is part of the reason why that document is regarded as being an extension of the liberal constitutionalist project, rather than a mere restatement of it.²⁵⁹ By considering the place of socio-economic rights in the South African democratic system the discussion in § 10.4(c) below attempts to do justice to this broader vision.

(a) Freedom of expression

258 See *Case & Another v Minister of Safety and Security & Others; Curtis v Minister of Safety and Security & Others* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) ('Case') at para 27 (Referring to the right to freedom of expression in IC s 15 'as part of a web of mutually supporting rights . . . [which] together may be conceived as underpinning an entitlement to participate in an ongoing process of communicative interaction that is of both instrumental and intrinsic value'.) This dictum, though occurring in the minority judgment of Mokgoro J, was applied by a near-unanimous court to the right to freedom of expression in the Final Constitution. See *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) at para 28 (Referring to FC ss 15-19 as a group of rights together promoting 'the freedom to speak one's mind', which freedom 'is now an inherent quality of the type of society contemplated by the Constitution as a whole'); *South African National Defence Force Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) ('SANDFU') at para 8 (Citing the passage from *Case* with approval and remarking that the rights in FC ss 10 and ss 16-19 'taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions'). On the relationship between freedom of expression and democracy, see D Milo & A Stein 'Freedom of Expression' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 42. On the relationship between freedom of assembly and democracy, see S Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43. On the relationship between freedom of association and democracy, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

259 See KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146, 153 (Arguing that the Final Constitution views the realization of social rights as being necessary to the exercise of 'democratic political rights'.)

In liberal constitutional theory, Ronald Dworkin has argued, the right to freedom of expression has both an 'instrumental' and a 'constitutive' dimension.²⁶⁰ In its instrumental dimension, the right protects expression because of the consequences for society that are thought to follow from protecting certain forms of expression (such as political speech).²⁶¹ In its constitutive dimension, the right protects expression because allowing people the freedom to express themselves without government restraint is thought to be necessary to the development of human personality. Although it is easy to see the first dimension of the right as being necessary to democracy, the second dimension is equally relevant. As Dworkin has argued, recognition of the second dimension requires government to treat its citizens as 'responsible moral agents'.²⁶² The protection of non-political speech, in other words, promotes a culture in which citizens are regarded as being capable of forming their own opinions, and in which their right to make political choices and engage in public debate is thereby indirectly respected.

In addition to endorsing this approach,²⁶³ the Constitutional Court's jurisprudence on the right to freedom of expression in FC s 16 shares with the liberal tradition the notion that it is sometimes justifiable to limit this right in order to protect democracy.²⁶⁴ In *Islamic Unity Convention v Independent Broadcasting Authority & Others*, for example, the Court held:

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The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Thus open and democratic societies permit reasonable proscription of

260 R Dworkin *Freedom's Law* (1996) 200 as quoted in I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 360.

261 In his commentary on Canadian constitutional law, Peter Hogg writes: 'Perhaps the most powerful rationale for the constitutional protection of freedom of expression is its role as an instrument of democratic government'. PW Hogg *Constitutional Law of Canada* (Loose-leaf Edition, 2001 — Rel. 1) 40-7 citing *Switzman v Elbling* [1957] SCR 285, 358, 369.

262 Dworkin *Freedom's Law* (supra) at 200.

263 See *SANDFU* (supra) at para 59 (The right to freedom of expression 'lies at the heart of a democracy' and is valuable for three reasons: 'its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally'), quoted in *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) ('*Islamic Unity*') at para 26. See also *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 21 ('Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled'); *Phillips v Director of Public Prosecutions (Witwatersrand Local Division)* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) at para 23 ('The right to freedom of expression is integral to democracy, to human development and to human life itself'); *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) ('*De Reuck*') at paras 59-60.

264 FC s 16 provides: '(1) Everyone has the right to freedom of expression, which includes—(a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research. (2) The right in ss (1) does not extend to—(a) propaganda for war; (b) incitement of imminent violence; (c) Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

activity and expression that pose a real and substantial threat to such values as the constitutional order itself.²⁶⁵

The notion that certain forms of speech may in fact undermine democracy is captured in FC s 16(2), which excludes three types of expression from the protection afforded by FC s 16(1).²⁶⁶ The Constitutional Court has made it clear that, where expressive conduct falls outside these three exclusions, any regulation of the right to freedom of expression will be found to limit the right, and the focus of the Court's attention will accordingly fall on the limitations stage of the inquiry.²⁶⁷

So much is uncontroversial. Besides affirming the liberal approach to the right to freedom of expression, however, the case law under FC s 16 also contains several arguments about the link between freedom of expression and democracy that are specific to South Africa. These arguments are worth examining for what they reveal about the peculiar features of the Final Constitution's vision for South African democracy.

In *S v Mamabolo (E TV & Others Intervening)*, a government official had been convicted by a High Court judge of the common-law crime of scandalizing the court. On appeal, the Constitutional Court was required to consider whether the continued existence of this crime in South African law was consistent with FC s 16(1). The interesting aspect of *Mamabolo* from the perspective of this chapter is that it concerned the role of freedom of expression in ensuring the accountability of judges to the people in a constitutional democracy.²⁶⁸ In assessing this question, the Court weighed, on the one hand, the need for 'vocal public scrutiny'²⁶⁹ of the judiciary, and, on the other, the need to preserve the 'moral authority'²⁷⁰ of the judiciary, especially in a young democracy where the judiciary's role in the maintenance of democracy is still being established. Public scrutiny of the judiciary, the Court noted, 'constitutes a democratic check' and must be allowed because it is difficult for the political branches, except in extreme cases of judicial misconduct, to check the judiciary without being seen to threaten judicial independence.²⁷¹ The countervailing consideration, however, was the need to build public confidence in the judiciary, particularly given the 'erosion' of that confidence under apartheid.²⁷²

265 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at paras 28-29 citing *Handyside v The United Kingdom* (1976) 1 EHRR 737, 754.

266 The unprotected forms of expression listed in FC s 16(2) are: (a) 'propaganda for war'; (b) 'incitement of imminent violence'; and (c) 'advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm'.

267 See *Islamic Unity* (supra) at paras 31-33; *De Reuck* (supra) at para 48; *Laugh it Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC) at para 47.

268 *Mamabolo* (supra) at para 15.

269 *Ibid* at para 30.

270 *Ibid* at para 16.

271 *Ibid* at para 30.

Against this background, the Final Constitution's vision for the right to freedom of expression was to seek a more nuanced approach to the right, in particular by balancing the right to freedom of expression against the right to human dignity in FC s 10.²⁷³

The *Mamabolo* Court contrasted its approach to that of the United States Supreme Court, whose jurisprudence it was asked to follow. In the United States, freedom of speech is given heightened protection in the form of the 'clear and present danger' test, which permits limitation of the First Amendment only in the most pressing circumstances. The Court was asked to follow this approach on the authority of a decision of the Ontario Court of Appeal which had sought to adapt it to Canadian law.²⁷⁴ The *Mamabolo* Court's response to this argument is instructive about its view of the special features of the Final Constitution's vision for South African democracy. Stressing that South Africa was a young democracy emerging from a totalitarian past, the Court acknowledged that this might be taken as a reason for accordng the right to freedom of expression heightened protection on the American model:

Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of express — the free and open exchange of ideas — is no less important that it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.²⁷⁵

Nevertheless, the Court reasoned, South Africa's status as a new democracy also provided an argument in favour of reducing the protection afforded to freedom of speech, especially in relation to criticism of the judiciary. It is precisely because the judiciary is more powerful in a new constitutional democracy that its integrity needs to be protected.²⁷⁶ The Court also took cognizance of crucial differences between the drafting histories of the United States and South African Constitutions which suggested that a different approach to the right to freedom of expression in South Africa was in order. Whereas the American Constitution was 'a monument to the libertarian aspirations of the Founding Fathers', the Final Constitution 'is a wholly different kind of instrument infinitely more explicit, more detailed, more balanced, more carefully phrased and counterpoised'.²⁷⁷

It would be convenient to think of *Mamabolo* as situating South African democracy somewhere in the middle of the political spectrum between

272 Ibid at para 17.

273 *Mamabolo* (supra) at para 41.

274 See *R v Kopyto* (1987) 47 DLR (4th) 213 (Ont CA) as cited in *Mamabolo* (supra) at para 35.

275 *Mamabolo* (supra) at para 37.

276 Ibid at para 38.

277 Ibid at para 40.

libertarianism and socialism, but of course this simple two-dimensional approach is misleading. Conceptions of democracy do not vacillate over time and from country to country in a fixed plane between these two extremes. Rather, the Western (and

increasingly international) understanding of democracy, as the discussion in § 10.2 makes clear, is continually evolving, stretching out in a second dimension that the traditional left-right axis is incapable of capturing.²⁷⁸ In addition, as *Mamabolo* indicates, the Final Constitution's vision for South African democracy is a product not only of the liberal tradition but also of the lived experience of the struggle for democracy in South Africa. Whether it is in the end correct to describe that vision as remaining within the liberal tradition does not really matter. The point is rather that the Final Constitution's vision for South African democracy is unique, and must in the end be deduced from a careful reading of the constitutional text, the history of its enactment, and the extrapolation of the constitutional drafters' basic premises to the changing circumstances of South African society.

The second case that illuminates the role of the right to freedom of expression in the Final Constitution's vision for South African democracy is *Islamic Unity Convention v Independent Broadcasting Authority & Others*.²⁷⁹ *Islamic Unity Convention* involved a challenge under FC s 16 to clause 2(a) of the Code of Conduct for Broadcasting Services, which prohibits broadcasting of 'any material which is likely to prejudice the safety of the State or the public order or relations between sections of the population'.²⁸⁰ The Court was accordingly required to focus on the exclusion from protection under FC s 16(2)(c) of expression that amounts to 'advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm'. 'There is no doubt', the Court held, 'that the State has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality'.²⁸¹ Nevertheless, the regulation in clause 2(a) went beyond the confines of FC s 16(2) by prohibiting categories of speech other than those specifically excluded by this subsection.²⁸² Nor could the clause be saved by FC s 36. To be sure, FC s 36 authorized limitations of the right to freedom of expression in service of the democratic values of 'human dignity, equality and freedom'. It was also true that the 'achievement of these values' gave the state a special interest in regulating '[e]xpression that advocates hatred and stereotyping of people on the basis of immutable characteristics'.²⁸³ But it had not been shown that this interest 'could not

278 Karl Klare expresses something like this idea in attributing to the Final Constitution the label 'post-liberal'. See Klare (supra) at 151.

279 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) ('*Islamic Unity Convention*').

280 Ibid at para 22.

281 Ibid at para 33. Earlier on in the judgment, the *Islamic Unity Convention* Court remarked that '[t]he restrictions that were placed on expression [under apartheid] were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa.' Ibid at para 27.

282 Ibid at para 35.

be served adequately by the enactment of a provision which is appropriately tailored and more narrowly focused'.²⁸⁴

Islamic Unity Convention reminds us that the commitment in *Mamabolo* to a more balanced view of the role of freedom of expression in South African democracy does not exempt the state from the need to pay careful attention to the way that this balance is struck in practice. The holding in *Mamabolo* that the right to freedom of expression is not paramount in the Final Constitution's hierarchy of rights does not mean that the right is not important. Even in the most politically sensitive of areas — expression touching on questions of 'race, ethnicity, gender or religion' — the state still bears the onus, when straying outside the confines of FC s 16(2), of justifying any limitation of this right.

The third case worth mentioning is *Khumalo & Others v Holomisa*.²⁸⁵ *Khumalo* concerned the question whether the common-law rules of defamation should be altered by the direct application of FC s 16. What is specific to South Africa about the right to freedom of expression, O'Regan J noted, is that this right is included in a Constitution committed to ensuring 'accountability, responsiveness and openness'.²⁸⁶ This observation suggests that the mass media has a heightened role to play:

The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperiled.²⁸⁷

The striking thing about this passage is that it transforms the media's right to freedom of expression into a constitutional obligation to disseminate information and 'provide citizens with a platform for the exchange of ideas'.²⁸⁸ Although prompted by a decision of the High Court of Australia,²⁸⁹ O'Regan J, by referring to FC s 1(d), amplifies the stress in that decision on media freedom to justify a much stronger conception of the role of the media in South Africa. The fact that the Final Constitution accords an instrumental purpose to the institutions of representative democracy, she reasons, means that the media is doubly important. Not only must it play a role in the exchange of information and ideas. It must also play a special role

283 Ibid at para 45.

284 Ibid at para 51.

285 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) ('*Khumalo*').

286 FC s 1 (d) quoted in *Khumalo* (supra) at para 23 n27.

287 Ibid at para 24.

288 Ibid. See also ibid at para 33 ('The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression.')

289 See *Theophanous v Herald & Weekly Times Ltd & Another* (1994) 124 ALR 1, 61 quoted in *Khumalo* (supra) at para 22.

in holding government to account, and in ensuring that it is responsive to the needs of the electorate. Here, then, we have a much deeper conception of democracy than the one set out by the unanimous Court in *UDM*.²⁹⁰ Democracy, according to O'Regan J in *Khumalo*, cannot depend for its protection

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on the restraining influence of regular elections alone. Rather it is a 'culture'²⁹¹ that needs to be nurtured between elections if it is to survive for any length of time.

The role of the right to freedom of expression in the consolidation of democracy has also been expressed in two decisions that otherwise might have been handed down in any one of the more established liberal democracies, *Phillips v Director of Public Prosecutions (Witwatersrand Local Division)*²⁹² and *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)*.²⁹³ In both these cases, whilst stressing the traditional function of the right to freedom of expression, the Court suggested that forms of expression that could not be associated, even indirectly, with 'the growth of democracy' would enjoy concomitantly less protection.²⁹⁴

In summary, the four special features of the Final Constitution's conception of the link between freedom of expression and democracy are: (1) the right to freedom of expression is of central, but not paramount, importance to democracy, and must be balanced against the right to human dignity in FC s 10; (2) the right to freedom of expression has a particular role to play in a new democracy such as South Africa, where it is crucial to democratic consolidation; (3) expression based on the immutable characteristics of a person or group is potentially destructive of democracy, especially in a country such as South Africa, but must nevertheless be regulated with care so as to remain within the boundaries set by FC s 16(2); and (4) the role of the right to freedom of expression in holding the political branches to account means that the media has a special constitutional obligation in South Africa to create the conditions necessary for the development of a democratic culture.²⁹⁵

(b) Political rights

290 See *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1213 (CC) ('UDM').

291 Ibid at para 24.

292 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) ('Phillips') (Section 160 (d) of Liquor Act 27 of 1989, which makes it an offence for the holder of an 'on-consumption liquor licence to allow 'any person to perform an offensive, indecent or obscene act' out to perform in public without being properly clothed, found to be overbroad and unconstitutional against FC s 16.)

293 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) ('De Reuck') (Unsuccessful challenge to s 27(1), read with the definition of child pornography in s 1, of the Film and Publications Act 65 of 1996.)

294 *Phillips* (supra) at para 23.

295 See also *Speaker of the National Assembly v De Lille* 1999 (4) SA 863 (SCA) at para 29 ('The right of free speech in the [National] Assembly protected by s 58(1) is a fundamental right crucial to representative government in a democratic society').

The 'right to participate in the making of laws' has been called 'the right of rights'²⁹⁶ and, indeed, there is broad agreement in democratic theory that, if any right is integral to democracy, then it is the right to participate in the democratic process.²⁹⁷ The special relationship between political rights and democracy is sometimes recognized in the text of a constitution,²⁹⁸ and state action impinging on such rights

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may be subject to a heightened level of review.²⁹⁹

In South Africa, FC s 19, which provides for a range of political rights, is not singled out as being more important than other rights in the Bill of Rights. The core democratic institutions that FC s 19 supports are, however, enumerated in FC s 1(d), which declares 'universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government' to be among the values on which the South African state is founded.³⁰⁰ This means that constitutional amendments affecting political rights may need to satisfy the procedural requirements, not just of amendments impinging on the Bill of Rights, but also of amendments to the founding values in FC s 1.³⁰¹

FC s 19 identifies three main categories of political rights: 'the right to make political choices' (FC s 19(1)); 'the right to free, fair and regular elections' (FC s 19(2)); and the right to vote and stand for public office (FC s 19(3)). In two of the five political rights cases decided by the Constitutional Court to date, *August* and *NICRO*,

296 J Waldron *Law and Disagreement* (1999) 282.

297 For a discussion of the right to participate, see § 10.3(c) *supra*.

298 The 1982 Canadian Charter of Rights and Freedoms, for example, excludes the right to vote in s 3 from the parliamentary override provision in s 33. See J de Waal 'Political Rights' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 5, 1999) 23-3; PW Hogg *Constitutional Law of Canada* (Loose-leaf Edition, 2003 — Rel. 1) 42-2.

299 In the United States, the right to vote is generally protected through the equal protection clause of the Fourteenth Amendment. In such cases, the US Supreme Court has typically held that the standard of review to be applied is strict scrutiny. See, eg, *Dunn v Blumstein* (1972) 405 US 330 (State law conditioning right to vote on minimum residence requirement struck down as being overbroad.) In Canada, by contrast, a deferential standard of review is applied to legislative determinations of electoral boundaries. See *Re Provincial Electoral Boundaries (Saskatchewan)* [1991] 2 SCR 158. Australia has, at best, an implied constitutional right to vote, and the jurisprudence of the Australian High Court is accordingly not particularly relevant. See T Blackshield & G Williams *Australian Constitutional Law and Theory: Commentary and Materials* (3rd Edition, 2002) 1101-05.

300 See C Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13.

301 See FC s 74(1) and (2), as applied in *UDM*. As Steven Budlender points out in his chapter in this volume, a literal reading of FC s 74(1) and (2) suggests that, for these provisions to apply, the constitutional amendment must actually take the form of an amendment to FC s 1 or a right in the Bill of Rights. The Court in *UDM*, without saying so expressly, read FC s 74(1) and (2) more generously to apply to any constitutional amendment impinging on FC s 1 or the Bill of Rights. See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17, 17-30.

the violation of FC s 19 was not seriously in dispute.³⁰² In a third case, *African Christian Democratic Party*, the constitutional claimant did not rely directly on political rights, but appealed instead to FC s 19, read with FC s 1(d), as a guide to the interpretation of the electoral provisions at issue.³⁰³ In the two remaining cases, however, *UDM* and *New National Party*, the question whether FC s 19 had been violated was central to the Court's decision.³⁰⁴

In *UDM*, as we have seen, it was alleged that FC s 19 had been infringed by the mid-term amendment of South Africa's proportional representation system so as to allow floor-crossing, and that the special procedures provided for constitutional amendments impinging on the Bill of Rights should therefore have been

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followed.³⁰⁵ The Constitutional Court dismissed this argument in three paragraphs.³⁰⁶ The key argument in the Court's reasoning is the holding that:

The rights entrenched under section 19 are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives.³⁰⁷

Whilst probably justified in relation to FC s 19(2) and (3), this argument seems misplaced in relation to FC s 19(1), which provides for the freedom 'to make political choices', including the right 'to form a political party', 'participate in the activities of a political party', and 'campaign for a political party or cause'. None of these rights may be meaningfully exercised only at election time, and all are patently capable of violation in between elections.

The deferential approach of the Court in *UDM* to state action impinging on political rights had earlier been signalled in *New National Party*, where an eight-to-one majority had dismissed a challenge by a minority political party to certain sections of the Electoral Act.³⁰⁸ The impugned sections together provided that, in order to register and vote in a general election, citizens had to be in possession of a particular kind of identity document or temporary identity certificate. It was common cause that these provisions prevented certain South African citizens above the statutory age from voting. The question the *New National Party* Court had to decide

302 See *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) ('August'); *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) ('NICRO').

303 *African Christian Democratic Party v The Electoral Commission & Others* 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC) ('African Christian Democratic Party') at paras 21-23.

304 *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) ('New National Party').

305 See § 10.3(b) supra.

306 See *UDM* (supra) at paras 49-51.

307 Ibid at para 49.

308 Act 73 of 1998.

was whether the impugned provisions violated the right to vote in FC s 19(3) and, if so, whether such violation was reasonable and justifiable according to the standard imposed by FC s 36.

The difference between the majority judgment of Yacoob J and the minority judgment of O'Regan J goes to the heart of the Final Constitution's conception of democracy. For the majority, although the 'importance of the right to vote is self-evident and can never be overstated', there was

no point in belabouring its importance and it is sufficient to say that the right is fundamental to a democracy, for without it there can be no democracy. But the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless.³⁰⁹

There is some ambivalence in this passage about the importance of the right to vote that provides an early indication of the approach the majority ultimately takes. Whilst affirming the centrality of the right to vote in maintaining the conditions necessary for democracy, the majority downplays the importance of the right in the ambiguous last sentence of the quoted passage. The fact that the right to vote is 'empty and useless' without procedural arrangements for its exercise, of course, cuts two ways. Either it means, as the majority later presses us to accept, that the legislature should be given a relatively free hand to decide what those

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arrangements should be,³¹⁰ or it means that the right is so important that a heightened level of review should be applied to the scrutiny of the arrangements — the approach taken by O'Regan J in her minority judgment.³¹¹

Two subsidiary considerations bolster the majority's approach in *New National Party*: a concern for the institutional legitimacy of the Court in reviewing procedural arrangements made for the exercise of the right to vote;³¹² and the purely technical argument that the two-stage system of review requires the reasonableness of state action to be considered only at the second, limitations stage.³¹³ Both of these subsidiary arguments are flawed: the first because it ignores the importance of the right to vote in lending legitimacy to the system in terms of which laws regulating the right to vote are made, and the second because it is contradicted by decisions handed down both before and after *New National Party*.³¹⁴

In avoiding these two errors, O'Regan J's minority judgment is more in keeping with the approach to political rights in democratic theory. As we have seen, democratic theory accords to political rights a special status as democracy-enhancing rights. Even Waldron, the most ardent critic of Dworkin's view that the set

309 *New National Party* (supra) at para 11.

310 *New National Party* (supra) at para 14 ('The details of the system are left to Parliament.')

311 *Ibid* at para 122.

312 *Ibid* at para 19 ('It is to be emphasised that it is for Parliament to determine the means by which voters must identify themselves. This is not the function of a Court.')

313 See *New National Party* (supra) at para 24.

of democracy-enhancing rights should be expanded to include all rights that ensure that citizens are treated with equal concern and respect, concedes that Dworkin's argument is unassailable in relation to the right to participate in the democratic process.³¹⁵ John Hart Ely's defence of political rights as 'democracy-reinforcing' rights is equally well known.³¹⁶ Against this background, the majority's reticence in *New National Party* to subject the right to vote in FC s 19(3) to reasonableness review is hard to fathom. Far from requiring special deference, the democratic objection to judicial review is weakest in relation to political rights.

Although in outcome they may appear to have vindicated the special place of political rights in the Final Constitution's vision for South African democracy, neither *August* nor *NICRO* nor *African Christian Democratic Party* contradicts the deferential standard of review adopted in *New National Party*. In *August*, a decision handed down just before *New National Party*, the Court held, in the absence of an express legislative prohibition, that the state was required to show that it had taken reasonable steps to enable prisoners to vote.³¹⁷ This was effectively the same standard of review as the one later applied in *New National Party*.³¹⁸ In *NICRO*, which was decided after the national Electoral Act had been amended to deny certain

314 In a series of decisions across different areas of law the Constitutional Court has shown itself to be prepared to engage in reasonableness review at the first stage of the inquiry. The most familiar of these areas is socio-economic rights, where the inquiry into the violation of the right has, since the decision in *Government of the RSA & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), depended on the Court's assessment of the reasonableness of the legislative and other measures taken to realize the right. See further S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33. In relation to property rights, too, the Court has laid down a test that sees it employing a flexible review standard at the initial stage, the outer end of which conforms to something approximating reasonableness review. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 65, discussed in T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46. In FC s 16 cases, as we have seen, the rationality of a law restricting freedom of expression generally does not provide a defence at the first stage of the inquiry unless the law regulates forms of expression specifically excluded by FC s 16(2). Although harder to compare, the Court's review standard under FC s 9(3), the unfair discrimination part of the equality clause, is also arguably higher than that deployed in *New National Party* in relation to political rights. See, eg, *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1537 (CC) at para 52, discussed in B Goldblatt & C Albertyn 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 35. To be fair to the majority in *New National Party*, most of these decisions were handed down after the decision in that case. The basic structure of the Final Constitution in this regard was, however, clear, as pointed out in O'Regan J's minority judgment at para 123. For a slightly different view, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34 (The authors contend that, save for rights provisions containing internal limitations clauses, no good reason exists for reasonableness tests to form a part of fundamental rights analysis.)

315 See Waldron *Law and Disagreement* (supra) at 282.

316 See JH Ely *Democracy and Distrust: A Theory of Judicial Review* (1980).

317 See *August* (supra) at para 22.

318 See *New National Party* (supra) at para 23.

categories of prisoner the right to vote, the state conceded that such legislative prohibition necessarily limited the right in FC s 19(3).³¹⁹ The standard of review to be applied in the case accordingly did not arise. And in *African Christian Democratic Party*, as we have seen, FC s 19 was relied on only indirectly, with greater normative weight being given to FC s 1(d).

Despite the relative degree of success enjoyed by constitutional claimants under FC s 19, therefore, the Court's jurisprudence in relation to political rights is out of kilter with its approach to FC s 16. As noted in § 10.4(a), state action impinging on freedom of expression that is not excluded from the ambit of the right by FC s 16(2) is generally taken to infringe FC s 16(1), with most of the interpretative work being done at the limitations stage. Under FC s 19, on the other hand, the constitutional claimant must discharge a fairly difficult legal burden before the limitations stage can be reached. The explanation for this discrepancy seems to be that, in FC s 19 cases, at least where the political stakes are high, the Court — driven by pragmatic rather than principled considerations — has opted for a deferential review standard. The fact that this approach is diametrically opposed to the one suggested by democratic theory is a salutary reminder that the theory and practice of adjudication do not always converge.

(c) Socio-economic rights

Socio-economic rights interact with democracy in two main ways: first, as rights to the minimum standard of welfare required for meaningful participation in the

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democratic process,³²⁰ and, secondly, as rights the adjudication of which involves the judiciary in the allocation of public resources, a function traditionally reserved for the legislative and executive branches of government. The first form of interaction is positive in the sense that the vindication of the right is, in theory at least, aimed at securing the conditions necessary for democracy to function. The second form of interaction, on the other hand, is potentially negative. For many, the judicial enforcement of socio-economic rights detracts from democracy, not just in the way Waldron argues that all rights detract from democracy,³²¹ but in a particularly severe way associated with the role judges are expected to perform when enforcing socio-economic rights. More so than in respect of other rights, the enforcement of socio-economic rights requires judges to review complex policy choices regarding the allocation of public resources. Quite apart from the fact that judges are not institutionally equipped to undertake this task, such policy choices are more

319 See *NICRO* (supra) at para 32.

320 See N Haysom 'Constitutionalism, Majoritarian Democracy and Socio-economic Rights' (1992) 8 *SAJHR* 451, 461 (Arguing that, '[b]y constitutionalising selected socio-economic rights, society is elevating certain rights to a necessary condition for the existence of a *minimum* civil equality'.); S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1, 2 (Arguing that the deprivation of 'basic subsistence needs . . . impedes the development of a whole range of human capabilities, including the ability to fulfil life plans and participate effectively in political, economic and social life'.); S Liebenberg 'Needs, Rights and Transformation: Adjudicating Social Rights' (Unpublished inaugural lecture, University of Stellenbosch, 4 October 2005, manuscript on file with author) 21-22 (Exploring the role of social rights in 'enhancing participatory parity'.)

321 See § 10.2(d) supra.

legitimately made, many democratic theorists think,³²² by the people's elected representatives, or at least by those immediately answerable to them.

Of the two main forms of interaction between socio-economic rights and democracy, the second has dominated the Constitutional Court's jurisprudence to date.³²³ None of the cases decided thus far has drawn an express link between socio-economic rights and the minimum standard of welfare required for meaningful participation in the democratic process.³²⁴ Instead, the Court's attention has been devoted to rebutting the contention that the second form of interaction between socio-economic rights and democracy is necessarily a negative one. In

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both *Grootboom* and *Treatment Action Campaign*, the Court emphasized that the adjudication of socio-economic rights was a role given to it by the Final Constitution, and therefore one to which no democratic objection could be raised, provided that the boundaries set by the Constitution were respected.³²⁵

Whilst this defence of the Court's role in relation to socio-economic rights is understandable in light of the separation of powers concerns that were raised in *Grootboom* and especially *Treatment Action Campaign*, when examined against the text of the Final Constitution it seems a little grudging. As noted in § 10.3(c), FC s 7(1) enjoins the courts to interpret all the rights in the Bill of Rights as affirming the 'democratic values of human dignity, equality and freedom'. If this injunction is taken at face value, the judicial enforcement of socio-economic rights need not be anti-democratic. On the contrary, the Final Constitution requires the courts to interpret socio-economic rights as democracy-enhancing rights in the same manner as the right to vote, the right to freedom of expression, or indeed any of the rights in the Bill of Rights. The democratic defence of justiciable socio-economic rights, in other words, is not simply that the Constitutional Assembly, a democratic body, decided that the power of future majorities should be restrained in this way. It is that the Constitutional Assembly — on the plain meaning of FC s 7(1) — evidently thought that the judicial enforcement of socio-economic rights would enhance the

322 For a review of the literature, see R Gargarella 'Theories of Democracy, the Judiciary and Social Rights' in R Gargarella, P Domingo & T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (forthcoming, 2006).

323 See L Williams 'Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South African Analysis' (2005) 21 *SAJHR* 436, 438 (Arguing that 'the fear that democracy might be undermined by judicial fiat has formed the backdrop against which the Constitutional Court has begun to fashion its role in giving content to socio-economic rights'.) The most important socio-economic rights cases decided to date are: *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC); *Grootboom* (supra); *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) ('*Treatment Action Campaign*'); *Khosa & Others v Minister of Social Development & Others*; *Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC).

324 The closest the Court has come to this interpretation is the statement in *Grootboom* (supra) at para 23 that '[a]ffording socio-economic rights to all people . . . enables them to enjoy the other rights enshrined in chap 2 [of the Final Constitution]'.

325 See, eg, *Grootboom* (supra) at para 20; *Treatment Action Campaign* (supra) at para 99. On the precommitment defence to the democratic objection to constitutional review generally, see S Holmes 'Precommitment and the Paradox of Democracy' in J Elster & R Slagstad (eds) *Constitutionalism and Democracy* (1988) 195.

quality of democracy in South Africa. That view may, of course, have been mistaken, but until the mistake is clearly established, and the Final Constitution amended, the courts' fidelity to the constitutional text requires them to give socio-economic rights the benefit of the doubt. Giving socio-economic rights the benefit of the doubt requires the courts not just passively to accept that such rights are capable of enhancing democracy, but actively to interpret socio-economic rights so as to serve this end.

The democracy-enhancing role of socio-economic rights is most obviously apparent in the first form of interaction described above. The very essence of this form of interaction, after all, is the claim that socio-economic rights enhance democracy by ensuring that everyone has the minimum standard of welfare required meaningfully to participate in politics. Of course, it may be that the judicial enforcement of socio-economic rights will in fact have the opposite effect, and that the involvement of courts in the allocation of public resources will either disrupt state welfare provision or impede economic growth.³²⁶ But these speculative arguments must be disregarded for interpretive purposes. The Final Constitution clearly gives courts a role in enforcing socio-economic rights, and it is not for the courts to question the economic wisdom of that decision. Rather, what the

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Final Constitution requires them to do is to interpret socio-economic rights in such a way as to ensure that no one is excluded from the democratic process for lack of resources.³²⁷

The second form of interaction between socio-economic rights and democracy was, at the time of the adoption of the Final Constitution, thought by almost everyone to be an unavoidably negative one. It was simply inconceivable that courts could enforce socio-economic rights without detracting from democracy. For some, this was reason enough to exclude socio-economic rights from the Bill of Rights altogether.³²⁸ For others, the fact that justiciable socio-economic rights would inevitably detract from democracy was a convenient counterweight to the politically driven decision to include property rights. Since judges would be given *this* anti-democratic power, why not at least temper it with the power to vindicate socio-economic rights when the occasion demanded?

326 See, eg, S Archer 'Human Rights and Economic Resources in South Africa after Political Change' Centre for Applied Legal Studies *Law & Transformation Conference* (Unpublished paper, August 2000, manuscript on file with author).

327 But see *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC). Stu Woolman contends that the *Khosa* court's rationale for extending FC s 27's right of access to social security to permanent residents — that 'wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole' — 'emphasizes an increase in the objective sense of well-being that flows from the enhancement of the *agency* of each individual member of our society' and that such agency must, per force, embrace rights of self-governance, and therefore, rights of political participation. See S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36, 36–15 citing *Khosa* (supra) at para 74.

328 See, eg, D Davis 'The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *SAJHR* 475.

As it turned out, the Final Constitution's vision for the relationship between socio-economic rights and democracy was more profound than anyone imagined. Although the Constitutional Court's need to build its legitimacy has prevented it from exploiting all the interpretative possibilities in the constitutional text, its cautious case-by-case approach has shown that socio-economic rights and democracy are not necessarily in conflict.³²⁹ In particular, the Court's record demonstrates that, by respecting the limits of its institutional role, a court may counter the democratic objection to justiciable socio-economic rights, whilst at the same time contributing to the deepening of democracy. This point may be illustrated by reference to policy developments after the decisions in *Grootboom* and *Treatment Action Campaign*.

In *Grootboom*, for technical reasons associated with the way the case was run, the order handed down was purely declaratory. This gave rise to a range of criticisms about the seriousness of the Court's commitment to enforcing the right to have access to adequate housing.³³⁰ If the poor were unable to influence the democratic process in their favour, surely the Court had to act more forcefully to protect the Final Constitution's vision? The passage of time has shown that these criticisms were not justified. In the five years since *Grootboom* was handed

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down, there has been a slow but inexorable shift in national housing policy towards the position preferred by the Court.³³¹ Beginning with the adoption of the Emergency Housing Programme,³³² and more recently with the wholesale re-orientation of housing policy to cater to the needs of informal settlers,³³³ the state's approach to housing today is closer to the kind of policy that the Court in *Grootboom* said was constitutionally required. That result could, of course, be entirely coincidental: it may be that South Africa's housing policy would have changed in this way without the intervention of the Court. But there are several reasons to think that *Grootboom* did make a difference. For one, *Grootboom* is cited in some of the major policy documents that have signalled this shift.³³⁴ For another, some of the policy choices underlying the new programme are too close to those recommended in *Grootboom* as to be entirely unrelated to it. Even if those choices cannot be directly attributed to the judgment, *Grootboom* at the very least created an environment in which such choices could be openly debated.

329 The case-by-case approach was enunciated in *Grootboom*. (*supra*) at para 20.

330 For my own misguided criticisms, see T Roux 'Understanding *Grootboom* — A Response to Cass R Sunstein' (2002) 12 *Constitutional Forum* 41, 51.

331 The remainder of this paragraph and the one following it draw on arguments made elsewhere. See T Roux 'The Constitutional Framework and the Deepening of Democracy in South Africa' paper prepared for the Open Society Institute *Africa Governance Monitoring and Advocacy Project* (June 2005, manuscript on file with author).

332 National Department of Housing (2003).

333 The Informal Settlement Support Programme adopted by the national Department of Housing in 2004. The Emergency Housing Programme and the Informal Settlement Support Programme are discussed in detail elsewhere in this work. See K McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55.

In the health sector, the re-orientation of the state's anti-retroviral programme in the direction mandated by the Court in *Treatment Action Campaign* has been much more controversial, with the successful litigant having to institute contempt proceedings in order to ensure implementation of the Court's decision.³³⁵ Nevertheless, public policy on the prevention and treatment of HIV/AIDS has since shifted in the direction preferred by the Court. More importantly, it is clear that the policy now more closely reflects the preferences of the majority of South Africans, and that this change occurred because *Treatment Action Campaign* created the space for broader public participation in the debate about the adequacy of government's response to the HIV/AIDS epidemic.

Grootboom and *Treatment Action Campaign* accordingly illustrate that, given the requisite amount of judicial restraint, and favourable political conditions, justiciable socio-economic rights may deepen democracy by enhancing public participation in the making of decisions about the allocation of public resources. Both

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cases therefore suggest that Gutmann and Thompson's scepticism about the impact of judicial review on democratic debate is misplaced.³³⁶ Far from removing issues from public discussion, limited and sensitive involvement by the courts in important democratic decisions may actually enable an otherwise passive citizenry to become more involved in politics. In so far as the Final Constitution seems to mandate a more direct role for the courts than this, one which sees the courts directly enforcing rights to the minimum standard of welfare required for meaningful participation in the democratic process, the legitimacy that the Constitutional Court has built for itself over the first ten years of its existence may now enable it to interpret the Final Constitution more expansively in this way.

10.5 The principle of democracy in South African constitutional law

(a) Introduction

The constitutional provisions and cases discussed in the previous two sections together inform our understanding of the principle of democracy in South African constitutional law.³³⁷ Some of the cases attempt expressly to articulate this principle in justifying the rules they lay down. Most of the cases, however, do not.³³⁸ The correct statement of the principle is in any event not dependent on any particular case. Rather, it is a function of the best reading of the constitutional text

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334 The discussion paper accompanying the Emergency Housing Programme referred expressly to the decision in *Grootboom*, along with the then recent experience of severe flooding in the north of the country, as the reason behind the new strategy. See National Department of Housing (2003). Although not that prominent in the policy documents underpinning the Informal Settlement Support Programme, the spectre of *Grootboom* loomed large in internal departmental discussions about how to deal with mass urbanisation. Arguably, *Grootboom* helped to tip the balance in these discussions in favour of a policy more accommodating of informal settlers.

335 See M Heywood 'Contempt or Compliance? The *TAC* Case after the Constitutional Court Judgment' (2003) 4(1) *ESR Review* 7, 10.

336 See § 10.2(c)(iii) *supra*.

and the accompanying case law, and is subject to revision by future cases in light of the legal rules there developed.

Because of the interpretive function assigned to it by the Constitutional Court in *NICRO*,³³⁹ the logical place to start in trying to articulate the principle of democracy is FC s 1(d). As we have seen, the founding values function something like principles in the way they inform the interpretation of other provisions. FC s 1(d) is not itself, however, coterminous with the principle of democracy, both because it is stated in the form of a founding value, and because the principle of democracy is something larger and more mutable than FC s 1(d).³⁴⁰

It is worth quoting FC s 1(d) in full again: 'The Republic of South Africa is one, sovereign democratic state founded on the following values: (a) . . . (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.' On its face, the principle of democracy that this provision supports is one that attributes to the institutions of representative government a particular purpose, namely, 'to ensure accountability, responsiveness and openness'. For this reading, though not for the argument of this section as a whole, the placement of the comma after 'government' in FC s 1(d) is crucial. Without the comma, the words 'to ensure accountability, responsiveness and openness' would have qualified the phrase 'multi-party system of government' alone, and FC s 1(d) would for the most part

337 The term 'principle' is used here in its Dworkinian sense of a legal standard that best fits and therefore best justifies the legal materials. See R Dworkin *Taking Rights Seriously* (1978), 22-31, 71-80; R Dworkin *Law's Empire* (1986) 225-58. In addition, though no court has confirmed this in so many words, the principle of democracy is also a justiciable principle of South African constitutional law akin to the principle of legality, or the rule of law doctrine, and the doctrine of separation of powers. On the principle of legality, or the rule of law doctrine, see *Fedsure Life Assurance & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at paras 56-59; *Pharmaceutical Manufacturers Association of SA & Another: In Re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 17 (Recognizing the principle of legality as a self-standing principle of South African constitutional law.) See also F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 11. On the separation of powers, see *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at paras 19-21 (Recognizing the separation of powers as an 'implied' provision of the Final Constitution.) In so far as its justiciability is concerned, the principle of democracy is more akin to the doctrine of separation of powers than it is to the principle of legality. This is because the principle of democracy, like the separation of powers doctrine, is given expression in the 'structure and provisions' of the Final Constitution as a whole. Cf *Heath* (supra) at para 21. It does not necessarily follow from this that, when invoking the principle of democracy, litigants should be able to point to the particular provision of the Final Constitution that they allege has been violated. As was the case in *Heath* in relation to the separation of powers, it should in theory be possible to invoke the principle of democracy by referring to its embodiment in the text of the Final Constitution as a whole. To date, however, all the cases in which express reference has been made to the principle of democracy have tied the application of that principle to a particular provision, meaning that the principle of democracy has not yet been recognized as a self-standing principle of South African constitutional law. See further the cases discussed in § 10.5(c) infra.

338 See § 10.5(c) infra.

339 See *NICRO* (supra) at para 21.

340 I say 'larger' because the principle of democracy must attempt to reconcile all the cases, even those that appear to have been wrongly decided, and 'more mutable' because it is subject to change in future cases.

have consisted of a list of institutions the purpose of which was left unstated. But this is not the provision that the Constitutional Assembly adopted. Nor is it a provision that would have made very much sense. Listing a range of institutions without any apparent purpose, except in the case of the last one, would have been an odd way for the Constitutional Assembly to have gone about articulating a founding value. Values, after all, provide standards against which conduct may be measured, whereas institutions are only valuable to the extent that they serve a valued purpose. The grammatically correct reading is therefore also the reading that makes best sense of the intention behind FC s 1(d). What the placement of the comma after 'government' does is to make it clear that the Final Constitution's commitment to the institutions of representative government is not a commitment to the value of these institutions in and of themselves, but a commitment to a particular kind of relationship between government and the governed, one in which the people's representatives are controlled by and responsible to the people, and in which the reasons behind the exercise of governmental power are publicly explained.

Put in this way, it is immediately apparent that FC s 1(d)'s conception of democracy, and the deep principle of democracy it supports, would be incompatible with a model of democracy in which political parties vied for the people's

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votes, only to ignore the people once elected. In adopting FC s 1(d), the Constitutional Assembly also conclusively rejected Rousseau's scepticism about the quality of democracy in a representative system of government. On the contrary, there is something of J S Mill's optimism about FC s 1(d) in the way it confidently draws a causal link between the adoption of the institutions of representative government and the consequences it assumes will surely follow. To judge by FC s 1(d) alone, the principle of democracy in South African constitutional law is something like this: *Government in South Africa must be so arranged that the people, through the medium of political parties and regular elections, in which all adult citizens are allowed to participate, exert sufficient control over their elected representatives to ensure that: (a) representatives are held to account for their actions; (b) government responds to the needs of the people; and (c) the reasons for all collective decisions are publicly explained.*

Unfortunately, not all the cases read FC s 1(d) in this way. And there's the rub, for the principle of democracy must endeavour to reconcile the best interpretation of the constitutional text with the way the courts have in fact interpreted those same provisions. The major stumbling block in the way of the interpretation of FC s 1(d) just offered is, of course, the decision of the unanimous Constitutional Court in *UDM*.³⁴¹ In that case, the Court was asked to place a value-laden construction on the commitment to multi-party democracy in FC s 1(d) that would have prevented Parliament from changing the then applicable electoral system so as to allow floor-crossing. The possible reasons behind the Court's refusal to give such a value-laden reading have already been discussed.³⁴² They are relevant here only to the extent that it is necessary to discern whether the Court in *UDM*, in declining to interpret FC s 1(d) in the value-laden way it was asked to do, at the same time attributed to FC s

341 *United Democratic Movement & Others v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC).

342 See § 10.3(b) supra.

1(d) a different set of values that have changed the way in which the principle of democracy in South African constitutional law must be stated. Here, at least, advocates of the value-laden reading may be thankful for a bit of luck, for the Court in *UDM* did not base its refusal to apply that reading on the primacy of a countervailing set of values located in FC s 1(d), but on a countervailing *principle*, extrinsic to FC s 1(d), namely, the principle that, where the Final Constitution does not clearly prescribe a particular model, the judiciary should defer to the legislature in politically sensitive cases concerning the design of the electoral system. Since that countervailing principle is not a principle located in FC s 1(d) itself, it is not part of the normative universe that needs to be taken into account when stating the principle of democracy derivable from FC s 1(d). Rather, the principle that the court should defer to the legislature in such cases is a self-standing principle, one that was accorded greater weight on the facts of the *UDM* case, but one that will not be relevant to all cases in which the principle of democracy is implicated.

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The principle of democracy derived from the plain meaning of FC s 1(d) accordingly survives *UDM*. Will it also remain unchanged as the best-fit reading of the legal materials when called upon to explain the other provisions in the Final Constitution on democracy and the cases decided under them? This is a complicated question and it will be easier to answer it in two stages. First, it will be necessary to consider whether the reading of FC s 1(d) offered at the beginning of this section fits with the other express references to democracy in the Final Constitution and the rights in the Bill of Rights that are integral to democracy. Once this task is complete, it will be possible to decide whether the case law necessitates an amendment to the principle of democracy discernible in the constitutional text.

(b) The principle of democracy in the constitutional text

The principle of democracy derived from FC s 1(d) is supported by the preamble. As noted in § 10.3(a), the first part of the preamble characterizes democracy not as a value-neutral set of procedures for achieving other valued ends, but as a value system in itself. This is in keeping with FC s 1(d)'s commitment to the institutions of representative government as a means to ensure a particular kind of relationship between government and the governed. The second part of the preamble also affirms the core idea that democracy is a system of government 'based on the will of the people' in which 'every citizen is equally protected by law'. The principle of political equality to which this part of the preamble refers is reflected in FC s 1(d)'s commitment to universal adult suffrage on a national common voters' roll. The two statements of that principle are not incompatible with each other, and together can be incorporated into the democratic principle's understanding of political equality as a necessary condition for the sort of relationship between government and the governed that it seeks to establish. Finally, the preamble's concern with the connection between the consolidation of democracy in South Africa and South Africa's relationship to other sovereign states is not part of the democratic principle itself, but rather a statement about the consequences that are expected to follow from the observance of that principle. It is therefore not necessary to try to incorporate the third part of the preamble into our understanding of the principle of democracy in South African constitutional law.

The main feature of the reading of the relationship between rights and democracy in § 10.3(c) was that these two concepts should not be seen to be in conflict with each other, but rather as being in constructive tension, the resolution of which should take place on a case-by-case basis in accordance with the democratic values of 'human dignity, equality and freedom'. These values are repeated in FC ss 7(1),

36(1) and 39(1). They also appear in a slightly extended form in FC s 1(a). The repetition of the same set of values in these provisions, it was argued, is deliberate, the intention being to make it clear that the rights in the Bill of Rights do not detract from democracy, but are rather constitutive of it. This Dworkinian approach to the relationship between rights and democracy is plainly incompatible with any attempt to equate the principle of democracy in South African constitutional law with

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the majority-rule principle.³⁴³ This is just not what the Final Constitution says, anywhere. Even if there were isolated references to democracy in the Final Constitution that could be read in this way,³⁴⁴ the overwhelming weight of the express and implied references to democracy in the Constitution comes down in favour of a different view. The principle of democracy in South African constitutional law is not that collective decisions shall be taken by majority vote, but something far deeper than this, including, at the very least, the notion that the people's will may be trumped by individual rights where this serves the democratic values of 'human dignity, equality and freedom'.

All the rights in the Bill of Rights contribute in one way or another to this deep principle. In most cases, the contribution is indirect. In some cases, however, such as those discussed in § 10.4, the contribution is direct. Thus, when FC s 16(1) provides that '[e]veryone has the right to freedom of expression', or when FC s 19(3)(a) provides that '[e]very adult citizen has the right to vote', the clear intention is to secure these rights against majority override, not for anti-democratic reasons, but so as to safeguard the conditions necessary for democracy. To be sure, these rights may be limited by law of general application. But such limitation, according to FC s 36(1), will be in keeping with the principle of democracy only if the law in question itself serves the democratic values of 'human dignity, equality and freedom'.

At this point the Final Constitution needs to be read very carefully.³⁴⁵ FC ss 7(1), 36(1) and 39(1) consistently tell us that the democratic values that the

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rights in the Bill of Rights are intended to serve are 'human dignity, equality and freedom'. On the other hand FC s 1(d) provides that the institutions of representative government are intended to ensure 'accountability, responsiveness and openness'.³⁴⁶ Is there a contradiction here? No, because FC s 1(d) is only one of four values on which the democratic South African state is founded, the others being '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms' (FC s 1(a)), '[n]on-racialism and non-sexism' (FC s 1(b)) and '[s]upremacy of the constitution and the rule of law' (FC s 1(c)). It follows that FC s 1(d) does not purport to be an exhaustive list of the values that the commitment to democracy in South Africa is intended to serve. Rather, it is a more limited list of the values that the institutions of *representative government* are thought to be capable of ensuring. The remaining values in FC s 1 can and must be integrated into our understanding of the principle of democracy in South African constitutional law. Any such principle, after all, though it need not articulate them expressly, must be

343 Note that the argument is not that the majority-rule principle is not a principle of South African constitutional law. Rather, the argument is that the principle of democracy can neither be equated with nor exhausted by the majority-rule principle.

344 The reference to democracy in FC s 160(8)(b) has been read by several courts, including the Constitutional Court, to refer to majority rule. See § 10.5(c) *infra*.

consistent with the founding values in FC s 1. This can be done, it is suggested, by rephrasing the principle of democracy derived from FC s 1(d) in the form of two linked propositions — the proposition already given about the way in which government ought to be arranged, and then a complementary proposition, as follows: *The rights necessary to maintain such a form of government must be enshrined in a supreme-law Bill of Rights, enforced by an independent judiciary, whose task it shall be to ensure that, whenever the will of the majority, expressed in the form of law of general application, runs counter to a right in the Bill of Rights, the resolution of that tension promotes the values of human dignity, equality and freedom.*

The next part of the Final Constitution that we need to take into account is those provisions considered in § 10.3(d), that is, express references to democracy in provisions setting out the powers and functions of the various legislative bodies. These provisions, as we have seen, may be divided into three basic types: provisions requiring legislative bodies to take account of representative and participatory democracy in the way they design their rules and orders; provisions requiring legislative bodies to allow minority party participation in their proceedings; and provisions requiring legislative bodies to facilitate public access to and involvement in their proceedings. All these provisions qualify the majority-rule principle underlying the provisions on national, provincial and local government legislative authority as a whole, that is, the principle that whichever party

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- 345 It might be useful at this point to contrast the reading of the principle of democracy offered here with the one proposed by Iain Currie and Johan De Waal. See I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 13-18. Currie and De Waal begin their treatment of 'democracy and accountability' by asserting that, in addition to the rule of law, 'the Constitution also requires the government to respect the principle of democracy'. Ibid at 13. The principle in general, they remark, means that 'government can only be legitimate in so far as it rests on the consent of the governed'. Ibid. They then list all the provisions in which direct reference is made to democracy, and quote FC s 1(d) in full. Ibid at 14. One can quibble that, apart from FC s 1(d), most of the provisions they cite are not references to 'the principle of democracy' but to the word 'democracy', but this is not that important. Currie and De Waal's reference to FC s 1(d) as central to the principle of democracy is certainly correct. They then go on to make two mistakes, however, first, in asserting that there is 'no definition of democracy in the Constitution nor an exhaustive list of the requirements that the principle imposes', and, secondly, in distinguishing from the principle of democracy, whose existence they affirm, a separate, connected but normatively distinct 'principle of accountability'. Ibid at 17. The first statement is mistaken because it is not in the nature of a legal principle to list exhaustively all the requirements it imposes. Rather, as noted above, the principle of democracy is a function of the constitutional text, the cases decided to date and the cases yet to be decided. The list of requirements imposed by such a principle is in theory infinite. Currie and De Waal's second mistake is more serious. In arguing that there are, in fact, two self-standing principles, one of democracy and one of accountability, they divest the principle of democracy of its true content, and set up the possibility of a conflict between these two principles in which a more shallow principle of democracy may win out. If FC s 1(d) is taken to be the closest thing to a statement of the principle of democracy in the Final Constitution, then it is clear that the principle of democracy connotes a unified conception of democracy and accountability in which the institutions of representative government are not divorced from the purpose for which they are established. To extract the principle of accountability from FC s 1(d) in this way deprives the institutions of representative government of their instrumental purpose, and the principle of democracy of its deeper meaning.
- 346 It is also possible to argue that 'accountability, responsiveness and openness' are really goals not values, and in this way to resolve the apparent contradiction between FC s 1(d) and FC ss 7(1), 36(1) and 39(1). See Dworkin's distinction between goals and values in *Taking Rights Seriously* (supra) at 22. However, we are expressly told in the beginning of FC s 1 that the items to follow are founding values — not goals. In any case, it is possible to reconcile them in another way, as the rest of this section makes clear.

wins the most votes in an election is entitled to form the government. The qualification that the three sets of provisions discussed in § 10.3(d) place on the majority-rule principle is that the commitment to multi-party democracy in FC s 1(d) is not one that may be fulfilled at election-time alone, but one that must be carried through to the day-to-day operation of the various legislatures, such that the views of citizens who voted for minority parties are fairly reflected in any discussions that take place. In addition, the third generic provision requires that the legislatures should make provision for citizens on occasion to bypass their elected representatives in order to participate directly in the proceedings of the legislature. This qualification may be expressed by restating the first element of the democratic principle in the following way: *Government in South Africa must be so arranged that the people, through the medium of political parties and regular elections, in which all adult citizens are entitled to participate, exert sufficient control over their elected representatives to ensure that (a) representatives are held to account for their actions, (b) government listens and responds to the needs of the people, in appropriate cases directly, [and] (c) collective decisions are taken by majority vote after due consideration of the views of minority parties, and (d) the reasons for all collective decisions are publicly explained.* (Words added are underlined; words deleted appear in square brackets.)

Is it also necessary to amend the statement of the democratic principle in light of the rights integral to democracy considered in § 10.4? To a large extent, these rights have already been taken into account in the statement of the second element of the democratic principle. At the risk of privileging certain rights over others and making the statement of the second element long and unwieldy, one might amend it thus: *The rights necessary to maintain such a form of government, including the right to freedom of expression, the right to form political parties, the right to vote, and the right to the minimum standard of welfare necessary to participate in the democratic process, must be enshrined in a supreme-law Bill of Rights, enforced by an independent judiciary, whose task it shall be to ensure that, whenever the will of the majority, expressed in the form of law of general application, runs counter to a right in the Bill of Rights, the resolution of that tension promotes the values of human dignity, equality and freedom.* This way of stating the second element of the principle, though accurate, is somewhat inelegant. On balance, therefore, it is probably better to leave the second element as it stood after consideration of FC ss 7(1), 36(1) and 39(1). This means that the principle of democracy derivable from the constitutional text, before consideration of the case law, is something like this: (1) *Government in South Africa must be so arranged that the people, through the medium of political parties and regular elections, in which all adult citizens are entitled to participate, exert sufficient control over their elected representatives to ensure that: (a) representatives are held to account for their actions, (b) government listens and responds to the needs of the people, in appropriate cases directly, (c) collective decisions are taken by majority vote after due consideration of the views of minority parties, and (d) the reasons for all collective decisions are publicly explained.* (2) *The rights necessary to maintain such a form of government must be enshrined in a supreme-law Bill of Rights, enforced by an independent judiciary, whose task it shall be to ensure that, whenever the will of the majority, expressed in the form of law of general application, runs counter to a right in the Bill of Rights, the resolution of that tension promotes the values of human dignity, equality and freedom.*

(c) The principle of democracy in the case law

The introduction to this section considered the extent to which the Constitutional Court's decision in *UDM* may be said to have altered the principle of democracy supported by FC s 1(d). For the same reason that *UDM* cannot be said to have altered that principle, it cannot be said to have altered the more extended principle discernible in the entire constitutional text. By declining to engage with the substantive values underpinning multi-party democracy, *UDM* does not stand for a countervailing interpretation of the democratic principle, but for an independent principle of judicial deference in politically sensitive cases, such as those involving the design of the electoral system. Whatever one thinks of the correctness of *UDM*, therefore, it cannot be said to impact on the principle of democracy. Rather, *UDM* stands for the meta-principle that where the principle of democracy and the principle of judicial deference in politically sensitive cases conflict, the latter principle must prevail. As it so happens, that part of the *UDM* decision strikes one as intuitively wrong, but it is not necessary to make a case for that intuition here. It is sufficient to conclude that the statement of the principle of democracy discernible in the constitutional text need not be altered in order to accommodate *UDM*.

UDM was, of course, not the first case to rely on the principle of judicial deference in politically sensitive cases concerning the design of the electoral system. In *New National Party*,³⁴⁷ Yacoob J held, in a decision from which only O'Regan J dissented, that the standard of review in challenges to electoral statutes based on the right to vote was bare rationality.³⁴⁸ In her powerful dissent, O'Regan J stressed the centrality of the right to vote in the consolidation of South African democracy, remarking that: 'The right to vote is foundational to a democratic system. Without it, there can be no democracy at all.'³⁴⁹ In according special importance to the right to vote in this way, O'Regan J aligned herself with the consensus view in the literature that, if any right needs to be safeguarded against majority override, it is the right to vote. For this reason, O'Regan J's judgment also supports the second element of the principle of democracy just outlined. As argued in § 10.5(b), it is integral to the Final Constitution's conception of democracy that rights be capable of trumping the will of the majority where such a result better serves 'the democratic values of human dignity, equality and freedom'. Excluding the right to vote from the operation of this principle by subjecting the state's regulation of it to a standard of mere rationality alone is clearly wrong.

Although the decisions in *August*³⁵⁰ and *NICRO*,³⁵¹ by vindicating prisoners' right

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to vote in the face of executive neglect and legislative override, counterbalance the decision in *NNP* somewhat, they do so without calling into question the standard of

347 *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) ('*NNP*').

348 *Ibid* at paras 19-24.

349 *Ibid* at para 122.

350 *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) ('*August*').

351 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) ('*NICRO*').

review laid down in that case.³⁵² *August* and *NICRO*, despite endorsing the centrality of the right to vote to South African democracy, neither support nor detract from the principle of democracy in § 10.5(b). At best, they are agnostic on the question whether that principle can be enforced in cases where the state does not act irrationally.³⁵³

Another case in which the principle of democracy appears at first blush to have given way to the principle of judicial deference in politically sensitive cases is *Democratic Alliance v ANC & Others*.³⁵⁴ In that case, it will be recalled, the Cape High Court was asked to decide whether FC s 160(8) meant that the party-political composition of a municipal council's committees, including the executive committee, had to be proportional to the parties' support in the council. The High Court decided that it did not, holding that FC s 160(8) primarily conferred on minority parties a right to participate in the proceedings of a municipal council and its committees, and that the composition of the committees need not exactly reflect the composition of the municipal council itself. This decision appears to have been strongly influenced by the decision in *UDM*, which had been handed down shortly before, and which gave rise to the dispute in *Democratic Alliance v ANC*. The *Democratic Alliance v ANC* Court thus held that, due to the political sensitivity of the case, a high degree of judicial deference was in order.³⁵⁵ To this extent, the approach in *Democratic Alliance v ANC* may be distinguished on the same basis as *UDM*. However, before this stage of the decision had been reached, the Court made a finding that is potentially more damaging to the deep principle of democracy. As noted in § 10.3(d)(ii), the High Court accepted without question a concession by counsel that, read on its own, the requirement imposed by FC s 160(8)(b) would be satisfied by a first-past-the-post system in which all the members of a municipal council's executive and other committees came from the majority party. FC s 160(8)(b), it will be recalled, provides that the manner in which members of a municipal council are entitled to participate in the proceedings of the municipal council and its committees must be 'consistent with democracy'. The construction placed by the Court in *Democratic Alliance v ANC* on this provision evinces a very shallow conception of democracy indeed. Read on its own, the Court held, the requirement that municipal councillors' participatory rights be consistent with democracy imposes an imprecise standard that would be satisfied by any number of arrangements, including a winner-takes-all system. The principle of democracy in FC s 160(8)(b), the Court thereby implied, though

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not equivalent to the principle of majority rule, is insufficiently determinate as to be clearly incompatible with it.³⁵⁶

352 *August* was decided twelve days before *NNP*. *NICRO* was decided some five years later.

353 It should not be necessary to add that South African constitutional law does not need a deep principle of democracy to guard against irrational state action. The principle of the rule of law, including the doctrine of legality, would do this job just as well. See F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.

354 2003 (1) BCLR 25 (C) ('*Democratic Alliance v ANC*').

355 *Ibid* at 41B-F.

Here, then, we have a statement of the principle of democracy that appears to be diametrically opposed to the one contained in the constitutional text. What are we to make of it? The first thing to say is that the Cape High Court, in accepting the concession made by the applicant's counsel in relation to FC s 160(8)(b), made a mistake. What the applicant's counsel and the Court seem to have missed is that the requirement of democracy in FC s 160(8)(b) applies both to municipal councillors' entitlement to participate in the proceedings of committees of the municipal council *and* to their entitlement to participate in the proceedings of the municipal council itself. FC s 160(8)(b) cannot therefore establish as weak a standard as the Court says it does, since a first-past-the-post system in which the majority party participated in the proceedings of the municipal council to the exclusion of minority parties would plainly be unconstitutional. In fact, a careful reading of FC s 160(8)(b) reveals that it has nothing at all to do with party-political participation in the municipal council or its committees. That issue is dealt with in FC s 160(8)(a), which provides that municipal councillors are entitled to participate in the proceedings of the council and its committees in a manner that allows 'parties and interests reflected within the Council to be fairly represented'. As the Court in *Democratic Alliance v ANC* itself decides, this provision is directly relevant to disputes about the *extent* of party-political participation in the proceedings of the municipal council and its committees. FC s 160(8)(b) has to do with something else, namely the *manner* of members' participation in such proceedings, which must be 'consistent with democracy'. To discern what this requirement means would have required the Court to undertake a detailed analysis of that phrase. Given counsel's concession in relation to FC s 160(8)(b), it is easy to understand why the Court did not do this: the task of deciding what the phrase 'consistent with democracy' means is nothing short of the task undertaken in this chapter. Offered a convenient way out, the High Court took it, and we are accordingly left no wiser about what the principle of democracy really means. By the same token, however, *Democratic Alliance v ANC* cannot be read as detracting from the principle of democracy discernible in the constitutional text as a whole. Since it makes no attempt to interpret the text beyond FC s 160(8), it cannot be taken as a serious attempt to articulate that principle, and its holding in this respect may therefore be disregarded.

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The Constitutional Court's interpretation of FC s 160(8) is contained in *Democratic Alliance & Another v Masondo NO & Another*.³⁵⁷ This case is a particularly rich one from the perspective of this chapter, and was accordingly discussed in some detail in § 10.3(d)(ii). Two of the three opinions, Sachs J's concurring and O'Regan J's dissenting opinion, come quite close to the reading of the constitutional text offered here. These opinions will be discussed in moment. First, however, it is necessary to ask whether the majority opinion in *Masondo* detracts from the principle of democracy set out in § 10.5(b). As was the case with *UDM* and *Democratic Alliance v*

356 See *MEC for Development Planning and Local Government in the Provincial Government of Gauteng v Democratic Party* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC). This case concerned a challenge to s 16(5) of the Local Government Transition Act 209 of 1993 ('LGTA') in terms of FC s 160(3)(b) read with FC s 160(2)(b). The constitutional provisions require that the budget of a municipal council be approved by a majority of members, whereas the LGTA provided for approval by two-thirds majority, with a deadlock-breaking mechanism allowing the MEC to approve the budget. One of the questions raised in this case was whether the LGTA framework offended a range of principles, including the principle of democratic government. The Court held that, even if there was such a principle, 'a deadlock-breaking mechanism to avoid impasse [in approving a municipal budget] would not be in breach of [it]'. *Ibid* at para 56.

357 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC) ('*Masondo*').

ANC, the answer must be 'no'. This time, fortunately, the reason for this conclusion is quite simple. As we saw in § 10.3(d)(ii), the difference between the three opinions handed down in *Masondo* had to do with the question whether the principle of democracy was implicated in that case at all, rather than with differing views about the content of the principle. Had the majority been asked whether they agreed with Sachs and O'Regan JJ's vision for South African democracy they would probably have said, 'Yes, of course.' But that was not the point of their disagreement. The point of their disagreement was whether mayoral committees in an executive mayoral system are best understood as executive bodies or as bodies in which the functions of the legislature and the executive are combined. The majority took the former approach, and in effect held that the principle of democracy in FC s 160(8) did not apply to the case.³⁵⁸ Sachs and O'Regan JJ, on the other hand, held that mayoral committees were mixed executive-legislative bodies because, in the nature of things, much of the deliberation over collective decisions in an executive mayoral system will occur in the mayoral committee. Both Sachs and O'Regan JJ therefore felt that the principle of democracy was indeed implicated. The difference between their two opinions can be attributed to O'Regan J's view that the absence of minority-party participation in the mayoral committee *per se* contradicted the 'fair representation' part of that principle, and Sachs J's view that it all depended on the way that the system was implemented.

It is impossible to summarize Sachs J's remarks in *Masondo* on the principle of democracy in South African constitutional law without depriving them of their special flavour:

The requirement of fair representation [in FC s 160(8)(a)] emphasizes that the Constitution does not envisage a mathematical form of democracy, where the winner takes all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. The dialogic nature of deliberative democracy has its roots both in international democratic practice and indigenous African tradition. It was through dialogue and sensible accommodation on an inclusive and principled basis that the Constitution itself emerged. It would accordingly be perverse to construe its terms in a way that belied or minimized the importance of the very inclusive process that led to its adoption, and sustains its legitimacy.

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The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not towards exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, 'South Africa belongs to all who live in it'. At the same time, the Constitution does not envisage endless debate with a view to satisfying the needs and interests of all. Majority rule, within the framework of fundamental rights, presupposes that after proper deliberative procedures have been followed, decisions are taken and become binding. Accordingly, an appropriate balance has to be established between deliberation and decision.³⁵⁹

358 *Masondo* (supra) at para 22 (Court holds that the governing principle was the need for effective and efficient service delivery, which is the more appropriate principle when it comes to the assessment of the conduct of the executive.)

359 *Masondo* (supra) at paras 42-43.

These two paragraphs, though somewhat eclectic in their blending of different theories, powerfully articulate many of the elements of the principle of democracy that § 10.5(b) argued was discernible in the constitutional text. The key aspects of the principle in Sachs J's formulation are: (a) the rejection of the winner-takes-all conception of democracy, except in so far as majority rule remains the basic way of taking decisions once the values of participation and deliberation have been adequately served; and (b) the notion that democracy is not an event that takes place only at election time, but rather a 'continuous' process in which every reasonable attempt is made to accommodate, or at least listen to, divergent views. If there is one theoretical influence in the mix that dominates the rest, it is the theory of deliberative democracy, and in particular Habermas's notion that communicative power is the only legitimate form of power in the modern nation-state.³⁶⁰ The principle of majority rule, in Sachs J's formulation, is legitimate only to the extent that it is subordinated to a deeper principle of democracy that stresses the value of participation and deliberation before decisions are taken.

O'Regan J's statement of the principle in FC s 160(8)(a) is very similar, but does contain one difference that may be crucial for the way the principle of democracy is conceived in other cases. Although Sachs J, like the Cape High Court in *Democratic Alliance v ANC*, interprets the phrase 'consistent with democracy' in FC s 160(8)(b) as meaning consistent with the principle of majority rule,³⁶¹ it is clear from the remarks just quoted that he thinks that the Final Constitution's overarching vision for South African democracy is much deeper than this, and that the operation of the majority-rule principle, not just in FC s 160(8), but generally, is constrained by the need to engage in meaningful

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deliberation beforehand. For Sachs J, therefore, the principle of democracy in South African constitutional law is a deep one, roughly corresponding to the statement of that principle in § 10.5(b). O'Regan J, on the other hand, says in so many words that the principle of democracy, at least in FC s 160(8)(b) is coterminous with the principle of majority rule. In the passage already quoted in § 10.3(d)(ii) she says that:

[FC] s 160(8)(b) is clear that the principle of fair representation is always subject to democracy and the will of the majority. The principle established by s 160(8) is a principle which requires inclusive deliberation prior to decision-making to enrich the quality of our democracy. *It does not subvert the principle of democracy itself.*³⁶²

It is clear from this passage that, when O'Regan J uses the phrase, 'the principle of democracy', she means the principle of majority rule. Her reading of FC s 160(8), in other words, is that it contains two principles — a principle of fair representation and a principle of democracy — and that these two principles may be reconciled with each other by reading the former to apply to the manner in which minority parties should be allowed to participate in the proceedings of a municipal council and its committees, and the latter to the way in which decisions are taken. It has already

360 Cf *Matatiele Municipality & Others v President of the Republic of South African & Others* 2006 (5) BCLR 622 (CC) ('*Matatiele*') at para 110 (Sachs J remarked: 'In our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness.') See § 10.3(b) supra.

361 See *Masondo* (supra) at para 38.

362 *Masondo* (supra) at para 78.

been noted in the discussion of *Democratic Alliance v ANC* that this reading of FC s 160(8) is questionable. Textually, there is nothing in FC s 160(8)(b) that says that this provision applies to decision-making, and certainly not to the exclusion of other issues. The operation of the majority-rule principle with regard to decision-making in a municipal council is set out in FC s 160(3), which provides that certain decisions of a municipal council must be taken 'with a supporting vote of a majority of its members' and others 'by a majority of the votes cast'. Given this comprehensive regulation of the issue, it unclear why FC s 160(8)(b) should be read as restating the majority-rule principle in relation to participation in the proceedings of the municipal council and its committees.³⁶³ The most obvious construction to be placed on FC s 160(8)(b), when read with the comprehensive regulation of decision-making in FC s 160(3), is that it applies to the *manner* of participation in a municipal council and its committees, and not to the way decisions are taken. What FC s 160(8)(b) says is that, in addition to being fairly represented, minority parties are entitled to participate in the meetings of a municipal council and its committees in a manner 'consistent with democracy'. The principle of democracy to which FC s 160(8)(b) here refers must mean, not the majority-rule principle, which has already been stated in FC s 160(3), but the deeper principle of democracy discernible in the constitutional text as a whole.

It would thus seem that O'Regan J's equation of the FC s 160(8)(b) requirement with the principle of majority-rule in decision-making is open to question.

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Nevertheless, that is conclusively what she says, and we are therefore left with a dissenting opinion that fails to attribute to the principle of democracy the full meaning argued for in § 10.5(b). Even Sachs J's concurring opinion, though it appears to support that reading of the principle more fully, might in the end be said to depend on the textual peg of the phrase 'fair representation'. Without that phrase, it is not self-evident that either O'Regan J or Sachs J would have read FC s 160(8) in the manner that they did. *Masondo* therefore leaves us with less than fulsome support for the reading of the principle of democracy outlined above.

Two more recent decisions, however, come much closer to that reading, and moreover were delivered by a near unanimous Court. In *African Christian Democratic Party*, the first occasion on which O'Regan J has written for the majority in a case concerning political rights, the Court held that provisions in electoral statutes should be interpreted in favour of 'enfranchisement rather than disenfranchisement and participation rather than exclusion'.³⁶⁴ This holding was expressly tied to FC s 1(d), which is quoted in full in the preceding paragraphs, along with Sachs J's commentary on FC s 1(d) in *August*.³⁶⁵ O'Regan J's judgment was concurred in by all the members of the Court with the exception of Skweyiya J. Here, then, we have conclusive support for the deep principle of democracy operating as a guide to the interpretation of statutes affecting political rights.³⁶⁶

363 It is possible that the intention of FC s 160(8)(b) was to extend the majority-rule principle in FC s 160(3) to proceedings of the committees of a municipal council. However, as noted earlier, this reading is strained since FC s 160(8) expressly applies both to proceedings of the committees of a municipal council and to proceedings of the municipal council itself, that is, in plenary session.

364 *African Christian Democratic Party* (supra) at para 23.

365 *August* (supra) at para 17, quoted in *African Christian Democratic Party* (supra) at para 22.

In a decision handed down three days later, *Matatiele Municipality & Others v President of the Republic of South African & Others*, we find even more conclusive evidence that a majority of the Constitutional Court may yet endorse the deep principle of democracy set out in § 10.5(b). In this case, it will be recalled, an amendment to the Final Constitution altering a provincial boundary was challenged under FC s 155(3)(b) for unconstitutionally limiting the authority of the Municipal Demarcation Board. Although the Court ultimately decided against the applicants on this point, it affirmed the importance of the Demarcation Board 'to our constitutional democracy' and the role of FC s 153(3)(b) read with FC s 1(d) in guarding against political manipulation of the demarcation process. This dictum, though not crucial to the outcome of the case and therefore not part of the ratio, suggests a slightly less deferential approach to the legislative regulation of the voting system than was evident in *UDM*. Of course, the political stakes were not quite as high in *Matatiele*, and therefore it is easy to downplay the importance of this dictum. Nevertheless, it does suggest that the meta-principle in *UDM* — that the principle of democracy must give way to the principle of deference to legislative determinations of the design of the electoral system — is not sacrosanct.

The second aspect of the *Matatiele* decision provides even greater support for the principle that § 10.5(b) argued is evident in the constitutional text as a whole. Faced with a concession by applicants' counsel that the procedures for the

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amendment of the Final Constitution had been duly followed, a majority of the Court refused to accept it. There was enough on the papers, the Court held, to suggest that the people of Matatiele had not been properly consulted about the decision to transfer the area in which they lived to a different province.³⁶⁷ Although a court should, as a rule, be cautious about deciding issues that were not raised by the parties in their pleadings, this rule had to 'yield to the interests of justice'.³⁶⁸ FC s 118(1)(a) was open to the interpretation that the people directly affected by a decision to alter a provincial boundary should be consulted by the provincial legislature concerned, either through public hearings or by giving them an opportunity to make written submissions. These issues, the Court held, 'lie at the very heartland of our participatory democracy'.³⁶⁹

The order in Ngcobo J's majority judgment in *Matatiele* was supported by all but two of the judges. Three other judges supported the order but not all of the reasoning in the majority judgment. The joint dissenting judgment of Skweyiya and Yacoob JJ takes issue, not with the Court's remarks on the possible interpretation of FC s 118(1)(a), but with the majority's decision to refer the case to further hearing. It therefore leaves the majority's provisional reading of this provision untouched. Sachs J, in concurring in both the order and the reasoning in the majority judgment, restates his conception of democracy in *Masondo* in even more explicitly

366 *African Christian Democratic Party* does not, however, overturn the standard of review applied in *NNP*. FC s 19 was used in *African Christian Democratic Party* as the basis for an enfranchisement-friendly reading of the statute in question, rather than as part of a direct challenge to the statute.

367 *Matatiele* (supra) at para 69.

368 *Ibid* at para 66.

369 *Ibid* at para 72.

Habermasian terms, holding that 'the legitimacy of laws made by Parliament comes not from awe, but from openness'.³⁷⁰ For Sachs J, at least, the principle of democracy derived from FC s 1(d) is a deep one that is capable of invalidating virtually any law or conduct, provided that there is a textual peg on which to hang it. O'Regan J, in supporting the majority's order but not all their reasoning, is a little more cautious. For her, the central question in the case was whether the people of Matatiele had a legitimate grievance and, if so, the consequences for government's relationship with that community if that grievance were left unaddressed. In her words: 'Were we to leave undetermined the legal issues raised by Ngcobo J it would create uncertainty and doubt which might continue to be a source of disquiet and anger for decades to come.'³⁷¹ The fact that the case involved a constitutional amendment, in other words, only heightened the need to ensure that government was responsive to the concerns of the Matatiele community. In this indirect way, O'Regan J's judgment, too, though it does not mention it expressly, provides support for the deep principle of democracy outlined in § 10.5(b).

What then, in conclusion, are we to make of the principle of democracy at this stage of our jurisprudence? The constitutional text clearly supports a deep reading of that principle which conforms to accounts in contemporary political theory which insist that, for democracy to be meaningful, government must facilitate real

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public participation in decision-making and genuine deliberation. That this is indeed the principle of democracy in South African law has not yet been confirmed by a majority of the Constitutional Court. Of the current judges, Sachs J has come closest to endorsing this reading, and O'Regan J certainly appears very sympathetic to it. The other judges, however, have remained largely agnostic, with two exceptions — *NNP* and *UDM*. *UDM* remains the greatest obstacle in the way of the recognition of the deep principle of democracy in South African constitutional law, all the more so because it was joined by Sachs and O'Regan JJ. But it is possible to distinguish *UDM* on the basis that, rather than standing for a different principle of democracy, it stands for a meta-principle, namely, that the deep principle of democracy must yield to a principle of judicial deference in politically sensitive cases, such as those involving legislative determinations of the electoral system. To the extent that this meta-principle still stands in the way of the deep principle of democracy, there are indications in *African Christian Democratic Party* and *Matatiele* that the meta-principle is weakening, and that we will shortly have a decision in which the majority of the Court endorses the deep principle in a case in which it really matters.

370 Ibid at para 110.

371 Ibid at para 90.