Chapter 45
Political Rights

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(a) The right to vote, the electoral system and the mandate of representatives

(i) General

(ii) The mandate of representatives and loss of membership

(iii) Proportional representation

(b) The active right to vote

(i) Equal voting rights

(ii) Secrecy of the ballot

(iii) Exclusion of classes of citizens from the right to vote

(c) The right to stand for election to public office

FC s 19 provides:

(1) Every citizen is free to make political choices, which includes the right —

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of this Constitution.

(3) Every adult citizen has the right —

(a) to vote in elections for any legislative body established in terms of this Constitution, and to do so in secret, and

(b) to stand for public office and, if elected, to hold office.

45.1 Introduction*

As with all rights in the Final Constitution, the political rights enshrined in FC s 19 must be read in context. South Africa's history of denying political rights to certain racial groups, discussed in Chapter 2 of this work[1] and briefly in § 45.2*(a)* below, is well known and provides one important context in which FC s 19 must be understood. FC s 19 must also be read alongside the other provisions of the Final Constitution relating to democracy.[2] Finally, to fully understand the workings of FC s

1 See S Woolman, J Swanepoel 'Constitutional History' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 2.

2 See the preamble, and FC ss 1, 7, 36, 39, 57, 59, 61, 70, 72, 116, 118, 152, 160, 195, 234, and 236, and the whole of Chapter 9. For a full exploration and discussion of the principle of democracy in South African constitutional law, see T Roux 'Democracy' 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 10.

19 — specifically FC s 19(2) and FC s 19(3) — one must understand South Africa's electoral system, and, in particular, its system of proportional representation.[3]

This chapter begins by placing the FC s 19 guarantees within their proper interpretive context. § 45.2 discusses South Africa's unique historical background regarding political rights and voting, surveys the other constitutional provisions which influence the interpretation of FC s 19, and briefly analyzes the impact that both foreign and international law may have on the courts' understanding of political rights. Given the sparse case law adjudicating FC s 19 directly, and the fact that the constitutionally-enshrined political rights are couched in broad terms, these various contexts provide important lenses through which to understand FC s 19's guarantees.

§§ 45.3-45.5 explore the application of FC s 19: the people or groups to whom it applies and who have standing to rely on this section, and the general approach that the Constitutional Court has adopted in FC s 19 disputes within the context

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of the separation of powers doctrine. These sections give essential perspective on the right, showing that the guarantees are broadly applicable (§ 45.3) and can be relied on by an expansive array of parties — even if they are not directly affected by an alleged violation (§ 45.4). § 45.5 documents the deferential standard adopted by the Constitutional Court in FC s 19 cases and then shows how the difficulty of devising a proper remedy constrains the Court's ability to protect FC s 19 rights.

§ 45.6 considers the implied right to political participation, and the relationship it bears to the narrower right contained in FC s 19. The implied right to political participation maps much of the territory covered by Chapter 10 of this work. (Chapter 10 — 'Democracy' — considers the principle of democracy in South African constitutional law.) This right is nevertheless worthy of separate consideration in light of the important decisions in *Doctors for Life International v Speaker of the National Assembly & Others*[4] and *Matatiele Municipality & Others v President of the Republic of South Africa & Others*.[5]

While FC s 19 protects several specific rights, when a question or controversy does not fit neatly into the ambit of one of these rights, the Constitutional Court has shown a willingness to refer to FC s 19 political rights in a more general sense. In particular, the Court has read FC s 19 along with FC s 1*(d)* to stand for the proposition that ambiguous electoral laws must be interpreted in favour of enfranchisement rather than disenfranchisement. § 45.7 analyzes the Court's treatment of the specific rights in FC s 19, and then discusses the general meaning given to FC s 19. Finally, §§ 45.8-45.10 break down the constituent parts of FC s 19, explaining each of them in turn and analyzing the case law in each area.

3 For a detailed discussion of election law, 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.

4 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC)('*Doctors for Life*').

5 2007 (1) BCLR 47 (CC)('*Matatiele (II)*').

45.2 Interpretation of political rights

As stated above, FC s 19 rights must be read in their proper context. Since the case law regarding FC s 19 remains fairly thin, the historical background of the right to vote and the related provisions of the Final Constitution are particularly important to unlocking the meaning of FC s 19.

(a) Historical background

The Constitutional Court's understanding of FC s 19 is deeply intertwined with South Africa's history of denying political rights to black people. Initially, each of the territories that were to form the Union of South Africa had different voting restrictions. For instance, the Cape allowed men of all races to vote, provided that they met certain economic qualifications, while the Transvaal discriminated along racial lines, not allowing non-white citizens to vote — and sometimes placed limitations on the voting privileges of white men. Many Africans expected the non-racial voting standards of the Cape to be extended as a 'reward' for supporting the British in the Anglo-Boer South African War of 1899-1902. However, the

Treaty of Vereeniging explicitly stated that non-whites could only be granted the franchise through the consent of the white population.[6]

Over the next several decades, blacks were stripped completely of their right to vote. The union between the Afrikaner governing party and the white Labour Party in 1924 precipitated the slide towards black disenfranchisement.[7] In 1936, the Representation of Natives Act[8] took blacks completely off of the voters roll, effectively taking away their right to vote in those territories where it once existed. By contrast, the franchise was extended to white women in 1930. By 1931, the economic qualifications limiting the right to vote for poorer white citizens were dropped. These changes effectively enfranchised all white citizens regardless of sex, economic status or social standing.

The enfranchisement situation of Indians and coloureds was a bit more complicated. Although an Act was introduced to Parliament in 1946 that would have provided Indians three representatives to Parliament,[9] the Indian community viewed the law as a slap in the face and undertook a boycott. Soon afterwards, the boycott was no longer necessary. Apartheid policies stripped Indians of even this minimal political representation.

Apartheid efforts at disenfranchisement of black people were met, in addition to political protest, with legal challenges. Some of the most well-known judgments to

6 Article 8 of the Treaty of Vereeniging.

7 This pact was precipitated by the economic crisis between 1919 and 1921. The lowered price of gold initially led many mining employers to lay off skilled white labour in favour of cheaper, black labour. Seeing their fortunes rapidly declining, the working class Labour Party entered into a coalition with the governing party in order to consolidate political power and improve the lots of the newly-expendable workers.

8 Act 12 of 1936.

9 Asiatic Land Tenure and Indian Representation Act 28 of 1946.

emerge from apartheid South Africa were delivered during this period, all tellingly related to political rights. In *Ndlwana v Hofmeyr*, a challenge to the Representation of Natives Act failed, the Appellate Division basing its decision on the notion of parliamentary supremacy.[10] However, in the famous pair of *Harris* cases, the Appellate Division twice struck down legislative attempts to disenfranchise blacks. In *Harris I*,[11] the Appellate Division struck down the Separate Representation of Voters Act,[12] which provided for 'the separate representation of European and non-European voters in the Province of the Cape of Good Hope'.[13] Outraged, the government sought to circumvent the judgment by passing the High Court of Parliament Act. The Act purported to turn Parliament itself into the highest court in constitutional matters, with the power to review and set aside, by simple majority vote, any Appellate Division decision declaring an Act of

Parliament invalid. The 'High Court of Parliament' proceeded to declare *Harris I* wrongly decided. Thus followed *Harris II*,[14] in which a unanimous Appellate Division struck down the High Court of Parliament Act.

The government, going back to the drawing board, used a two-step legislative strategy, passing two Acts by ordinary majority, in order, first, to restructure Parliament to give it the majority necessary to amend the Constitution;[15] and, secondly, to amend the Constitution by removing the constitutional protection of black voting rights.[16] These steps allowed it to re-enact the Separate Representation of Voters Act. At the same time, the government passed legislation to increase the quorum of the Appellate Division bench for cases concerning the validity of legislation. The majority of the enlarged bench of the Appellate Division then dismissed the challenge to these new statutes in *Collins*.[17] The sole dissenting judge was Schreiner JA.[18]

10 1937 AD 229.

11 *Harris v Minister of the Interior* 1952 (2) SA 428 (A).

12 Act 46 of 1951.

13 The basis of the decision was that the Act was not passed in conformity with the provisions of the South Africa Act of 1909, the constitution of the day, which required more than a two-thirds parliamentary majority, and special procedures, when legislating to disqualify any person as a voter on the ground of race.

14 *Minister of the Interior v Harris* 1952 (4) SA 769 (A).

15 The Senate Act 53 of 1955 effectively enlarged and restructured the upper house of Parliament (the Senate) so as to give the government the two-thirds parliamentary majority necessary to amend the entrenched provisions of the South Africa Act.

16 The South Africa Act Amendment Act 9 of 1956, passed with a two-thirds majority, repealed s 35 of the South Africa Act, which protected black voting rights.

17 *Collins v Minister of the Interior* 1957 (1) SA 552 (A).

The 1983 Constitution created a tricameral legislature that included Indians and coloureds. The 1983 Constitution allotted voting power to whites, Indians and coloureds in a ratio of 4:2:1, respectively, but gave no representation to Africans. This Constitution lasted a mere ten years before being repealed by the Interim Constitution, which affirmed, for the first time in South Africa's history, the principle of universal adult suffrage.[19]

(b) Drafting history

In addition to embodying new political rights, the Final Constitution was itself the product of a multi-staged process of participatory political decision-making. It is therefore useful to consider briefly the drafting history leading up to the enactment of FC s 19.

Before the multi-party negotiations commenced, there were confidential discussions, referred to as 'talks about talks', to test the waters between the African National Congress (ANC) and the ruling National Party (NP).[20] These talks

established the ground rules for the negotiations that followed. In particular, the initial meetings between the ANC and the NP led to the adoption of the Groote Schuur Minute.[21] This Minute was the first agreement between the two organisations: in the Minute, the NP agreed to meet the ANC's demands contained in the Harare Declaration,[22] and the ANC agreed, in turn, to help to reduce the levels of violence in the country. The next formal agreement was the Pretoria Minute. In this second Minute, the government agreed to release political prisoners and the ANC agreed to suspend the armed struggle.

These two agreements paved the way for the CODESA talks[23] and, thereafter, the Multi-Party Negotiating Forum 'MPNF') held at the World Trade Centre, Kempton Park. The MPNF ultimately culminated in the adoption of the Interim Constitution on 18 November 1993. The Interim Constitution was enacted by the tricameral parliament, signed into law by the State President, FW de Klerk, and came into force on 27 April 1994. Ironically, therefore, the principle of universal franchise was introduced by the act of an undemocratic legislature.

18 In the view of many in the legal profession at the time, Oliver Schreiner JA was subsequently passed over for appointment as Chief Justice on the basis of his dissenting views in cases such as *Collins*.

19 For a more complete history, see S Woolman & J Swanepoel 'Constitutional History' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 2.

20 Z Motala & C Ramaphosa *Constitutional Law: Analysis and Cases* (2002) 4. Cyril Ramaphosa chaired the Constitutional Assembly, the democratically elected legislative body which drafted and adopted the Final Constitution.

21 The Groote Schuur Minute was signed on 2 May 1990. See Motala & Ramaphosa (supra) at 4.

22 The Harare Declaration, a document adopted by the Organization of African Unity in 1989, contained the ANC's understanding of the process towards a negotiated settlement.

23 Convention for a Democratic South Africa.

Section 21 of the Interim Constitution, the predecessor to FC s 19, provided:

> (1) Every citizen shall have the right —
>
> *(a)* to form, to participate in the activities of and to recruit members for a political party;
>
> *(b)* to campaign for a political party or cause; and
>
> *(c)* freely to make political choices.
>
> (2) Every citizen shall have the right to vote, to do so in secret and to stand for election to public office.

At the second plenary session of CODESA, the major parties had agreed that a democratically elected Constitutional Assembly (CA) should draft the new constitution. However, as noted by the Constitutional Court:

> [i]nstead of an outright transmission of power from the old order to the new, there would be a programmed two-stage transition. An interim government, established and functioning under an interim constitution agreed to by the negotiating parties, would govern the country on a coalition basis while a final constitution was being drafted. A national legislature, elected (directly and indirectly) by universal adult suffrage, would double as the constitution-making body and would draft the new constitution within a given time. But — and herein lies the key to the resolution of the deadlock — that text would have to comply with certain guidelines agreed upon in advance by the negotiating parties. What is more, an independent arbiter would have to ascertain and declare whether the new constitution indeed complied with the guidelines before it could come into force.[24]

The 'guidelines' referred to were the Constitutional Principles (CPs) contained in the Interim Constitution, and the 'independent arbiter' was to be the Constitutional Court. A number of the CPs referred to political rights and democracy, in particular CP VIII, CP XIV and CP XVII. It is appropriate to remember them, as the CPs still find an echo in FC s 19 and the principle of democracy underlying the Final Constitution:

VIII	There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation.
XIV	Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.
XVII	At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.

When FC s 19 was drafted, a number of changes, some of significance, were made to IC s 21. FC s 19 nevertheless received no objections during the certification process and was certified by the Constitutional Court as complying with the CPs set out above.[25] Where a provision of the Final Constitution was drafted so as to differ from its Interim Constitution predecessor, courts interpreting the Final Constitution should regard such textual changes as deliberate and intended to have some effect.

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24 *Ex parte Chairperson of the Constitutional Assembly, In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 13 (*First Certification Judgment*).

25 See *First Certification Judgment* (supra) at Annexure 3: Summary of Objections and Submissions; *Ex parte Chairperson of the Constitutional Assembly, In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC).

There are two significant differences between IC s 21 and FC s 19. First, the structure of rights in sub-sec (1) is conceptually altered: FC s 19(1) provides that an overarching right to make political choices *includes* the rights to form a political party; to participate in the activities of, or recruit members for, a political party; and to campaign for a political party or cause. IC s 21(1) treated the right to make political choices as a discrete right and treated the other three rights as separate, rather than subordinate, rights. Secondly, the insertion of the right to free and fair elections in FC s 19(2) was wholly new.

The upgrading of the right to make political choices broadens the right extensively. When interpreted as part of IC s 21(1), this right would *not* have included the rights in IC s 21(1)*(a)* and *(b)* to form, to participate in the activities of and to recruit members for a political party; and to campaign for a political party or cause. Under the Final Constitution, these rights form part, but not the whole, of the right to make political choices. Forming and participating in the activities of and recruiting members for political parties, and campaigning for a political party or cause are now instances of the making of political choices. These activities also help us to understand what else amounts to a protected political choice, as other instances of political choices should have characteristics in common with these examples. One such characteristic is that all of the rights in FC s 19(1), which constitute instances of the right to make political choices, involve the relationship between citizens and political parties or causes. Arguably, therefore, the right to make political choices is limited to choices implicating political parties or causes: rights fitting within a representative model of democracy in which political rights of citizens

against the state are mediated by political parties. This construction of FC s 19 may mean that, if our constitutional conception of democracy has both participatory and representative dimensions, the participatory dimension must be found in provisions outside FC s 19(1) (and possibly outside FC s 19 as a whole). This conception of a broader right to participate in political processes, which is found in provisions outside FC s 19, and a narrower right embodying the classical protections necessary in a representative democracy, in particular the right to vote, is discussed in more detail in § 45.6 below.

(c) Constitutional context

(i) Relationship between FC s 1(d) and FC s 19

Several provisions of the Final Constitution are particularly helpful in placing FC s 19 in its proper context. FC s 1*(d)* states that 'universal adult suffrage, a national common voters [sic] roll, regular elections, and a multi-party system of democratic government' are foundational values of the new South African constitutional order. As a result, democratic values must be promoted when a court interprets the provisions of FC s 19.[26] If the court finds that the FC s 19 rights are infringed, these values must also be used to determine whether that limitation is reasonable and justifiable.[27]

26 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.

27 See FC ss 39 and 36.

(ii) Other relevant constitutional provisions

As will be discussed in § 45.6 below, FC s 19 entrenches a set of political rights that constitute a subset of a broader right to political participation that runs through the Constitution. Part of that right to political participation is the right of public involvement in legislative processes, contained in FC s 59(1)*(a)* in respect of the National Assembly, FC s 72(1)*(a)* in respect of the National Council of Provinces, and FC s 118(1)*(a)* in respect of provincial legislatures. These provisions, and the broader right of political participation of which they form part, are discussed in § 45.6 below.

FC s 19 must also be considered within the constitutional framework regulating elections. FC ss 46(1) and 105(1) set forth the broad constitutional requirements governing the national and provincial legislatures, respectively, and give the national legislature regulatory power over the non-fixed details of the two systems. FC s 157 provides for the election of members of Municipal Councils. While these provisions give the national legislature the responsibility of creating a working regulatory framework for elections, it is the Court's responsibility to ensure that the laws and regulations passed by the legislature are consistent with the Constitution's guarantees.

Also, the constitutional provisions dealing with the rights of freedom of expression,[28] assembly, demonstration, picket and petition, [29] association,[30] the provisions regarding the electoral system, the electoral commission,[31] the mandate

28 FC s 16. For more on freedom of expression, see D Milo, A Stein & G Penfold '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, June 2008) Chapter 42.

29 FC s 17. For more on freedom of assembly, 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.

30 FC s 18. For more on freedom of association, 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.

31 FC ss 190 and 191.

of representatives and traditional leaders,[32] and the provision for referendums[33] are integrally linked with FC s 19.

(d) International law

In terms of FC s 39(1)*(c)*, when interpreting the Bill of Rights, a court must consider international law. It is incumbent on courts, therefore, to have regard to the protection afforded to political rights in international law when interpreting FC s 19 and the other provisions of the Final Constitution that protect political rights.

The International Covenant on Civil and Political Rights (ICCPR) entrenches political rights in art 25, which provides:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> *(a)* To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> *(b)* To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> *(c)* To have access, on general terms of equality, to public service in his country.[34]

In General Comment 25, the United Nations Human Rights Committee commented on art 25, noting that 'whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.'[35] As is appropriate in international instruments, the ICCPR provides flexibility to nation states as to how they must respect this right. For example, the reference to participation in public affairs *directly or through elected representatives*, reflects the range of democratic models between the participatory

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32 See *ANC v Minister of Local Government and Housing* 1997 (3) BCLR 295 (N). The High Court refused to invalidate a proclamation, issued in terms of the Local Government Transition Act 209 of 1993, which entitled traditional leaders to become *ex officio* members of regional councils. The applicants' argument that IC s 182 only allowed traditional leaders to be nominated to 'elected local government' was rejected. Since local governments in rural areas are not wholly elected, the argument meant that traditional leaders could only participate in the cities and towns, where almost none of them lived. FC schedule 6, item 26(1) makes it clear that traditional leaders are *ex officio* entitled to be members of the local government structures, wherever they reside, until 1999 or until an Act of Parliament provides otherwise.

33 FC s 84(2)*(g)* grants the President the power to call for a referendum in terms of an Act of Parliament. That Act now seems to be the Electoral Commission Act 51 of 1996 and no longer the Referendums Act 108 of 1983. The former does not explicitly repeal the latter, but s 2(2) provides that the President may, notwithstanding anything to the contrary contained in any other law, declare that a referendum shall be held to ascertain the views of voters on a matter, determine who shall be entitled to vote, and determine the questions to appear on the ballot paper.

34 United Nations Human Rights Committee, General Comment 25 'The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service' (Article 25 of the Covenant) (57th session, 1996) CCPR/C/21/Rev.1/Add.7 ('GC 25').

35 GC 25 (supra) at para 1.

and representative polar extremes.[36] However, it is clear that art 25 contemplates a form of *democracy*, and General Comment 25 states further that '[a]rticle 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.'[37] Significantly, art 25 adopts a standard of reasonableness as the internal measure for testing restrictions of the rights that it contains.[38] In *NNP*, as is discussed in § 45.5*(b)* below, the Constitutional Court adopted the much more deferential standard of rationality.

In *Doctors for Life*, the Court emphasized the entitlement of citizens in terms of art 25 to participate in public affairs, and held that art 25 must be understood in the light of art 19 of the ICCPR, the right to freedom of expression, which includes the 'freedom to seek, receive and impart information and ideas'.[39] The Court held that arts 19 and 25 guarantee not only the positive right to political participation, but simultaneously impose a duty on states to facilitate public participation in the conduct of public affairs.[40]

The African Charter on Human and Peoples' Rights ('the African Charter') protects political rights in art 13 and, like the ICCPR, refers to 'participation' in political processes:

> 1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
>
> 2. Every citizen shall have the right of equal access to the public service of his country.

> 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.[41]

36 See GC 25 (supra) at para 3: people have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government.

37 Ibid.

38 GC 25 (supra) at para 25: 'Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office.' GC 25 (supra) at para 10 states: 'The right to vote at elections and referenda must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership should not be a condition of eligibility to vote, nor a ground of disqualification.'

39 *Doctors for Life* (supra) at para 91.

40 Ibid at para 92.

41 African (Banjul) Charter on Human and Peoples' Rights, adopted on 27 June 1981 (Acceded to by South Africa on 9 July 1996).

The inclusion of rights of access to the public service and to public property and services in the same provision as the right to participate in the government of one's country perhaps reflects a concern of many young African democracies regarding the abuse of political power, especially in respect of employment, public resources and state services. In *Doctors for Life*, the Constitutional Court read art 13 (the right to participate in government) together with art 25, which provides that '[s]tates parties . . . shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.' By implication, the Court was suggesting that states parties to the African Charter must take steps, through teaching, education and publication, to ensure that citizens are able to exercise their right to participate in the government of their country.

The *Doctors for Life* Court concluded that the international law position in respect of political rights is as follows:

> The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.[42]

The Court held that, while the right to political participation in international law can be realized in multiple ways, it 'does not require less of a government than provision for *meaningful exercise of choice in some form of electoral process* and public participation in the law-making process by permitting public debate and dialogue with elected representatives'.[43]

The Court noted that the international law right to political participation, being an open-textured 'programmatic' right (one which must be realized through the programmes and policies of individual states) will undoubtedly evolve, gathering its meaning and content from historical and cultural experience.[44] As will be seen in § 45.6 below, the international law position heavily influenced the *Doctors for Life* Court. The evolving international law on political rights, particularly the emerging right to democratic governance in international law,[45] will therefore continue to be particularly

relevant as our domestic law in this area develops. Insofar as these norms become part of customary international law, they also become the law of South Africa.[46]

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42 *Doctors for Life* (supra) at para 105.

43 Ibid at para 106 (emphasis added).

44 Ibid at paras 96-97.

45 See, in general, G Fox 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539; T Franck 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46; H Klug 'Guaranteeing Free and Fair Elections' (1992) 8 *SAJHR* 263.

(e) Foreign law

In terms of FC s 39(1)*(c)*, when interpreting the Bill of Rights, a court may consider foreign law. It is appropriate, therefore, to have regard to the constitutional protection afforded to political rights in other constitutional regimes.

The Canadian Charter of Rights and Freedoms contains a cluster of 'democratic rights' in ss 3 to 5. Section 3 provides: 'Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.' This provision is similar to FC s 19(3), which also couples the right to vote with the right to stand for election to legislative bodies, and Canadian jurisprudence on the interpretation of s 3 is accordingly useful to South African courts. The Canadian Supreme Court, like the South African Constitutional Court, has been criticized for adopting a highly deferential approach to limitations of the right to vote.[47] The Canadian Supreme Court's deference flows from its notion that the purpose of the right is to confer on each citizen 'effective representation' in the legislature.[48] Sections 4 and 5 of the Canadian Charter are concerned respectively with the duration of the terms of the House of Commons and Parliament, and the sitting of Parliament and the legislatures.

The German Basic Law (*Grundgesetz*) does not contain a provision equivalent to FC s 19 in its Fundamental Rights chapter, although it does entrench the rights to freedom of expression,[49] association,[50] assembly[51] and petition.[52] However, Chapter III, dealing with the Bundestag (legislature), provides for elections and specifically entrenches the right to vote and be elected in art 38:

> (1) Members of the German Bundestag shall be elected in general, direct, free, equal, and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.
>
> (2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.
>
> (3) Details shall be regulated by a federal law.

In addition, Chapter II of the Basic Law, dealing with the Federation and the Länder (provinces) contains the following articles, which carry more than an echo of Germany's own painful history of abuse of political rights:

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46 For a discussion of FC s 39(1)*(b)* and FC s 232, see H Strydom & K Hopkins 'International Law and International Agreements' 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 30.

47 PW Hogg *Constitutional Law of Canada* (3rd Edition, 1992) 1001.

48 *Re Prov Electoral Boundaries (Sask)* [1991] 2 SCR 158.

49 Article 5.

50 Article 8.

51 Article 9.

52 Article 17.

Article 20 [Basic institutional principles; defence of the constitutional order]

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

Article 21 [Political parties]

(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.

(2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.

(3) Details shall be regulated by federal laws.

In providing for public participation in political processes in constitutional provisions falling *outside of a Bill of Rights*, the German Basic Law is structurally similar to the Final Constitution, as will be seen when the right to political participation is considered in § 45.6 below.

The *Doctors for Life* Court noted that a growing number of national constitutions, in particular those adopted after the ICCPR entered into force, endorse the principle of participatory democracy. The Court referred to a number of constitutions 'which, like our Constitution, include provisions that promote public participation in law-making'. In the context of a consideration of the right to participate, specifically, in the law-making process, the Court referred to the law of England, the United States of America, Germany, Tanzania, Portugal, Colombia and Belarus. It also noted the growing trend among states to embrace the principle of participatory democracy.[53]

(f) Statutes embodying political rights

Finally, the interpretation of FC s 19 should also take place within the context of relevant domestic legislation. Domestic legislative efforts to realize political rights include the Referendums Act,[54] the Electoral Act,[55] the Electoral Commission Act,[56]

53 *Doctors for Life* (supra) at paras 102-104.

54 Act 108 of 1983.

55 Act 73 of 1998.

56 Act 51 of 1996.

the Abolition of Restrictions on Free Political Activity Act,[57] the Independent Communications Authority of South Africa Act,[58] the Independent Media

Commission Act,[59] the Labour Relations Act,[60] the Protected Disclosures Act,[61] the Promotion of Access to Information Act,[62] the Promotion of Administrative Justice Act,[63] and the Promotion of Equality and Prevention of Unfair Discrimination Act.[64] While, of course, none of these Acts can limit the rights in FC s 19 unless that limitation is saved by FC s 36, they are relevant to the extent that, if a right is embodied in legislation, it is not necessary to rely directly on FC s 19.[65] In addition, in interpreting these statutes, FC s 39(2) requires courts to 'promote the spirit, purport and objects of the Bill or Rights', an interpretive process in which FC s 19 will play a significant role. Accordingly, the relationship between these Acts and FC s 19 cuts both ways.

45.3 Horizontal application of political rights

According to FC s 8(2), a constitutional provision applies horizontally to a natural or juristic person to the extent that it is applicable, taking into account the nature of the right and the duty imposed by the right.[66] Although the Constitutional Court has not had to answer this question explicitly, FC s 19(1) and (3) should have horizontal applicability. As far as an infringement on these rights is concerned, it matters little whether it is a state or a private person that is denying a person the right to vote in secret, to stand for public office, to participate in the activities of a political party, or to campaign for a political cause. Horizontal applicability may prove to be very

57 Act 206 of 1993.

58 Act 13 of 2000.

59 Act 148 of 1993.

60 Act 66 of 1995.

61 Act 26 of 2000.

62 Act 2 of 2000.

63 Act 3 of 2000.

64 Act 4 of 2000.

65 See *S v Mhlungu & Others* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59; *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC) at para 7; *Ferreira v Levin NO, Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 199.

66 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, § 31.8*(a)*(ii).

important since many potential infringements may come from political rivals, or even private employers, rather than the government.

Currie and De Waal contend that FC s 19(2), which effectively gives content to the right to vote, is not applicable horizontally because the duty to create free, fair, and regular elections falls only on the government.[67] We disagree. It may be that the duty to ensure *regular* elections falls only on the state. Intuitively, however, the fairness of any game or contest depends both on the role of the referee or umpire and on the conduct of the competing players. The players are obliged to 'play fair', even if the role of enforcing the rules of the game rests solely on the arbiter. FC s 19(2) should similarly be regarded as imposing duties on the political parties contesting an election. It may be that FC s 19(2) imposes only *negative horizontal* duties on private persons to respect the right: for example, by not engaging in acts of political violence, intimidation or electoral fraud. By contrast, the state will bear

positive obligations to take steps to protect, promote and fulfil the right to free and fair elections, discharged primarily through the Independent Electoral Commission, which is obliged in terms of FC s 190 to ensure that elections are free and fair. The horizontal application of FC s 19(2) may also become vital where the Independent Electoral Commission fails, refuses or lacks the institutional capacity to intervene to prevent violations by political parties or other private persons.

In *Institute for Democracy in South Africa & Others v African National Congress & Others* ('*IDASA*'), the applicants were IDASA, a non-governmental organization, and two private citizens. The applicants launched a High Court application against a number of political parties, seeking to compel them to disclose the sources of the substantial donations they receive.[68] The respondents were the African National Congress (ANC), the Democratic Alliance (DA), the Inkatha Freedom Party (IFP) and the New National Party (NNP), all political parties registered in terms of s 15 of the Electoral Commission Act.[69] The High Court held that political parties, for the purposes of the request for access to their donations records, are 'private bodies', rather than 'public bodies', as defined in the Promotion of Access to Information Act.[70] The *IDASA* court held that some of the provisions of the Final Constitution relied upon by the applicants, which fell outside the Bill of Rights, were not enforceable as against private parties, including political parties.[71] However, the High Court proceeded to consider and apply FC s 19. It ultimately concluded that the applicants did not require access to the requested records for the purpose of protecting their FC s 19 rights. Nevertheless, the *IDASA* Court's approach strongly suggests that it regarded FC s 19 as binding not only the state, but also political parties. Thus, FC s 19 applies, for the time being, horizontally.

67 See I Currie & J de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 447.

68 2005 (5) SA 39 (C), 2005 (10) BCLR 995 (C)(*IDASA*). *IDASA* is discussed further at § 45.7 infra.

69 Act 51 of 1996.

70 *IDASA* (supra) at para 32.

71 Ibid at para 40.

45.4 Standing to sue in political rights cases

At a textual level, FC s 19 excludes non-citizens from its application, and is one of the few rights in the Final Constitution to do so.[72] But what about political parties? Most of the cases decided to date have been brought by political parties, and yet on its face the right is extended to citizens only. How then do political parties have standing to sue under FC s 19? The answer lies in the distinction between the holder of a right (in this case, citizens) and the persons who have standing in terms of FC s 38 to enforce the right.[73] FC s 38 provides:

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are —
>
> *(a)* anyone acting in their own interest;
>
> *(b)* anyone acting on behalf of another person who cannot act in their own name;
>
> *(c)* anyone acting as a member of, or in the interest of, a group or class of persons;
>
> *(d)* anyone acting in the public interest; and
>
> *(e)* an association acting in the interest of its members.

The Constitutional Court has also granted political parties standing to sue under FC s 19. For example, it has heard cases over the disparate impact that a voter identification requirement[74] and floor-crossing legislation[75] have had on political parties, over the interpretation of election statutes,[76] and over the amount of discretion possessed by the Electoral Commission.[77] In *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO),* the Court granted standing to a national non-profit organization to bring an

72 For a full discussion of the beneficiaries of the various rights found in the Bill of Rights, 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.

73 For a full discussion of standing, see C Loots 'Standing, Ripeness and Mootness' 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 7. The broad approach to both standing and application rests, to a significant degree, on the Court's doctrine of objective unconstitutionality. For more on this doctrine, 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.

74 See *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('*New National Party*'); *Democratic Party v Minister of Home Affairs & Another* 1999 (3) SA 254 (CC), 1999 (6) BCLR 607 (CC).

75 *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 1179 (CC)('*UDM*').

76 See *African Christian Democratic Party v Electoral Commission & Others* 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC)('*African Christian Democratic Party*').

77 See *Liberal Party v Electoral Commission & Others* 2004 (8) BCLR 810 (CC)('*Liberal Party*').

application on behalf of two convicted prisoners who were unable to register or vote in an upcoming election.[78] As noted above, in *IDASA*, a High Court application was brought by a non-governmental organization and two private citizens. The three applicants brought the proceedings in terms of FC s 38 'on their own behalf, in the interests of all South African citizens, and in the public interest.'[79] The High Court did not question their standing.

In appropriate cases, litigants will have standing to seek relief under FC s 19 on any of the bases provided for in FC s 38. Persons would thus have standing in their own interest, as citizens and as voters. They could also institute proceedings on behalf of other persons who cannot act in their own name (for example, on behalf of soldiers on active duty outside the country during an election or mentally handicapped persons or unrehabilitated insolvents who lack the legal capacity to institute proceedings). One could sue as a member of, or in the interest of, a group or class of persons, such as prisoners. Arguably, whenever the right to a free and fair election is threatened, public interest standing would arise. One can also imagine that a political association — not a political party — could claim standing as an association acting on behalf of its members.

In *Doctors for Life*, Ngcobo J stated that there are two extraordinary standing requirements for an application to strike down legislation due to a failure to facilitate public involvement in its enactment: first, the applicant must have sought and been denied an opportunity to be heard on the relevant Bills; and, secondly, the applicant must have launched the application as soon as practicable after the Bills were promulgated.[80] However, *Doctors for Life* was not decided on the basis of FC s 19, and these standing requirements would, therefore, appear only to apply to cases under FC ss 59(1)*(a)*, 72(1)*(a)* and 118(1)*(a)*: the duty of legislatures to facilitate public involvement in the law-making process.

Section 96 of the Electoral Act provides, under the heading 'Jurisdiction and Powers of Electoral Court', that '[t]he Electoral Court has final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal or review.' In *Liberal Party v the Electoral Commission & Others*, the Constitutional Court left open the question whether this provision ousts the Court's jurisdiction to hear electoral matters.[81] Noting that FC s 167 confers jurisdiction on the Court in all constitutional matters, and noting the rights guaranteed in FC s 19, the *Liberal Party* Court assumed in favour of the (ultimately unsuccessful) applicant that the matter was constitutional and that the Court had jurisdiction.[82] In *African Christian Democratic Party*, the Court was able to avoid the question again, holding that the Electoral Act does not govern municipal elections, which are regulated instead by the Municipal

78 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('*NICRO*').

79 Ibid at para 3.

80 *NICRO* (supra) at para 216.

81 *Liberal Party* (supra) at para 15.

82 Ibid at paras 12-15.

Electoral Act, and therefore that s 96 of the Electoral Act did not apply.[83] It may be that the Court will seek to avoid what appears to have been intended as an ouster provision in s 96 by holding that s 96 only confers exclusive and final jurisdiction on the Electoral Court in matters based directly on the Electoral Code. Where a complaint of infringement of constitutional rights arises, the Constitutional Court will retain jurisdiction.

45.5 Justiciability of political rights

(a) Separation of powers concerns

In *United Democratic Movement v President of the Republic of South Africa & Others* ('*UDM*'), the Constitutional Court adopted a strongly deferential approach in considering a constitutional challenge to floor-crossing legislation. The Court set the tone for its consideration of the merits of the challenge by noting that '[t]his case is not about the merits or demerits of the disputed legislation, [which] is a political question and is of no concern to this Court.'[84] The Court held that if defection is permissible, the details must be left to Parliament.[85] The Court further held that the frustration of the will of the electorate (by allowing floor-crossing)

does not infringe FC s 19 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.'[86] In addition, the *UDM* Court held, multi-party democracy is not undermined by floor-crossing because FC s 1*(d)* does not prescribe a particular form of electoral system, and the commitment to multi-party democracy is not incompatible with a system of proportional representation that allows floor-crossing between elections.[87] When it reached the question of remedy, the Court emphasized that '[o]ne of the considerations that must be kept in mind by a Court in making orders in constitutional matters is the principle of the separation of powers and, flowing from it, the deference it owes to this Legislature in devising a remedy.'[88] Separation of powers and deference are, in this sense, the central themes of *UDM*.

The reasoning in *UDM* reflects a shallow, pluralist conception of the principle of democracy under the Final Constitution. It is also at odds with the Court's other dicta on the nature of South African democracy. As contended in Chapter 10 of this volume,[89] the ratio of *UDM* does not affect the content of the principle of democracy in South African constitutional law, but rather stands for a meta-principle that the judiciary should defer to the legislature in politically sensitive cases concerning the

83 *African Christian Democratic Party* (supra) at para 15.

84 *UDM* (supra) at para 11.

85 Ibid at para 47.

86 *UDM* (supra) at para 49.

87 Ibid at para 35.

88 Ibid at para 115.

design of the electoral system. If this is so, then *UDM* also does not qualify the standard or level of review in political rights cases. Instead, it provides for a strong principle of deference in a narrow set of cases implicating political rights: those involving the electoral system. Although the *UDM* Court did proceed to apply a rationality test to the floor-crossing provisions, it did so to determine whether they were consistent with the rule of law. It did not apply to the provisions a test for an infringement of FC s 19 or any other right.[90] It ultimately concluded that the impugned provisions were rational.[91]

In relation to the right to vote, a particular version of the counter-majoritarian argument has been advanced by some judges of the Constitutional Court. The argument is that, by interfering in the legislative process or invalidating legislation adopted by democratically elected legislative bodies (even if doing so in order to enforce the right to vote), the Court is undermining the right to vote itself.[92] The answer to this concern lies in the supremacy of the Final Constitution. In *Doctors for Life*, Ngcobo J explained:

> This Court has emphasised on more than one occasion that although there are no bright lines that separate its role from those of the other branches of government,

> 'there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.'
>
> But at the same time, it has made clear that this does not mean that courts cannot or should not make orders that have an impact on the domain of the other branches of government. When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may — and if need be must — use their powers to make orders that affect the legislative process.[93]

In the area of election law, the courts play a special role as the 'referees' of the democratic process.[94] Rather than having the usual counter-majoritarian function of ensuring that the popular will of the people as expressed through legislative enactments is in accord with the Final Constitution, the duty of the 'referee court' (including the Independent Electoral Commission and Electoral Court) during elections is to ensure that the popular will of the people is fairly represented in the

89 See T Roux 'Democracy' 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 10, 10-64 — 10-65.

90 *UDM* (supra) at para 55.

91 Ibid at para 70.

92 *Doctors for Life* (supra) at para 339 (Yacoob J) and at para 239 (Sachs J).

93 *Doctors for Life* (supra) at para 199 citing *Minister of Health & Others v Treatment Action Campaign & Others (2)* 2002 (5) SA 721 (CC) at para 98.

outcome.[95] As such, the courts can be seen as the guardians of democracy and their supervision helps to extend the legitimacy of the democratic process.

(b) Standard of review in political rights cases

The Constitutional Court, at least rhetorically, has recognized the profound importance of political rights. In *New National Party*, for example, the Court remarked: 'The importance of the right to vote is self-evident and can never be overstated . . . without it there can be no democracy.'[96] In *August*, Sachs J held:

> 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 of personhood. Quite literally, it says that everybody counts.[97]

And in *African Christian Democratic Party v Electoral Commission & Others*, the Court held that it will interpret legislation 'to promote enfranchisement rather than disenfranchisement and participation rather than exclusion'.[98]

The Court's rhetorical statements about the importance of political rights have not, however, been translated into a strict standard of review. Quite the opposite. In *New National Party*, the Court adopted a highly deferential standard of review in relation to a constitutional challenge to certain provisions of the Electoral Act. The provisions in question required a particular kind of bar-coded identity document as a precondition for registration as a voter in national and provincial elections, as well as for the exercise of the right to vote itself. Yacoob J for the majority tested the impugned legislation by asking, first, whether the regulatory scheme was rationally related to a legitimate government purpose, holding that reasonableness only became relevant during limitations analysis.[99] Yacoob J then went further, holding that to succeed in establishing that the Act infringed the right to vote, a litigant would have to show that, 'as at the date of the adoption of the measure, its probable consequence would be that those who want to vote would not have been able to do

94 I Ebsen *Das Bundesverfassungsgericht als Element gesellschaftlicher Selbstregulierung: eine pluralistische Theorie der Verfassungsgerichtbarkeit im demokratischer Verfassungsstaat* (1985) 340; J Ely *Democracy and Distrust* (1980) 73. The last author refers to the famous footnote of Justice Stone in *United States v Carolene Products* 304 US 144, 152-53 (1938) n 4: 'It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.'

95 The framers of the Canadian Charter recognized the different function fulfilled by the courts in this area by not subjecting the right to vote (s 3) to the override power afforded Parliament in s 33.1 of the Charter.

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

97 *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) ('*August*') at para 17.

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

so, even though they acted reasonably in pursuit of the right.'[100] On this test, citizens must prove the reasonableness of their conduct in pursuing their rights, but legislation need only be rational to pass constitutional muster. On the facts, Yacoob J found that the requirement of the bar-coded identity document as the principal method of identification was, on the face of it, rationally connected to the legitimate governmental purpose of enabling the effective exercise of the vote.[101] This degree of deference to the legislature does not sufficiently protect the right to vote and is discordant with the rhetorical importance that the Court places on the right to vote in other cases.

O'Regan J issued a compelling dissent in *New National Party*, holding that mere rules and regulations, some of which may restrict certain people's ability to exercise their right to vote, do not limit the right to vote. They constitute a necessary form of regulation.[102] According to O'Regan J, the primary obligation imposed by FC s 19(2) and (3) is not negative but positive. It requires government to take positive steps to ensure that the right is fulfilled.[103] Matters such as the location of the polling booths, the hours of voting and the requirements of proof of identity must be regulated by law. When creating this regulatory framework, Parliament should seek to enhance democracy, not to limit it.[104] Citizens must comply with reasonable regulation: unreasonable regulation will infringe the right to vote.[105] The following passage lies at the heart of her reasoning:

> Given the constitutional obligations imposed upon Parliament to enhance democracy by providing for free and fair elections, it seems incongruous and inappropriate that this Court should be able to determine whether citizens have acted reasonably, but not Parliament. Citizens, of course, have an obligation to comply with reasonable regulations made by Parliament and the Commission in order to exercise their right to vote. This Court must, however, determine whether Parliament (and the Commission) has acted reasonably in making such regulations. If citizens do not comply with reasonable regulations, they cannot complain that their right to vote has been infringed. The test proposed by Yacoob J may also be difficult to apply. South Africa is a diverse society. Some of its citizens are fully literate and live in wealth and comfort, many, however, are disadvantaged both educationally and materially. What is reasonable for one group of citizens may be quite unreasonable for another. It is not clear to me how the test established by the majority can accommodate sensitively the

99 See *New National Party* (supra) at paras 23-24. For further discussion of the relationship between the rights analysis and the limitations analysis in *New National Party*, 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.

100 *New National Party* (supra) at para 23.

101 Ibid at paras 26 and 31.

102 Ibid at para 123.

103 Ibid at para 118.

104 Ibid at para 122.

105 Ibid at para 124.

realities of South African society. Related to this difficulty with the test is the problem that the test may be evasive of application in relation to those citizens who are unaware of legislative provisions which qualify the right to vote. In this case, evidence was produced which showed that in July 1998, almost 60% of South Africans were unaware of the fact that they would need a bar-coded ID to vote. Many of them may still be unaware of that fact. Ignorance will lead to non-compliance. Is such non-compliance always to be considered unreasonable conduct? It seems to me therefore that the test adopted by the majority may be difficult to apply.

In my view, the proper approach is to require legislative regulation of the right to vote to be reasonable. As a test, it is less difficult to implement than the test adopted by the majority. It will enable appropriate scrutiny of legislative measures regulating elections before they are held and it emphasises not only the importance of the right to vote but also the importance of the obligation imposed upon Parliament to enact measures in a manner which will enhance, not inhibit, the growth of democracy in South Africa.[106]

The simple rationality test adopted by the majority in *New National Party* is far too deferential a standard to apply to such a profoundly important right. It also rests on two incorrect assumptions. The first is that the principle of separation of powers prohibits courts from determining whether the legislature acted reasonably. This is not the case, as the Court's later decisions in *Doctors for Life* and *Matatiele II* illustrate. Indeed, in *Doctors for Life*, Ngcobo J emphasized the appropriateness of reasonableness as a review standard and its frequent use as such throughout the Final Constitution.[107]

The second incorrect assumption in *New National Party* is that the validity of a statute is ordinarily determined with reference to the circumstances that existed at the time of its enactment.[108] Although the majority of the Court conceded that the circumstances prevailing at the time when the validity of the provision is considered by a court are not irrelevant, the majority clearly favoured 'putting itself in the position of the legislature at the time when the legislation was passed'. The Court develops this approach from the doctrine of objective unconstitutionality,

ie the principle that a pre-existing law becomes invalid the moment the Constitution comes into force.[109] This doctrine of objective unconstitutionality in turn follows from the principle of constitutional supremacy. It is normally used to explain one of the consequences of constitutional invalidity, which is that, in theory, a court merely 'confirms' that a statute is invalid and that its order of invalidity therefore operates retrospectively. While it may be the correct approach in theory, it should never be rigidly adhered to in practice. The Court's jurisprudence on the retrospectivity of orders of invalidity makes manifest this inherent flexibility. In any event, the doctrine is of doubtful assistance in the interpretation stage of analysis. If strictly applied it would mean that the court must not only put itself in the shoes of the legislature at the time when the law was passed but also ask itself what the Final Constitution

106 *New National Party* (supra) at paras 126-127.

107 *Doctors for Life* (supra) at para 126.

108 *New National Party* (supra) at para 22.

109 See *Ferreira v Levin NO & Others; Vryenhoek v Powell* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 25-30.

meant when the law was passed. In so far as an applicant alleges that the effect of a law is unconstitutional, it seems strange to decide the matter by trying to predict the effects of the legislation when the law was passed, rather than simply looking at what they really are.

The Court's decision to approach the matter from the time when the law was passed leads it to make artificial distinctions between the constitutional validity of the statutory provisions and the constitutional validity of their implementation. When the effect of a law is considered, this distinction seldom makes sense. The way in which a law is implemented may provide insight into its eventual effects. Thus, requiring proof of identity with the bar-coded ID undoubtedly had the effect of making it more difficult for people to exercise their right to vote. As O'Regan J concluded in her dissenting judgment,[110] this requirement was unreasonable. In *New National Party*, the Court should have balanced the extent of the infringement against the importance of the purpose of the legislation under the limitations clause.

In *August & Another v Electoral Commission & Others*,[111] which was decided before *New National Party*, the Court had appeared to upgrade the level of review in respect of the right to vote from rationality to reasonableness. The question before the *August* Court was whether the Electoral Commission had an obligation to take affirmative steps to ensure that prisoners awaiting trial and sentenced prisoners could register and then vote in an upcoming general election. The Court held that the right to vote 'by its very nature imposes positive obligations on the legislature and the executive',[112] that the Electoral Commission had an 'obligation to take *reasonable* steps to create the opportunity to enable eligible prisoners to register and vote',[113] and that any limitation on the right to vote must pass scrutiny under the limitation clause. The *August* Court found the inaction of the legislature and the Commission unconstitutional. It ordered the Electoral Commission to make 'all *reasonable* arrangements' to ensure that people who were imprisoned during the registration period could register, and that all

registered prisoners could vote in the upcoming election. However, the references to 'reasonableness' appear to be obiter dicta, as the case was decided on the basis that the right to vote in FC s 19 was obviously limited, and that such limitation could only be justified under FC s 36 if effected by means of a law of general application.[114] Accordingly, the level of review to which a statute limiting the right to vote would be subjected did not really arise.

In *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others*, the standard for testing infringements of the right to vote again did not need to be addressed. The Minister of Home Affairs had, correctly in the view of the *NICRO* Court, conceded that legislation that

110 *New National Party* (supra) at para 158.

111 *August* (supra) at para 3.

112 *NICRO* (supra) at para 16.

113 Ibid at para 22.

114 *NICRO* (supra) at paras 3 and 31.

precluded prisoners sentenced to imprisonment without the option of a fine from voting in upcoming elections limited the right to vote, but sought to justify the limitation under FC s 36. Due to this concession, the Court said nothing about the level of review under FC s 19. The Minister bore the onus to justify the conceded limitation of the right, and the Court held that this onus had not been discharged by the two lines of justificatory argument advanced. First, the *NICRO* Court held that the main thrust of the government's justification of the provisions in question was directed to logistical and cost arguments which, on the evidence before the Court, could not be sustained.[115] Secondly, as to the policy issues raised as justification (that at the level of policy it was important for the government to denounce crime, particularly crimes involving violence and even theft, and to communicate to the public that citizens' rights are related to their duties and obligations as citizens), the *NICRO* Court held that the legislation was not narrowly tailored to such crimes, and that in any event insufficient evidence had been placed before it by the Minister.[116] Due to the Minister's concession, the Court did not have to consider these justifications as against FC s 19. Arguably, given a proper evidentiary foundation, these bases might justify depriving certain prisoners of the vote in terms of a rationality testing. But they would appear to remain unreasonable.

In *UDM*, although it ultimately adopted a very deferential approach, the Court nevertheless referred to reasonableness as the applicable level of review in considering whether floor-crossing was inimical to the multi-party system of government established by FC s 1*(d)*. The Court held:

> A multi-party democracy contemplates a political order in which it is permissible for different political groups to organise, promote their views through public debate and participate in free and fair elections. These activities may be subjected to *reasonable* regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multi-party democracy, will be invalid. What has to be decided, therefore, is whether this is the effect of the disputed legislation.[117]

In *Doctors for Life* and *Matatiele II*, the Court applied a standard of reasonableness to the state's duty to facilitate public involvement in the law-making process.[118] The right to such public involvement in the law-making process forms part of the broader 'right to political participation', as does FC s 19.[119] It remains to be seen whether reasonableness will be the yardstick for all obligations arising out of the broad right to political participation (outside of the right to vote), or even what the content of this right will be. A further question is what the standard of review will be where a litigant relies on both FC s 19 and the right to participate in the law-making process (for example, where legislation impacting on the right to vote is passed without sufficient public involvement). In such a case, the challenge as to the substantive complaint and the procedural complaint would be closely related. It seems

115 Ibid at para 66.

116 Ibid at para 67.

117 *UDM* (supra) at para 26.

118 *Doctors for Life* (supra) at para 146; *Matatiele (II)* (supra) at para 50.

119 *Doctors for Life* (supra) at paras 105-08.

paradoxical that such legislation could be tested for reasonableness as to process requirements, but merely for rationality as to its substance.

The dissenting approach of O'Regan J in *New National Party* fits much more comfortably with the dicta of the Court in *August* and *UDM* regarding reasonableness and with the majority's conception of the nature of South African democracy in *Doctors for Life* and *Matatiele II*. Unfortunately, however, absent a departure from precedent, the majority decision in *New National Party* will remain valid in respect of challenges to electoral statutes allegedly infringing the right to vote.

(c) Remedies in political rights cases

The difficulty of issuing effective remedies exerts a strong influence over the Constitutional Court's FC s 19 jurisprudence. If a complaint is lodged timeously, an interdict or some other effective remedy can often be fashioned prior to an election, even if it requires the Court to push back electoral deadlines for a political party to register for an election.[120] The Court has shown a pragmatic willingness to quickly consider time-sensitive electoral issues.[121] Once an election has taken place, however, the possibilities for remedy shrink considerably. Absent a severe infringement that could clearly have changed the outcome of an election, it is difficult to conceive of a post-election remedy for the prevention of a qualified voter from voting — whether or not FC s 38 requires that an effective remedy must be found.

Setting aside an election is a drastic remedy. It is particularly so in a system of proportional representation, where it is not possible to limit the order to the

constituencies affected.[122] Accordingly, save in the most extreme circumstances, where the effect of the unconstitutional law or conduct outweighs the cumulative effect of the mechanisms meant to ensure that the election is free and fair, the Court is unlikely to set aside an election. Where a substantial period of time has elapsed since the election, the public interest in the finality of the result will outweigh the interests of the litigants.[123] A mere declarator may at least serve the purpose of condemning the breach. The Court could also consider awarding constitutional damages, in place of an order setting aside election results.[124]

120 In *African Christian Democratic Party*, the Court ordered the Electoral Commission to ignore its deposit deadline to allow the ACDP to register to contest the Cape Metro elections.

121 In *New National Party*, *NICRO*, *African Christian Democratic Party* and *Liberal Party*, the Court expedited its procedures in order to deal with a time-sensitive electoral matter.

122 See *Dongo v Mwashita & Others* 1995 (2) ZLR 228 (HC). The Zimbabwean High Court held that trivial deviations from laws governing the conduct of elections would not lead to the setting aside of an election. However, the court found that the irregularities in the present case were substantial and had affected the result of the election, and that the election therefore had to be set aside. However, the court was only considering a single constituency within a general election.

123 Zimbabwean cases support this proposition. See, eg, *Mandava v Chigudu & Others* 2000 (1) ZLR 679 (HC); *Makamure v Mutongwiza* 1998 (2) ZLR 154 (H); *Kutama v Town Clerk, Kwekwe* 1993 (2) ZLR 137 (S). In these cases, delay weighed heavily against granting the relief sought. See also *DTA of Namibia v Prime Minister of the Republic of Namibia* 1996 (3) BCLR 310 (NmH).

Several statutes, such as the Electoral Act and the Labour Relations Act, provide remedies when political rights are violated by private persons. The statutes afford the individual, in some respects, broader rights than FC s 19. Whether the courts will develop remedies beyond those conferred by these statutes depends on the approach to the scope and limitation of political rights and the interpretation of FC s 8(3). For example, the Labour Relations Act does not oblige an employer to grant a worker leave for the purpose of standing for public office.[125] If the request for leave is refused, a court is likely to hold that FC s 19 is not infringed because the right to stand for public office does not entitle a worker to leave. Similarly, it does not entitle a candidate to financial support for his or her campaign. This interpretation of FC s 19 makes it unnecessary to consider a common-law remedy to give effect to the right. The Electoral Act, to use another example, creates several criminal offences to prevent horizontal infringements of the right to vote. However, the Act provides no civil remedies.[126] A court is unlikely to hold that the existence of these criminal prohibitions disposes of the need to develop a civil remedy. Even if one considers them to be 'remedies', they hardly offer 'appropriate relief' to the complainant. In such cases (for example, where one private person unlawfully prevents another from voting on election day), a declarator coupled with an award of damages seems to be the only remedy appropriate to vindicate the right to vote and deter infringements in future.

45.6 The broad and narrow rights to participate in public affairs: doctors for life and matatiele II

In *Doctors for Life* and *Matatiele II*, the Constitutional Court discovered in the Final Constitution a broad, general principle of public participation in the political process. At lease some aspects of the principle are justiciable. One component of the right to political participation is the right to public involvement in the law-making process. Another component of the right is FC s 19 read with FC ss 16 to 18. In *Doctors for Life*, the Court held that the international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected to public office.[127] The Court went on to find a domestic equivalent of this international law position in the Constitution, holding:

> In our country, the right to political participation is given effect not only through the political rights guaranteed in section 19 of the Bill of Rights, as supported by the right to freedom of expression but also by imposing a constitutional obligation on legislatures to facilitate public participation in the law-making process.

124 See *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others,* Amici Curiae*)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC). See also M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

125 The Labour Relations Act 66 of 1995 merely affords employees who are office bearers of representative trade unions the right to take reasonable paid leave during working hours to perform their functions. See LRS s 15.

126 See Electoral Act 73 of 1998 ss 87-94 read with ss 97-99.

127 *Doctors for Life* (supra) at para 105

As discussed in § 45.2*(d)* above, in international law the broad and narrow rights are both located in the text of art 25 of the ICCPR. In the Final Constitution, however, only the narrower right is contained in FC s 19. To find the broader right to political participation, therefore, the *Doctors for Life* Court had to go further afield, both to international law itself and to the right to public involvement in the legislative process in FC s 59(1)*(a)* (in respect of the National Assembly), FC s 72(1)*(a)* (in respect of the National Council of Provinces), and FC s 118(1)*(a)* (in respect of provincial legislatures).[128]

The applicant in *Doctors for Life* impugned a cluster of health-related statutes — the Choice on Termination of Pregnancy Amendment Act,[129] the Sterilisation Amendment Act,[130] the Traditional Health Practitioners Act[131] and the Dental Technicians Amendment Act[132] — on the grounds that, during the legislative process leading to their enactment, the National Council of Provinces (NCOP) and provincial legislatures had not complied with their constitutional obligations under FC ss 72(1)*(a)* and 118(1)*(a)*. In terms of FC s 72(1)*(a)*, the NCOP 'must . . . facilitate public involvement in [its] legislative and other processes. . . and [those of] its committees'. FC s 118(1)*(a)* imposes a similar obligation on the provincial legislatures.[133]

At the outset, Ngcobo J, writing for the majority, addressed the issue of separation of powers, noting that this principle is one of the essential features of South African democracy.[134] While the courts must observe the constitutional limits of their authority, and not interfere in the processes of other branches of government unless so mandated by the Final Constitution,[135] the Final Constitution is the supreme law and binds all branches of government, including Parliament.[136] Accordingly, the Court has the power and responsibility to ensure that Parliament fulfils its constitutional obligations: it would require clear language in the Final Constitution to deprive the Court of this power.[137]

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128 *Doctors for Life* (supra) and *Matatiele II* (supra).

129 Act 38 of 2004

130 Act 3 of 2005.

131 Act 35 of 2004.

132 Act 24 of 2004.

133 Ngcobo J delivered the judgment of the majority. Sachs J filed a separate concurring judgment, and Yacoob J (with the concurrence of Skweyiya J) and Van der Westhuizen J filed dissenting judgments.

134 *Doctors for Life* (supra) at para 36.

135 Ibid at para 37.

136 Ibid at para 38.

Ngcobo J considered the right to political participation under international law and foreign law. He concluded that, under international law,[138] while the right can be achieved in many ways, it 'does not require less of a government than provision for meaningful exercise of choice in some form of electoral process and public participation in the law-making process by permitting public debate and dialogue with elected representatives'.[139] Ngcobo J held that the duty to facilitate public involvement in the legislative process under the Final Constitution must be understood as a manifestation of the international law right to political participation. Under the Final Constitution, he explained, the right to political participation is given effect to not only through FC s 19, as supported by the right to freedom of expression, 'but also by imposing a constitutional obligation on legislatures to facilitate public participation in the law-making process'.[140] This public involvement in the legislative process, noted Ngcobo J, is a more specific form of political participation than that provided for by art 25 of the ICCPR, which provides for participation in the conduct of 'public affairs' more generally.[141]

As a backdrop to his consideration of the content of the right to public involvement in the law-making process, Ngcobo J for the majority espoused the Court's own principle of democracy:

> The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.[142]

Ngcobo J went on to consider by what standard to test the state's obligations to facilitate public involvement in the law-making process. He emphasized that Parliament will have considerable discretion in determining how best to fulfil its duty

to facilitate public involvement.[143] He concluded, however, that a legislature must act *reasonably* in discharging its duty to facilitate public involvement in the law-making process.[144] In determining whether a legislature has acted reasonably, relevant factors will include: the nature and importance of the legislation and the intensity of its impact on the public; practicalities such as time and expense, which

137 Ibid.

138 Ibid at paras 90-106. See § 45.2*(d)* and *(e)* infra for a more detailed consideration of international law and foreign law.

139 Ibid at para 106.

140 Ibid at para 106.

141 Ibid at para 107.

142 Ibid at para 121.

143 *Doctors for Life* (supra) at paras 122-24.

144 Ibid at paras 125-26.

relate to the efficiency of the law-making process; [145] and rules, if any, adopted by the legislature to facilitate public involvement.[146] However, practicalities alone will not justify failure to involve the public.[147] In evaluating the reasonableness of the conduct of a legislature, the Court will nevertheless pay particular attention to what the particular legislature considers reasonable.[148]

Ngcobo J held that there are two aspects to the constitutional duty of legislatures to take reasonable steps to facilitate public involvement: first, 'the duty to provide meaningful opportunities for public participation in the law-making process'; and, secondly, 'the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided'.[149] This second, broader requirement has at its core public education and other such measures.[150] The purpose of such measures is to 'create conditions . . . conducive to the effective exercise of the right to participate in the law-making process.'[151] Ngcobo J discussed the various practical means of providing opportunities for public participation: he observed that the conventional methods are the submission of written or oral representations,[152] and held that public participation can be achieved through either method.[153] Again, the ultimate question is whether what the legislature has done is reasonable in the circumstances.[154]

On the facts, Ngcobo J found that the NCOP had failed to discharge its constitutional duty to facilitate public involvement in respect of the Choice on Termination of Pregnancy Amendment Bill[155] and the Traditional Health Practitioners Bill,[156] but that it had discharged its obligations in respect of the Dental Technicians

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145 Ibid at para 128 and para 146.

146 Ibid at para 146.

147 Ibid

148 Ibid

149 Ibid at para 129.

150 Ibid at paras 130-34.

151 Ibid at para 132.

152 Ibid at para 142.

153 Ibid at para 144.

154 Ibid at para 146.

155 Ibid at para 189.

156 Ibid at para 181.

Amendment Bill.[157] The basis for the finding of breach concerning two of the Bills was that the NCOP had decided that public hearings should be held in relation to the two Bills, and that they should be held in the provinces, but that neither the NCOP nor a majority of the provinces had in fact held the promised hearings.[158]

In considering the remedy, Ngcobo J held that the obligation to facilitate public involvement is a manner and form requirement of the law-making process. Non-compliance renders the resulting legislation invalid.[159] However, he suspended the Court's order of invalidity for eighteen months to enable Parliament to re-enact the impugned legislation by following the correct procedure.[160] Ngcobo J further adopted a restrictive approach to standing. He held that there are two extraordinary standing requirements for such an application to be heard: first, the applicant must have sought and been denied an opportunity to be heard on the relevant Bills; and, secondly, the applicant must have launched the application as soon as practicable after the Bills had been promulgated.[161]

Yacoob J dissented.[162] He held, for largely textual reasons, that 'public involvement' does not mean 'public participation'.[163] Moreover, he reasoned that the Final Constitution does not require public involvement as a requirement for valid enactment of legislation;[164] that to infer such a requirement when it is not expressly provided for would impermissibly undermine the legislature and the right to vote;[165] and that, in the circumstances, the failure to hold public hearings 'though regrettable [was] of no constitutional moment'.[166] Van der Westhuizen J's dissenting judgment held that public involvement is not a constitutional requirement for passing legislation. His judgment tracked the logic of Yacoob J's dissent.[167] Separation of powers concerns feature strongly in both dissenting judgments.[168]

157 Ibid at para 192.

158 Ibid at para 193.

159 *Doctors for Life* (supra) at para 209.

160 Ibid at para 214.

161 Ibid at para 216.

162 Skweyiya J concurred in the judgment of Yacoob J.

163 Ibid at para 308.

164 Ibid at paras 317-20.

165 Ibid at paras 338-39.

166 Ibid.

167 Ibid at paras 241-245.

168 Ibid at para 244(7) (Van der Westhuizen J) and at para 338 (Yacoob J).

In the judgment of Sachs J, who concurred in the majority judgment, the separation of powers doctrine sounds a central theme. Despite his concurrence, Sachs J called for caution:

> New jurisprudential ground is being tilled. Both the separation (and intertwining) of powers in our Constitution, and the notions underlying our participatory democracy, alert one to the need for a measured and appropriate judicial response. I would prefer to leave the way open for incremental evolution on a case by case [basis] in future. . . . I fear the virtues of participatory democracy risk being undermined if the result of automatic invalidation is that relatively minor breaches of the duty to facilitate public involvement produce a manifestly disproportionate impact on the legislative process.[169]

In *Matatiele II*, which was delivered the day after *Doctors for Life*, Ngcobo J again delivered the majority judgment. The majority essentially applyied the principles established in *Doctors for Life* to the facts of *Matatiele II*. *Matatiele II* concerned a constitutional challenge to the Constitution Twelfth Amendment Act[170] and the

Cross-boundary Municipalities Laws Repeal and Related Matters Act.[171] The constitutional amendment and the related act had the effect of re-demarcating the boundary of the municipality of Matatiele so as to transfer it from KwaZulu-Natal to the Eastern Cape. Ngcobo J affirmed the ratio of *Doctors for Life*: legislatures must take reasonable steps to facilitate public involvement in the law-making process.[172] Ngcobo J found on the facts that, although the Eastern Cape legislature had discharged its obligations by holding public consultations, the KwaZulu-Natal legislature had failed to do so.[173] He declared invalid the offending legislation, but suspended the order of invalidity for eighteen months.[174] Skweyiya, van der Westhuizen and Yacoob JJ filed separate dissenting judgments that reaffirmed the dissenting position they had adopted in *Doctors for Life*.

It is clear from these two cases, therefore, that South African democracy has a participatory dimension. Out of this broad right to political participation some justiciable rights arise. One segment of this broad right consists of the political rights in FC s 19. Another is the duty of legislatures to take reasonable steps to facilitate public involvement in the law-making process.

45.7 Structure of FC s 19

FC s 19, whilst forming part of the broad right to political participation, is itself divided into three subsections, each of which deals with a separate category of

169 Ibid at para 239.

170 Constitution Twelfth Amendment Act of 2005.

171 Act 23 of 2005.

172 *Matatiele II* (supra) at para 50.

173 Ibid at paras 83-84.

174 Ibid at para 114.

political rights: the freedom to make independent political choices, the right to free and fair elections, and the right to vote and run for elective office. It is significant that the first two rights are granted to 'every citizen', while the third is granted to 'every adult citizen'. Not only does this mean that only adult citizens may vote, but it makes explicit that the freedom to make independent political choices and the guarantee of free and fair elections are a constitutional right of every South African citizen, regardless of age.[175] As such, the text of FC s 19 makes political freedom and the entitlement to live in the particular type of constitutional democracy created by the Final Constitution core components of South African citizenship.

In addition, where a case does not neatly fit into any one of these categories, the Constitutional Court has shown a willingness to resort to FC s 19 as a whole, bolstering its interpretation by reference to the founding values in FC s 1*(d)* and the principle of democracy. In *African Christian Democratic Party*, for example, the Court held that FC s 1*(d)* and FC s 19 mean that electoral statutes, where ambiguous, should be interpreted in favour of enfranchisement and against disenfranchisement.[176] In *Doctors for Life* and *Matatiele II*, the Court, having considered

various provisions, including FC s 19 and FC s 1*(d)*, concluded that South African democracy has both representative and participatory dimensions. Against this background, the Court relied on the provisions of the Final Constitution that require legislatures to facilitate public involvement in the law-making process and held that the legislatures have a duty to take reasonable steps to do so.[177]

One possible challenge that might not fit neatly under any one of the subsections of FC s 19 is a challenge to the requirement that a deposit be paid by parties wishing to contest an election. Requiring the payment of a deposit for electoral participation constitutes a baseline property or wealth qualification and thereby infringes FC s 19 as a whole, especially when read together with the principle of democracy established in *Doctors for Life* and *Matatiele II*. However, in *African Christian Democratic Party*, the Court delivered an *obiter dictum* that appears to endorse the requirement of a deposit, noting that it ensures that the participation of political parties in elections is not frivolous, and that the payment of a deposit complements the duty to inform the electoral authorities of the party's intention to participate and of the details of its candidates.[178] Nevertheless, if a political party were able to show that its participation in an election was not frivolous and that it had complied with the other procedural requirements, such as furnishing the prescribed notifications and information, it might have some prospects of success in a challenge to the deposit requirement. While the currently prescribed deposit for local government elections is not unreasonably high, the total amount escalates according to the number of municipalities contested. This escalation of fees may be prohibitive for new or emerging parties.

175 *New National Party* (supra) at para 12.

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

177 *Doctors for Life* (supra) at paras 125-126; *Matatiele II* (supra) at para 50.

178 *African Christian Democratic Party* (supra) at para 31.

45.8 FC s 19(1): The freedom to make political choices[179]

The purpose of FC s 19(1) is to ensure that citizens are able freely to align themselves with the political cause or party of their choice without fear of adverse consequences. As such, FC s 19(1) is essentially a freedom right and a special political species of the rights to equality, freedom of expression, belief, opinion, assembly and association.

Anticipating that the freedom to make independent political choices may be infringed in the workplace, FC s 197(3) stipulates that no employee of the public service 'may be favoured or prejudiced only because that person supports a particular political party or cause.' The Labour Relations Act also aims to protect employees from being forced to toe a certain political line. In terms of s 186 of the Act, a dismissal is automatically unfair if the employer unfairly discriminated against an employee on the basis of political opinion. Section 26(3) of the LRA provides that a closed shop agreement is only binding if no amount of the

worker's salary is deducted to benefit a political party or contributed to the campaigning costs of a candidate standing for political office.[180]

In *IDASA*, the applicants sought to establish the principle that political parties, or at least those holding seats in the national, provincial or local government legislatures, are obliged in terms of FC s 32(1) (the right of access to information) and ss 11 and 50 of the Promotion of Access to Information Act (PAIA),[181] to disclose details of the substantial donations that they receive, on due and proper request to do so by any South African citizen. In support of the application, the applicants relied on FC s 19(1) and (2). FC s 19(1) and (2) guarantee the rights 'to make political choices' and to 'fair and regular elections' respectively. The High Court held that the respondent political parties were private, and not public, bodies for the purpose of a PAIA request for access to information.[182] Accordingly, the applicants had to show that they reasonably required the respondents' donation records in order to exercise or protect those particular rights.[183]

The applicants contended that the right 'to make political choices' entailed 'the right, in the first place, to choose between political parties'.[184] They argued further that, in order to exercise this choice, citizens require relevant information about a

179 The freedom to make political choices was protected by IC s 21(1).

180 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; C Cooper 'Labour Relations 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 53.

181 Act 2 of 2000.

182 *Institute for Democracy in South Africa & Others v African National Congress & Others* 2005 (5) SA 39 (C), 2005 (10) BCLR 995 (C)(*IDASA*) at para 32.

183 Ibid at para 33.

184 Ibid at para 42.

party, its policies and its finances. It was further contended on behalf of the applicants that an election is only 'fair' if the electorate can make informed choices. Implicit in these submissions is a deep conception of democracy, one in which citizens actively participate in and through the medium of political parties.

The High Court held that the applicants had failed to explain how the respondents' donation records would assist them to exercise or protect their rights in terms of FC s 19(1) and (2). It held that donor secrecy did not impugn any of the rights contained in either of these subsections. In doing so, the High Court adopted a narrow, literal interpretation of FC s 19(1) that holds that the provision was 'intended to prevent any restrictions being imposed on a citizen's right to make political choices, such as forming a political party, participating in the activities of and recruiting members for a party, and campaigning for a political cause.' This interpretation limits FC s 19(1) to the formal aspects of political activity by citizens. The High Court held further that 'the emphasis in section 19(2) lies upon the elections and the nature of the electoral process and not so much upon the persons or parties participating in those elections.'[185] This reasoning echoes the Constitutional Court's dictum in *UDM* that all the rights in FC s 19 'are directed

to elections, to voting and to participation in political activities [and that]. . . [b]etween elections . . . voters have no control over the conduct of their representatives.'[186]

The *IDASA* Court accordingly declined to interpret the right to make political choices, and FC s 19 as a whole, in accordance with a deliberative conception of democracy in which informed citizens actively engage in a genuine dialogue with their elected representatives and with the political parties campaigning for their votes.[187] Instead, the High Court adopted a check-box conception of the right to make political choices, limited to the formal, external choices in respect of forming a political party, participating in the (formal) activities of and recruiting members for a party, and campaigning for a political cause. There is much to be said for the contention that these acts are worth less (perhaps even worthless) if performed by an uninformed, disengaged citizenry. In *Doctors for Life*, Ngcobo J emphasized that '[p]ublic involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens.'[188]

(a) The right to form a political party

FC s 19(1) protects the right to form a political party and the freedom to determine the purpose and objectives of that party. The Electoral Commission Act makes provision for political parties to register.[189] In order to take part in an election, a political party must give the Electoral Commission notice of its intention to contest

185 Ibid at para 47.

186 *UDM* (supra) quoted in *IDASA* (supra) at para 49.

187 See S Bosch 'IDASA v ANC — An Opportunity Lost for Truly Promoting Access to Information' (2006) 123 *SALJ* 615 (Offers a useful criticism of the decision.)

188 *Doctors for Life* (supra) at para 131.

the election, provide the Commission with a party list, and pay a deposit via a bank guaranteed cheque.[190] The requirements for registration therefore pose no substantive barriers to a person wishing to form a political party. They are merely procedural. It is not even clear whether a political party has to be registered in terms of this Act. The objective of the provisions may simply be to enable the Electoral Commission to maintain a register of parties.

Access to the ballot is controlled in terms of the provisions of the Electoral Act. These provisions require parties wishing to participate in elections to register in terms of that Act.[191] The biggest restriction on access to the ballot remains the payment of a deposit, the amount of which is determined by the Electoral Commission. The deposit is forfeited if the party fails to secure at least one seat in the elections it is contesting. As discussed in § 45.7, a deposit, which has the effect of substantially limiting access to the ballot, may be regarded as a property qualification and therefore unconstitutional.

The requirement to pay a 'deposit' to contest elections was considered in *African Christian Democratic Party*. The applicant ('ACDP') sought leave to appeal against a decision of the Electoral Court refusing to interfere with a decision by the Electoral Commission to exclude it from contesting the local government elections in the Cape Town Metropolitan area. The Electoral Commission held that the ACDP had not complied with ss 14 and 17 of the Local Government: Municipal Electoral Act,[192] because it had failed to pay the prescribed deposit. The ACDP had made a bulk payment to the National Office of the Electoral Commission, as was permitted by the Electoral Commission, in respect of a list of municipalities which accompanied the payment. In error, the ACDP failed to include the Cape Town Metropolitan area on the list. After paying the bulk deposit, the ACDP decided not to contest seats in certain municipalities that appeared on the list. As a result, the Commission had surplus funds of R10 000 that were not specifically allocated as a deposit to any particular municipality. However, the ACDP failed to request that the Electoral Commission allocate a portion of the surplus to the Cape Town Metropolitan area. The Commission took the view that it had not received a deposit in respect of the Cape Town Metropolitan area and refused to allocate a portion of the surplus funds to that area. The Electoral Court upheld the Commission's view and dismissed the ACDP's complaint. The ACDP appealed to the Constitutional Court on the basis that it had paid the necessary deposit. The Electoral Commission opposed the appeal and contended that the ACDP had not.

O'Regan J, for the majority, held that, when interpreting electoral statutes, courts should seek to promote enfranchisement rather than disenfranchisement, within the limits of the interpretive exercise.[193] Adopting this approach, O'Regan J held that ss

189 See ss 15-17 of the Electoral Commission Act 41 of 1993.

190 See s 17 of the Local Government: Municipal Electoral Act 27 of 2000.

191 See ss 26-31 of the Electoral Act.

192 Act 27 of 2000.

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

14 and 17 did not prevent the Electoral Commission from establishing a central or 'bulk' payment facility.[194] O'Regan J concluded that the surplus paid by the ACDP constituted compliance with these provisions and that the ACDP had, therefore, already paid the requisite deposit. No condonation of non-compliance was in issue.[195] After determining that an order for the applicant would not disrupt the upcoming election,[196] O'Regan J made an order declaring that the ACDP was entitled to participate in the elections and directing the Commission to facilitate its participation.[197]

The decision is to be welcomed. Procedural requirements for participation in elections, such as the payment of a deposit, though important both for practical

purposes and to ensure that elections are, in fact, free and fair, should not overshadow the real purpose of elections: to provide citizens with an opportunity to participate directly, albeit periodically, in governance.

A further question is whether the Electoral Commission would be entitled to refuse to register a political party on the basis that its values, proposed policies or internal governance are unconstitutional. As noted above, the German Basic Law requires parties to be internally democratic and denies any protection to those that seek to undermine the constitutional state.[198] Section 16(1)*(c)* of the Electoral Act provides that the chief electoral officer may not register a party if the proposed name, symbols or the constitution or deed of foundation of the party contains anything propagating or inciting violence or hatred, or which causes serious offence to any section of the population on the grounds of race, gender, sex, or other listed grounds, or which indicates that persons will not be admitted to membership or welcomed as supporters on the grounds of their race, ethnic origin or colour. This statutory restriction is self-evidently a reasonable and justifiable limitation of the right to form a political party.

(b) The right to participate in the activities of a political party

194 Ibid at para 28.

195 Ibid at paras 33-34.

196 The Court stated that it must balance the disruption caused by the order and the fundamental importance of political rights. The closer the dispute to the date of the election, the more disruption such an order would cause.

197 Ibid at para 37. Skweyiya J dissented, holding that the ACDP had failed to comply with the mandatory requirement of paying the deposit, and that conferring a discretion on the Electoral Commission would threaten the integrity of the elections and the democratic process.

198 Article 21 [Political parties] of the Basic Law provides:

> (1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds. (2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality. (3) Details shall be regulated by federal laws.

The right to participate in the activities of a political party forms part of the freedom to make political choices and must be interpreted in this context. Just as the right to freedom of expression does not necessarily entitle a person to have his views published in the newspaper of his choice, FC s 19(1) does not entitle a person to participate in any particular activity of the party of her choice. In so far as the constitutions of the various political parties constrain members of political parties or other individuals from participating, FC s 19(1) will be of limited assistance. It will not enable applicants to challenge admission criteria or members to dispute intra-party decision-making mechanisms or disciplinary procedures. FC s 18, the freedom of association, is likely to form a more fertile constitutional basis for the review of admissions policies and expulsion proceedings.[199] Administrative law remedies, in particular judicial review, in terms of the Promotion of Administrative Justice Act,[200] read with the constitutional rights to equality and to

just administrative action,[201] may also provide a more fruitful basis to challenge such party procedures.

Section 9(2) of the Electoral Code prohibits the use of threats or rewards to prevail upon persons to participate in political activity. Section 108 of the Electoral Act criminalizes holding or taking part in political meetings, marches or demonstrations on voting day. It also provides that no political activity other than voting is allowed at a voting station on voting day. These limitations are clearly constitutional. By limiting political activities during and shortly before the voting period, the statutory provisions seek to protect the right freely to make a political choice.

(c) The right to campaign for a political party

(i) General

The citizen's right to campaign for a political party aims to prevent intimidation and other forms of interference with free political canvassing and campaigning. Section 87 of the Electoral Act makes it an offence to prevent reasonable access to voters and unlawfully to prevent the holding of political meetings, marches, demonstrations and other political events. In so far as political rights are violated by rival political parties, the Code of Conduct addresses the situation.[202] Every party and every candidate participating in an election must subscribe to the Code.[203] The Act confers extensive powers on courts to deal with political parties and candidates acting in breach of the Act, including the Code of Conduct.[204] Vicarious liability of political parties is not regulated by statute and parties are therefore liable for acts committed by their members only when facts are proved which give rise to such liability at common law.[205]

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199 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 (Contends that control over entrance, voice and exit are essential for the protection of associational rights, and that the case law supports the proposition that fair hearings are a necessary feature of most public associations.)

200 Act 3 of 2000.

201 The right to form a political party was protected by IC s 21(1)*(a)*.

It is unclear whether the right to campaign extends to the workplace. When trade unions engage in political activities it has to be kept in mind that, in terms of the Labour Relations Act, members of a trade union have the right to take part in

the legal activities of the union and the representatives of the union have the right of access to the employer's premises.[206] Employee protest actions to promote or to defend socio-economic interests of workers are also protected.[207]

(ii) State funding of political parties[208]

FC s 19(1) clearly implies that there may be no restrictions on citizens' rights to make financial or other contributions to political parties, unless such restrictions meet the requirements of the limitations clause. Since it forms part of a freedom right, the right to campaign does not entitle a political party to claim support from the state. However, FC s 236 provides that, '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'.

The Public Funding of Represented Political Parties Act gives effect to FC s 236.[209] The Act establishes a special fund, managed by the Electoral Commission, from which money is allocated from time to time to the political parties represented in the National Assembly and the provincial legislatures. The amount parties receive

202 See Schedule 2 of the 1998 Electoral Act. In terms of item 3*(c)* political parties are enjoined to take reasonable steps to prevent their members from contravening the Code or any other law. See *African National Congress v National Party (Independent Electoral Commission Intervening)* 1994 (4) SA 190 (ENC), 202. Kriek JP held, in respect of a similar provision of the 1993 Code, that this does not make the party responsible for all forms of illegal conduct perpetrated by party officials. In this case officials of the National Party unlawfully issued temporary voters' cards to 146 individuals in the Victoria West region. The court held that, as the National Party could not foresee the situation arising, its failure to warn its officials not to issue the cards was not unreasonable and no penalty was therefore imposed. Some of the provisions of the Electoral Act have an indirect bearing on the right to campaign for a political party by placing limitations on other fundamental rights. The right of political parties to freedom of expression is limited by s 9(1) of the Electoral Code. According to this section, false or defamatory remarks and the use of language which may lead to violence and intimidation are prohibited.

203 See Electoral Act s 99.

204 The penalties range from a warning to R200 000 fines to disqualification of candidates or even to the cancellation of the registration of a political party. See Electoral Act s 96.

205 *National Party v Jamie NO & Another* 1994 (3) SA 483 (EWC), 494; *Inkatha Freedom Party v African National Congress* 1994 (3) SA 578, 588 (EN). For a discussion of the liability of political parties at common law, see *Hamman v South West African People's Organisation* 1991 (1) SA 127 (SWA).

206 See LRA ss 4 and 12.

207 See LRA s 77.

208 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, 29-21.

209 See Act 103 of 1997.

depends on two considerations: the party's proportional number of seats and the principle of equity. The latter principle dictates that each represented party must receive a fixed minimum amount of money. The funds must be used for purposes compatible with the functioning of a political party in a modern democracy.

Unrepresented parties do not qualify for state funding. Since there is no constitutional entitlement to state funding, the exclusion of unrepresented parties does not violate FC s 19. However, the FC s 9(1) right to equal benefit of the law may form the basis for such a challenge.[210] FC s 9(1) requires that the differentiation between represented and unrepresented parties bear a rational connection to a legitimate government objective. The purpose of the Public Funding of

Represented Political Parties Act, and FC s 236, is to promote multi-party democracy. It is not clear why the achievement of this objective demands a differentiation between represented and unrepresented parties. An equality challenge is nevertheless unlikely to succeed for two reasons. First, the Public Funding of Represented Political Parties Act satisfies the requirement in FC s 236 that national legislation be enacted to regulate public funding of political parties. The legislation contemplated by FC s 236 is expressly required to provide for the funding of parties 'participating in national and provincial legislatures': that is, the parties actually represented in those bodies. Secondly, it could be argued that the differentiation between represented parties and unrepresented parties is not arbitrary since it is difficult to ascertain the support for unrepresented parties, and therefore the amount of state support that should be given to them.[211]

(iii) Political parties and the media

The right to campaign for a political party does not entitle the political party or an individual to access state-controlled media or privately owned media.[212] When a party is treated unfairly by the media, a challenge based on FC s 9, in conjunction with FC s 19, may be more sensible. During the 1994 elections the relationship between the media and the political parties was regulated by the Independent Media

210 The constitutional guarantee of equal opportunity for political parties is merely a special application of the FC s 9 general equality clause. Some constitutions have special clauses which protect equal opportunity for political participation. Article 33(1) of the German Basic Law guarantees equal political rights and duties to every German in every federal state. See S Woolman & J de Waal 'Freedom of Association: The Right to be We' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism* (1994) 374. For the position in the United Kingdom, see A Birch 'The Theory and Practice of Modern British Democracy' in J Jowell & D Oliver *The Changing Constitution* (2nd Edition, 1989) 98.

In a decision of the Zimbabwean Supreme Court — *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Others* 1998 (2) BCLR 224 (ZS) — a patently unfair system of funding political parties was held to violate the applicant party's right to freedom of speech. The statute provided that parties with less than fifteen elected members of Parliament were not entitled to any state funding at all. This threshold resulted in only one party, the majority party, qualifying for funding. In striking down the statute the court remarked that 'in poorer societies, where private funding is either not available or offers inadequate assistance, the inability to obtain state funding, because the qualification is set too high, causes a reduction of the effective freedom of expression of political parties'. Ibid at 237.

211 Section 74 of the Electoral Act 202 of 1993 provided that parties qualified for 50 per cent of an initial grant if they submitted a list of 10 000 signatures (of National Assembly voters) or 3 000 signatures (of provincial legislature voters). The full initial grant was given to parties that could show, with a poll based on scientific methods and evaluation, potential support of at least two per cent of voters. The latter provision led to disputes about the representativity and scientific nature of a poll. See *Workers International to Rebuild the Fourth International v IEC* 1994 (3) SA 277 (SPE).

Commission. This body was dissolved and the Independent Broadcasting Authority (IBA) took over its function to determine the duration of, and other issues pertaining to, party political broadcasts during the election period.[213] The IBA has since been replaced by the Independent Communications Authority of South Africa (ICASA).[214] The underlying principle remains that political parties must be treated equitably when the election is covered. For example, no broadcaster may be compelled to broadcast a political advertisement, but in making time available the broadcaster may not discriminate against a political party.

There are also statutory restrictions on publication during the period from the date on which an election is called to the date the result of the election is determined and declared. Section 107 of the Electoral Commission Act 51 of 1996 provides requirements in respect of any printed matter intending to affect the

outcome of an election.[215] No person may print, publish or distribute any printed matter or publication that does not comply with these requirements. This provision limits the right to freedom of expression, but this limitation is probably reasonable and justifiable in terms of FC s 36. The right of political parties to freedom of expression is also limited by s 9(1) of the Electoral Code, which prohibits false or defamatory remarks and the use of language which may lead to violence and intimidation. At common law, political bodies fall within the class of non-trading corporations that can sue for defamation.[216]

45.9 FC s 19(2): The right to free, fair and regular elections

The right to free, fair and regular elections in FC s 19(2) gives content and meaning to the right to vote.[217] As the Constitutional Court has held, 'the right to vote is

212 See, eg, Woolman & De Waal 'Freedom of Association' (supra) at 372 n152 for the position in Germany. Small parties receive less television time than the larger parties in Germany

213 The Independent Media Commission was established in terms of Act 148 of 1993. This Act, and therefore the Commission, ceased to exist when the Independent Electoral Commission was dissolved.

214 ICASA was established in terms of the Independent Communications Authority of South Africa Act 13 of 2000. Section 2 provides that one of the objects of the Act is to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by FC s 192. See J White 'Independent Communications Authority of South Africa (ICASA)' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskaslon & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24E.

215 Section 107 provides that any printed matter intending to affect the outcome of an election must state clearly the full name and address of the printer and publisher. The provision also requires the publisher of certain publications originating from political parties and related persons to head an article in that publication with the word "advertisement" if inserted in the publication on the promise of payment to the publication.

216 *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 600.

217 See N Steytler, J Murphy, P de Vos & M Rwelamira *Free and Fair Elections* (1993).

indispensable to, and empty without, the right to free and fair elections'.[218] Whereas FC s 19(3) guarantees the existence of the right to vote, FC s 19(2) obliges the government to make proper arrangements for its effective exercise. Read together, these subsections entitle every South African citizen to vote in a free and fair election.[219]

One essential ingredient for a free and fair election is the creation of an independent commission to manage the elections.[220] Such a commission has been established by the Electoral Commission Act.[221] The two main functions of the Electoral Commission are to manage elections of national, provincial and municipal legislative bodies and to ensure that those elections are free and fair.[222] As far as the management of the elections is concerned, the role of the Commission is not merely supervisory.[223] Rather, its functions 'relate to an active, involved and detailed management obligation over a wide terrain'.[224] Moreover, the Commission is solely responsible for organizing elections. It must of course do so in terms of legislation and the Final Constitution,[225] but the Electoral Commission is not

part of any government department. As with other Chapter 9 Institutions — state institutions supporting constitutional democracy — its independence is entrenched under FC s 181(2).[226] Although accountable to the National Assembly,[227] the Final Constitution requires the Electoral Commission to perform its functions impartially.

The existing legislative framework within which the Electoral Commission operates may not fully protect the independent functioning of the Commission. First,

218 *New National Party* (supra) at para 12.

219 As the Constitutional Court observed in *New National Party*, the right to free, fair and regular elections is guaranteed to all South African citizens irrespective of their age. *New National Party* (supra) at para 12.

220 Ibid at para 16.

221 Act 51 of 1996.

222 It goes without saying that if the independence of the Commission — and therefore FC s 19(2) — is undermined, then any individual has standing to approach a court for appropriate relief, including a declaration of rights, even if the Commission itself does not seek or even oppose such an application. See § 45.4 supra, on standing.

223 *New National Party* (supra) at para 76.

224 Ibid.

225 The fact that it is responsible for running the elections does not entitle it to write the electoral laws. That is the function of Parliament and not the Commission. If legislation infringes the independence of the Commission, it may of course be challenged.

226 See Electoral Commission Act s 3.

227 See FC s 181.

there appears to be a lack of 'financial independence'.[228] The Commission must be afforded an adequate opportunity to defend its budgetary requirements before Parliament and must then have the ability to access funds allocated to it in order to discharge its functions.[229] No member of the executive should have the power to stop transfers of money to an independent institution such as the Electoral Commission without the existence of appropriate safeguards for the independence of the institution. Secondly, there may be problems with the 'administrative independence' of the Commission. The Commission must retain operational control over the functions it is required to perform. No state department may tell the Commission how to perform functions such as the registration of voters. However, if the Commission asks the government for assistance, then it must be provided.[230]

If the management of the election by an independent commission is an essential ingredient of a free and fair election, it follows that legislation and government conduct which undermine the independence of the Commission violate the FC s 19(2) right to free and fair elections. But not every failure of the government to assist the Commission undermines its independence. In many cases the Commission will be able to resist interference with its independence. For example, in *New National Party*, the NNP sought declaratory relief in consequence of actions by the government which allegedly interfered with the independence of the Commission. Despite holding that the government failed to appreciate the true import of FC ss 181 and 190, which provide for the independence of the Commission and require that all organs of state must assist and protect the Commission to ensure its independence and effectiveness,[231] the Constitutional Court refused to grant relief on the basis that the applicant lacked standing to rely on these sections of the Final Constitution.[232] Implicit in the Court's finding was the view that FC s 19(2) was not violated since the Commission managed to assert its independence

without resort to the courts.[233] Individuals, even political parties, will seldom persuade the courts to interfere in disputes between organs of state in the absence of an allegation that a fundamental right is infringed or threatened, since the

228 For more on the absence of financial independence of Chapter 9 Institutions generally, and the ability of government to undercut their respective mandates, see S Woolman & J Soweto-Aullo 'Commission for the Promotion and the Protection of the Rights of Religious, Linguistic and Cultural 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.

229 *New National Party* (supra) at para 98.

230 Ibid at para 99.

231 Ibid at para 100.

232 Ibid at paras 106-107.

233 See *Sithole & Others v Minister of Justice & Others* 2000 (1) ZLR 246 (HC). The applicants sought to set aside the appointment of the Registrar-General on the grounds of previously demonstrated bias, partiality and lack of transparency and because he had an interest in the outcome of the referendum, since the draft constitution would abolish his office. The application ultimately failed on the basis that the President ought to have been cited in the application, as it was the exercise of the President's power to appoint the Registrar-General that was in issue.

principles of cooperative government — and, in particular, FC s 41(3) — envisage that intergovernmental disputes must be resolved through other means.

While it is a necessary ingredient, the existence of an independent Electoral Commission is, in itself, not sufficient to secure free and fair elections. According to the Constitutional Court, the requirement of 'fairness' has at least two further implications. The first is that each citizen must not be allowed to vote more than once in the elections, and the second is that any person not entitled to vote must not be permitted to do so. Regulation of the exercise of the right to vote is therefore necessary to ensure a free and fair election.[234] The Final Constitution recognizes the necessity of such regulation by requiring a properly functioning voters' roll.[235] Registration on the voters' roll must be viewed in this context. According to the Court, it is a constitutional requirement to vote and not a limitation of the right to vote.[236] The same applies to the provisions of the Electoral Act that govern proof of identity. Some form of easy and reliable identification is necessary to facilitate the process of registration and voting. The legislature is obliged to make provision for such a form of identification in order to ensure the fairness of the elections. As was discussed above, the majority of the *New National Party* Court held that legislative regulation of the exercise of the right to vote will not be unconstitutional as long as the provision is rationally related to a legitimate government purpose. In our view, the standard of reasonableness advocated by O'Regan J in her dissenting judgment is more appropriate. FC s 19 is of signal importance to South Africa's constitutional democracy and abridgements of its requirements ought to be subject to more searching analysis on the part of our courts.

While individuals may of course challenge legislation and state conduct which undermines their right to free and fair elections, it may sometimes prove difficult to find an appropriate remedy for a violation of FC s 19(2). The most intrusive remedy, setting aside the results of an election, seems to be available only when the effect of the unconstitutional law or conduct outweighs the effect of the mechanisms meant to ensure that the election is free and fair.[237] Individuals and political parties wishing to enforce the right to free and fair elections should therefore act timeously, ensuring that violations can be remedied through

interdicts or other appropriate forms of relief.[238] As far as the regularity of elections is concerned, the Final Constitution determines the duration of the National Assembly, provincial legislatures and municipal councils in FC ss 49, 108 and 159 respectively.[239]

45.10 FC s 19(3): The active and passive right to vote

234 *New National Party II* (supra) at para 12.

235 See FC ss 1*(d)*, 46(1), 105(1) and 157(5).

236 *New National Party II* (supra) at para 15.

237 See *DTA of Namibia v Prime Minister of the Republic of Namibia* 1996 (3) BCLR 310 (NmH). See § 45.5*(c)* supra.

238 See § 45.5*(c)* supra, on remedies.

(a) The right to vote, the electoral system and the mandate of representatives

(i) General

Many of the constitutional provisions applicable to elections since the first democratic elections in 1994 have expired and been replaced by other provisions and by way of a detailed matrix of saving and suspending provisions in the Interim Constitution and Final Constitution.[240] The constitutional and statutory framework for elections is now far less complex.

FC s 46(1) provides that the electoral system is prescribed by national legislation, is based on a common voters' roll, with a minimum voting age of 18 years, and results, in general, in proportional representation. FC s 105(1) provides the same in respect of provincial elections.[241]

In this electoral system, the electorate has no choice between candidates, only between parties. Each party creates a candidate list from which representatives are installed into office in accordance with the proportion of the vote which that party received in the election. The electorate is not given a formal role in the selection of names on the candidate list or the determination of the order in which the names appear. This selection process is left solely to the discretion

of the party. And parties have used very different methods to create and to order their party lists.[242]

The election of members to municipal councils must be in accordance with national legislation. This system — now provided for in the Local Government:

239 The Assembly and the provincial legislatures may be dissolved before their expiry date in the circumstances envisaged in FC ss 50 and 109. If the Final Constitution is amended to extend the life of a legislative body, the right to regular elections may be impaired. The requirements for amending FC s 19 will then have to be met. It is slightly more difficult to amend the Bill of Rights than the other provisions of the Constitution. See FC s 74.

240 In respect of the first election of the National Assembly under the Final Constitution (held in 1999), the Final Constitution saved the provisions of the Interim Constitution, which therefore applied to that election despite the repeal of the Interim Constitution. At the same time, FC s 50(1) was suspended until the second election of the National Assembly under the Final Constitution. In addition, Schedule 2 of the Interim Constitution applied to the filling of vacancies in the legislatures until the second election of the National Assembly under the Final Constitution. As amended, Schedule 2 provides that the next available person on the list of the party which nominated the vacating member shall fill the vacant seat. FC s 47(4), which foresees national legislation to deal with this issue, was explicitly suspended by FC Schedule 6, item 6(4), until after the second election under the Final Constitution. Those saving and suspending provisions are no longer applicable.

241 However, FC Schedule 6, item 6 provided that the first election of the National Assembly and the provincial legislatures would take place in accordance with IC Schedule 2, as amended by Annexure A to Schedule 6 of the Final Constitution. Schedule 2, as amended, essentially provides for a list system of proportional representation for the election of both the National Assembly and the provincial legislatures. For example, in respect of the National Assembly, items 1 and 3 of the Schedule provide that the parties shall nominate candidates and must do so by submitting regional and national lists or only regional lists.

242 See P de Vos 'South Africa's Experience with Proportional Representation' in J de Ville & N Steytler *Voting in 1999: Choosing an Electoral System* (1996) 29.

Municipal Structures Act[243] — must provide for the list system of proportional representation or a combination of lists and ward representation.[244]

(ii) The mandate of representatives and loss of membership

As far as the mandate of representatives is concerned, FC s 47(3) provides that a person loses membership in the National Assembly if at any time that person fails to meet the eligibility requirements in FC s 47(1) or is absent from the Assembly without permission in contravention of the established rules of the legislature. Similar provisions regulate the loss of membership and the filling of vacancies in the provincial legislatures.[245] Schedule 6, item 6 provides that Schedule 2 of the Interim Constitution[246] applied to the loss of membership and the filling of vacancies in the National Assembly until the second election of the Assembly under the Final Constitution. Schedule 2 of the Interim Constitution was then amended by the insertion of item 23A, which introduced an additional ground for the loss of membership of a legislature in circumstances other than those provided for in FC ss 47(3) and 106(3). As item 6(3) of Schedule 6 provides that Annexure A applied only until the second election of the National Assembly under the Final Constitution, the anti-defection provision in item 23A and the power to amend that provision within a reasonable period had a maxim lifespan ending in September 2004, the latest date by which the second election under the Final Constitution had to be held.

The additional ground for loss of membership introduced by item 23A was that a representative loses membership of a legislature to which the Schedule applies if that person ceases to be a member of the party which nominated him or her as a member of the legislature.[247] However, Schedule 2, as amended by item 23A(3), provided that an Act of Parliament could be passed, within a reasonable period after the Final Constitution took effect, to provide for a manner in which it would be possible for a member who ceased to be a member of the party which nominated him or her to retain membership of a legislature.

Parliament passed such a law in 2002, entitled the Loss or Retention of Membership of National or Provincial Legislatures Act 22 of 2002 ('the Membership Act'), which provided for a limited system of floor-crossing in the national and provincial legislatures. In *UDM*, the Constitutional Court declared the Membership Act invalid because it was not passed within a reasonable time after the adoption of amendment 23A(3) to Schedule 2.

243 Act 117 of 1998. See s 22 and Schedule 1 of the Act.

244 See FC s 157.

245 See FC s 106(3) and (4).

246 As amended by Annexure A to Schedule 6 of the Final Constitution.

247 Legally speaking, the constitutional provisions do not preclude a Member of Parliament or a member of a provincial legislature from criticizing his or her party or even from voting across party lines. Cf H Steinberger 'Political Representation in Germany' in P Kirchhof & D Kommers (eds) *Germany and its Basic Law* (1993) 126. In practice, however, the extent to which an MP or MPL will be able to differ from the 'party line' will depend on whether parties can expel such members and the extent of control courts will exercise over disciplinary procedures in terms of FC s 33 (the right to just administrative action).

Parliament was nevertheless able to introduce the amendments originally contained in the Membership Act by way of a constitutional amendment. Republic of South Africa Amendment Act 2 of 2003 repealed the Membership Act and introduced a new Schedule 6A of the Final Constitution. The new Schedule introduces the amendments attempted by the Membership Act and provides for floor-crossing in national and provincial legislatures. In most instances, floor-crossing is subject to a window-period and 10 per cent threshold requirements.

In *UDM*, the Court also considered the First Amendment Act[248] which allowed floor-crossing in local governments during two fifteen-day periods in the second and fourth year after an election and the accompanying Local Government Amendment Act,[249] which reconciled the Amendment with already existing legislation. Under the First Amendment Act, 10 per cent of the representatives of a party must disaffect from that party in order for the floor-crossing to be legitimate. The legislature waived this requirement for the first fifteen-day period in order to accommodate the break-up of the Democratic Alliance. The *UDM* Court heard a multi-pronged challenge from the applicant. It rejected every argument put forth. Perhaps, the most important of these rejections were the Court's conclusions that floor-crossing did not interfere with the founding values or basic structure of the Final Constitution[250] and was not inconsistent with the provisions of FC s 19(3).[251] The *UDM* Court held that FC s 19(3) is agnostic with regard to the constitutionality of floor-crossing:

> [T]he 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.[252]

Lastly, the Court applied a rationality test to ensure that the floor-crossing provisions were consistent with the rule of law.[253] It found that having two fifteen-day periods in between election cycles and a 10 per cent minimum to allow a cross-over permitted some cross-over flexibility while still promoting stability,[254] and that the provision excluding application of the 10 per cent minimum from the first cross-over period was a rational response to the dissolution of the Democratic Alliance.[255]

248 Constitution of the Republic of South Africa Amendment Act 18 of 2002 ('Constitution First Amendment Act').

249 The Local Government: Municipal Structures Amendment Act 20 of 2002 ('Local Government Amendment Act').

250 *UDM* (supra) at paras 15-17.

251 Ibid at para 49.

252 Ibid.

253 Ibid at para 55.

254 Ibid at para 69.

255 Ibid at para 70.

(iii) Proportional representation

The only remaining constitutional requirements of significance as far as the electoral system is concerned are the provisions which require, in general, proportional representation.[256] The entrenchment of proportional representation is difficult to reconcile with the traditional approach to the interpretation of political rights. It is normally accepted that political rights may be realized within a variety of electoral systems. All electoral systems have advantages and disadvantages.[257] Judiciaries around the world have therefore seldom interfered with a legislative preference for a particular electoral system.[258] The entrenchment of proportional representation, however, places limits on the ability of South African legislatures to experiment with different types of electoral system. It therefore becomes necessary to delineate the boundaries of legislative discretion in this area. The central feature of proportional representation, which may not be abrogated, lies in the notion that votes should count substantively the same. In other words, in contrast to majoritarian or pluralistic systems, proportional representation means that all votes are equal and no votes are wasted.[259] There are many alternatives to

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256 See FC s 46(1)*(d)* (National Assembly); FC s 106(1)*(d)* (provincial legislatures). A somewhat stricter requirement of proportionality, it seems, applies to municipal councils in FC s 157(3).

257 See, eg, K Asmal & J de Ville 'An Electoral System for South Africa' in N Steytler, J Murphy, P de Vos & M Rwelamira (ed) *Free and Fair Elections* (1993); D Horowitz *A Democratic South Africa? Constitutional Engineering in a Divided Society* (1991); A Reynolds *Voting for a New South Africa* (1993). Commentators often do not mention one of the central shortcomings of the list system of proportional representation: since party bureaucrats acquire decisive powers, the system makes it possible for party elites to 'fix' results. Thus, whether or not such 'deals' were made in the first South African election, the list system lends itself to this sort of abuse more than the other systems of political representation.

258 The European Commission has rejected an argument that electoral rights necessarily translate into a system of proportional representation. See Application 7140/75, 7 Eur Comm'n HR 95, 97 (1977).

259 See *Louw v Matjila & Others* 1995 (11) BCLR 1476 (W). The High Court considered the meaning of proportional representation. The court held that the real question was whether an election yielded a result which was broadly proportional to the interests of those who participated therein in the sense that it could be demonstrated that the results were representative of the society whose interests were intended to be served by the election. The underlying purpose of a system of proportional representation, the court said, is to ensure the equitable representation of minorities in the organs of government. Ibid at 1482. The Local Government Transition Act 209 of 1993 displayed a commitment to accommodate as effectively as possible the diversity of South African society. The intention was that organs of government would be as inclusive and representative as possible at all levels. Turning to the facts of the case, the court held that the procedure adopted for the election of members to the executive council of the Transitional Metropolitan Council of Johannesburg was plainly defective. The respondents not only failed to comply with any recognized system of proportional representation but in fact failed to demonstrate the nature of the system which they sought to rely upon. But, as the invalidation of the election would cause great inconvenience, the court merely made a declaratory order for the guidance of future elections. The plaintiff was awarded costs.

In *Democratic Party v Miller*, the High Court invalidated reg 74(5) of the Local Government Election Regulations 28 of 1996 in Kwazulu-Natal. 1997 (1) SA 758 (D), 1997 (2) BCLR 223 (D). The regulation provided that if a party list contained fewer candidates than the proportional share the party was entitled to, the party would forfeit its entitlement to representation. The court held that 'once a vote is cast it is to be counted for purposes of determining the proportional representation quota . . . that is consistent with the fundamental right to vote accorded to every citizen in terms of s 21(2) of the [interim] Constitution. Any legislation which detracts from this or results in a distortion of the voting falls to be struck down as inconsistent with both the fundamental right to vote and the principle that the election is to be conducted democratically.' Ibid at 226.

the present electoral system which will meet this criterion. The list system of proportional representation is therefore not immune from constitutional reform.

Nonetheless, the Constitutional Court has made it clear that it will police closely the bounds of any reform of the electoral system, at least in the context of provincial constitution-making. In a proposed provincial constitution, the Western Cape legislature provided for an electoral system that expressed a form of proportional representation: however, its proposed proportional representation system divided the province into a number of geographic multi-member constituencies. In *Ex parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Province of the Province of the Western Cape*, the Constitutional Court found this system to be inconsistent with the Final Constitution.[260] The Court reasoned that such a form of proportional representation was inconsistent with the single list system provided for in Schedule 6 of the Final Constitution read with Schedule 2 of the Interim Constitution.[261] Further, the electoral system did not qualify as a legislative structure and thus could not fall within the scope of the permissible deviation allowed by FC s 143(1)*(a)*.[262]

The courts have also considered the extent and applicability of the requirement of proportionality in two further cases. In *Democratic Alliance v ANC & Others*,[263] the

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In *Crowther & Andere v Plaaslike Oorgangsraad v Bethlehem & Andere,* the High Court was less forgiving and the election of the executive committee of a transitional local council was set aside. 1997 (8) BCLR 1011 (O). The court held that s 16(6) of the Local Government Transition Act, as amended, dictated that if a transitional local council chose to elect an executive committee, it had to do so in accordance with a system of proportional representation. In other words, the provision was peremptory. The court found the respondent's method of election, which amounted to a majority vote, to be inconsistent with the statutory requirement of proportional representation. The fact that the transitional local council described the system as one of proportional representation was irrelevant, as was the fact that the result of the election might have brought about a measure of proportional representation.

A disproportionate result was, however, the crucial consideration in the invalidation by the High Court of the election of an executive committee in *Nasionale Party in die Oos-Kaap & 'n Ander v Port Elizabeth Oorgangsraad & Andere.* 1998 (2) BCLR 141 (SE). The court disagreed with the approach in *Louw v Matjila* to the extent that it permitted a result which was merely 'broadly proportional to the interests of those who participated' in the election. According to the court, a stricter approach was necessary. In any event, a distortion that allowed a political party to obtain a two-thirds majority on the executive committee, the majority needed for decisions of the committee, in circumstances where the same party did not have a two-thirds majority on the transitional council, was unacceptable.

260 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC)('*Western Cape, First Certification Judgment*'). For more on this judgment, and on provincial constitutions generally, see S Woolman 'Provincial Constitutions' 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 21.

261 Ibid at paras 43 and 46. The Court apparently saw the inconsistency deriving solely from the operation of the transitional provisions of Schedule 6. Ibid at para 43 n69. It thus remains possible that geographic multi-member constituencies are consistent with the Final Constitution's command for in general proportional representation. Ibid at paras 45 and 47-49.

262 *Western Cape, First Certification Judgment* (supra) at paras 45 and 47-49. For more on this aspect of the judgment, see S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005)

263 2003 (1) BCLR 25 (C).

Cape High Court was asked to decide whether FC s 160(8) requires the party-political composition of a municipal council's committees, including the executive

committee, to be proportional to the parties' support in the council. FC s 160(8) requires that members of a municipal council are entitled to participate in the proceedings of the council and its committees in a manner that must be 'consistent with democracy'. FC s 160(8) makes no explicit requirement of proportional representation. The High Court, seemingly heavily influenced by the decision in *UDM* delivered shortly before, remarked that, due to the political sensitivity of the case, a high degree of judicial deference was necessary.[264] The court ultimately held that 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.

A similar issue arose in *Democratic Alliance & Another v Masondo NO & Another*.[265] *Masondo* concerned the question as to whether FC s 160(8) applied to mayoral committees. The majority of the *Masondo* Court held that these bodies are executive in nature, not legislative, and therefore that the requirement of participation 'consistent with democracy' was not applicable. However, Sachs and O'Regan JJ issued separate dissenting judgments. They wrote that mayoral committees are mixed executive and legislative bodies that *do* implicate the democracy requirement in FC s 160(8). By deciding that FC s 160(8) did not apply, Sachs and O'Regan JJ contended, the majority had failed to indicate what sort of minority party participation will be 'consistent with democracy'.

(b) The active right to vote

The active right to vote is protected by FC s 19(3).[266] The right may not be transferred. No duty to vote may be derived from FC s 19, but the introduction of such a duty by statute will not necessarily be unconstitutional.[267] Section 87 of the Electoral Act prohibits undue influence in respect of other persons registering to vote, voting, voting for particular candidates, and associated conduct.

(i) Equal voting rights

As the Constitutional Court has stated, most electoral laws have the potential directly or indirectly to affect different categories of people in different ways: by reason of where they live, their standard of literacy or political beliefs.[268] In South Africa, the anti-discrimination provision does not require applicants to show that such laws intentionally discriminate against them, but merely that the law affects a

264 *Democratic Alliance v ANC* (supra) at 41B-F.

265 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC).

266 The right to vote was protected by IC s 21(2). The franchise is also protected in FC s 1. When it comes to amendment of the Final Constitution, FC s 1 may be of significance. In terms of FC s 74, FC s 1 requires a higher majority of the National Assembly to amend than FC s 19, and, to the extent that the two provisions correspond, the higher degree of entrenchment also extends to FC s 19.

267 See Maunz-Dürig-Herzog's *Grundgesetz Kommentar* (1991)(Commentary on art 38 of the Basic Law.)

listed or analogous group negatively and results in unfair discrimination against them.[269] A violation of FC s 9(3) may nevertheless be difficult to show

since the Constitutional Court appears to require proof that the law in itself resulted in fewer people of the affected group exercising the right to vote and not merely that the law made it more difficult for them to exercise the right to vote.[270] In other words, an applicant is required to show a factual causal connection between the law and the diminished number of people exercising the franchise. In our view, this approach fails to focus on the impact of the discriminatory law or conduct on the litigants and instead focuses, inappropriately, on the indirect consequences of that impact. But that is not generally how our equality jurisprudence works. Once a law affects a listed or analogous group negatively, it discriminates. Moreover, a facially discriminatory law that affects a group identified in FC s 9(3) is presumed to be unfair. The burden then shifts to the state or other party defending the discriminatory provision to prove that the provision is unfair. In considering the issue of unfairness, the number of affected groups who did not vote may be a factor to take into account, but it cannot be decisive precisely because people fail to vote for various reasons. The appropriate question is whether the impact on the group is unreasonable in the light of the purpose of the legislation. For example, a property qualification will unfairly discriminate. It is not necessary to show that such a law actually resulted in fewer poor people voting and that, in the absence of the qualification, more poor people would have voted.[271]

The constitutional entrenchment of proportional representation makes it unlikely that South African courts will be confronted with the apportionment[272] and

gerrymandering disputes[273] which led to so much litigation in Canada and the United States. The major advantage of a system of proportional representation is that, in theory at least, it guarantees almost exact equality of the vote.[274]

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268 See *Democratic Party v Minister of Home Affairs & Others* 1999 (3) SA 254 (CC), 1999 (6) BCLR 607 (CC)('*Democratic Party*') at para 12.

269 See *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) para 43.

270 In *Democratic Party,* the Court held that it was not enough to show that the requirement of a green bar-coded identity document affected a greater proportion of white potential voters, rural voters and young voters. *Democratic Party* (supra) at para 12. It was necessary to show that the requirement resulted in smaller numbers of the affected groups registering than those outside the categories.

271 Cf *Harper v Virginia Board of Elections* 383 US 663, 86 SCt 1079 (1966). The case concerns the constitutionality of a $1.50 poll tax. The court described the tax as capricious and found that it violates the equal protection clause. Lines drawn on the basis of wealth or property are, as those on the basis of race, traditionally disfavoured. In overturning the statute, the Supreme Court described wealth as a 'suspect classification' and stated that the vote was a 'fundamental interest'. Both strands of equal protection jurisprudence in the US were therefore applied in this case. See also *Hill v Stone* 421 US 289 (1975)(Use of the franchise to achieve unrelated state, objectives — such as the enforcement of the tax laws — declared unconstitutional); *Cipriano v City of Houma* 395 US 701 (1969); *City of Phoenix v Kolodziejski* 399 US 204 (1970)(Difference between the interests of property owners and non-property owners found insufficiently substantial to justify the exclusion of the latter from the franchise); *Dunn v Blumstein* 405 US 330 (1972)(Durational residence requirements found unconstitutional.)

(ii) Secrecy of the ballot

FC s 19 provides that every citizen has the right to vote in secret.[275] Several provisions in the 1998 Electoral Act deal with the secrecy of the vote.[276] Section 90(1) provides that no person may interfere with a voter's right to secrecy. Section 98 makes such interference an offence. These provisions give effect to the constitutional imperatives and the international human rights law norms relating to secrecy.[277]

(iii) Exclusion of classes of citizens from the right to vote

Under the Electoral Act, only South African citizens who are 18 years old or older are eligible to vote.[278] In order to exercise this right, each citizen must register with the

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272 The term 'apportionment' is used to describe deviations from the 'one person, one vote' principle. The courts in the US have increasingly been confronted with such disputes ever since the Supreme Court decided in *Baker v Carr* that apportionment disputes are justiciable and are not covered by the 'political question' doctrine. 369 US 186, 82 SCt 691 (1962). The courts seem to tolerate significant deviations at state and local level. See *White v Regester* 412 US 755, 93 SCt 2332 (1973); *Abate v Mundt* 403 US 182, 91 SCt 1904 (1971); *Mahan v Howell* 410 US 315, 93 SCt 979 (1973); *Brown v Thomson* 462 US 835, 103 SCt 2332 (1983); *Board of Estimate of City of New York v Morris* 489 US 688, 109 SCt 1433 (1989)). In elections for Congress, on the other hand, the Supreme Court requires almost mathematical equality. See *Reynolds v Sims* 377 US 533, 84 SCt 1362 (1964); *Kirkpatrick v Preisler* 394 US 526, 89 SCt 1225 (1969); *Wesberry v Sanders* 376 US 1, 84 SCt 526 (1964); *Karcher v Daggett* 462 US 725, 103 SCt 2653 (1983). The Canadian courts have adopted a more flexible approach. Apportionment legislation is upheld as long as it guarantees 'effective representation' to the electorate. As a result, courts have tolerated considerable deviations from the equality principle. Rural voters have most often been the beneficiaries of court-sanctioned deviations. See *Attorney-General for Saskatchewan v Carter* (1991) 81 DLR (4th) 16; *Reference Re: Electoral Boundaries Commission Act* (Alberta) 86 DLR (4th) 447, [1991] 2 SCR 158. But see *Dixon v British Columbia* (1989) 59 DLR (4th) 247. (The deviations were found to be unconstitutional.) In the United Kingdom the judiciary has been reluctant to interfere with the proposals of the Boundary Commissioners. See D Butler 'Electoral Reform' in J Jowell & D Oliver (eds) *The Changing Constitution* (2nd Edition, 1989) 373.

273 'Gerrymandering' describes the drawing of constituency lines in a manner so as to dilute the support for particular political parties, cultural or racial groups. The US Supreme Court has been more sympathetic to claims from racial minorities than to claims from political parties. See *Davis v Bandemer* 478 US 109, 106 SCt 2797 (1986); *Gaffney v Cummings* 412 US 735, 93 SCt 2321 (1973). In order to support a claim of racial gerrymandering, the Court merely requires a showing of discriminatory effect and not discriminatory intent. See *Thornburgh v Gingles* 478 US 30, 106 SCt 2752 (1976). Recently, however, the Court has also set limits on legislatures' ability to secure representation of minority groups. In *Shaw v Reno* the US Supreme Court struck down a voting district that had an extremely irregular shape (substantial parts of the district consisted solely of a highway). 509 US 630, 113 SCt 2816 (1993). The Court said that the district plan resembled 'political Apartheid'.

274 The German Constitutional Court, in dealing with equality of the vote within the list system of proportional representation, has said that every ballot must have the same potential value and that every voter must have an equal opportunity to influence the outcome of the election. See 1 *BVerfGE* 208, 242; 34 *BVerfGE* 81, 98.

275 The right to vote in secret was protected by IC s 21(2).

276 Legal provisions dealing with the secrecy of the vote include ss 38, 39, 70 and 90 of the 1998 Electoral Act. Section 90(2) provides that no person may, except as permitted under the Act, disclose any information about voting or the counting of votes, or open any ballot box or container sealed in terms of the Act, or break its seal. See also ss 5 and 15 of the Referendums Act 108 of 1983.

Electoral Commission to ensure that their name is placed on the voters' roll.[279] Permanent residents are no longer entitled to vote. These provisions, which merely confirm similar restrictions appearing in the text of the Final Constitution,

are relatively uncontroversial.[280] The Act also prevents persons subject to a court order declaring them to be of unsound mind, mentally disordered, or detained under the Mental Health Act,[281] from registering to vote.[282] Excluding these classes of mentally-handicapped citizens is a clear limitation of the right to vote and arguably constitutes unfair discrimination on a listed ground.[283] As such, the provisions must be justified under FC s 36. Since the Act provides no provision for a mentally-handicapped person to challenge their ineligibility to vote, a court could find the law to be overbroad by excluding mentally-capable citizens from voting.

Although the 1993 Electoral Act excluded certain classes of prisoners from voting in the 1994 elections,[284] when the 1998 Electoral Act was enacted it made no

277 For the position in international law, see art 25 of the International Covenant of Civil and Political Rights, art 21 of the Universal Declaration of Human Rights, and art 3 of the European Convention on Human Rights. See also s 17 of the Namibian Constitution and art 38(1) of the German Basic Law.

278 See Electoral Act s 1.

279 See Electoral Act s 8(1).

280 FC s 46 read with FC s 19(3), which guarantees every 'adult citizen' the right to vote. Elsewhere legislatures have extended the vote to foreigners at, for example, the local level. In *BverfGe EuGRZ* 1990, 438, the German Constitutional Court invalidated such legislation on the basis that constitutional amendment was the only permissible means to extend the vote to foreigners. Considerable problems were caused with the deprivation and restoration of South African citizenship to Africans who became 'citizens' of the Bantustans: Transkei, Bophuthatswana, Venda and Ciskei. See P Ncholo 'The Right to Vote' in N Steytler, J Murphy, P de Vos & M Rwelamira *Free and Fair Elections* (1993) 60.

281 Act 18 of 1973.

282 See 1998 Electoral Act s 8.

283 See FC s 9(3): 'disability' is a ground for unfair discrimination.

284 One of the most contentious issues during the negotiations process concerned the right of prisoners to vote. The final compromise, brought about after several uprisings and considerable loss of life in the prisons, was written into law only on the day before the first democratic election took place. On 25 April 1994, Mr F W de Klerk, then State President, amended s 16*(d)* of the 1993 Electoral Act by Proclamation 85 of 1994 in order to limit the category of prisoners not entitled to vote to those convicted for murder, robbery with aggravating circumstances, and rape, and attempts to commit those offences. Initially s 16*(d)* excluded those in prison for murder, culpable homicide, rape, indecent assault, childstealing, assault with intent to do grievous bodily harm, robbery, malicious injury to property, breaking and entering any premises with intent to commit an offence, fraud, corruption, and bribery, and any attempt to commit the offences referred to. The Transitional Electoral Council then apparently agreed to extend the vote to all prisoners. But President De Klerk refused to sign the Proclamation containing this far-reaching amendment of the Electoral Act. Instead, the more limited version of the amendment was signed into law. The implementation of this last-minute deal was by no means uniform. It is therefore not possible to say how many and which classes of prisoners voted in the first democratic election.

mention of the voting rights of prisoners.[285] The Electoral Commission therefore made no arrangements to register South African citizens who were in prison and created no special voting procedures to allow incarcerated citizens to vote. This omission could have resulted in the effective disenfranchisement of all

prisoners. Prior to the election, the omission was challenged by two prisoners in *August & Another v Electoral Commission & Others*.[286]

The question before the *August* Court was whether the Electoral Commission had an obligation to take affirmative steps to ensure that prisoners awaiting trial and sentenced prisoners could register and then vote in an upcoming general election. The Constitutional Court reasoned that the right to vote 'by its very nature imposes positive obligations on the legislature and the executive',[287] that the Electoral Commission had an 'obligation to take reasonable steps to create the opportunity to enable eligible prisoners to register and vote',[288] and that any limitation on the right to vote must pass scrutiny under the limitation clause. Since this infringement on the prisoners' right to vote was not brought about by a law of general application, but was rather the result of the legislature's silence and the subsequent omission of the Electoral Commission, the Court found the resulting restriction unconstitutional.[289] It then ordered the Electoral Commission to make 'all reasonable arrangements' to ensure that people who were imprisoned during the registration period could register, and that all registered prisoners could vote in the upcoming election.

The two main counter-arguments rejected by the *August* Court were that prisoners forfeited their right to vote by denying themselves the opportunity to register and/or vote by becoming incarcerated and that making special provision for

Lawyers for Human Rights sponsored two prisoners to take the relevant organs of state to court. In *Masuku & Mbonani v State President & Others,* the two prisoners contended that s 16 of the 1993 Electoral Act was inconsistent with the Interim Constitution's political rights and right to equality. 1994 (4) SA 374 (T). The prisoners, who were both convicted of murder, were disqualified from voting in the April 1994 general elections. The Transvaal Provincial Division of the Supreme Court held that it had no jurisdiction to consider the validity of the Electoral Act. Since convicts had to vote by special vote on 26 April 1994 and the Interim Constitution only came into operation on the 27th, the court held, that, even before the coming into effect of the Interim Constitution, the time for convicted persons to vote would have expired, and to give an order in favour of the applicants would be a *brutem fulmen.* The last part of the reasoning cannot be accepted. If there was a violation, a court could have considered other forms of appropriate relief, including an award of damages.

285 For further discussion of the voting rights of prisoners, 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, 29-3.

286 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC)('*August*') at para 3.

287 Ibid at para 16.

288 Ibid at para 22.

289 For a discussion of the meaning of 'law of general application' in FC s 36 and its consequences in *August*, see S Woolman and 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.

prisoners to vote on election-day presented the Electoral Commission with excessive logistical difficulties. With respect to the first argument, the Court stated that the common law establishes that, while certain restrictions on a prisoner's freedom must necessarily follow from imprisonment, a 'substantial residue of basic rights' — in this case, the right to vote — cannot be denied prisoners.[290] The Court answered the second argument by stating that since prisoners are a 'determinate class of persons, subject to relatively easy and inexpensive administrative control', they should pose no excessive administrative difficulties when compared with other groups for whom special voting procedures are made.

The Court explicitly stated that its judgment in *August* should not be read as suggesting that Parliament was prevented from disenfranchising certain categories of prisoners.[291] In 2004, this notion was tested in *NICRO.* Parliament amended the 1998 Electoral Act[292] to prohibit prisoners serving a sentence without the option of a fine from voting.[293] The Court struck down this part of the amendment. It found

that the government's justifications were insufficient to uphold a limitation on the right to vote. In particular, the *NICRO* Court found the that provision was overbroad,[294] that providing registration and voting accessibility to this group of prisoners would not create excessive financial or logistical strain,[295] that making special arrangements for prisoner registration and voting does not disfavour other groups who have some logistical difficulty registering and voting,[296] and that the government could not provide an adequate policy explanation for this limitation.[297] As a result, the Court ordered the voters' roll to be temporarily opened for all prisoners serving sentences without the option of a fine and for these prisoners to be afforded the opportunity to vote.

August and *NICRO* make it explicitly clear that at least some prisoners must be afforded the right to vote. Given this imperative, it seems clear that no limitation can be placed on prisoners' right to vote based on logistical or financial constraints: that is, the additional administration necessary to allow the remainder of the prisoner

290 *August* (supra) at para 18.

291 Ibid at para 31.

292 The Electoral Laws Amendment Act 34 of 2003.

293 The effect of s 24B of the Act was that imprisoned citizens awaiting trial enjoyed the presumption of innocence and were thus permitted to vote, citizens imprisoned with the option of a fine were allowed to vote so as to not discriminate against poorer citizens who are only in prison due to their lack of ability to pay the requisite fine.

294 See *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('*NICRO*') at para 67.

295 Ibid at para 49.

296 Ibid at paras 52-53.

297 Ibid at para 65-66.

population to vote is not sufficiently burdensome to justify such a limitation. It remains an open question, however, whether a more narrowly-tailored ban on prisoner voting rights — such as disenfranchising only those prisoners found guilty of a certain category of more serious crimes — may be constitutionally permissible. By a vote of 5-4, The Canadian Supreme Court in *Sauvé* struck down a law disenfranchising prisoners serving prison terms of at least two years.[298] The outcome of any further such legislative attempt to limit the voting rights of prisoners in South Africa will depend to a large extent on the vexed question of the standard of review applicable to FC s 19 cases. Rationality review may not present a sufficiently strong shield to protect the voting rights of prisoners from future legislative curtailment.

(c) The right to stand for election to public office

FC ss 47 and 106 provide that every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly or a provincial legislature. Unrehabilitated insolvents, persons declared to be of unsound mind, and anyone convicted of an offence and sentenced to more than twelve months' imprisonment, without the option of a fine, are disqualified. More controversially, 'anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service' may not become a member. This provision does not apply to the President, Deputy President, Ministers, Deputy Ministers and other office bearers whose functions have been declared compatible with membership by national legislation.

FC ss 47 and 106 technically do not limit the right to stand for election to public office. Instead, these provisions prevent a person from being a *member* of a legislature while working for the state. They prevent a person from holding two jobs paid for by the government. Civil servants' rights to stand for election to public office are limited in many countries. In South Africa, s 36 of the Public Service Act forbids employees of the state to 'draw up or publish any writing or deliver a public speech to promote or prejudice the interests of any political party'.[299] Section 20*(g)* of the same Act provides that members of the public service who make use of their position to promote or to prejudice the interest of any political party shall be guilty of misconduct. These provisions make it impossible for civil servants to run for public office. The justification most often advanced for such limitation is that the state has a legitimate interest in preserving a neutral and professional civil service. However, it is difficult to see why such a limitation should be upheld in an open and democratic society based on human dignity, freedom and equality. The courts, the Public Service Commission and the Office of the Public Protector should provide the citizen with sufficient protection against unreasonable and politically biased decision-making. It is, in any event, doubtful whether the limitation of civil servants' right to stand for public office furthers the attainment of a career-orientated and non-partisan public service.[300]

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298 *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68.

299 Act 103 of 1994.

300 See 44 *BVerfGE* 125, 138. The German Constitutional Court tried to distinguish between permissible campaign efforts of government officials and the improper use of public means for party political purposes.

In *O'Meara NO v Padayachi*, the High Court referred the issue of whether a provision of the Local Government Transition Act[301] was constitutional to the Constitutional Court.[302] The provision disqualified persons indebted to local government — in respect of assessment rates, rent, service charges or any other moneys for a period of longer than three months — from standing for election. In addressing the question of reasonable prospects of success, the Court stated that the provision was necessary to prevent unsuitable persons from standing who, through their past and present conduct, had shown themselves disruptive of the organs of local government or wilfully to have failed to discharge obligations to local government. However, the disqualification went beyond what was necessary since it embraced all failures to pay, irrespective of their nature or magnitude or the state of mind of the debtor. This Act was, as its name indicates, only applicable to a transitional period, and accordingly the disqualifying provision challenged in *O'Meara* fell away.[303]

Given that the right to stand for public office is in many ways the twin of the right to vote, the question of the appropriate level of review to test for infringements arises here, too. In our view, mere rationality does not sufficiently protect the right, and reasonableness is the least that should be required of law or conduct limiting the right to stand for election and hold public office.

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301 Act 209 of 1993.

302 1997 (2) BCLR 258 (D). See also *Waters v Khayalami Metropolitan Council* 1997 (3) SA 476 (W).

303 In terms of s 94 of the Local Government: Municipal Electoral Act 27 of 2000, the Local Government Transition Act 209 of 1993 does not apply to a municipal election held after the expiry of the term of municipal councils referred to in s 93(3) of the Local Government: Municipal Structures Act 117 of 1998.