

# RETHINKING THE RIGHT TO VOTE

Henk Botha  
 BLC LLB LLM LLD  
 Professor of Law, University of Stellenbosch

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## 1 Introduction

South African constitutional scholars have been puzzling for some time over a basic tension in the Constitutional Court's voting rights jurisprudence. While some of its judgments show a commitment to a vigorous defence and enforcement of an inclusive, egalitarian and participatory vision of democracy and an active notion of citizenship, others appear to be characterised by a deferential posture and a shallow conception of democracy. The court's emphasis on the centrality of the right to vote to dignity and democratic citizenship and its endorsement of the voting rights of marginalised categories of persons such as prisoners<sup>1</sup> is seemingly contradicted by its willingness, in cases like *New National Party of South Africa v The Government of the Republic of South Africa* ("NNP")<sup>2</sup> and *United Democratic Movement v President of the Republic of South Africa (1)* ("UDM"),<sup>3</sup> to defer to legislative choices. The deferential posture struck in these cases sits uneasily with the widely shared assumption that democracy itself requires judicial vigilance in the face of electoral rules that tend to thwart electoral competition and distort the representative nature of government. It is also at odds with later judgments dealing with political rights other than the right to vote, in which a robust, participatory vision of democracy formed the basis for successful challenges to the validity of conduct or legislation.<sup>4</sup>

Academic analyses of these judgments have focused, for the most part, on the standards of review employed by the Constitutional Court, and the level of judicial interference or restraint at work in these cases. The resulting focus on institutional and separation of powers concerns has proved helpful

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<sup>1</sup> *August v Electoral Commission* 1999 3 SA 1 (CC); *Minister of Home Affairs v NICRO* 2004 5 BCLR 445 (CC).

<sup>2</sup> 1999 3 SA 191 (CC).

<sup>3</sup> 2003 1 SA 488 (CC).

<sup>4</sup> The court struck down two Acts of Parliament in *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) and an Act of Parliament and a constitutional amendment in *Matatiele Municipality v President of the Republic of South Africa (2)* 2007 1 BCLR 47 (CC) for a failure on the part of the legislature to facilitate adequate public involvement in the legislative process. In *Ramakatsa v Magashule* 2013 2 BCLR 202 (CC), the Free State provincial elective conference of the ANC was declared void in view of certain irregularities that were held to breach both the constitutional right to participate in the activities of a political party (s 19(1)) and the ANC's constitution and audit guidelines. And in *Oriani-Ambrosini v Speaker of the National Assembly* 2012 6 SA 588 (CC), certain rules of the National Assembly were invalidated to the extent that they required the National Assembly's permission before a member could introduce a Bill in terms of s 73(2) of the Constitution. The court interpreted the relevant constitutional provisions in view of the principles of representative and participatory democracy, multiparty democracy, pluralism, democratic deliberation, responsiveness, accountability and openness.

in explaining and critiquing some of the apparent anomalies in the court's jurisprudence, and in suggesting alternative approaches that would protect voting rights more rigorously. At the same time, it has resulted in an under-emphasis on the substantive content of the right to vote. Academic criticisms of the shallow conception of democracy that is supposedly at work in the *NNP* and *UDM* judgments, is as a rule supplemented neither by a critical analysis of the court's substantive understanding of the right to vote, nor by the development of an alternative interpretive framework for understanding this right.

This article takes a different approach. It places the emphasis on the Constitutional Court's substantive understanding of the right to vote, and is interested in the role played by constitutional values like dignity and democracy in the interpretation of this right. On the one hand, it asks whether and to what extent the Constitutional Court's dignity-based construction of voting rights can explain the apparent anomalies and contradictions referred to above. Does the court's focus on dignity, coupled with its failure to flesh out the meaning of democracy in the voting rights context, result in an interventionist stance in some cases and an overly deferential one in others? Does it blind the court to the ways in which seemingly neutral measures feed into systemic disadvantage and further the political disempowerment of the poor and marginalised? Does it shift the attention away from structural issues relating to democratic accountability and electoral competition, and pay too much attention to the symbolic value of the vote?

On the other hand, the article asks whether an articulation of dignity with the values of democracy, equality and citizenship might provide the basis for a more rigorous understanding of the right to vote. First of all, how could such an understanding enable a jurisprudence that is responsive to the ways in which electoral laws intersect with systemic disadvantage and structural power, to reproduce private inequality in the political sphere? Secondly, how would it react to struggles for the extension of the right to vote to those who are subject to state power, but are excluded from membership in the political community by virtue of their nationality?

## 2 The Constitutional Court's voting rights jurisprudence

### 2.1 The dignity of citizenship: *August* and *NICRO*

In *August v Electoral Commission* ("*August*"), the Constitutional Court held that the failure of the Electoral Commission to take steps to allow prisoners to register and vote amounted to an impermissible restriction of section 19(3)(a).<sup>5</sup> The court was clear that convicts do not forfeit all their rights upon entering prison – even under common law, prisoners retained a residue of personal rights that were not excluded by law.<sup>6</sup> It rejected the reasoning of the court *a quo*, which had held that the prisoners' inability to register and vote was of

<sup>5</sup> S 19(3)(a): "Every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret".

<sup>6</sup> *August v Electoral Commission* 1999 3 SA 1 (CC) paras 18-19.

their own making. Instead, it stressed that the right to vote imposes positive obligations on the state, and that it is untenable to equate prisoners' position with that of other citizens who find it difficult or impractical to exercise the vote. Since their inability to register and vote arose directly from their incarceration by the state and from the failure to make provision for them, the Electoral Commission could not escape responsibility for their plight.<sup>7</sup>

It was unnecessary for the court to pronounce on the question whether the disenfranchisement of prisoners constituted a reasonable and justifiable limitation of the right to vote in accordance with section 36 of the Constitution of the Republic of South Africa, 1996 (the "Constitution"). This was because the restriction was not sourced in the Electoral Act 73 of 1998 ("Electoral Act"), but resulted from the inaction of the Electoral Commission. In the absence of a law of general application there was no need to engage in an assessment of proportionality or to balance the state's objectives against the severity of the limitation. The court expressly left open the possibility that legislation, which disenfranchises certain categories of prisoners, could be justifiable under section 36.<sup>8</sup>

Despite the narrowness of its holding, the judgment nevertheless suggests that, given the importance of the right and the history of its suppression under apartheid, limitations would be subjected to rigorous scrutiny. In an oft-quoted passage, Sachs J endorsed the universality of the vote in the following terms:

"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. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity".<sup>9</sup>

In the view of the court, laws and measures which deprive South Africans of equal citizenship not only impoverish democracy and are at odds with the inclusive community of equals established by the Constitution, but also impair the human dignity of those deprived of the basic rights of citizenship. Dignity is here articulated with a range of other values, including citizenship, representative democracy, political equality, nationhood and belonging. By grounding the right to vote in this formidable cluster of values, the judgment appears to set the bar quite high for the justification of the disenfranchisement of categories of South African citizens. A compelling justification would presumably be needed for limitations which signal that some adult citizens are incapable of meaningful participation in political life or are unworthy of integration into the political community. Yet, in view of the gap between the breadth of Sachs J's rhetoric, the depth of his democratic vision and the

<sup>7</sup> Paras 20-22.

<sup>8</sup> Para 31.

<sup>9</sup> Para 17.

narrowness of the holding, it remained to be seen how rigorously the court would scrutinise statutory exclusions of prisoners from the right to vote.

Five years later, the constitutionality of legislation which disenfranchised prisoners came before the court in *Minister of Home Affairs v NICRO* (“*NICRO*”).<sup>10</sup> The law in question disqualified all convicted prisoners serving sentences of imprisonment without the option of a fine from the right to vote. The majority judgment of Chaskalson CJ rejected the state’s contention that the limitation was reasonable in view of logistical difficulties or in terms of the state’s prerogative to choose to use scarce resources to enable law-abiding citizens to vote. In the first place, the court found that the state had failed to establish a factual basis for its contention that allowing prisoners to vote would place an undue burden on its resources. No information relating to expenditure or logistical problems was placed before the court. It was also not explained why it would impose an undue burden on the resources of the Electoral Commission if the existing arrangements that allowed unsentenced prisoners and prisoners who had not paid their fines to vote, were to be extended to other prisoners.<sup>11</sup>

Secondly, while the court showed some sympathy for the argument that restricting the right of prisoners to vote signalled the government’s denunciation of crime, it was clearly frustrated at the clumsy way in which the objective had been formulated. Quoting at length from both the majority and minority judgments in *Sauvé v Canada (Chief Electoral Officer)*,<sup>12</sup> Chaskalson CJ pointed out that in that case, the Canadian Supreme Court had had the benefit of extensive policy arguments for and against prisoner disenfranchisement. In *NICRO*, by contrast, these issues had been introduced “almost tangentially”.<sup>13</sup> It was, however, unnecessary to decide whether and when such policy considerations should be allowed to override the right of prisoners to vote, as the court found that the blanket exclusion of all prisoners sentenced without the option of a fine was overbroad and thus unconstitutional. Since no information was placed before the court relating to the types of offences included in this category, or the number of persons who were disenfranchised for relatively minor transgressions, the provision could not be held to be proportionate to a legitimate state objective.<sup>14</sup>

The minority judgments of Madala J and Ngcobo J were far less exacting in their demand for state justification of restrictions of the vote, and more willing to override inclusivity in the name of civic responsibility. Madala J and Ngcobo J both found that the true purpose of the limitation was to denounce crime and to inculcate in citizens a sense of their responsibilities and obligations. In the view of Madala J, the temporary disenfranchisement of prisoners was proportionate to this important purpose.<sup>15</sup> Ngcobo J agreed, but

<sup>10</sup> 2004 5 BCLR 445 (CC).

<sup>11</sup> Paras 47-51.

<sup>12</sup> 2002 SCC 68.

<sup>13</sup> 2004 5 BCLR 445 (CC) para 66.

<sup>14</sup> Para 67.

<sup>15</sup> Paras 113-117 and 126.

found that the limitation went too far to the extent that it included in its ambit prisoners awaiting the outcome of an appeal.<sup>16</sup>

The majority judgment, by contrast, insists that the factual basis for the justification of the disenfranchisement of citizens must be clearly established; the policy grounds relied upon by the state “must be accurately and precisely defined”,<sup>17</sup> and limitations of the right to vote must be carefully and narrowly crafted. These requirements follow, by and large, from the court’s general approach to limitation analysis under section 36. In practice, however, the stringency of their application tends to vary, depending on the seriousness of the limitation in question.<sup>18</sup> The majority arguably tightened the justificatory burden due to the importance of the right to vote to constitutional values like dignity and democracy and the extent of prisoners’ disenfranchisement.<sup>19</sup> As a result, the court was less willing to accept justifications based on “common-sense” assumptions that were not backed up by clear factual evidence and policy arguments, or to countenance measures that were not narrowly tailored.<sup>20</sup>

The judgment nevertheless does not close the door on criminal disenfranchisement. It contains few hints as to the relative weight to be accorded to voting rights *vis-à-vis* state objectives such as the denunciation of crime and the promotion of civic responsibility, or the rigour with which the less restrictive means test will be applied. A more narrowly tailored limitation of prisoners’ voting rights may well be held to pass constitutional scrutiny.<sup>21</sup>

## 2 2 Responsibility and restraint: *NNP* and *UDM*

The *NNP* case concerned a challenge to the constitutionality of a legislative requirement that voters had to have either a green bar-coded identity document or a temporary identification certificate. Older forms of identification did not suffice. The requirement was controversial, as surveys indicated that a substantial part of the population did not have the required identity documents

<sup>16</sup> Paras 138-140 and 143-145.

<sup>17</sup> Para 65 (quoting from McLachlin CJ in *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68 para 23). See also para 36 (“the party relying on justification should place sufficient information before the court as to the policy that is being furthered, the reasons for that policy, and why it is considered reasonable in pursuit of that policy to limit a constitutional right”).

<sup>18</sup> This is in terms of the court’s general approach to the factors enumerated in s 36, in terms of which it does “not adhere mechanically to a sequential check-list”, but rather engages in “a balancing exercise” through which it arrives at “a global judgment on proportionality”. *S v Manamela (Director-General of Justice Intervening)* 2000 3 SA 1 (CC) para 32. In *Minister of Home Affairs v NICRO* 2004 5 BCLR 445 (CC) para 37, the court similarly stated:

“Ultimately what is involved in a limitation analysis is the balancing of means and ends.”

<sup>19</sup> See *Minister of Home Affairs v NICRO* 2004 5 BCLR 445 (CC) para 47.

<sup>20</sup> See S Woolman & H Botha “Limitations” in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2006) 34-85 – 34-92 for an analysis of the Constitutional Court’s approach to the less restrictive means requirement.

<sup>21</sup> See L Muntingh & J Sloth-Nielsen “The Ballot as a Bulwark: Prisoners’ Right to Vote in South Africa” in AC Ewald and B Rottinghaus (eds) *Criminal Disenfranchisement in an International Perspective* (2009) 221 238, who argue that future legislative attempts to disenfranchise serious offenders could conceivably survive constitutional challenges, in view of factors such as the over-breadth of the legislation in *Minister of Home Affairs v NICRO* 2004 5 BCLR 445 (CC), the poor quality of argument advanced on behalf of the state, the dissenting judges’ greater readiness to find that the state met its justificatory burden, and possible shifts resulting from new appointments to the Constitutional Court.

and that it was unlikely that the Department of Home Affairs would be able to issue all the documents in time for the forthcoming election. The majority, in a judgment authored by Yacoob J, held that the requirement was constitutional. Parliament had to ensure that those eligible to vote would be able to do so if they took reasonable steps in pursuit of that right. Whether or not the potential consequence of a law would be to disable prospective voters from voting, even if they acted reasonably, had to be assessed in view of the circumstances pertaining at the time of the enactment of the provisions, and not those existing at the time of the challenge to the validity of the legislation.<sup>22</sup> Moreover, the court was not to test the reasonableness of the electoral scheme (except insofar as an infringement of section 19(3) was found, in which case the reasonableness of the limitation would be assessed in terms of section 36(1)). The question was, rather, whether the legislation was rationally connected to a legitimate government purpose.<sup>23</sup> This test, in the majority's view, recognises that it is up to Parliament, and not the courts, to determine how voters are to identify themselves.<sup>24</sup> The court found that the legislation was rationally connected to the legitimate government purpose of ensuring the integrity of the electoral process, and that it did not amount to a denial of the right to vote. It dismissed concerns over the capacity of the Department of Home Affairs to issue the required documents to applicants within a short span of time, arguing that those concerns pertained to the implementation of the Act, rather than to its constitutionality.<sup>25</sup>

While the majority's emphasis on voters' responsibility resonates with the idea of active citizenship, the deferential nature of its rationality enquiry, coupled with its insistence that the constitutionality of the legislation must be assessed at the time of its enactment and must be separated from issues arising out of its implementation, is cause for concern.<sup>26</sup> In her dissent, O'Regan J questioned the idea that voters are required to show that they have acted reasonably, but that the court is barred from inquiring into the reasonableness of the measures adopted by Parliament. This test, in her view, ignores the diversity of South Africa's population, and simply assumes that what is reasonable for some (for example educated and affluent urban voters) is also reasonable for others (for example poor and illiterate rural voters).<sup>27</sup> Proposing instead a test that requires legislative regulation of the right to vote to be reasonable, she found that the objectives sought to be advanced by the

<sup>22</sup> *New National Party of South Africa v The Government of the Republic of South Africa* 1999 3 SA 191 (CC) paras 21-23.

<sup>23</sup> Para 24.

<sup>24</sup> Para 19.

<sup>25</sup> Paras 37-47.

<sup>26</sup> The majority judgment in *NNP* has been widely criticised in the academic literature. See T Roux "Democracy" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2006) 10-55 – 10-57; J Brickhill & R Babiuch "Political Rights" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 2007) 45-18 – 45-21; T Roux *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (2013) 341-350. But see also J Fowkes "Right After All: Reconsidering *New National Party* in the South African Canon" (2015) 31 *SAJHR* 151 for a more positive appraisal of the judgment.

<sup>27</sup> *New National Party of South Africa v The Government of the Republic of South Africa* 1999 3 SA 191 (CC) para 126.

legislation did not justify the restriction of the rights of prospective voters who were in possession of older (non-bar-coded) identity documents.<sup>28</sup>

The level of deference shown by the majority in *NNP* raises questions over the capacity of the court's construction of section 19(3) to promote a conception of citizenship which is rooted in a culture of democratic participation, and is capable of challenging societal inequality and exclusion in the public-political sphere. If the universality of the franchise is indeed, as Sachs J suggested in *August*, a powerful reminder of the intertwined destinies of all citizens, rich and poor,<sup>29</sup> and if, as will be argued below,<sup>30</sup> such a common citizenship is an important corrective to the inequalities found in the private sphere, one would expect the courts to be more vigilant in their examination of measures which may have the effect of reproducing existing patterns of socio-economic disadvantage in the political sphere. Not only those measures which expressly exclude certain categories of citizens from voting, but also those which impose unreasonable barriers to the exercise of the vote should be subjected to rigorous scrutiny. This is particularly so where the legislative regulation of the right to vote has a disproportionate impact on the poor, illiterate and other marginalised groups.

One would also expect the courts to be more exacting in their analysis of features of the electoral system which diminish the importance of the vote or dilute the accountability of representatives. In *UDM*<sup>31</sup> the court considered the constitutionality of a legislative package – including two constitutional amendments – allowing legislators to cross the floor to another political party without losing their seats. It was argued *inter alia* that the constitutional amendments violated the basic structure of the Constitution and that they were inconsistent with the founding value of multi-party democracy as entrenched in section 1(d) of the Constitution. The court rejected these contentions. It found that, even if the basic structure doctrine, as developed in India, applied in South Africa – a question it declined to decide – the amendments in question did not touch the inviolable core of the Constitution. That is because “proportional representation, and the anti-defection provisions which support it”, could not be said to be “so fundamental to our constitutional order as to preclude any amendment of their provisions”.<sup>32</sup> The court relied on similar reasons in rejecting the challenge based on the value of multi-party democracy. It held that proportional representation is not an inherent requirement of democracy and that a system of proportional representation without an anti-defection clause is not necessarily inconsistent with a multi-party system of democratic government.<sup>33</sup>

This line of reasoning is surprising, given the court's earlier judgment in the *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* (“*First Certification*”)

<sup>28</sup> Paras 146-161.

<sup>29</sup> 1999 3 SA 1 (CC) para 17.

<sup>30</sup> See part 4 1 below.

<sup>31</sup> 2003 1 SA 488 (CC).

<sup>32</sup> Para 17.

<sup>33</sup> Paras 29, 34.

case<sup>34</sup>, in which it rejected an objection against the anti-defection clause in schedule 6 to the Constitution. In that case, the court recognised the close link that exists between voters and political parties under a list system of proportional representation, and the role of an anti-defection clause in ensuring that “the will of the electorate is honoured”.<sup>35</sup> It also acknowledged the threat that, in the absence of an anti-defection clause, the governing party could use its power to entice members of minority parties to join it, thus enabling it to misrepresent the views of the electorate.<sup>36</sup> The *UDM* Court, by contrast, relativized the distinction between proportional and constituency-based forms of representation. It stated that, in constituency-based systems, “a member who defects to another party during the life of a legislature is equally open to the accusation that he or she has betrayed the voters”.<sup>37</sup> Different forms of representation are here compared at such a high level of abstraction that the specific difficulties inherent in the attempt to combine floor crossing with a list system of proportional representation are obscured from view. This enables the court to treat floor crossing simply as a matter of legislative choice, which has little or no bearing on the value of multi-party democracy or the right to vote.<sup>38</sup>

Other parts of the judgment similarly reveal a restrictive understanding of democracy and a high degree of deference towards Parliament. Consider, for example, the court’s response to the applicants’ references to democratic countries with proportional systems of representation in which defection is not allowed. The court brushed these references aside by observing that the applicants did not cite any foreign case law in which it was held that, “absent a constitutional or legislative requirement to that effect, a member of a legislature is obliged to resign if he or she changes party allegiance during the life of a legislature”.<sup>39</sup> To require a holding at that level of specificity is to place the threshold for the relevance of foreign law quite high. This restrictive view of the role of foreign law is borne out in the rest of the judgment. No reference is made to the considerable body of comparative literature on the meaning of “multi-party democracy” or to foreign case law in which courts have pronounced on the constitutionality of electoral rules that purportedly distort the will of the voters and/or skew the proportionality of representation.<sup>40</sup> This is surprising, given the court’s claim that it could find no assistance from commentaries on the South African Constitution relating to the meaning of multi-party democracy.<sup>41</sup> A consideration of foreign judgments might not have provided the court with clear-cut answers to the difficult questions confronting it in this case, but it would, in all likelihood, have enriched its

<sup>34</sup> 1996 4 SA 744 (CC).

<sup>35</sup> Para 186.

<sup>36</sup> Para 187.

<sup>37</sup> 2003 1 SA 488 (CC) para 34.

<sup>38</sup> See, for a rigorous critique of this and other aspects of the judgment, Roux “Democracy” in *CLOSA* 10-26 – 10-29; Roux *The Politics of Principle* 351-362.

<sup>39</sup> 2003 1 SA 488 (CC) para 35.

<sup>40</sup> Cf the references to foreign case law in part 3 1 below.

<sup>41</sup> 2003 1 SA 488 (CC) para 25.



analysis of key concepts and enhanced its understanding of the judiciary's role in promoting a multi-party system of democratic government.

Consider, also, the court's rejection of the argument that the 10% threshold requirement for defections would benefit bigger parties at the expense of smaller ones. The court insisted that "[t]he fact that a particular system operates to the disadvantage of particular parties does not mean that it is unconstitutional",<sup>42</sup> and that the details of a legal regime allowing defection must be left to Parliament. This reasoning has been criticised for its failure to situate the controversy over floor crossing within the context of the ruling party's electoral dominance, and for its lack of understanding of the court's role in interrogating measures that tend to inhibit electoral competition or skew electoral outcomes.<sup>43</sup>

The *UDM* Court also rejected a challenge based on the alleged violation of the right to vote in terms of section 19(3) of the Constitution. It held that between elections, "voters have no control over the conduct of their representatives"<sup>44</sup> and that, if they are unhappy with the way in which elected representatives conduct themselves, their remedy lies in not voting for them during the next election.<sup>45</sup> Again, these statements point to a shallow conception of democracy and a problematic understanding of the court's role in guarding against distortions of the democratic process. They have given rise to criticisms for what is seen as the court's fixation on the act of voting, its consequent neglect of the democratic processes leading up to and underpinning elections,<sup>46</sup> and its under-estimation of the different ways in which a single party's dominance can inhibit the growth of opposition parties and stifle democratic contestation.<sup>47</sup>

### 2 3 Mixed messages: *Richter* and *AParty*

In *Richter v Minister of Home Affairs* ("*Richter*"),<sup>48</sup> the Constitutional Court was asked to confirm the invalidation by the High Court of section 33(1)(e) of the Electoral Act, which allowed certain voters who were temporarily absent from the Republic to apply for a special vote. The High Court had held that the section amounted to unfair discrimination, as it restricted the special vote to a few categories of voters who were abroad on polling day, namely those who were overseas for purposes of a holiday, a business trip, attendance of a tertiary institution, an educational visit or participation in an international sports event. The High Court sought to remove the discrimination by severing the reference to the five categories of voters mentioned above, and by severing the word "temporary".

<sup>42</sup> Para 47.

<sup>43</sup> S Choudhry "‘He Had a Mandate’: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy" (2009) 2 *CCR* 1 37-48.

<sup>44</sup> 2003 1 SA 488 (CC) para 49.

<sup>45</sup> Para 50.

<sup>46</sup> See G Quinot "Snapshot or Participatory Democracy? Political Engagement as Fundamental Human Right" (2009) 25 *SAJHR* 392.

<sup>47</sup> Choudhry (2009) *CCR* 37-48; S Issacharoff "Constitutional Courts and Democratic Hedging" (2011) 99 *Georgetown LJ* 961 997-1001.

<sup>48</sup> 2009 3 SA 615 (CC).

The Constitutional Court upheld the High Court's order, subject to a few relatively minor alterations. Its reasoning was different, though. It declined to decide whether section 33(1)(e) constituted unfair discrimination, and held instead that it unjustifiably limited the right to vote. Writing for a unanimous court, O'Regan J held that, while it was not unreasonable to require voters to travel some distance from their homes to the polling station or to stand in queues, they could not reasonably be expected to "travel thousands of kilometres across the globe to be in their voting district on voting day".<sup>49</sup> The failure to give registered voters who were abroad on voting day an opportunity to apply for a special vote, amounted to a limitation of section 19(3). The respondents had not proffered any justification for restricting the categories of voters who qualified for a special vote, nor could the court think of a legitimate purpose served by it. The limitation therefore did not pass scrutiny under section 36.

The court confirmed the High Court's order which not only severed the words which restricted the special vote to specific classes of absentee voters, but also severed the word "temporary". As a result, the judgment extended the vote not only to all registered voters temporarily absent from the Republic, irrespective of the reasons for their absence, but also to those registered voters whose absence is permanent. This is surprising, as Wessel le Roux has shown.<sup>50</sup> The requirement that voters must have their ordinary residence in the Republic has been a central feature of the electoral system. One would certainly not expect the court to overturn this requirement without hearing argument on the reasons underpinning it and without considering the constitutionality of a residence-based system. And yet, this is exactly what the court appears to have done. The judgment contains no reference to the close connection under the Electoral Act between residence, registration and voting, nor does it provide any reasons for the confirmation of the second severance order.<sup>51</sup>

The severance of the word "temporary" is even more puzzling in view of the court's judgment in *AParty v Minister for Home Affairs, Moloko v Minister for Home Affairs* ("*AParty*"),<sup>52</sup> which was delivered on the same day as *Richter*. The court in *AParty* rejected an application for direct access to challenge the constitutionality of provisions in the Electorate Act which preclude South African citizens not ordinarily resident in South Africa from registering as voters. Writing for a unanimous court, Ngcobo J reasoned that it was undesirable for it to sit as a court of first and final instance on matters which "go to the very heart of the electoral scheme chosen by Parliament", and which raise "complex and difficult questions concerning the constitutional validity

<sup>49</sup> Para 68.

<sup>50</sup> W le Roux "Migration, Street Democracy and Expatriate Voting Rights" (2009) 24 *SAPL* 370 383-398; & W le Roux "Economic Migration, Disaggregated Citizenship and the Right to Vote in Post-Apartheid South Africa" in R Danisch (ed) *Citizens of the World: Pluralism, Migration and Practices of Citizenship* (2011) 119 122-127.

<sup>51</sup> Le Roux (2009) *SAPL* 383.

<sup>52</sup> 2009 6 BCLR 611 (CC).

of this electoral scheme and the legislative choice made by Parliament”.<sup>53</sup> His judgment stressed Parliament’s constitutionally mandated role in devising an electoral system,<sup>54</sup> emphasised that a court should not prescribe to Parliament which scheme to choose from a range of legitimate options,<sup>55</sup> and made it clear that questions about the constitutionality of the electoral scheme ought to be properly canvassed, with input from all parties, including the Minister and the Electoral Commission.<sup>56</sup>

The *AParty* judgment makes it seem unlikely that the court in *Richter* intended to sever the link established in the Electoral Act between ordinary residence and rights of political participation. However, the latter reading has been actively promoted by the expatriate voting rights lobby,<sup>57</sup> and also appears to have informed recent amendments to the Electoral Act which allow South African citizens to register as voters while abroad.<sup>58</sup> While some would describe this outcome as a victory for the universality of the franchise, the process that gave rise to it can hardly be described as an instance of reasoned democratic deliberation or of a rational dialogue between the courts and Parliament. To start with, the Constitutional Court’s confirmation of the second severance order is unsupported by any reasons, flies in the face of its usual caution in intervening in the electoral scheme designed by Parliament and appears to be contradicted by the *AParty* judgment. Moreover, Parliament unquestioningly accepted a reading of the *Richter* judgment which is in fact far from uncontroversial.

The net result is that a valuable opportunity has been lost for democratic deliberation over the basis of political rights. Wessel le Roux argues that the uncritical conflation of citizenship and nationality – if not in the *Richter* judgment itself, then in its interpretation by the expatriate voting rights lobby and by Parliament – stands in the way of struggles for the extension of voting rights to non-nationals who are permanently resident in South Africa. To this extent, *Richter* has resulted in a foreclosure of the democratic processes through which the bounds of the political community are contested and redrawn. Moreover, it has done so without engaging in any reasoning over the relationship between voting rights, nationality and residence, and without hearing any argument on these matters.<sup>59</sup>

### 3 Explaining the anomalies

The picture emerging from the above discussion of the Constitutional Court’s voting rights jurisprudence is confusing and contradictory. Despite the court’s glowing rhetoric on the importance of universal adult suffrage in judgments like *August* and *NICRO*, it struck a deferential pose in cases like *NNP* and *UDM* in which alleged limitations of the right to vote stopped short

<sup>53</sup> Para 55.

<sup>54</sup> S 46(1)(a) of the Constitution.

<sup>55</sup> 2009 6 BCLR 611 (CC) para 55.

<sup>56</sup> Para 57.

<sup>57</sup> See Le Roux (2009) *SAPL* 370 for a critique of this interpretation.

<sup>58</sup> Electoral Amendment Act 18 of 2013.

<sup>59</sup> Le Roux (2009) *SAPL* 393-398.

of the patent disenfranchisement of classes of citizens. In *Richter*, on the other hand, it appears to have thrown all caution to the wind by issuing an order that impacts directly on the electoral scheme devised by Parliament, without even engaging the underlying issues. By contrast, the *AParty* judgment, delivered on the same day, expressly declined to interfere with the electoral system designed by Parliament without a proper consideration of the issues.

A number of explanations for these apparent contradictions have been mooted in the academic literature. This section considers two of these explanations. The first takes its cue from the distinction between rights and structures, while the second centres on the distinction between principle and pragmatism. Drawing on and critically analysing these accounts, a third possible explanation is explored, which relates the tensions in the court's jurisprudence to the way in which it has placed human dignity at the centre of voting rights.

### 3 1 Rights and structures

In an essay on the role of constitutional courts in protecting the integrity of democratic structures and processes in societies in transition, Samuel Issacharoff argues that the judgment in *UDM* represents a retreat from the first certification judgment's attention to "structural restraints on the centralization of power" and commitment to the policing of "excess[es] of democracy".<sup>60</sup> The certification judgment evinced a keen understanding of the ways in which the Constitutional Principles had sought to prevent democratic structures from being subverted by a dominant political party intent on maximising its own interests in the name of the people. The *UDM* Court, by contrast, denied that the ANC's powerful position and capacity to benefit from floor crossing had any constitutional relevance. In doing so, it "retreated to a formalist account of the Constitution as guaranteeing primarily procedural norms and individual rights".<sup>61</sup> Instead, the court should have used the opportunity to "reassert the structural underpinnings" of the certification judgment.<sup>62</sup> This it could have done by drawing on the constitutional guarantee of effective minority party participation, and with reference to the basic structure doctrine as developed by the Indian Supreme Court.<sup>63</sup>

The distinction between rights and structures is also central to Sujit Choudhry's analysis of the role of the Constitutional Court in South Africa's dominant party democracy. Drawing on Issacharoff and Pildes' distinction between "the 'foreground' of constitutional rights" and the "background rules that structure partisan political competition",<sup>64</sup> Choudhry argues that the

<sup>60</sup> Issacharoff (2011) *Georgetown LJ* 995.

<sup>61</sup> 998.

<sup>62</sup> 998.

<sup>63</sup> 999-1001. In a subsequent contribution, Issacharoff argues that the case law of the Colombian Constitutional Court and the Indian Supreme Court could provide useful pointers in the development of such a jurisprudence. See S Issacharoff "The Democratic Risk to Democratic Transitions" (2012) 5 *CCR* 1 13-22. For a critique of this argument, see T Roux "The South African Constitutional Court's Democratic Rights Jurisprudence" (2012) 5 *CCR* 33.

<sup>64</sup> Choudhry (2009) *CCR* 18.

Constitutional Court has focused too narrowly on the violation of individual rights and paid too little attention to the ways in which basic features of the constitutional design – such as electoral competition – are distorted through laws and measures aimed at consolidating the ANC’s domination. In his view, judicial review is generally more effective when it addresses the underlying, structural causes of democratic malaise – such as the erosion of political competition – and does not simply treat the symptoms, in the form of individual rights violations. The court has, by and large, missed this point. Failing to grasp the extent to which commonplace assumptions about democratic accountability are undermined in a dominant party democracy, it has neglected to develop doctrines able to arrest the pathologies arising from the ANC’s dominance.<sup>65</sup>

The distinction between individual rights violations and their structural causes is a familiar one which has featured prominently in, among other contexts, the literature on socio-economic rights. It is frequently asked whether the Constitutional Court’s socio-economic rights jurisprudence gets the balance right between doing justice to the individual litigants and addressing the structural impediments to the realisation of these rights in ways that go beyond the individual dispute before it. The court is sometimes criticised for failing to develop standards providing adequate guidance to lower courts and organs of state, which would allow socio-economic disadvantage to be addressed in a more systemic and better coordinated manner. Such an approach would presumably be more consonant with the insight that socio-economic deprivation is, in many cases, deeply embedded in social structures and cultural prejudices, and better able to address it than the determination of the validity of individual complaints on an *ad hoc* basis.<sup>66</sup>

The literature on political rights in a dominant party democracy is, similarly, concerned that an approach which focuses primarily on individual rights, could serve to blind judges to the pathologies resulting from the imperfections and failures of the political system. However, it would be a mistake to treat rights and structures as separate, unrelated entities, as the literature sometimes appears to do, or to suggest that adjudication should eschew rights analysis in favour of analyses of the institutional architecture created by the Constitution. The point should, rather, be that rights and democratic structures serve the same constitutional values and are interdependent and mutually reinforcing.<sup>67</sup> Not only is the realisation of political rights conditional on the enforcement of the Constitution’s institutional provisions, but rights adjudication could serve to bolster democratic institutions and help overcome the structural impediments to their effective functioning.

<sup>65</sup> 33-34.

<sup>66</sup> See S Liebenberg “Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of ‘Meaningful Engagement’” (2012) 12 *Afr Hum Rts L J* 1; D Brand “The South African Constitutional Court and Livelihood Rights” in O Vilhena, U Baxi & F Viljoen (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013) 414.

<sup>67</sup> See J Klaaren “Structures of Government in the 1996 South African Constitution: Putting Democracy Back into Human Rights” (1997) 13 *SAJHR* 3.

Consider, for example, the German Federal Constitutional Court's use of the principle of the equality of the vote to interrogate measures that result in the distortion of the representation of different political parties. Even though the court, in 1957, upheld the constitutionality of the rule that a political party must achieve a minimum threshold of 5% in national elections to gain seats in Parliament,<sup>68</sup> a 1990 judgment ruled that the application of the threshold to the whole of Germany in the first election after unification was unconstitutional. The reason was that it unduly favoured parties that were active only in West Germany over ones that were active only in East Germany. Given the short span of time within which those parties had to compete for votes in the other territory, the rule violated the equality of the vote and the equality of opportunity of political parties.<sup>69</sup> The German Constitutional Court relied on the equality of suffrage to set limits to electoral rules that skew the proportionality of representation or stifle party-political competition in other contexts as well. For example, the court has stressed that the equality of the vote requires constituencies to have relatively equal populations.<sup>70</sup> It has also held that electoral rules which could result in a loss of seats for a party receiving more second-ballot votes<sup>71</sup> were unconstitutional.<sup>72</sup> These judgments are clear that any deviation from the equal value that should be accorded to every vote must be justified by compelling reasons. The principle of equal voting rights has thus been used to overcome the considerable degree of deference that is normally paid to the legislature in regulating the electoral system, given that article 38(3) of the Basic Law leaves the choice of a system of representation to Parliament.

A 2013 judgment of the African Court on Human and People's Rights similarly illustrates the interdependence of rights and democratic structures, and the capacity of rights discourse to challenge legal rules that have a corrosive effect on the basic structures and premises of the democratic system. The court held that the prohibition of independent candidates in presidential, parliamentary, and local government elections violated the right to participate freely in the government of one's country, as well as the rights to freedom of association, equality and freedom from discrimination, as guaranteed under the African Charter on Human and People's Rights.<sup>73</sup>

The problem with *UDM* is precisely the Court's failure to come to terms with the interconnectedness of rights and democratic structures. The judgment fails to see how background rules that do not directly affect the electorate's ability to vote, can nevertheless distort the outcome of the vote and undermine democratic accountability. It divorces the right to vote from institutional issues relating to the system of representation and the role of opposition parties, and

<sup>68</sup> BVerfGE 6, 84 94-95 (1957), with reference to BVerfGE 1, 208 256 (1952).

<sup>69</sup> BVerfGE 82, 322 (1990).

<sup>70</sup> BVerfGE 16, 130 (1963).

<sup>71</sup> In terms of Germany's mixed model of representation, voters in Germany have two ballots. The first is for an individual candidate standing for a specific constituency, while the second is for the party of their choice.

<sup>72</sup> BVerfGE 121, 266 (2008).

<sup>73</sup> *Tanganyika Law Society v United Republic of Tanzania; Reverend Christopher Mtikila v United Republic of Tanzania* Applications 009/2011 and 011/2011.

assumes that the ruling party's dominance has no bearing on either the vote or the democratic structures underpinning it.

### 3.2 Principle and pragmatism

Theunis Roux has offered a different explanation for the apparent anomalies characterising the court's voting rights jurisprudence. Roux wrote in 2006 that *UDM* should not be seen as a renunciation of the deep principle of democracy embodied in the constitutional text, and articulated in some of the Constitutional Court's decisions.<sup>74</sup> Rather, it relies on "a countervailing principle, extrinsic to FC s 1(d)", which holds that "where the Final Constitution does not clearly prescribe a particular model, the judiciary should defer to the legislature in politically sensitive cases concerning the design of the electoral system".<sup>75</sup> Put differently, judgments like *NNP* and *UDM* amount to a pragmatic concession to the court's vulnerable institutional position.<sup>76</sup>

Roux has further developed this frame of analysis in subsequent writings. In a recent book, he argues that the Chaskalson Court's attempts to secure its institutional independence rested, on the one hand, on a commitment to legally principled adjudication, and on the other hand, on a set of strategies designed to underplay the political nature of its role and to "manage its relationship with the ANC".<sup>77</sup> The formalism and deference of the *NNP* and *UDM* judgments are directly attributable to the political pressures facing the court, and are best seen as adjudicative strategies designed to protect the court's institutional position. Both applications challenged the ANC's electoral dominance, and adverse findings might have endangered the court's relationship with the ruling party.<sup>78</sup> But even though the court's restraint is understandable from this perspective, Roux criticises these judgments for failing to carve out a meaningful role for the court in "opening up South Africa's dominant party democracy".<sup>79</sup> They not only represent a problematic departure from the court's general commitment to principled decision making, but are also questionable as a matter of judicial politics.

Roux's analysis thus relies on a closely related set of distinctions. On the one hand, the court's general approach, as enunciated in judgments like *August* and *NICRO*, is based on principle and embodies a deep understanding of democracy. On the other hand, judgments like *NNP* and *UDM*, which appear to be underpinned by a shallow conception of democracy, are exceptions to the general rule, which can only be explained with reference to strategic considerations.

<sup>74</sup> See Roux "Democracy" in *CLOSA* 10-65 – 10-68; T Roux "The Principle of Democracy in South African Constitutional Law" in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 79 82-86 for his formulation of the constitutional principle of democracy enshrined in the South African Constitution. But see also D Brand "Writing the Law Democratically: A Reply to Theunis Roux" in Woolman & Bishop (eds) *Constitutional Conversations* (2008) 97.

<sup>75</sup> Roux "Democracy" in *CLOSA* 10-64.

<sup>76</sup> 10-57.

<sup>77</sup> Roux *The Politics of Principle* 383.

<sup>78</sup> 350, 363-364.

<sup>79</sup> 389.

Assuming that the court's voting rights judgments provide a big enough sample to warrant conclusions about what constitutes the general rule and what amounts to exceptions, it could nevertheless be asked whether Roux does not overstate the divide between *August* and *NICRO*, on the one hand, and *NNP* and *UDM*, on the other. Can *August* and *NICRO* truly be said to stand for a rigorous voting rights jurisprudence, given the gap between the broad democratic vision that they articulate and the narrowness of the court's actual reasoning? In addition, can the differences between the facts of these cases not explain the different outcomes, and provide clues as to the limits of the court's interpretive approach? As Roux recognises, *NNP* differed from the prisoners' voting rights cases in that it involved not the express disenfranchisement of a discrete category of voters, but a regulation aimed at the facilitation of the right to vote which happened to make it difficult or impossible for some citizens to cast their ballots.<sup>80</sup> The laws in *UDM*, on the other hand, had no bearing on who was allowed to vote, but potentially diluted the value of the vote and the accountability that democratic representatives owe to the electorate. In view of these differences, it seems possible that there is something about the court's interpretation of the right to vote which makes it more amenable to intervene in cases like *August* and *NICRO* and less so in ones like *NNP* and *UDM*.

Secondly, there are a number of doctrinal difficulties involved in extending the reasoning in *August* and *NICRO* in order to provide relief in cases in which disenfranchisement results from an ostensibly neutral and rational regulatory scheme. As Roux indicates, a less deferential approach in *NNP* would have required the court either to import a reasonableness standard into the inquiry whether the right to vote had been infringed, as O'Regan J had done, or to treat any regulation of the electoral process which imposes obligations on voters as a limitation of the right to vote which triggers the reasonableness test in terms of the general limitation clause in section 36.<sup>81</sup> The problem with the first approach is that it sits uneasily with the structure of Bill-of-Rights litigation, which entails a two-stage approach which first enquires into the scope and ambit of the right(s) in question and then, once a limitation has been found, considers whether it is reasonable and justifiable. Although the court has incorporated a reasonableness standard into the interpretation of some rights, it has done so only in cases in which the text of the Constitution itself prompts a blurring of the distinction between the first and second stage, by expressly qualifying the scope of the right with reference to open-ended standards such as reasonableness.<sup>82</sup> The relaxation of the demarcation of the two stages might indeed have been preferable in view of the fundamental importance of the right to vote. Even so, it is understandable that the court,

<sup>80</sup> 343-345.

<sup>81</sup> 349.

<sup>82</sup> See ss 26(2) and 27(2) (requiring the state to take reasonable measures to achieve the progressive realisation of the right of access to adequate housing, and the right of access to health care, food, water and social security respectively).



given its general caution and somewhat conservative jurisprudential leanings, was loath to relax it in the absence of an express textual invitation to do so.<sup>83</sup>

The second alternative is not without problems either. To treat any regulation of the electoral process, or any regulation imposing obligations on voters as a limitation of the right to vote, would effectively collapse the two-stage inquiry into the second stage, which focuses on the justifiability of the limitation. Again, this approach might be preferable to one which shields regulatory measures from reasonableness analysis, even where they place real obstacles in the way of exercising the vote. However, in the absence of a test to distinguish limitations from regulatory measures that do not restrict the right to vote, there is a danger that the courts may water down the limitations standard in view of the large number of measures that could come before them, and in recognition of Parliament's constitutionally mandated role in regulating elections.

These doctrinal obstacles are not insurmountable. Courts are free to adapt doctrine to changing circumstances, to accommodate it to shifting contexts and to develop it in line with constitutional values. However, the question is whether the Constitutional Court's voting rights jurisprudence provides an adequate normative framework to justify and guide such deviations from its general approach to fundamental rights adjudication. Do judgments like *August* and *NICRO* rest upon a sufficiently deep understanding of democracy to be able to do that? Or could it be that there is more continuity between these judgments and the ones in *NNP* and *UDM* than is commonly assumed?

### 3 3 Dignity and democracy

The first two explanations of the inconsistencies in the Constitutional Court's voting rights jurisprudence beg the question whether the court's basic approach to voting rights has contributed to the disappointing outcomes in *NNP* and *UDM*: the first, because it overstates the distinction between rights and structures; and the second, because it assumes that any such inconsistencies must result from extra-legal considerations. In this section I consider a third explanation, which ascribes these inconsistencies to the role of human dignity in the court's voting rights jurisprudence. This explanation rests on three premises: that dignity plays an important, even decisive, role in the court's interpretation of political rights; that in some contexts, the court's dignity-based analysis of political rights promotes an inclusive, egalitarian and participatory vision of democracy and an active notion of citizenship; and that in others, it is conducive to a more restrained role for the judiciary vis-à-vis the democratic process.

<sup>83</sup> Despite their jurisprudential differences, Karl Klare and Theunis Roux agree that, in South African legal culture, a sharp distinction is drawn between law and politics. See K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 168-172 (warning that the conservatism of South African legal culture could inhibit the interpretive creativity required by a transformative constitution); Roux *The Politics of Principle* 219-231 (arguing that the Chaskalson Court, given its composition, could be expected to adopt a cautious approach which upholds the distinction between law and politics).

Sachs J's pronouncement in *August* on the relationship between dignity and the right to vote has been quoted with approval in other cases in which restrictions on the vote have been invalidated.<sup>84</sup> The court in these cases did not rely exclusively on the value of human dignity in interpreting the right to vote or in assessing its importance in relation to countervailing considerations, but also referred to the importance of the right to vote to the constitutional value of democracy. For instance, in the *Richter* case, O'Regan J emphasised, in addition to the symbolic value of the vote as stressed by Sachs J in *August*, "the deep, democratic value that lies in a citizenry conscious of its civic responsibilities and willing to take the trouble that exercising the right to vote entails".<sup>85</sup> Here, dignity and democracy are treated as complementary and mutually reinforcing values.

It could nevertheless be argued that it is dignity – that is, the equal dignity of members of the political community – that does the bulk of the work in the court's voting rights analysis. In the first place, the cases in which a violation of the right to vote was found, all concerned instances in which an identifiable social group – prisoners, on two separate occasions, and non-resident South African citizens – were deprived of the vote. These cases resemble those equality cases in which differential treatment was found to impair the equal dignity of the groups concerned, and consequently amounted to unfair discrimination. In line with those cases, the court balked at the suggestion that prisoners had disqualified themselves from the right to vote,<sup>86</sup> rejected measures which lumped together all persons who had been imprisoned without the option of a fine,<sup>87</sup> and was at pains to point out that the fact that citizens are working abroad does not mean that they have relinquished their commitment to South Africa.<sup>88</sup> The court, it seems, has little sympathy for measures which rest on crude generalisations that label entire social groups or categories of persons as lacking in civic commitment or as unworthy of exercising the right to vote. Such measures, in the view of the court, are at odds with a constitutional vision in which all citizens have equal dignity,<sup>89</sup> and in which prejudice and social stereotypes cannot justify the limitation of their rights.<sup>90</sup>

Secondly, the instances in which a limitation of section 19(3) was not found, did not involve the direct exclusion of categories of persons from the ballot, but concerned allegations that regulatory measures aimed at

<sup>84</sup> See *Minister of Home Affairs v NICRO* 2004 5 BCLR 445 (CC) para 28; and *Richter v Minister of Home Affairs* 2009 3 SA 615 (CC) para 52.

<sup>85</sup> *Richter v Minister of Home Affairs* 2009 3 SA 615 (CC) para 53. See also *Minister of Home Affairs v NICRO* 2004 5 BCLR 445 (CC) para 47 ("the right to vote is foundational to democracy which is a core value of our Constitution").

<sup>86</sup> *August v Electoral Commission* 1999 3 SA 1 (CC) paras 20-22.

<sup>87</sup> *Minister of Home Affairs v NICRO* 2004 5 BCLR 445 (CC) para 67.

<sup>88</sup> *Richter v Minister of Home Affairs* 2009 3 SA 615 (CC) para 69.

<sup>89</sup> See for example *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) paras 107, 127 and 134; *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) paras 15 and 60.

<sup>90</sup> See for example *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 37.

facilitating the electoral process infringed the right to vote,<sup>91</sup> or that features of the representative system diluted the link between voters and their representatives.<sup>92</sup> In these cases, the court showed considerable deference to the decisions of Parliament. This, too, seems consistent with a dignitarian framework – since the laws in question did not exclude or discriminate against distinct social groups, they did not trigger the strict scrutiny reserved for measures that strike at the heart of the constitutional values of human dignity and equality.<sup>93</sup>

Thirdly, much of the court’s voting rights jurisprudence turns on the distinction between measures which make it impossible or unduly difficult for citizens to vote and those requiring them only to “take reasonable steps in pursuit of that right”.<sup>94</sup> In the court’s view, the disenfranchisement of prisoners clearly fell into the first category. As the court pointed out in *NICRO*:

“Prisoners are prevented from voting by the provisions of the Electoral Act and by the action that the State has taken against them. Their position cannot be compared to people whose freedom has not been curtailed by law and who require special arrangements to be made for them to be able to vote.”<sup>95</sup>

The same applied to voters who were abroad on voting day, and who could not be reasonably expected to “travel thousands of kilometres across the globe to be in their voting district on voting day”.<sup>96</sup> A number of other measures were, however, found only to require voters to take reasonable steps. These include the requirement in *NNP* of a bar-coded identity document as a prerequisite for voting,<sup>97</sup> and the requirement in *Richter* that voters who will be abroad on the day of election notify the Chief Electoral Officer of their intention to bring out a special vote within 15 days of the date of proclamation of the election.<sup>98</sup>

The distinction is in accordance with the court’s basic dignitarian framework. It is widely held, in accordance with Kant’s second formulation of the categorical imperative, that dignity proscribes the treatment of individuals as mere means to an end or as disposable objects of state power.<sup>99</sup> In terms of this approach, measures which impose reasonable obligations on individuals that respect their moral agency, are not seen to be inconsistent

<sup>91</sup> For example the voter identification requirements in *New National Party of South Africa v The Government of the Republic of South Africa* 1999 3 SA 191 (CC) and *Democratic Party v The Minister of Home Affairs and the Electoral Commission* 1999 3 SA 254 (CC); and the notification requirement in *Richter v Minister of Home Affairs* 2009 3 SA 615 (CC) paras 80-84.

<sup>92</sup> *United Democratic Movement v President of the Republic of South Africa* 2003 1 SA 488 (CC).

<sup>93</sup> See Woolman and Botha “Limitations” in *CLOSA* 34-79 – 34-81.

<sup>94</sup> *New National Party v Government of the Republic of South Africa* 1999 3 SA 191 (CC) para 23. Cf also para 15 (the requirement of voter registration is “a constitutional requirement of the right to vote, and not a limitation of the right”).

<sup>95</sup> *Minister of Home Affairs v NICRO* 2004 5 BCLR 445 (CC) para 53. See also *August v Electoral Commission* 1999 3 SA 1 (CC) para 22.

<sup>96</sup> *Richter v Minister of Home Affairs* 2009 3 SA 615 (CC) para 68.

<sup>97</sup> 1999 3 SA 191 (CC).

<sup>98</sup> 2009 3 SA 615 (CC) paras 80-84.

<sup>99</sup> See G Dürig “Der Grundrechtssatz von der Menschenwürde” (1956) 81 *AöR* 117 127 for a classical statement of the object formula, and L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 54-62, 99-102, 138-140 for an endorsement of a Kantian understanding of human dignity and of Dürig’s formulation.

with the inherent dignity and worth of the human person.<sup>100</sup> Accordingly, the imposition of reasonable civic duties on potential voters neither reduces them to passive objects of government power, nor denies their civic responsibility or choice. It is, however, a different matter where the measures in question make it impossible or exceedingly difficult for them to vote. Besides restricting their participation in political life, such measures signal that they are less worthy of civic consideration and less capable of the responsible exercise of political freedom.

Finally, despite references to the importance of the vote to the democratic society envisaged by the Constitution, the court has largely failed to indicate how the value of democracy sheds light on the meaning of section 19(3). This is evident from the *UDM* Court's failure to give meaningful content to the value of democracy and to explore the link between democratic rights and structures. It is also noticeable in the *Richter* case: even though the court stressed the link between the exercise of the vote and the idea that the government derives its power from and remains subject to the will of the people,<sup>101</sup> it did not even begin to address questions relating to the definition of "the people" or the link between voting rights and residence.

It appears plausible, in view of the above analysis, to claim that the apparent inconsistencies in the Constitutional Court's voting rights jurisprudence have something to do with the emphasis it has placed on human dignity. In the first place, the Court's dignity-based approach has resulted in a fairly rigorous form of scrutiny whenever discrete classes of voters are disenfranchised. Where, on the other hand, restrictions of the vote arise from regulatory measures aimed at facilitating the exercise of the vote, or from the rules that regulate the powers of representatives and their links to the electorate, the court has shown a far greater degree of restraint. This is perhaps not surprising: in other contexts, too, it has been noted that a dignity-based approach tends to be more alert to direct rights violations which clearly deny the autonomy and worth of the human person or signal that a class of persons is less worthy of equal consideration, than to infringements which occur at the interface of supposedly neutral legal rules and cultural, material and structural impediments to the equal enjoyment of rights.<sup>102</sup>

Secondly, the distinction between measures which make it impossible or unduly difficult for some to vote and those that impose reasonable civic obligations has proved problematic. At one level, it seems to be in accordance with our basic intuitions about dignity and moral agency; at another, it tends to deflect attention away from the state's positive duty, in terms of section

<sup>100</sup> For instance, in BVerfGE 88, 203 281 (1993) the German Federal Constitutional Court held that a pregnant woman who is required to participate in a pre-abortion counselling procedure is not treated as a mere object, as the law recognises her autonomy and responsibility and views her as a partner.

<sup>101</sup> 2009 3 SA 615 (CC) para 53.

<sup>102</sup> H Botha "Equality, Plurality and Structural Power" (2009) 25 *SAJHR* 1 8-10.

7(2), to protect, promote and fulfil the rights in the Bill of Rights.<sup>103</sup> In a society plagued by high levels of poverty and inequality, there is a danger that courts may base their assessment of what amounts to reasonable civic obligations on assumptions derived from the lived experience of the middle class, and may consequently understate the difficulties experienced by poor, illiterate and rural voters. Again, the focus on the dignity and personhood of individual voters appears to shift the attention away from the ways in which seemingly neutral laws reproduce the political disempowerment of poor and marginalised groups and communities.<sup>104</sup>

### 3 4 Concluding remarks

The preceding analysis suggests that the Constitutional Court's focus on human dignity, coupled with its failure to give meaningful content to the value of democracy in its voting rights judgments, can help explain the apparent anomalies in the court's jurisprudence. The analysis draws on the distinction, made by Choudhry and Issacharoff, between rights and structures. However, it resists a hierarchical approach which prioritises structures over rights, and insists instead on their interdependence. The problem in cases like *NNP* and *UDM* is not that the court engages in rights analysis, but rather that its analyses are not sensitive enough to social and political structures of power and domination, and how they impact on the normative ideals embodied in rights discourse.

The analysis also does not deny the importance of institutional considerations, such as the Constitutional Court's attempts to protect its own institutional position, as analysed by Roux. It is likely that the court's deference in *NNP* and *UDM* arose, in part, from concerns about its institutional position. However, that is not to say that these were the only considerations influencing the court, or that the court saw these cases in terms of a stark choice between

<sup>103</sup> Dignity-based forms of analysis sometimes appear to be more responsive to violations which result from actions than from omissions, at least in cases which involve a direct conflict between the state's duties to respect and to protect fundamental rights. See for example BVerfGE 115, 118 (2006), in which the German Federal Constitutional Court invalidated legislation which authorised the security forces to shoot down an aircraft which was to be used to destroy human life. The court refused to balance the dignity of innocent victims against the lives of others who might be saved in the process, and thus privileged the state's negative duty to respect dignity over its positive duty to protect it. See Ackermann *Human Dignity: Lodestar for Equality in South Africa* 119-126 for a defence of this approach.

<sup>104</sup> It could be argued that *NNP* rested on a flawed application of the distinction between regulatory measures and outright deprivations of the right to vote, as the requirement of a bar-coded identity document made it impossible or unduly difficult for poor, rural voters to vote. This may be taken to mean that it is not the Court's dignity-based construction of the right to vote, but rather its application of that standard in *NNP* which is problematic. It must nevertheless be asked whether there is not something about the court's understanding of dignity which facilitates the failure to situate these measures within a context of material deprivation. The literature on the court's dignity-based interpretation of equality suggests some possible explanations, for example that the court views dignity in overly individualistic terms (C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248 258-260) and/or occasionally premises it on moralistic notions of dignified behaviour (H Botha "Equality, Dignity, and the Politics of Interpretation" (2004) 19 *SAPL* 724 743-746). My analysis in the next section suggests a further explanation: that the court's voting rights judgments reduce dignity to the symbolic value of formal inclusion in the body politic or the purely formal equality of citizens, and overlook the ways in which ostensibly neutral electoral rules overlap with systemic inequality and structural power to deepen and reproduce social exclusion.

pragmatism and principle. It seems likely that its responses were shaped not only by concerns about its institutional position, but also by its understanding of the relevant normative and doctrinal issues and the extent of the threat that the laws in question posed to its constitutional vision of democracy. If this is correct, it seems plausible to suggest that, whatever other reasons the court may have had to tread lightly, its dignity-based understanding of voting rights played an important role in enabling it to identify *NNP* as a case of regulation rather than deprivation, and *UDM* as a matter of legislative choice over the particulars of the representative system, rather than a dispute which goes to the heart of democratic accountability.

A final qualification is that my critique of the Constitutional Court's dignity-based approach refers to the specific sense in which the court has used the term "dignity" in its voting rights jurisprudence, and should not be taken to imply that dignity has no place in our understanding of the right to vote. Dignity is a contested concept, and everything depends on how we flesh out its meaning and articulate it with other democratic values.<sup>105</sup>

#### 4 Reconsidering Sachs J's dictum in *August*

Sachs J's dictum in *August*, in which he grounded the universality of the right to vote in dignity, equality and citizenship, is often cited in case law and academic writings. It has nevertheless been under-analysed in the literature, presumably because it is thought to amount to little more than a rhetorical flourish. However, the above analysis suggests that it does more work than is commonly assumed. If the likelihood of judicial intervention or restraint is indeed tied to a particular measure's impact on the dignity of those affected, it is important to come to terms with the court's understanding of dignity in this context, and of its articulation with the values of democracy, citizenship, equality and nationhood.

There is a second reason for taking this passage seriously. It is possible that the democratic vision that it articulates, has greater transformative potential than would appear from the actual holding itself or from cases in which it has been cited. This may be the result of the gap between the breadth of Sachs J's vision and the narrowness of the holding in *August*. It may also have to do with the way in which Sachs J's rich articulation of constitutional values has been reduced in subsequent cases to a one-dimensional, formulaic understanding. The possibility that there is something about the dictum itself which undermines its own transformative potential, should also not be discounted.

<sup>105</sup> On the relation between dignity and democracy, see P Häberle "Die Menschenwürde als Grundlage der staatlichen Gemeinschaft" in J Isensee & P Kirchhof (eds) *Handbuch des Staatsrechts der Bundesrepublik Deutschland Bd II: Verfassungsstaat* 3 ed (2004) 317 350-353; S Woolman "Dignity" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2005) 36-12 – 36-14; Woolman & Botha "Limitations" in *CLOSA* 34-113 – 34-127 and H Botha "Human Dignity in Comparative Perspective" (2009) 20 *Stell LR* 171 192-194, 214-215.

#### 4 1 Dignity, equality and citizenship

Subsequent judgments have focused, for the main part, on Sachs J's description of the vote as a badge of dignity and personhood, and have taken this to mean that universal adult suffrage plays an important symbolic role in signalling the equal dignity and worth of all South Africans, irrespective of their race, social class, economic status or conformity to dominant norms of behaviour.<sup>106</sup> This is undoubtedly an important dimension of the right to vote.<sup>107</sup> However, it could be asked whether this emphasis on the symbolic value of the vote does not miss something important about dignity's relationship with the equality and universality of democratic citizenship, as alluded to by Sachs J. Is the vote to be seen simply as a ritual enactment, performed every five years, of the equal dignity of all citizens? Is it thus divorced from other forms of participation in the life of the polity? In addition, must we take his dictum simply to refer to the strict formal equality of citizens? Does political equality not also require a sensitivity to, and political mobilisation around the ways in which material and other forms of disadvantage skew political power and distort the equal representation of all citizens?

The work of Hannah Arendt provides a useful vantage point for a consideration of these questions. Arendt had no place in her thought for abstract notions of human dignity. Commenting on the desperate situation of refugees and stateless persons in the wake of two World Wars and the radical restructuring of the political landscape in Europe, she wrote that individuals who no longer belonged to an organised human community, and who could for that reason only rely on their abstract and general humanity, soon discovered that "[t]he world found nothing sacred in the abstract nakedness of being human".<sup>108</sup> Deprived of "a place in the world which makes opinions significant and actions effective",<sup>109</sup> they were relegated to a sphere of mere existence – outside the law, outside politics and outside humanity. For her, rights – whether civil rights or human rights – could only be guaranteed through membership in a political community. Similarly, human dignity becomes a meaningless abstraction when it is uncoupled from political membership. The concrete, embedded dignity of citizens is the only form of dignity worth talking about.<sup>110</sup>

In Arendt's thought, equality is also closely related to membership in a political community. Arendt considered the private realm as the sphere in which the natural inequalities between individuals loom large. The public realm, on the other hand, is the sphere of human artifice, in which citizenship

<sup>106</sup> *Minister of Home Affairs v NICRO* 2004 5 BCLR 445 (CC) para 28; *Richter v Minister of Home Affairs* 2009 3 SA 615 (CC) para 53.

<sup>107</sup> See F Michelman "Why Voting?" (2001) 34 *Loy LA L Rev* 985.

<sup>108</sup> H Arendt *The Origins of Totalitarianism* (1968) 299.

<sup>109</sup> 296.

<sup>110</sup> On the distinction between the abstract dignity of humanity and the dignity of citizens, see F du Bois "Freedom and the Dignity of Citizens" in AJ Barnard-Naudé, D Cornell & F du Bois (eds) *Dignity, Freedom and the Post-Apartheid Legal Order: The Critical Jurisprudence of Laurie Ackermann* (2009) 112 142-147, who argues that, whereas Kant's moral writings conceive of individuals in abstract, impersonal terms and demand respect only for their moral capacity, his legal writings are concerned with the respect due to concrete, socially embedded persons.

provides a mask which enables individuals to be judged on the basis of their words and actions, rather than their natural differences. It is here that they can create a common world and reveal their singularity through public action. The equality on which the public sphere rests, can never be “natural”, but can only arise from human organisation. It comes about as a result of our decision, as citizens, “to guarantee ourselves mutually equal rights”,<sup>111</sup> and is contingent on the existence of public institutions which provide a space for such interaction.

Arendt’s views on the dignity and equality inherent in citizenship provide important clues to the meaning of Sachs J’s dictum in *August*. The idea that citizenship abstracts away from the natural differences and inequalities between people, resonates powerfully with Sachs J’s emphasis on the way in which universal adult suffrage transcends disparities of wealth and power. Moreover, her belief that membership in a political community enables citizens to disclose their uniqueness through public speech and action, has an affinity with the participatory strands in the court’s jurisprudence. But, even though Arendt can certainly not be criticised for a shallow understanding of democracy which reduces political rights to the occasional exercise of the vote, she is vulnerable to the charge that her political thought forecloses meaningful responses to the pernicious effects of private inequality in the public-political realm. In seeking to protect the integrity of the public sphere by fencing it off from private need, Arendt severely restricted the range of issues that can be subjected to democratic decision-making. Critics have pointed out that the boundary between the public and private spheres is porous and constantly shifting, and is the subject of countless democratic struggles which seek to politicise matters that used to be seen as falling squarely within the private sphere. Because she defined the political with reference to a pre-existing border, Arendt could not account for the transformative potential inherent in struggles that place that very border in question. As a result, she was unable to theorise the potential of political equality to challenge inequities in the social sphere.<sup>112</sup>

In her book titled *Genealogies of Citizenship*, the American sociologist Margaret Somers relies on Arendt to argue that rights are not simply individual possessions, but public goods that “can only be sustained by an alliance of public power, political membership, and social practices of equal moral recognition”.<sup>113</sup> Drawing *inter alia* on TH Marshall’s classical typology of citizenship and his insistence that social rights play an important role in enabling citizens to participate on an equal footing in social, cultural and political life,<sup>114</sup> she develops a theory to account for the relationship between

<sup>111</sup> Arendt *The Origins of Totalitarianism* 301.

<sup>112</sup> For critical perspectives on the dichotomy between the public and private spheres in Arendt’s thought, see S Benhabib *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (1992) 89-120; J Rancière “Who is the Subject of the Rights of Man?” (2004) 103 *SAQ* 297; E Christodoulidis “De-Politicising Poverty: Arendt in South Africa” (2011) 22 *Stell LR* 501.

<sup>113</sup> M Somers *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights* (2008) 5.

<sup>114</sup> TH Marshall “Citizenship and Social Class” in TH Marshall (ed) *Class, Citizenship, and Social Development* (1963) 71.



citizenship and socio-economic inequality. In a departure from mainstream approaches, which understand citizenship in terms of the relation between the state and individual citizens, she conceives it in terms of the triadic relation between the state, market and civil society. On this understanding, civil society is the sphere in which citizenship and social solidarity are nurtured. Moreover, it is a site of contestation which has an important role to play in resisting both state repression and the extension of the inequalities of the market into other spheres of human activity.<sup>115</sup>

However, civil society is fragile, and its egalitarian and socially inclusive ethos can easily make way for a darker, exclusionary and repressive side. This is particularly the case when the balance of power among the state, market and civil society is distorted. According to Somers, this has occurred in the United States during the past decades, where citizenship has increasingly been subjected to the contractual logic of the market. Under the pressure of market fundamentalism, the rights of citizens have become conditional on their ability to exchange something of equal value, thus enabling the state to shirk its responsibility by shifting the blame for social problems onto the individuals themselves. This amounts to a repudiation of the egalitarian, inclusive and universalistic assumptions underlying citizenship.<sup>116</sup> Somers argues that the state's hopelessly inadequate response to the trauma inflicted on the residents of New Orleans by Hurricane Katrina, confirmed that market fundamentalism had deprived the poor of meaningful social and political membership. The contractualisation of citizenship, as evidenced *inter alia* by the substitution, through the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, of workfare for welfare, had reduced the poor to internally stateless persons, who had to fend for themselves but lacked the resources to do so. She writes:

“Market fundamentalism thus grafted its universalistic discourse onto the substance of a society that was still deeply segregated and rent with historically inflicted inequalities. ... [T]he discursive triumph of market fundamentalism has the effect of freezing in place the identity-based inequalities and historical exclusions, and then worsening them through deepening market-based inequalities. The result is nothing less than total social and political exclusion from membership in the human community.”<sup>117</sup>

Somers' reconceptualization of Arendt's notion of the right to have rights to refer not only to “recognition, inclusion, and membership” in the political community, but also in civil society,<sup>118</sup> allows for a richer analysis of the relation between citizenship, dignity and equality. Breaking with the dichotomy between the public and private spheres which is so central to Arendt's thought and differentiating civil society from both the state and the

<sup>115</sup> Somers *Genealogies of Citizenship* 30-32.

<sup>116</sup> 2-3, 37-42. Somers views citizenship as distinctly non-contractual. She writes: “citizenship entails reciprocal but *non-equivalent* rights and obligations between *equal* citizens; contracts entail market exchange of *equivalent* goods or services between *unequal* market actors” (69, emphasis in the original).

<sup>117</sup> 104-105. See also M Pieterse “Procedural Relief, Constitutional Citizenship and Socio-Economic Rights as Legitimate Expectations” (2012) 28 *SAJHR* 359 374-378 for a critique of Constitutional Court judgments which condition socio-economic rights on conformity to a neo-liberal concept of citizens as paying customers.

<sup>118</sup> Somers *Genealogies of Citizenship* 25.

market, she grounds citizenship in a balance between these three institutions. She is thus able to shift the focus away from the formal status of citizenship, and to draw attention instead to the overlap between social exclusion and political disenfranchisement. Somers recognises that it is not only the external boundaries separating citizens from non-citizens that place some persons beyond the protection of the law. There are internal exclusions, too, which deprive certain classes of nationals from actual citizenship. These internal borders track different, overlapping forms of disadvantage, based *inter alia* on race, class, unemployment, gender and non-conformity to mainstream norms and roles, which are deepened as a result of the marketization of citizenship. In effect, they exclude some from social membership, sever them from the public sphere and deprive them of the actual enjoyment of rights, even where they retain formal membership of the political community.<sup>119</sup>

How does Sachs J's articulation in *August* of the importance of the vote stand up to this? His references to human dignity, equality and the universality of the vote certainly capture the idea that citizenship serves to integrate individuals into an inclusive community based on equal recognition.<sup>120</sup> Moreover, his allusion to disparities of wealth and power signals an awareness of historical patterns of social exclusion and disadvantage. Based on this, it does not seem fanciful to expect the court to be exacting in its demand for the justification of measures that add the insult of political disenfranchisement to the injury of social marginalisation. An argument could even be made that such restrictions should never be allowed, as they effectively remove the last remaining vestiges of the political and social membership of those affected, and thus deprive them of the very basis of their rights.<sup>121</sup>

But of course, the court did not go nearly that far. In *August* and in *NICRO*, it held open the possibility that the disenfranchisement of prisoners could pass constitutional muster, provided that it was proportionate to a sufficiently important state goal. Moreover, it is not clear whether Sachs J's reference to disparities of wealth and power was truly meant to incorporate a substantive vision of equality into the court's voting rights analysis. His dictum could be read simply to refer to the formal equality of citizenship, which plays an important symbolic role in integrating the poor and marginalised into the community of citizens, but does not require a probing analysis of the intersection between disenfranchisement and social exclusion. This reading seems to be confirmed by the judgment in *NNP*, which was delivered a mere twelve days after the one in *August*, and the one in *Democratic Party*

<sup>119</sup> Somers *Genealogies of Citizenship* 21-22 and 118. See also E Balibar *Citizenship* (2015) 62-82.

<sup>120</sup> On citizenship's integrative function, see also U Preuß "Citizenship and Identity: Aspects of a Political Theory of Citizenship" in R Bellamy, V Bufacchi & D Castiglione (eds) *Democracy and Constitutional Culture in the Union of Europe* (1995) 107.

<sup>121</sup> A Kesby *The Right to Have Rights: Citizenship, Humanity, and International Law* (2012) 85-90 argues that the disenfranchisement of prisoners strikes at the heart of their political and social membership, and often serves as the final step in confirming their status as outcasts. She is critical of the decontextualised approach that is typically adopted by courts when considering the constitutionality of such measures. This approach fails to come to terms with the overlap between citizenship and other markers of disadvantage, such as race, poverty, unemployment and social deviancy, and underestimates the impact of disenfranchisement on prisoners' membership in the human community.

*v Minister of Home Affairs*,<sup>122</sup> in which the court rejected the argument that the same voter identification requirement amounted to unfair discrimination.

Also missing from Sachs J's judgment is engagement with the agonistic dimension of citizenship. For Somers, citizenship is not only a means of social and political integration. It is also a site of contestation, which depends for its survival on its capacity to mobilise resistance against both state repression and boundary transgressions by the market. The disenfranchisement of categories of people that are deemed socially redundant narrows down the scope for contestation, by silencing voices and depriving the political community of "oppositional counter-publics"<sup>123</sup> that can mobilise such resistance.

O'Regan J's dissenting judgment in *NNP* comes closest to capturing the egalitarian and agonistic dimensions of the right to vote. She expressly recognises the link between the right to vote and the exercise of political power, when stating that:

"The right to vote is more than a symbol of our common citizenship, it is also an instrument for determining who should exercise political power in our society."<sup>124</sup>

By this, she does not simply mean that power is derived from the people, or that the exercise of public power is legitimated through elections. Rather, she emphasises that a denial of the vote leads, in many cases, to the complete denial of fundamental human rights. She refers to apartheid South Africa, where the denial of the vote to black people entrenched white political power, which "was used systematically to further the interests of white South Africans and to disadvantage black South Africans".<sup>125</sup> She also points out, with reference to a decision of the United States Supreme Court, that "the right to vote is 'preservative of all rights'".<sup>126</sup> The right to vote, on this understanding, is both the basis of other rights and a mechanism through which the poor and marginalised can resist social exclusion. For this reason, a deferential standard of review, such as rationality, is not an appropriate baseline for determining whether the regulation of the electoral process infringes the right to vote.

## 4 2 Dignity, citizenship and nationality

Sachs J's dictum in *August* is replete with references to the South African nation. It refers, *inter alia*, to the importance of the vote for "the accomplishment of an all-embracing nationhood" and in signalling that, despite differences in class and status, "we all belong to the same democratic South African nation".<sup>127</sup> There is nothing sinister about these references. They are meant to emphasise the shift away from the apartheid order's exclusionary laws and practices, which reduced the majority of the population to statelessness, to the inclusivity of the new constitutional order, which has redrawn the bounds

<sup>122</sup> 1999 3 SA 254 (CC).

<sup>123</sup> K Thomas "Racial Justice" in A Sarat, B Garth & R Kagan (eds) *Looking Back at Law's Century* (2002) 78-87.

<sup>124</sup> 1999 3 SA 191 (CC) para 122.

<sup>125</sup> Para 120.

<sup>126</sup> Para 122.

<sup>127</sup> 1999 3 SA 1 (CC) para 17.

of membership and belonging. And yet, the passage is perhaps too quick to identify citizenship with, and tie voting rights to, nationality. Could it be that the court's apparent conflation in *Richter* of citizenship with nationality is rooted in Sachs J's dictum in *August*?

Historically, the distinction between citizenship and nationality pointed to a fundamental divide between the active status of citizenship and the passive status of subjects whose submission to the law had to be secured, but who were excluded from active participation in the life of the nation. Nationality, which designated a passive status, extended to all who had a close relationship with the nation state, usually by virtue of birth or some other criteria which established ties of trust and belonging. Citizenship, by contrast, conveyed an active status: only citizens were full members of the polity and were entitled to participate in political decision-making.<sup>128</sup> The twentieth century saw a growing convergence of the two, as a result of the extension of suffrage to women, the poor and, in countries where citizenship used to be racially qualified, members of previously excluded racial groups. However, in recent years the distinction has reasserted itself in different, often contradictory ways.

In the first place, many of the rights traditionally associated with citizenship have been extended to nationals of other countries. Foreign nationals are guaranteed civil rights and often enjoy social rights and benefits. Moreover, the right to vote is increasingly granted to non-nationals based on their residency, at least at some levels of government (most often local government).<sup>129</sup> Citizenship has thus been "disaggregated" into different components, with the result that the legal position of certain foreign nationals has come to approximate that of citizen-nationals. These developments resulted from a variety of pressures, including the growing mobility of people across national boundaries, political attempts to integrate foreign nationals into society, and supranational processes of regional integration.<sup>130</sup> As Benhabib points out, these changes respond to the growing gap between, on the one hand, "the 'ideal typical' model of citizenship in the modern nation-state", which presupposes a "unity of residency, administrative subjection, democratic participation, and cultural membership",<sup>131</sup> and, on the other, changes in demographics and the

<sup>128</sup> See U Preuß "The Relevance of the Concept of Citizenship for the Political and Constitutional Development of the EU" in U Preuß and F Requejo (eds) *European Citizenship, Multiculturalism, and the State* (1998) 11 16-19; Preuß "Citizenship and Identity" in *Democracy and Constitutional Culture* 109-110.

<sup>129</sup> In a study published in 2008, D Earnest *Old Nations New Voters: Nationalism, Transnationalism, and Democracy in the Era of Global Migration* (2008) pointed out that voting rights had been extended to non-citizen residents in 45 countries. See also CM Rodriguez "Noncitizen Voting and the Extraconstitutional Construction of the Polity" (2010) 8 *Int'l J Const L* 30.

<sup>130</sup> In the European Union, the institution of European citizenship, the extension of basic rights (including political rights) to nationals of other member states, and the resultant differentiation between the position of EU citizens and third country nationals have resulted in a complex web of rights and duties that are constantly being reconfigured. See M Aziz "Implementation as the Test Case of European Citizenship" (2009) 15 *Colum J Eur L* 281; S Kadelbach "Union Citizenship" in A von Bogdandy & J Bast (eds) *Principles of European Constitutional Law* 2 ed (2010) 443.

<sup>131</sup> S Benhabib *The Rights of Others: Aliens, Residents and Citizens* (2004) 144 [emphasis in the original omitted].

nature of political authority, which render that model out of sync with the actual conditions obtaining today.

Secondly, nationalist understandings of membership and belonging, which ground citizenship not in a legal status defined in terms of civil rights, but in membership in a community founded on a particular ethnic or cultural identity, have reappeared. As Habermas notes, appeals to such an organic, pre-political and naturalistic conception of the nation and identity-based understanding of citizenship have historically been powerful vehicles for the promotion of discrimination within and aggression across the boundaries of the nation state.<sup>132</sup> This is still the case today. Somers argues that, in the contemporary United States, nationalist and ethnic notions of belonging have to compensate for the exclusion of significant sections of the nation from real social and political membership. In many cases, the internally stateless “have become nationalist patriots – a symbolic garb that compensates for the loss of rights by cultural and symbolic identification”<sup>133</sup> with “a militant security-driven nationalism” and “a radical free-market ideology”.<sup>134</sup> In South Africa, too, nationalist and culturalist notions of belonging are vying with the universal language of human and civil rights, as a means of integrating the poor and marginalised into the national community.<sup>135</sup>

A too ready identification of nationality with citizenship overlooks the incongruence between residency, subjection to government power, democratic rights and cultural membership, and risks appropriating the vocabulary of identity-based notions of national belonging. But let us assume, for the moment, that Sachs J’s references to nationhood were not meant to collapse the citizenry onto an exclusive understanding of the South African nation. Couldn’t it be argued that his articulation of the vote with dignity might pave the way for the extension of voting rights to non-nationals who have made South Africa their home and are subject to the state’s authority? Doesn’t it follow from the injunction that persons should never be treated as mere objects, that they should have a say in how they are governed? Doesn’t human dignity require the state to narrow the gap between those who are governed by the laws, and those with the right to elect the lawmakers?

These arguments were made before the Constitutional Court of Bremen, a city state in Germany, in a case concerning the constitutionality of a

<sup>132</sup> J Habermas *The Inclusion of the Other: Studies in Political Theory* (1998) 111-117.

<sup>133</sup> Somers *Genealogies of Citizenship* 134.

<sup>134</sup> 133.

<sup>135</sup> The nature of and reasons for the exclusivity of popular understandings of South African citizenship have been debated particularly within the context of xenophobic attacks. For different explanations of these phenomena, see J Comaroff & JL Comaroff “Naturing the Nation: Aliens, Apocalypse, and the Postcolonial State” in T Hansen & F Stepputat (eds) *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* (2005) 120; J Klaaren “Citizenship, Xenophobic Violence, and Law’s Dark Side” in L Landau (ed) *Exorcising the Demons Within: Xenophobia, Violence and Statecraft in Contemporary South Africa* (2011) 135.

provincial Bill.<sup>136</sup> The Bill would have extended the right to vote in elections for the state (provincial) legislature to residents who were citizens of other member states of the European Union (EU). In addition, it would have granted the right to vote in local council elections to residents who were citizens of third-country states (that is countries outside the EU). Previous attempts on the part of provincial legislatures to extend the vote to non-citizens had been unsuccessful. Most notably, in 1990 the Federal Constitutional Court invalidated a law of the provincial legislature of Schleswig-Holstein which sought to extend the vote in local government elections to citizens of certain countries who had been resident in Germany for at least five years. The court held that the law was inconsistent with article 28(1) of the German Basic Law which, read with article 20(2), restricted the vote to German nationals, as defined in article 116(1).<sup>137</sup> However, the Bremen provincial legislature argued that this judgment had been overtaken by an amendment to article 28(1) of the Basic Law which, in accordance with the Treaty of Maastricht, extended the right to vote and to be elected in local government elections to citizens of other member states of the EU. As a result, the province was free to develop a more inclusive interpretation of the concept of “the people”, which sought to address democratic concerns arising from the growing gap between the electorate and those who are subject to the law, and which was more in line with the constitutional precept of human dignity, with its emphasis on the right of individuals to have a say in decisions affecting them.

The court rejected these arguments by a majority of six to one. Despite the fact that the provincial Constitution does not expressly restrict “the people” to German nationals, but stipulates that all state authority shall be exercised by the residents of Bremen who are entitled to vote, the court held that this provision had to be interpreted in line with the Basic Law’s conception of “the people”, which comprises only German nationals. The constitutional amendment which extended the right to vote in local government elections to citizens of other member states of the EU did not change the underlying principle, but only made a limited exception in order to ensure compliance with the Maastricht Treaty. A further extension of the vote could only be achieved through another constitutional amendment, or through changes to the laws governing the acquisition of German nationality.

In her minority judgment, Sacksofsky J rejected the idea that the constitutional amendment of 1992 amounted to a limited exception which had no bearing on the general principle that “the people” comprised only German nationals. She held that the provinces were not barred from extending voting rights to foreign nationals, in an attempt to bring electoral law more closely in line with the democratic principle that everyone who is affected by state

<sup>136</sup> St GH Bremen, Judgment of 31.01.2014 - St 1/13. I am indebted to Wessel le Roux for drawing my attention to this judgment. See W le Roux “Residence, Representative Democracy and the Voting Rights of Migrant Workers in Post-Apartheid South Africa and Post-Unification Germany (1990-2015)” in H Botha, N Schaks & D Steiger (eds) *The End of the Representative State? Democracy at the Crossroads* (2015, forthcoming) for an analysis of this case, and for a defence of a residence-based understanding of democracy.

<sup>137</sup> BVerfGE 83, 37 (1990).

power, should have the opportunity to take part in the democratic process. She added, with reference to the judgment of the Federal Constitutional Court in the Lisbon Treaty Case,<sup>138</sup> that the same principle was also underpinned by human dignity. The only constraint was the requirement, contained in article 28(1) of the Basic Law, that representatives must be elected through general, direct, free, equal and secret elections.

This case highlights the potential of a dignity-based understanding of political rights to hold open the possibility of more inclusive democratic imaginations. The articulation of the idea that human dignity demands that every person should be treated as an autonomous subject, rather than a mere object, with the democratic principle that people who are subject to state power, should have a say in how that power is exercised, seems particularly promising. At the same time, the judgment illustrates the difficulties facing such a democratic politics in a constitutional system in which democratic citizenship has traditionally been closely aligned to nationality.<sup>139</sup>

## 5 Concluding remarks

This article asks whether the fluctuations in the Constitutional Court's voting rights jurisprudence between deep and shallow understandings of democracy and between interventionist and deferential modes of adjudication may have something to do with the court's substantive understanding of the right to vote. It argues that the court's focus on human dignity, coupled with its failure to give meaningful content to the value of democracy within the voting rights context, has given rise to fairly rigorous forms of scrutiny in cases where discrete classes of adult citizens are excluded from the vote, and a far more restrained attitude where restrictions arise from regulatory measures aimed at facilitating the exercise of the vote, or from the rules that regulate the link between representatives and the electorate. As a result, the court's jurisprudence tends to underplay the state's positive duty to protect and promote the right, by displacing responsibility onto the voters themselves. It also shows a lack of sensitivity to structural impediments to the exercise and efficacy of the vote, whether these are rooted in poverty and social exclusion or the structures and operation of the (party-)political system.

Dignity is, however, a contested concept, and we should not be too quick to banish it from our understanding of voting rights. The article contends that Sachs J's articulation in *August* of the right to vote with dignity, equality and democratic citizenship has transformative potential. Drawing on the work of Margaret Somers and, to a certain extent, Hannah Arendt, it argues that dignity, read together with democracy, equality and citizenship, need not simply refer to the symbolic value of formal inclusion in the body politic, or the purely formal equality of citizens. It can also evoke a richer, more deeply egalitarian conception of citizenship – as full inclusion in civil society and

<sup>138</sup> B VerfGE 123, 267 (2009).

<sup>139</sup> See H Botha "The Rights of Foreigners: Dignity, Citizenship and the Right to Have Rights" (2013) 130 *SALJ* 837 856-869 for an analysis of the possibilities and limits of dignity-based modes of constitutional analysis in defending the rights of foreign nationals.

the political community, as a bulwark against social and political inequality and as a site of democratic struggle. On this basis, a more rigorous voting rights jurisprudence could be developed, which is suspicious of attempts to disenfranchise marginalised groups of voters, as disenfranchisement is likely to sever the last remaining ties of membership in the political community and thus to remove the very basis of their rights. Importantly, such a jurisprudence would also be sensitive to the ways in which ostensibly neutral electoral rules overlap with systemic inequality and structural power to deepen and reproduce social exclusion, to privilege certain ways of seeing and thinking and to silence voices from the margins.

The link made by Sachs J between dignity and democratic citizenship raises difficult questions relating to the criteria for inclusion in the community of citizens. It is tempting to confine it to the circle of nationals, as the court has done on one reading of *Richter*. However, there are good reasons to resist such a conflation of citizenship and nationality, as Le Roux and others have shown. In an era characterised by the growing disjunction between nationality, residency and subjection to state power, we need to reflect critically on the implications of the idea that human dignity requires every person to be treated as an autonomous subject, and its relation to the democratic principle that people who are subject to state power, should have a say in how that power is exercised. This could help to open up spaces for new democratic imaginations, which challenge nationalist notions of membership and belonging in the name of more encompassing understandings of dignity and citizenship.

### SUMMARY

This article asks whether and to what extent the Constitutional Court's dignity-based interpretation of the right to vote can explain the apparent anomalies in its voting rights jurisprudence. It argues that the court's emphasis on the symbolic value of the universality of the vote may blind it to the ways in which seemingly neutral measures feed into systemic disadvantage and further the political disempowerment of the poor and marginalised. It may also result in shifting the court's attention away from structural issues relating to democratic accountability and electoral competition. Against this background, the article asks whether dignity can be reinterpreted and articulated with the values of democracy, equality and citizenship, to ground a richer, more deeply egalitarian vision, which understands the vote not simply in terms of formal inclusion in the body politic, but as full inclusion in civil society and the political community, as a bulwark against social and political inequality and as a site of democratic struggle. It also asks whether such a reinterpretation of the right to vote could help open up spaces for new democratic imaginations, which could challenge nationalist notions of membership and belonging in the name of more encompassing understandings of dignity and citizenship.