INTRODUCTION: POLITICAL RIGHTS SINCE 1994

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South Africa marked 20 years of constitutional democracy when it went to the polls in May 2014. Voting is a particularly significant and moving occasion in South Africa: individuals waiting in the queues to cast their ballots are acutely aware of how the majority were excluded from the franchise; and, definitively, embrace a form of civic equality where every individual's voice counts. Given this history, the five successful free and fair national elections, held in South Africa since 1994, are a significant achievement. Yet, increasingly, they are seen not to be enough to guarantee a vibrant democracy. Individuals wish to participate in decisions that affect their lives more frequently than once every five years. The political system itself is often seen to create too much distance between the electorate and their representatives and there has been the domination of the political sphere by one party since 1994. The funding of political parties is once again in the spotlight as is the democracy within political parties themselves.

The Constitution of the Republic of South Africa, 1996 guarantees a specific set of political rights to citizens in s 19 which include the right to form a political party and to participate in its activities as well as the right to free, fair and regular elections. The Constitutional Court has since 1994 been called upon to make a number of significant decisions relating to the political rights of individuals. Its judgments have included discussions of the nature of South African democracy which it held includes both representative and participatory elements; ensured the right to vote extends to prisoners and those living abroad; and recognised the importance of internal party democracy. Yet, despite the significance of these issues to the character and nature of South African democracy, legal academia has paid rather limited attention to the political rights in the South African Constitution.

The South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), a centre of the University of Johannesburg, decided that the elections of 2014 were an opportunity to focus on political rights and their meaning and to stimulate further scholarship in this area. A conference was organised a few weeks after the elections took place at the Constitutional Court auditorium on Constitution Hill and brought together academics, members of civil society and the media to discuss these important questions.¹

¹ I express my thanks to the Konrad Adenauer Stiftung for its generous sponsorship of this conference and for enabling SAIFAC to continue to stimulate cutting-edge academic writing on important topics of South African democracy. I would like to thank Michael Dafel for the important role he played in the organisation and conceptualisation of the conference; as well as...
This Special Focus on Political Rights commences with an excellent engagement by Ngwako Raboshakga with the jurisprudence of the Constitutional Court on public involvement in legislative decision-making processes. The article is really concerned about the nature of South African democracy which Raboshakga characterises as encompassing not simply a right to vote for representatives periodically but also the ‘participation by the public in representative’s decision-making processes and the holding of representatives accountable to the values of the Constitution’. Raboshakga contends that the early judgments of the Constitutional Court engage in a substantive manner (through the use of a reasonableness standard) with the question of participation by members of the public. Its more recent judgments, however, represent a regression to a formal approach that focuses on whether a legislature has complied with a particular set of procedures instead of focusing upon whether real and substantive participation has occurred. The court should revert to its former approach if South Africa is truly to become a flourishing participatory democracy.

Effective participation too is at the heart of Pierre de Vos’s article which he contends requires members of a political party to have a meaningful say in the policies of that party, the election of its leadership and its lists for Parliament and other elected bodies. De Vos offers a reading of the South African Constitution and the recent seminal case of Ramakatsa that stresses the importance of internal party democracy. The participation of members in a particular party is intimately connected to the realisation of their political rights (as outlined in s 19). As a result, De Vos argues, the state has a duty to pass a ‘party’ law which regulates and ensures the democratic functioning of political parties.

De Vos’s article raises the question of the nature of political parties in our democracy – are they to be understood as ‘public’ or ‘private’ entities and what are the consequences of any such classification? Michael Dafel contends that they are private parties but that does not end the matter of their constitutional obligations. He examines the Ramakatsa decision closely and contends that it is significant because it represents ‘the first time the Constitutional Court permitted a non-state actor to base a cause of action against another non-state actor solely on the prescriptive contents of a constitutional right’. Members of political parties could thus hold their parties directly accountable for failing to meet their obligations in terms of s 19(1)(b) of the Constitution. Such a form of direct application of constitutional rights is appropriate, argues Dafel, in cases such as this where there are certain entitlements with weak countervailing interests; and where it is fair to impose such a constitutional obligation upon a non-state actor such as a political party.

as Freddy Mukodzeri and Naomi Hove for their administrative acumen. I am also grateful to the editors of the South African Journal on Human Rights for agreeing to this Special Focus on political rights which enables the publication and wider dissemination of some of the excellent writing that emerged from the conference and, more generally, to create a cluster of articles relating to this theme.
Political parties and individual representatives are not, however, only accountable to members of their parties but must be responsive to the electorate as a whole. David Bilchitz, in his article, is concerned specifically with a problem that has arisen in South Africa (and many other developing democracies) where representative institutions fail adequately to represent and address the interests of the poor. Bilchitz contends that the political rights in s 19 – including both their representative and participatory democratic dimensions – cannot adequately deal with this problem. He then explores the potential for justiciable, constitutionalised socio-economic rights to help correct for the structural difficulties democracies face in taking into account the interests of the poor. Bilchitz contends that socio-economic rights should be seen, at least partially, as a species of political rights in that they are concerned with ensuring that the interests of the poor are addressed substantively and that adequate enforcement mechanisms are developed. In defending this claim, he focuses on the role courts can play in vindicating these rights and reads the case law of the Constitutional Court on socio-economic rights through a ‘political rights’ prism. In doing so, he seeks to highlight how courts can play a role in addressing flaws in the current political system.

The article by Jackie Dugard can be seen to complement that of Bilchitz in that she is concerned with the procedural obstacles which prevent the poor from vindicating their interests – political or otherwise – in courts. Dugard’s concern is first to describe the restrictive doctrine adopted by judges of the Constitutional Court when considering whether to allow a litigant to approach it directly (without first having to go through another court). She then goes on to challenge the rationales provided for this approach and to suggest that ‘the time has come for the court to open its doors a bit wider, especially in cases where poor people are raising key policy and rights issues in the public interest’. Only in this manner will the court be able to function as an institutional voice for the poor and thus enable another form of democratic participation.

Together, these five articles represent a rich collection of academic thinking around the political rights in the 1994 Constitution. There is no doubt that there are many elements of the existing jurisprudence which have not been covered; and exciting, new understandings and possibilities which still require articulation. Political rights, as this Special Focus indicates, cover a wide-range of subject matters and require an engagement with the very foundations and nature of South African democracy. Hopefully, these questions and the manner they are addressed will stimulate the interest of legal academics and thus provide a catalyst for future scholarship in this field.