

IT'S MY PARTY (AND I'LL DO WHAT I WANT TO)?: INTERNAL PARTY DEMOCRACY AND SECTION 19 OF THE SOUTH AFRICAN CONSTITUTION

PIERRE DE VOS*

ABSTRACT

South Africa's democracy has both representative and participatory elements. The participatory aspect of democracy enhances the civic dignity of citizens by empowering them to take part in decisions that affect their lives. However, the overbearing role that political parties play in the South African democracy runs the risk of limiting the ability of citizens to participate *effectively* in decisions that impact on their lives. This is because the leaders of political parties (especially of governing parties) may wield enormous power and influence inside their respective parties and in the legislature and executive. Where the ordinary members of parties have little or no direct say about the formulation of the policies of the party they belong to or the election of its leaders or those who will stand for election as public representatives at national and provincial level, the ability of such members to participate in democratic processes and decisions are limited. To facilitate the participation of party members in the activities of a political party to ensure the enhancement of their civic dignity s 19(1)(b) of the Constitution guarantees the right of every citizen freely to make political choices, including the right to participate in the activities of, or recruit members for, a political party. In *Ramakatsa v Magashule* the majority of the Constitutional Court affirmed the importance of the right of party members to participate freely in the activities of the political party they belong to and also found that the constitutions of political parties have to ensure this happens. Provisions of a political party's constitution can be declared invalid if it fails to comply with the provisions of the Bill of Rights (including s 19(1)(b)). This article contends that *Ramakatsa* can be interpreted to place a positive duty on the legislature to pass a 'party law' that sets minimum requirements to protect the democratic participation of party members in the activities of the party – including about the formulation of party policies, the election of party office bearers and the selection of the party's candidates for election as public representatives.

Key words: bills of rights, democracy, Parliament, political rights

I INTRODUCTION

The active participation of citizens in decisions that impact on their lives is a cornerstone of modern constitutional democracies.¹ This is so because

* Claude Leon Foundation Chair in Constitutional Governance, Department of Public Law, University of Cape Town. I would like to thank Jonty Cogger for valuable research assistance provided in the writing of this article.

1 N Roberts 'Public Deliberation in an Age of Direct Citizen Participation' (2004) 34 *American Review of Public Administration* 315, 315. See generally S Freeman 'Deliberative Democracy: A Sympathetic Comment' (2000) 29 *Philosophy and Public Affairs* 371–418; ME Warren 'What can Democratic Participation mean Today?' (2002) 30 *Political Theory* 677–701.

constitutional democracy is premised on the idea that governments must be responsive to the needs of citizens.² This responsiveness can only be achieved through at least some degree of citizen-participation (through the election of public representatives, participation in public discussions, participation in peaceful protests, participation in law-making activities, or participation in other political activities)³ in decisions over things which impact on their lives. The assumption underlying support for active citizen-participation is that without such participation by citizens, governments are unlikely to be either accountable or responsive to the needs of citizens.⁴ From a normative perspective, where governments fail to be responsive to the needs of people, the government will fall into a 'democratic deficit'. From an empirical perspective when citizens come to believe that they cannot use their agency as citizens to participate in decision-making that affects them in order to achieve responsiveness, a government also falls into a 'democratic deficit'.⁵

However, political scientists and democratic theorists differ about the degree of citizen participation that is desirable in a democracy. Simplifying the matter slightly, one finds in one corner those who argue that too much citizen participation in political decision-making might negatively affect the quality of decisions made through the political process. This group warns that too much participation may threaten the protection of the rights and freedoms of some citizens (especially vulnerable and marginalised groups), and may thus hamper the full recognition and proper management of diversity in a

2 The Constitution of the Republic of South Africa, 1996 s 1(d) states that the Republic of South Africa is one, sovereign, democratic state founded on (amongst others) the value of '[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness'. The link between responsiveness and the transformative vision contained in the Constitution is made explicit by Moseneke DCJ in *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) (CCT 01/14) [2014] ZACC 23 (2 September 2014) para 33, where he states: 'Our state must direct reasonable public resources to achieve substantive equality "for full and equal enjoyment of all rights and freedoms". It must take reasonable, prompt and effective measures to realise the socio-economic needs of all, especially the vulnerable. In the words of our Preamble the state must help "improve the quality of life of all citizens and free the potential of each person". *That ideal would be within a grasp only through governance that is effective, transparent, accountable and responsive.*' (my italics)

3 ME Warren 'Citizen Participation and Democratic Deficits: Considerations from the Perspective of Democratic Theory' in J De Bardeleben & J Pammatt (eds) *Activating the Citizen: Dilemmas of Participation in Europe and Canada* (2009) 17, 18. See also J Cohen & J Rogers *On Democracy* (1983). Erik Olin Wright, whose work promotes a 'radical democratic egalitarian understanding of justice' argues that democratic participation is a precondition for the establishment of a politically just society. 'All people should have broadly equal access to the necessary means to participate meaningfully in decisions over things which affect their lives. This includes both the freedom of individuals to make choices that affect their own lives as separate persons, and their capacity to participate in collective decisions which affect their lives as members of a broader community.' E Olin Wright *Envisioning Real Utopias* (2010) 12.

4 See Constitution s 1(d).

5 Warren (note 3 above) 18.

democracy.⁶ They also warn that expansive forms of participation by citizens in decisions that affect their lives make it too difficult to govern a state effectively. It follows that the spheres of society that are organised democratically must be limited.⁷ In the other corner one finds those who see such a limited conception of democracy as an important reason for many of the ills associated with contemporary liberal democracies.⁸ Limited participation, so the argument goes, empowers unelected and unaccountable bureaucrats or politicians beholden to party and business elites and not voters to make decisions that may have a profound impact on the lives of citizens. It disempowers citizens and makes them cynical about the democratic process while allowing those with money to buy influence and to subvert the democratic will of the people. The differences of opinion between those with a narrow and limited view of democracy and those who have a more expansive view of democracy raises profoundly important questions and it is beyond the scope of this article to engage deeply with these questions.⁹ However, as will become apparent, the arguments advanced in this article display a closer affinity with the latter

- 6 For example, would the South African Parliament have passed the Civil Union Act 17 of 2006 which extended marriage rights to same-sex couples if robust participation by anti-same-sex marriage proponents were allowed to carry the day in the legislative process. See N Mkhize '(Not) in My Culture: Thoughts on Same-sex Marriage and African Perspectives' in M Judge, A Manion & S de Waal (eds) *To Have & to Hold* (2008) 97, 103.
- 7 See Roberts (note 1 above) 316, who argues that an appropriate emphasises on representative democracy and an avoidance of the imposition of too much participatory elements in a democracy may shield citizens from the dangers of direct involvement in government. 'It buffers them from uninformed public opinion, it prevents the tyranny of the majority, and it serves as a check on corruption. It also meets the needs of a complex, postindustrial society that requires technical, political, and administrative expertise to function. Unlike public officials, citizens do not have the time or the interest to deliberate for the purpose of developing informed public judgment. Given the size and complexity of the modern nation state, direct citizen participation is not a realistic or feasible expectation.' See also generally RA Dahl *On Democracy* (1998), where similar arguments are developed in more detail.
- 8 M Warren 'Democratic Theory and Self-transformation' (1992) 86 *American Political Science Review* 8, 8. See generally B Barber *Strong Democracy* (1984); S Bowles & H Gintis *Democracy and Capitalism: Property, Community, and the Contradictions of Modern Social Thought* (1986); F Cunningham *Democratic Theory and Socialism* (1987); J Dryzek *Discursive Democracy: Politics, Policy, and Political Science* (1990); and J Mansbridge 'Self-interest in Political Life' (1990) 18 *Political Theory* 132–53.
- 9 Warren (ibid) 8. As Warren points out, traditional liberal theorists that see trade-offs between democracy and other goods often hold that the self is defined by interests that are formed pre-politically, either reflecting fixed desires or formed by social institutions and other circumstances that are outside of institutionalised politics. Democracy, on this view, is primarily a means for aggregating pre-political interests and should be limited in scope and domain just because it is instrumental to pre-political interests and not a good in itself. In contrast, theories that argue for increasing the scope and domain of democracy (expansive democracy) hold that standard liberal democracy fails to articulate goods that are inherent in democracy and exaggerates the threats posed by democracy to other goods. On this view, these limitations follow from a more general failure of standard liberal democracy to appreciate the transformative impact of democracy on the self, a failure rooted in its view of the self as prepolitically constituted. On the expansive view, were individuals more broadly empowered, especially in the institutions that have most impact on their everyday lives (workplaces, schools, local governments, etc), their experiences would have trans-formative effects: they would become more public-spirited, more tolerant, more knowledgeable, more attentive to the interests of others, and more probing of their own interests.

view than the former view of democracy. This is so because my argument is premised on the idea that increased citizen participation in and control over decision-making in political parties is desirable and may arguably be constitutionally mandated. Although I leave open the question of whether it is desirable because such increased participation by citizens in the activities of political parties will enhance the quality of the democracy, I nevertheless make the claim that such increased citizen participation is a prerequisite for the protection and promotion of the civic dignity of citizens. I take my cue from the Constitutional Court judgment in *Doctors for Life International v Speaker of the National Assembly*¹⁰ where Ngcobo J (as he then was) highlights the need for citizen participation in governance matters in an unequal society like South Africa and explicitly links this need for participation with the dignity of citizens in the following expansive passage:

The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. *It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of.* It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.

It is now well established that the value of dignity permeates the South African Constitution. The value of human dignity 'informs the interpretation of many, possibly all, other rights' contained in the Bill of Rights.¹¹ As such it is a motif that 'runs right through the protections offered by the Bill of Rights'.¹² This idea or value of dignity is 'at the inner heartland of our rights culture'.¹³ Underlying the constitutional focus on the value of dignity is the assumption that each human being has incalculable human worth, regardless of circumstances, and should be treated accordingly. This idea that dignity is inherent to every person regardless of circumstance, which leads to the conclusion that everyone has the same moral worth,¹⁴ suggests that individuals must be accorded an equal opportunity to take part in democratic decisions. Although it can be

10 2006 (6) SA 416 (CC); (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC) (17 August 2006) para 115 (my italics) (*Doctors for Life*).

11 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* (CCT35/99) 2000 (3) SA 936; [2000] ZACC 8; 2000 (8) BCLR 837 (7 June 2000) para 35.

12 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6; (CCT11/98) [1998] ZACC 15; 1998 (12) BCLR 1517 (CC) (9 October 1998) para 120. As the Constitutional Court pointed out in *Dawood* (ibid) para 35 the value of dignity permeates the Bill of Rights to contradict South Africa's apartheid past 'in which human dignity for black South Africans was routinely and cruelly denied'.

13 *Masetlha v President of the Republic of South Africa* (CCT 01/07) 2008 (1) SA 566 (CC); [2007] ZACC 20; 2008 (1) BCLR 1 (3 October 2007) para 98.

14 *City Council of Pretoria v Walker* (CCT8/97) 1998 (2) SA 363; [1998] ZACC 1; 1998 (3) BCLR 257 (17 February 1998) para 113.

viewed more broadly, at the very least dignity relates to a person's identity, his or her autonomy and moral agency.¹⁵ In a democracy in which the value of dignity is foundational, rights should arguably be interpreted and applied in such a way that increases an individuals' control over self-determination and self-development. This is in line with a more expansive theory of democracy as it assumes that democracy has more than an instrumental value to ends such as freedom, protection of private satisfactions, security, and order. In this view, democracy generates values that are intrinsic to political interaction and are closely related to self-development. Limiting citizens' participation in democracy to, say, electoral competition between elites would deprive those citizens who are not members of the elite access to conditions of their own development.¹⁶ That is why rights in the Bill of Rights relating to political participation should, I argue, be interpreted expansively in order to give full effect to the value of dignity and its agency-protecting effects.

In *Doctors for Life* Ngcobo J was writing about citizen participation in the law-making process.¹⁷ This article aims to extend the logic of the reasoning of the Constitutional Court in the *Doctors for Life* judgment to another (distinct, narrow, but important) area of political life that potentially has a direct effect on the quality of the lives of many people in South Africa, namely the degree to which members of political parties are able to participate in the activities of their respective political parties. As such, the article aims to propose an interpretation of the relevant provisions of the Constitution that would extend constitutionally permitted – or mandated – democratic participation of citizens beyond traditional areas such as participation in elections and participation in law-making into the sphere of the operation of political parties in order to advance the promotion of the human dignity of all. This argument is not uncontroversial. As Pippa Norris points out, political parties have long been commonly regarded in some forms of traditional liberal theory as private associations, which should be entitled to compete freely in the electoral marketplace and govern their own internal structures and processes.¹⁸ Moreover, in terms of a specific conception of the right to freedom of association¹⁹ – which focuses on the need to protect private associations from 'capture'²⁰ – associations require their members to expend time, energy and funds on building the organisation to achieve a stated set of

15 S Woolman 'The Widening Gyre of Dignity' in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 197; and P de Vos & W Freedman *South African Constitutional Law in Context* (2014) 457.

16 Warren (note 8 above) 9.

17 Constitution ss 59(1)(a), 72(1)(a) & 118(1)(a).

18 P Norris *Building Political Parties: Reforming Legal Regulations and Internal Rules* (2004) 20. Norris points out that in the traditional view any legal regulation by the state, or any outside intervention by international agencies, 'was regarded in this view as potentially harmful by either distorting or even suppressing pluralist party competition with a country'. But see I van Biezen 'Political Parties as Public Utilities' (2004) 10 *Party Politics* 701–22.

19 Constitution s 18 states: 'Everyone has the right to freedom of association.'

20 S Woolman 'Freedom of Association' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed rev service 5 (2013) 44–9.

aims. Members readily volunteer because of their commitment to the cause. In terms of this distinct view of freedom of association, organisations must therefore be allowed to adopt rules, mechanisms of operation and policies to prevent persons with aims that are inimical to the objectives of the organisation from ‘capturing’ the organisation and subverting its objectives.²¹

However, the autonomy and moral agency so closely associated with the value of dignity is potentially severely curtailed by some rules and practices of political parties that exclude ordinary members from effective participation in important decisions relating to that political party. Political parties must surely have the right to adopt constitutions that contain rules regulating the ordered functioning of the party and allowing the party to discipline members for clearly enunciated breaches of its code of discipline. However, this article argues that when such rules curtail the ability of ordinary members of political parties to take part – in a meaningful manner – in the election of party leaders and the formulation of party policies, these rules will, at the very least, become constitutionally suspect. Because of the central role played by political parties in the South African system of governance, because of the horizontal application of the rights contained in the Bill of Rights,²² which potentially renders political parties subject to the provisions in the Bill of Rights (including the provisions on the political rights of citizens contained in s 19 of the Bill of Rights), and because of the specific interpretation provided by the Constitutional Court of the right of every citizen freely to make political choices, including the right ‘to participate in the activities of, or recruit members for, a political party’,²³ it is possible to argue that members of political parties in South Africa have a constitutional right to participate in a manner compatible with democratic principles in the activities of a political party to which they belong. This constitutionally mandated right to democratic participation in the activities of a political party by its members may extend to meaningful democratic participation in making decisions on:

- 21 See De Vos & Freedman (note 15 above) 474. See also *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston* 515 US 557 (1995) in which the US Supreme Court held that the right to dissociate included the right to exclude unwanted members and unwanted messages. The organisers of a St Patrick’s Day parade were willing to allow gay men and lesbians to participate in the parade, but refused to allow them to march as a unit under their own banners. The court held that the parade organisers had a right to refuse to endorse a message supporting gay rights which would be conveyed by permitting the banners. The court held that it boils down to the choice of a speaker not to propound a particular point of view.
- 22 See Constitution s 8(2): ‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’ In the US context the US Supreme Court has decided that political parties are in essence private entities. See *California Democratic Party v Jones* 120 SCt 2402 (2000). This view has been criticised. See S Issacharoff ‘Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan’ (2001) 101 *Columbia LR* 274–313.
- 23 Constitution s 19(1)(b). See generally, *Ramakatsa v Magashule* (CCT 109/12) [2012] ZACC 31; 2013 (2) BCLR 202 (CC) (18 December 2012). See also M Dafel ‘The Directly Enforceable Constitution: Political Parties and the Horizontal Application of the Bill of Rights’ (2015) 31 *SAJHR* 56 concerning the implications of *Ramakatsa* regarding horizontality.

- the policies of a political party;
- the leadership of the party; and
- the candidates nominated by the party for election to the national and respective provincial legislatures and local government elective bodies.

II THE LIMITS OF DEMOCRATIC PARTICIPATION IN THE POLITICAL SPHERE

Participation in the affairs of an organisation or of government can only function in a relatively democratic manner if all those who are affected by the relevant decisions have broadly equal access to the necessary means to participate meaningfully in these decisions, in proportion to their stake in the outcome.²⁴ Yet this ideal of ensuring equal access to the means to enable citizens to participate in important decisions about their lives is probably impossible to attain in a modern capitalist state – also in the political sphere. Even where the system of government provides for extensive public participation (in electing public representatives and in participating in other political decisions that affect their lives directly or indirectly), not all citizens will be equally capable of having their voices heard or will be heard equally. Neither will all citizens have equal access to relevant information that will allow them to make informed political choices and to act on it. When citizens are unable to access relevant information this will make it very difficult, if not impossible, to act with the requisite agency and autonomy, something that is assumed to be a prerequisite for the realisation of the inherent dignity of the person.

There are several reasons why equal access is probably unobtainable. First, the unequal distribution of private economic power almost always translates into the unequal distribution of access to political power. Those with access to economic resources can either buy access to those with political power or can use their resources to try and influence political decisions in a direct manner.²⁵ Modern political parties need funding to take part in elections and to function effectively in-between elections and they solicit funds from various sources including from private donors who often gain special access to the leaders of

24 Warren (note 3 above) 17. The requirement that citizens should have an opportunity to influence the outcome of a specific decision by the government does not speak to the nature or the quality of this influence and does not presuppose that each citizen should possess a veto right over any decisions that affect their lives.

25 Because political parties in a modern capitalist state (with its relatively ‘open’ and ‘free’ and ‘independent’ media) requires access to considerable financial resources to communicate with the electorate – especially during election campaigns – in order to promote itself, its leaders and sometimes even its ideas and policies, private individuals and institutions with access to enormous financial resources can often ‘buy’ access to political leaders by donating to their campaigns or the campaigns of the party. Moreover, those who possess economic power (and the access to economic resources that it implies) are more likely to be able to make use of formal mechanisms aimed at safeguarding participatory democracy, for example, by travelling to Parliament to make submissions before a Portfolio Committee or by using airtime to phone a talk-radio programme.

the political parties in return.²⁶ Second, not all citizens are equally informed about or engaged in the political sphere. Some citizens will be well-informed and deeply engaged – potentially ensuring more meaningful participation in legislative and governance decisions – while other citizens will not be informed or engaged or will be completely misinformed, either because they take no interest in such affairs or because their sources of information reflect and advance certain economic and political interest.²⁷ Even in a country where freedom of expression is constitutionally guaranteed, citizens do not have equal access to all ideas and facts that might be relevant in assisting them to make informed and free political choices. No citizen has access to all the media sources available in the country, nor to all the books, films and other forms of artistic expression. Power – also the power to have your voice and ideas heard and taken seriously – is unevenly distributed in society and even in a democracy in which free speech is guaranteed, the mass media in particular contribute to the manufacturing of a consensus in which the voices of the marginalised are often drowned out and the interests of the powerful are promoted. In this regard, for example, Edward Herman and Noam Chomsky argue that it is the function of the mass media to amuse, entertain and inform, ‘and to inculcate individuals with the values, beliefs, and codes of behaviour that will integrate them into the institutional structures of the larger society’.²⁸ They argue that there are limits to the kinds of critical reporting that can be done in a democracy – even by the most critical media. There are also huge inequalities in command of resources, and its effect both on access to a private media system and on its behaviour and performance. Factors such as the size, concentrated ownership, owner wealth, and profit orientation of the dominant mass-media firms; advertising as the primary income source of the mass media; the reliance of the media on information provided by government, business, and ‘experts’ funded and approved by these primary sources and agents of power; ‘flak’ as a means of disciplining the media; and other ideological and religiously dominant forces, curtail what can be written and said.²⁹

26 Constitution s 236 requires the adoption of national legislation to ‘provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis’. This is done in terms of the Public Funding of Represented Political Parties Act 103 of 1997. The Act provides for the limited funding of political parties represented in the legislature. However, it does not regulate donations to political parties, nor does it require political parties to reveal the sources of their funding. For a critical discussion of political party funding see I van Biezen & P Kopecký ‘The State and the Parties: Public Funding, Public Regulation and Rent-seeking in Contemporary Democracies’ (2007) 13 *Party Politics* 235–54; K Matlosa (ed) *The Politics of State Resources: Party Funding in South Africa* (2004).

27 See C Barnett ‘The Limits of Media Democratization in South Africa: Politics, Privatization and Regulation’ (1999) 21 *Media Culture Society* 649–71. A lack of trust in political institutions, a lack of access to diverse sources of news, and myriad other factors may contribute to producing citizens that are misinformed or unengaged in politics.

28 ES Herman & N Chomsky *Manufacturing Consent: The Political Economy of the Mass Media* (1988) 306.

29 Ibid.

Furthermore, not all citizens choose to be members of political parties and, as we shall see in the next part, political parties play a pivotal role in ‘delivering’ democratic government, which means that membership of a political party potentially provides citizens with an important platform to take part in decisions of that party and, hence, indirectly to have an influence on the direction of government. Citizens who are not members of any political party have no direct opportunity to have a say in the direction a political party takes, who its leaders might be and who it nominates to represent the party in the various legislative bodies. Because of the pure proportional representation electoral system in place for national and provincial elections in South Africa, members of political parties in South Africa potentially therefore have disproportionate influence over decisions like who serves in legislatures compared to non-party members.

Lastly, power does not only reside in institutions usually associated with the functioning of a democracy: legislatures, the executive, the judiciary and political parties. Private institutions often wield enormous power and can make decisions that directly impact on the lives of citizens. Although private institutions usually operate within a legal framework and are constrained by regulations, where the regulation is light and imposes few tangible obligations on the organisation, they will have a relatively free hand to make decisions that will affect the lives of their employees.³⁰ Such employees will have no right to participate in the decisions made for the benefit of shareholders or company management. Such organisations may then also make decisions that may damage the environment to the detriment of many citizens and in the absence of strict environmental regulation those affected by the environmental degradation would have little say in the decisions leading to such degradation. Such institutions – especially transnational corporations – can influence public policies and can successfully agitate for deregulation to leave them free to pursue the interest of their shareholders unencumbered by onerous regulations aimed at protecting the interests of citizens.³¹

30 See K Wyland ‘Neoliberalism and Democracy in Latin America: A Mixed Record’ (2004) 46 *Latin American Politics and Society* 135–57, who argues that in Latin America so called neoliberal policies – including deregulation – have strengthened the sustainability of democracy in Latin America but limited its quality. He argues that tighter external economic constraints limit governments’ latitude and thereby restrict the effective range of democratic choice, leading to the weakening of political parties and depressing political participation – eroding government accountability in the process.

31 See B Balanyá, A Doherty, O Hoedeman, A Ma’anit & E Wesselius *Europe Inc. Regional & Global Restructuring and the Rise of Corporate Power* (2000) in which the authors argue that in Europe transnational corporations – working through lobby groups – have succeeded in influencing a wide range of policies in Europe. For a US perspective see MA Smith *American Business and Political Power: Public Opinion, Elections, and Democracy* (2000).

In this article I do not focus on several of these important issues that make equal participation in political decisions impossible.³² Although questions about the better regulation of political party funding – including rules to enhance the transparency of party funding – and questions about how possible changes to the electoral system could enhance the quality of the democracy and of accountability of elected politicians are very important, it is beyond the scope of this article to deal with these matters in depth. However, I flag these issues here as I believe the discussion about internal party democracy does not occur in a vacuum and is affected by the other factors that limit the ability of the members of political parties to take part in a meaningful way in the activities of their party and also affect the level of accountability of elected officials.

III THE CENTRAL ROLE PLAYED BY POLITICAL PARTIES IN SOUTH AFRICA'S DEMOCRACY

In South Africa's system of constitutional democracy political parties occupy the centre stage.³³ South Africa is thus not only a parliamentary democracy but also a party democracy. There is some disagreement about the wisdom of placing political parties at the centre of a democracy. Some critics contrast party democracy with an idealised version of democracy based on individual representation and argue that the latter form of representation is the best place to ensure full participation of voters in the democratic process.³⁴ However, the idea that political parties are essential for practising democracy in the modern state has become dominant in democratic theory.³⁵ Although there is considerable disagreement in the various strands of democratic theory on the precise role political parties should perform in order to make democracy work, as a general proposition, political parties are important for the proper functioning of a democracy.³⁶ Ideally parties will act as vehicles to articulate group aims, nurture political leadership, develop and promote policy alternatives, and present voters with coherent electoral alternatives. Party cohesiveness in legislatures can contribute to stability – especially in a parliamentary democracy in which the majority party forms the government and legislators from that party usually support the political programmes and policies formulated by the members of the executive because of the enforcement of strict party discipline. As politicians within the same party

32 I also do not engage in detail in the emerging discussion on the need to reform South Africa's electoral system to enhance citizen participation and political accountability in the political process as this is a complex topic that deserves a more detailed treatment. As will be pointed out below I do argue that the present pure proportional representation system enhances the need for heightened internal party democracy.

33 *Ramakatsa* (note 23 above) para 65.

34 See generally BR Barber 'The Undemocratic Party System: Citizenship in an Elite/Mass Society' in RA Goldwin (ed) *Political Parties in the Eighties* (1980) 34–49.

35 WC Müller 'Political Parties in Parliamentary Democracies: Making Delegation and Accountability Work' (2000) 37 *European J of Political Research* 309, 309.

36 See generally A Ware *Citizens, Parties and the State* (1987).

tend to be more responsible to one another than they otherwise would be and because of the shared electoral fate of those voted in on the strength of a shared party label, they will not as easily act as free agents (even when the electoral system and party culture allows for it) because their own interest and the communal interest of the party they belong to converge. In short, the argument is that political parties ensure that voters have significant electoral choices, and they help ensure that choices made in elections will translate into decisions in the public realm. This view of the utility of parties in modern electoral democracies is a widely shared one.³⁷

In South Africa, the basic assumption underlying the provisions of the Constitution relating to the functioning of the legislature and the executive in the national and provincial sphere is that the political party is the main vehicle through which representative democracy in South Africa is operationalised. It is therefore not surprising that s 1 of the Constitution, while confirming the democratic nature of the state, also states that the Republic is founded, inter alia, on the values of ‘[u]niversal adult suffrage, a national common voters roll, regular elections and a *multi-party system* of democratic government, to ensure accountability, responsiveness and openness’.³⁸

However, because a pure proportional representation electoral system is in place for election to the National Assembly and provincial legislatures³⁹ and because members of the National Council of Provinces (NCOP) are selected based on their party membership,⁴⁰ representative democracy⁴¹ is wholly dependent on political parties for its realisation. No person can serve in the national or any of the provincial legislatures without being a member of a political party and without having been chosen or selected by that political party to represent the interests of the political party in the respective legislatures.⁴² This is because at national and provincial level political parties – and not individual candidates – contest elections and voters cast their ballots for the political party of their choice.⁴³ Voters have no direct say on who appears on the electoral lists of political parties, on the order in which names are to appear on these electoral lists or on the order according

37 See S Scarrow *Political Parties and Democracy in Theoretical and Practical Perspectives: Implementing Intra-party Democracy* (2005) 4.

38 Constitution s 1(d).

39 Ibid s 46(1)(d) affirms that the National Assembly consists of members elected in terms of an electoral system that ‘results, in general, in proportional representation’, while s 105(1)(d) contains an identical provision regarding provincial legislatures.

40 Ibid s 61.

41 As the Constitutional Court explained in *Doctors for Life* (note 10 above) para 115: ‘Representative democracy entails free and fair election through which citizens vote for public representatives while participatory democracy requires citizens to take part in the governance of the country.’

42 See *Majola v The President* (48541/2010) [2012] ZAGPJHC 236 (30 October 2012) where the South Gauteng High Court rejected a challenge to the constitutionality of s 57A read with schedule 1A of the Electoral Act 73 of 1998 because of an alleged inconsistency between these provisions and s 19(3)(b) of the Constitution. See L Wolf ‘The Right to Stand as an Independent Candidate in National and Provincial Elections: *Majola v The President*’ (2014) 30 SAJHR 159–82 for a critical discussion of the judgment.

43 *Ramakatsa* (note 23 above) para 66. See also part 3 of the Electoral Act 73 of 1998 (Electoral Act).

to which candidates who appear on individual party lists will be dispatched to the various legislatures according to the percentage of votes garnered by that specific political party.⁴⁴ Moreover, the president – in whom the executive authority of the Republic is vested⁴⁵ – is formally elected by the members of the National Assembly⁴⁶ while the various premiers – in whom executive authority of a province is vested⁴⁷ – are formally elected by the various provincial legislatures.⁴⁸ In theory, this means that the members of the majority party in the National Assembly and in the various provincial legislatures determine who will serve as the president and as the various premiers. In practice, it is the extra-parliamentary leadership of the majority party in each legislature that determines who serve as president and as the various premiers and then instruct their elected representatives to vote for the agreed upon candidate. Voters therefore have no direct or even indirect say in the election of the president or the various premiers – only the members of the winning party who participate in its activities have an indirect say in who is elected premier or president.⁴⁹ As the members of the various legislatures have been elected to those legislatures because they were placed on the electoral list of their respective parties (placed on the list according to criteria or in terms of a process determined by that political party and its leaders), because of the fact that strict party discipline operates in South Africa⁵⁰ and because they will automatically lose their membership of the legislature if they are dismissed

44 The Electoral Act confirms that parties wishing to contest national or provincial elections can only do so if they are registered and if they have submitted prescribed lists of candidates. See ss 26 & 27.

45 Ibid s 85(1).

46 Ibid s 86(1).

47 Ibid s 125(1).

48 Ibid s 128(1).

49 For example, at the ANC's 52nd National Conference held at Polokwane in 2007, the conference decided on the following rules for the 'deployment' of premiers and the president: 'At provincial government level, the PEC should recommend a pool of names of not more than three cadres in order of priority who should be considered for Premiership, and the NEC will make a final decision based on the pool of names submitted by the PEC. Those members of either the PEC or NEC who are being considered for deployment should recuse themselves when decisions affecting them are made. The provincial leadership, especially Officials, should be afforded space to make an input on the deployment of MECs. At national government level, Conference agrees that the ANC President shall be the candidate of the movement for President of the Republic.' See ANC 52nd National Conference: Resolutions (20 December 2007) <<http://www.anc.org.za/show.php?id=2536>> item 57.

50 For example, s 5.4 of the ANC constitution (as amended and adopted by the 53rd National Conference Mangaung 2012 <<http://www.anc.org.za/docs/const/2012/const.pdf>>) states that: 'ANC members who hold elective office in any sphere of governance at national, provincial or local level are required to be members of the appropriate caucus, to function within its rules and to abide by its decisions under the general provisions of this Constitution and the constitutional structures of the ANC.' Similarly s 2.5.3.7 of the Democratic Alliance (DA) constitution of 2010 <<http://www.da.org.za/docs/542/DEMOCRATIC%20ALLIANCE%20FEDERAL%20CONSTITUTION%202010.pdf>> states that: 'Any member, including a public representative, is guilty of misconduct if he or she unreasonably fails to comply with or rejects decisions of the official formations of the Party', while s 9.2.6 of the Constitution states that: 'Members [of a legislative caucus] must at all times adhere to and support decisions of the relevant caucus and must not differ publicly from any decision once it has been taken except when it has been decided by the caucus that a member may on a question of conscience exercise a free vote.'

from that party,⁵¹ there is little chance that members of the majority party in the National Assembly or any of the provincial legislatures will refuse to obey an instruction from the party leadership to elect a candidate designated by the party leadership as president or premier respectively. This means that, in essence, a relatively small number of the members of a governing party determine who the president of the country and the various premiers of the provinces will be.

Despite the fact that political parties play a central role in how the democratic representative institutions – the various legislatures and executives – are constituted and how they operate in South Africa and even what decisions legislatures or executives take, the South African Constitution does not contain any provisions regulating the relationship between political parties and their public representatives who serve in the various legislatures and executives.⁵² Although the Constitution does contain several provisions that emphasise the importance of the participation of all political parties represented in the various legislatures in the activities of those legislatures in a manner consistent with democracy,⁵³ it is silent on whether these representatives participate in such institutions under dictation from the party that they represent and to what extent party structures can instruct or ‘guide’ decisions made by elected representatives in their capacity as elected representatives.⁵⁴ However, anecdotal evidence suggests that in the context of a culture of strict party discipline, elected representatives are not free agents and may well be heavily influenced by decisions taken by the extra-parliamentary leadership of the party when they engage in their constitutionally mandated activities as part of legislatures or as members of national or provincial executives.

The somewhat overbearing role that political parties play in the South African democracy is regularly criticised. This criticism centres mainly on the lack of accountability of party representatives in legislatures and on the strict enforcement of party discipline on elected representatives. As noted in the previous part, it is beyond the scope of this article to deal

51 Constitution ss 47(3)(c) & 106(3)(c) state that a member of the National Assembly or a provincial legislature respectively loses his or her membership of the National Assembly or provincial legislature if he or she ceases to be a member of the party that nominated that person as a member of the legislature.

52 Ibid s 236 of the Constitution does require the adoption of national legislation to provide for the funding of political parties participating in the national and provincial legislatures ‘on an equitable and proportional basis’, but the regulation of political party funding is beyond the scope of this article.

53 See, for example, Constitution s 57(2)(b) (participation of parties in proceedings of National Assembly and its committees in a manner consistent with democracy); s 61(1) (parties represented in a provincial legislature are entitled to delegates in the province’s delegation of the NCOP); s 78(1)(a) (parties are entitled to representation on mediation committee of Parliament in substantially the same proportion that the parties are represented in the Assembly); s 116(2)(b) (participation of parties in the proceedings of the provincial legislature and its committees in a manner consistent with democracy).

54 In *Merafong Demarcation Forum v President of the Republic of South Africa* (CCT 41/07) 2008 (5) SA 171 (CC); [2008] ZACC 10; 2008 (10) BCLR 968 (CC) (13 June 2008) the matter of whether extra-parliamentary political party structures can ‘dictate’ to elected representatives was raised but given the factual matrix this point was not thoroughly engaged with.

with these important issues. Instead, I focus on the question of intra-party democracy. I argue that although the Constitution does not contain an explicit instruction to the legislature to adopt a 'party law'⁵⁵ aimed at protecting and enhancing democratic participation of the members of political parties in the activities of political parties (especially in the election of its leaders and public representatives),⁵⁶ a recent judgment of the Constitutional Court can be interpreted (in the light of the fact that the value of human dignity permeates the Bill of Rights) as guaranteeing for party members the right to participate democratically in decisions made by the party. Furthermore, it is contended that, on a generous interpretation, the meaning of judgment could be extended to impose an obligation on the legislature to adopt such a 'party law' – although real questions about the required content of such a 'party law' remain.⁵⁷

Richard Katz cites three possible objectives of a 'party law'. First, a 'party law' may determine what constitutes a political party. Second, a 'party law' may regulate the form of activity in which parties may engage. Third, a 'party law' may ensure appropriate forms of party organisation and behaviour. Katz contends that potentially the most controversial aspect of a 'party law' would be those aimed at regulating appropriate forms of intra-party organisation and behaviour. This is so because such regulation would intrude into internal issues of party leadership and social relationships. For example, a 'party law' could require political parties to elect party office bearers through a secret ballot of all party members, while a specific political party may prefer to choose them through a limited number of nominated delegates at a party congress. A 'party law' might also demand gender or ethnic balance of its office bearers or the candidates standing for public office, or laws might require maintaining party organisations in various national regions in a federal or quasi-federal structure when a particular party may have a strong inclination to central control. One can, of course, also imagine other policy goals that nations may seek to implement through a 'party law'. For example, in order to promote nation-building and reconciliation it is possible to imagine a South African 'party law' prohibiting a political party from officially denying the existence of apartheid. Although a 'party law' may therefore deal with and regulate many aspects of political parties, this

55 The term 'party law' is not an exact concept. The term is sometimes used in reference to the internal rules of political parties, such as party charters or bylaws by which parties govern themselves. However, in this article I use 'party law' to refer to the body of state law concerning what parties must and must not do – what is legal and illegal in party politics. Generally, this includes law concerning what constitutes a political party, the form of activity in which parties may engage, and what forms of party organisation and behaviour are appropriate. See K Janda *Political Parties and Democracy in Theoretical and Practical Perspective: Adopting Party Law* (2005) 3.

56 Some 'party laws' also deal with the funding of political parties, with the regulation of their finances and with requirements to reveal their sources of funding.

57 Apart from provisions dealing with the role of party members in important decisions affecting the party, a party law may also deal with other important matters such as the funding of political parties. However, it is beyond the scope of this article to deal with party funding.

article focuses only on those aspects relating to the relationship between party members and their party.⁵⁸ The article specifically does not focus on the relationship between political parties and the electoral system or the manner in which political party finances are regulated. Furthermore, it does not make any claims about what impact improved intra-party democracy might have on the quality of the South African democracy. Instead it contends that effective participation is a laudable end in itself, linked as it is with the restoration of the civic dignity of citizens. In any event the political science literature seem divided on whether more or less intra-party democracy would improve the quality of a democracy and this may well depend on contextual factors (too many to engage with here, even if I had the space and ability to do so competently).⁵⁹ It is important to take note of the limited scope of this article; future research on how different levels of intra-party democracy may affect the quality of democracy *in South Africa* may be needed to explore the many questions left unanswered here.

Whatever the constitutionally appropriate relationship between political party structures and their representatives in the various legislatures and executives may be, it cannot be gainsaid that political parties play a disproportionately important role in who governs nationally and provincially and how they govern. Section 19 of the Constitution implicitly recognises the importance of political parties in the South African constitutional project. The section guarantees for every citizen the right to form a political party; to participate in the activities of, or recruit members for, a political party; and to campaign for a political party or cause. The section also guarantees the right for every adult citizen to stand for public office and, if elected, to

58 RS Katz 'Democracy and the Legal Regulation of Political Parties' <<https://www.aswat.com/files/Democracy%20and%20the%20Legal%20Regulation%20of%20Political%20Parties-%20EN.pdf>> quoted in Janda (note 55 above) 3.

59 See RT Pettit 'Exploring Variations in Intra-party Democracy: A Comparative Study of the British Labour Party and the Danish Centre-Left' (2012) 14 *The British J of Politics & International Relations* 630–50 (arguing intra-party democracy is not on the wane in democracies as some suggest); RY Hazan & G Rahat *Democracy within Parties: Candidate Selection Methods and Their Political Consequences* (2010) (asking whether too much participation harm democracy and proposing selection method that balances demands for participation, representation, competition, and responsiveness); A Gauja 'The Individualisation of Party Politics: The Impact of Changing Internal Decision-making Processes on Policy Development and Citizen Engagement' (2015) 17 *The British J of Politics & International Relations* 89–105 (arguing for more community consultations, online participation and use of supporters' networks to enhance intra-party democracy); and K Bruhn 'Too Much Democracy? Primaries and Candidate Success in the 2006 Mexican National Elections' (2010) 52 *Latin American Politics and Society* 25–52 (using empirical data from Mexico to argue that primary elections seem to hurt party performance in subsequent general elections).

hold office.⁶⁰ Given the pure proportional representation electoral system that operates at national and provincial level, the right to stand for public office and to hold office can only be realised by citizens through their participation in political parties. In this article I argue that the rights contained in s 19 of the Constitution can only be fully realised if political parties operate in a fair and relatively democratic manner in terms of rules contained in the constitution of the relevant party. In the absence of detailed constitutional provisions regulating the operation of political parties, I contend that, read generously, the Constitution may well impose a positive duty on the national legislature to adopt legislation to regulate internal party democracy to give effect to s 19 of the Bill of Rights and to safeguard the democratic process and ensure a minimum threshold of intra-party democracy in all political parties taking part in the electoral process.

IV INTRA-PARTY DEMOCRACY

Internal democracy in political parties – also known as intra-party democracy – refers to the level and methods of including party members in the decision-making processes of a party, including in the election of its public representatives and in the deliberations about party policies. As such ‘intra-party democracy’ is a very broad term, describing the wide range of methods that would allow for party members to take part in the activities of the political party they belong to.⁶¹ It can include the level to which ordinary members have a say in the nomination processes of candidates standing for election to various public bodies,⁶² the level of democratic participation of the members of a political party in policy formulation⁶³ and/or in the election of the leadership⁶⁴ of the party and even whether members are allowed to ‘recall’ public representatives of their respective parties if they are unhappy with their performance. Intra-party democracy can also be affected by rules that prescribe the race and gender composition of candidates’ lists for election to public bodies. In order to ensure forms of intra-party democracy the internal

60 Section 19 reads in full:

- (1) Every citizen is free to make political choices, which includes the right –
 - (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right –
 - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to stand for public office and, if elected, to hold office.

61 Scarrow (note 37 above) 3.

62 Ibid 7.

63 Ibid 10.

64 Ibid.

functioning of political parties is legally regulated in many democracies,⁶⁵ sometimes because this is mandated by constitutional provisions.⁶⁶ However, in some constitutions the regulation of intra-party democracy is explicitly limited or prohibited.⁶⁷

There are both pragmatic and principled arguments advanced in favour of enhanced intra-party democracy. On a pragmatic level advocates for intra-party democracy argue that parties using internally democratic procedures are likely to select more capable and appealing leaders, to have more responsive policies, and, as a result, to enjoy greater electoral success.⁶⁸ On a level of principle the argument is advanced that political parties committed to democracy must ‘practice what they preach’ by using internally democratic procedures for their deliberation and decisions, because this strengthens democratic culture and promotes the human dignity of citizens who belong to political parties by empowering such citizens vis-à-vis the elected representatives of the political party. In this view, one of the dangers of party democracy is that elites within political parties (or factions within such parties) may wield too much power and may disempower ordinary citizens who belong to political parties. In this view, intra-party democracy is a prerequisite for effective political participation of citizens – especially in a system in which the electoral system

65 Germany is a good example of a country where the legal regulation of intra-party democracy is well established and thought to be working well. The legislation regulating intra-party democracy in Germany was originally enacted to respond to international political pressure to convince the world of the country’s objection to fascism and totalitarianism of all sorts. This resulted in regulations on intra-party democracy regarding party registration, candidate selection and leadership elections which is present still today. See J Sundberg ‘Compulsory Party Democracy: Finland as a Deviant Case in Scandinavia’ *Party Politics* (1997) 97, 98–9. For example art 15 of The Law on Political Parties (Party Law) amended version of 31 January 1994 (Federal Law Gazette I) 149, last amended pursuant to art 2 of the Law dated 22 December 2004 (Federal Law Gazette I) 3673, impose democratic election procedures for the election of members’ assemblies and executive committees (‘bodies’) of political parties in Germany as follows: ‘(1) The bodies shall adopt their resolutions on the basis of a simple majority vote unless a higher majority vote is prescribed by law or by the statutes. (2) The elections of the members of the executive committee and of the delegates to delegates’ assemblies as well as to bodies of higher-level regional branches shall be secret. Voting may be open at all other elections unless voters object when asked. (3) The statutory provisions governing the filing of motions must be such as to ensure a democratic formation of will and in particular the adequate discussion of proposals also put forward by minorities. At least the delegates of the regional branches at the next two lower levels must be granted the right to file motions at the assemblies of higher-level regional branches. Any commitment to resolutions taken by other bodies shall be impermissible at elections and polls.’

66 Section 6 of the Spanish Constitution (passed by the Cortes Generales in Plenary Meetings of the Congress of Deputies and the Senate held on October 31, 1978 ratified by the Spanish people in the referendum of December 7, 1978, sanctioned by His Majesty the King before the Cortes on December 27, 1978), for example, states: ‘Political parties are the expression of political pluralism; they contribute to the formation and expression of the will of the people and are a fundamental instrument for political participation. Their creation and the exercise of their activities are free in so far as they respect the Constitution and the law. Their internal structure and operation must be democratic.’

67 For example, art 108 of the Constitution of Colombia, 1991 <http://confinder.richmond.edu/admin/docs/colombia_const2.pdf> states: ‘In no case may the law impose rules of internal organization on parties and political movements or demand affiliation with them to participate in elections.’

68 Scarrow (note 37 above) 3.

requires voters to vote for parties and not for individual candidates.⁶⁹ It is said that intra-party democracy has the apparent potential to promote a 'virtuous circle' linking ordinary citizens to government, benefiting the parties that adopt it, and more generally contributing to the stability and legitimacy of the democracies in which these parties compete for power. Those who emphasise the participatory aspects of democracy place the most value on intra-party democracy as an end in itself.⁷⁰ As noted above South Africa's Constitutional Court has emphasised the importance of the participatory form of democracy in *Doctors for Life*.

Regardless of whether these assumptions about the benefits of intra-party democracy are correct or not, the specific nature of the South African Constitution – including those provisions in the Constitution that extend the application of the Bill of Rights horizontally and make it applicable to political parties – s 19 of the South African Bill of Rights, as interpreted by the Constitutional Court in *Ramakatsa*, at the very least pose questions about whether the Constitution does not impose a duty on the legislature to adopt legislation that would enhance intra-party democracy.⁷¹

The South African Constitution contains no explicit provisions regulating the manner in which political parties must operate. The Electoral Commission Act contains formal requirements for the valid registration of a political party (which is required before a party can take part in an election)⁷² and thus already places some restrictions on the freedom of political parties operating in South Africa. Although the Act requires a political party to submit a deed of foundation which has been adopted at a meeting of, and has been signed by, the prescribed number of persons who are qualified voters as well as a constitution of that party as a precondition for registration, the Act does not impose requirements on what a party's constitution should contain or how it should operate. Section 16 of the Electoral Act does prohibit the registration of a political party if its 'proposed name, abbreviated name, distinguishing mark or symbol mentioned in the application resembles the name, abbreviated name, distinguishing mark or symbol' of any other registered party to such an extent that it may deceive or confuse voters.⁷³ The Act also prohibits the registration of a party if its a proposed name, abbreviated name, distinguishing mark or symbol contains anything which portrays the propagation or incitement

69 Ibid.

70 Ibid 4. However, it must be noted that the legal regulations of intra-party democracy may in some circumstances be ineffective if they cannot be enforced. See M Ohman 'Africa' in IDEA *Funding of Political Parties and Election Campaigns: A Handbook on Political Finance* (2014) <http://www.idea.int/publications/funding-of-political-parties-and-election-campaigns/upload/foppec_p3.pdf> 61. He argues that the implementing agencies in Ghana and Sierra Leone (Electoral Commission of Ghana and Political Parties Registration Commission in Sierra Leone) have not attempted to enforce the provisions due to a lack of capacity, rendering the legal regulations ineffective.

71 In *Ramakatsa* (note 23 above) the Constitutional Court assumed, without discussing the matter in detail, that s 19 of the Bill of Rights applies to political parties.

72 See s 15 of the Electoral Commission Act 51 of 1996.

73 Ibid s 16(1)(b).

of violence or hatred or which causes serious offence to any section of the population on the grounds of race, gender, sex, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language or which indicates that persons will not be admitted to membership of the party or welcomed as supporters of the party on the grounds of their race, ethnic origin or colour.⁷⁴ The Act also allows the Electoral Commission to cancel the registration of a political party if that party has changed its deed of foundation or constitution and the Commission is satisfied that change has resulted in that deed of foundation or constitution containing anything:

[w]hich portrays the propagation or incitement of violence or hatred or which causes serious offence to any section of the population on grounds of race, gender, sex, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language; or which indicates that persons will not be admitted to membership of the party or welcomed as supporters of the party on the grounds of their race, ethnic origin or colour.⁷⁵

However, it is not at present a legal requirement for the registration of a political party by the Electoral Commission that the political party must allow for the democratic participation of all members of a political party in the activities of that political party. Nor is it a legal requirement that the leadership of a political party be democratically elected by its members. The question that arises is whether, in the absence of a legal framework safeguarding the rights of the members of political parties and guaranteeing their democratic participation in important decisions of that party, whether it would be possible for individuals to have their right – set out in s 19(1)(b) of the Bill of Rights – to participate in the activities of a political party effectively exercised.

V *RAMAKATSA V MAGASHULE*⁷⁶ AND ITS CONSEQUENCES

In *Ramakatsa* the Constitutional Court held that the right to participate in the activities of a political party imposes on every political party the duty to act lawfully and in accordance with its own constitution. The judgment, declaring invalid the African National Congress (ANC) Free State elective conference held in June 2012, raises many questions about the integrity and fairness of internal democratic processes in political parties in South Africa. From a Constitutional Law perspective the judgment is important as it affirms the strong link between internal party democracy and the right of citizens to take part in the political process and to vote in elections – a right, as I have pointed out above, guaranteed by s 19 of the Bill of Rights. Earlier decisions of the Constitutional Court – including the *New National Party* case⁷⁷ dealing with the requirement that only voters in possession of green bar-coded ID

74 Ibid s 16(1)(c).

75 Ibid s 17(1)(d).

76 Note 23 above.

77 *New National Party v Government of the Republic of South Africa* (CCT9/99) 1999 (3) SA 191; [1999] ZACC 5; 1999 (5) BCLR 489 (13 April 1999) (*NNP*).

books could register and vote in elections and the *UDM*⁷⁸ case dealing with floor crossing – have been criticised for the rather narrow and formalistic view they espoused of democracy and of the obligation imposed by s 19 of the Bill of Rights.⁷⁹ In *UDM*, for example, the Constitutional Court stated:

The rights entrenched under section 19 are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives. They cannot dictate to them how they must vote in Parliament, nor do they have any legal right to insist that they conduct themselves or refrain from conducting themselves in a particular manner.⁸⁰

As Theunis Roux argues, the argument advanced by the Constitutional Court here seems misplaced in relation to s 19(1) of the Bill of Rights. After all the right to participate in the activities of a political party may not only be meaningfully exercised at election time and is clearly capable of being violated in-between elections.⁸¹ The *Ramakatsa* judgment can be viewed as a slight correction on these earlier judgments. In the case – heard in the run-up to the elective conference of the governing ANC at Mangaung in December 2012 – the appellants, acting in their personal interests and also in the interests of a class of persons made up by members of the ANC and voters resident in the Free State, sought an order setting aside the Provincial Conference of the ANC held earlier that year at Parys as well as the decisions taken there.⁸²

For the purposes of this article the important argument advanced by the appellants was that their constitutional right to participate in the activities of the ANC – as guaranteed by s 19(1)(b) of the Bill of Rights – was breached as a result of a number of irregularities that occurred before the challenged conference was held.⁸³ The majority of the court – in a judgment co-authored by Moseneke DCJ and Jafta J – held that it did. As is often the case in judgments of the Constitutional Court, the court invoked South Africa's history as a guiding tool to interpret the obligations imposed by the Bill of Rights⁸⁴ and specifically s 19, noting that during the apartheid era many

78 *United Democratic Movement v President of the Republic of South Africa (African Christian Democratic Party Intervening; Institute for Democracy in South Africa as amici curiae)* (No 2) (CCT23/02) 2003 (1) SA 495; [2002] ZACC 21; 2002 (11) BCLR 1179 (4 October 2002) (*UDM*).

79 See T Roux 'Democracy' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2012) 10-1, 1-55.

80 *UDM* (note 78 above) para 49.

81 Roux (note 79 above) 10-55.

82 *Ramakatsa* (note 23 above) para 59.

83 *Ibid* para 60.

84 See the following judgments for evidence of the Constitutional Court's references to South Africa's history: *S v Makwanyane* (CCT3/94) 1995 (3) SA 391; [1995] ZACC 3; 1995 (6) BCLR 665; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 156, per Ackermann J ('We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where State action must be ... justified rationally.');

para 220, per Langa J (the Constitution signalled a 'dramatic change in the system of governance');

para 262–66, per Mahomed J (the Constitution represents a 'decisive break from, and ringing rejection of, that part of the past that is disgracefully racist, authoritarian, insular, and repressive' and must be interpreted against this historical context); para 302, per Mokgoro J (the historical context within which the Constitution was adopted help to explain its meaning); para 322, per O'Regan J (the values of the Constitution are 'not those that have informed our

organisations whose objectives were to advance the rights and interests of black people – including the ANC – were banned. The court also noted that until 1990 participation in the activities of these organisations constituted a serious criminal offence that carried a heavy penalty and asserted that the ‘purpose of section 19 is to prevent this wholesale denial of political rights to citizens of the country from ever happening again’.⁸⁵

The judgment confirms the pivotal role that political parties play in the South African constitutional democracy as ‘elections are contested by political parties’ and it is ‘these parties which determine lists of candidates who get elected to legislative bodies’.⁸⁶ According to the court the ‘success for political parties in elections lies in the policies they adopt and put forward as a plan for addressing challenges and problems facing communities’. The court, seemingly sympathetic to the theory that intra-party democracy represents a virtuous circle mentioned in the previous part, stated that participation in the activities of a political party is critical to attaining such success.⁸⁷ The court also pointed out that the Constitution imposes a duty on the legislature to enact national legislation that provides for funding of political parties represented in national and provincial legislatures ‘in order to enhance multi-party democracy’ because political parties ‘are the veritable vehicles the Constitution has chosen for facilitating and entrenching democracy’⁸⁸ and are thus indispensable conduits for the enjoyment of the right to vote in elections. This link between participation in political parties and the realisation of the right to vote is pivotal to the reasoning of the majority.⁸⁹ It affirms that

past’). Also see *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) 1267 para 10 (quoting the postamble to the interim Constitution); *Azanian Peoples Organisation (Azapo) v President of the Republic of South Africa* 1996 (8) BCLR 1015 (CC) paras 2–3, per Mahomed DP (Constitution is committed to a more just, democratic order); *Shabalala v Attorney-General of the Transvaal* 1995 (12) BCLR 1593 (CC) 1605 paras 25–6; *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (10) BCLR 1348 (CC) 1395 para 147; *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC) 897 para 94, per Kriegler; *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC) para 8, per Chaskalson P (a commitment to ‘transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order’).

85 *Ramakatsa* (note 23 above) para 64.

86 *Ibid* para 66.

87 *Ibid*.

88 *Ibid* para 67.

89 The link is important because of the importance the Constitutional Court has placed on the right to vote – given South Africa’s history in which this right was denied to the majority of citizens. In *August v Electoral Commission* 1999 (3) SA 1 (CC); [1999] ZACC 3; 1999 (4) BCLR 363 (CC) para 17, Sachs J reaffirmed the importance of one of the rights to vote as follows: ‘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. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather

political rights are not limited to the right to vote in an election but extends to participation in political activities – including the activities of political parties – in-between elections. However, the judgment does not state in categorical terms that the right to participate in the activities of a political party necessarily requires full democratic participation in the activities of that party. Rather the judgment in *Ramakatsa* implies, but never spells out explicitly, that what is required is effective participation in the activities of the party. However, the court adds the caveat that this must be done in a manner determined by the political parties themselves. Thus Moseneke DCJ and Jafta J state:

In relevant part section 19(1) proclaims that every citizen of our country is free to make political choices which include the right to participate in the activities of a political party. This right is conferred in unqualified terms. Consistent with the generous reading of provisions of this kind, the section means what it says and says what it means. It guarantees freedom to make political choices and once a choice on a political party is made, the section safeguards a member's participation in the activities of the party concerned. In this case the appellants and other members of the ANC enjoy a constitutional guarantee that entitles them to participate in its activities. It protects the exercise of the right not only against external interference but also against interference arising from within the party.⁹⁰

It is unclear what form the Constitutional Court envisages such participation to take and to what extent the participation must be meaningful and capable of influencing both the policies of the party and the selection of its candidates for public office or its office bearers. Put differently when the court says s 19 'safeguards a member's participation in the activities of the party concerned' what is the quality of the participation the court envisages is required? Surely, participation in the activities of a political party will be meaningless if members can only attend meetings and follow instructions of party leaders to engage in political campaigning, but are not allowed to participate in some or other democratic manner in the activities of the party? Would such non-democratic 'participation' not render s 19 no more than a paper right? The closest the *Ramakatsa* judgment comes to explain what the content of this right might be and to what degree this might impose a duty on political parties to ensure at least certain forms of intra-party democracy in its organisation is where the majority concludes that the implications of s 19(1) of the Bill of Rights is that the 'constitutions and rules of political parties must be consistent with the Constitution which is our supreme law'.⁹¹ But what is the obligation imposed by s 19(1)(b) on political parties? When will the Constitution and rules of a political party be in conflict with the right of citizens to participate in a political party? Does it require political parties to regulate its affairs in an entirely democratic manner? The majority of judges in the case suggest that political parties should, at the very least, have some margin of appreciation (although they do not use that term) in determining how they wish to regulate how members of the political party should exercise the right to participate

than disenfranchisement.'

90 *Ramakatsa* (note 23 above) para 71.

91 *Ibid* para 72.

in the activities of their party as '[t]hese activities are internal matters of each political party' and parties are therefore 'best placed to determine how members would participate in internal activities'.⁹²

What is clear – and what the Electoral Act also requires – is that political parties, at the very least, are required to adopt a constitution and, furthermore that this constitution of a political party will be the instrument which must facilitate and regulate participation by members in the activities of a political party.⁹³ Tellingly, the majority in *Ramakatsa* confirmed that political parties may not adopt constitutions which are inconsistent with s 19 and that a political party's constitution can be declared invalid if it fails to comply with the requirements of s 19 – including the requirement in s 19(1)(b) that members of a party have a right to participate in its activities.⁹⁴ But because the ANC's constitution was not under attack, the court did not provide a detailed analysis of what the right to participate might entail and what quality of participation by a member in the activities of a political party is required by the Constitution. However, the discussion by the majority of the court about the ANC's constitution give some indication of what kinds of provisions would have to be included in a political party's constitution to pass constitutional muster. The court mentions these aspects approvingly, at the very least suggesting that these aspects are the bare minimum required to ensure a Constitution of a political party complies with the provisions of the Bill of Rights. It lists the following attributes – contained in the ANC constitution – as being of relevance and this gives some indication of the content of s 19(1)(b), it:⁹⁵

- confers on members the power to determine and formulate the party's policies;
- stipulates that the leadership of the party is accountable to its members in terms of the procedures laid down in its constitution;
- requires the party – in its composition and functioning – to be democratic;
- requires membership of all bodies of the party to be open to all men and women in the organisation without regard to race, colour and creed;
- guarantees freedom of speech and free circulation of ideas and information;
- guarantees for all members the right to full and active participation in the 'discussion, formulation and implementation of the policy of the ANC';

92 Ibid para 73.

93 Ibid. See also the minority judgment of Yacoob J (para 16), where he states: 'the right to participate in the activities of a political party confers on every political party the duty to act lawfully and in accordance with its own constitution. This means that our Constitution gives every member of every political party the right to exact compliance with the constitution of a political party by the leadership of that party.' In his minority decision, Froneman also confirmed (para 43) that there 'should be little doubt that the right to participate in the activities of a political party imposes a duty on every political party to act lawfully and in accordance with its own constitution'.

94 Ibid para 74.

95 Ibid paras 74 & 75.

- guarantees for all members the right to '[t]ake part in elections and be elected or appointed to any committee, structure, commission or delegation of the ANC'.

The attributes of the ANC constitution highlighted by the Constitutional Court all point to active democratic participation of members in the activities of the party and suggest that s 19(1) may require – at the very least – that the constitutions of political parties facilitate the democratic participation of its members in the activities of the party. An expansive interpretation of s 19(1) and the way the Constitutional Court understood its meaning in *Ramakatsa* would give effect to the Constitutional Court dictum in *Doctors for Life* that the civic dignity of individuals are enhanced when they participate in political decisions that impact on their lives. Dignity is about having agency and having the ability to participate in decision-making. I thus contend that participation by members in the activities of a political party would be rendered meaningless if this participation were 'facilitated' in a non-democratic manner. This article therefore argues that the right to participation can only make sense and have any real practical effect if the right included the ability of members to participate in a meaningful and democratic way in the activities of a party. After all, meaningful and demonstrate participation in political parties can best be facilitated through democratic processes.

A more difficult argument to make is that because the Constitution does not stipulate in detail what the nature of the democratic participation is that a political party must comply with, the legislature might have a duty to adopt legislation that would ensure 'reasonable and effective' democratic participation of members in political parties in the activities of political parties. Although this is a contentious argument, I nevertheless advance the possible reasoning on which such an argument could be pursued.

Section 7(2) of the Constitution must be at the heart of any argument that the Constitution may place positive obligation on the legislature to pass a 'party law' that would impose a duty on political parties to allow a minimum threshold of democratic participations in its activities. Section 7(2) of the Constitution requires the state to take steps to respect, protect, promote and fulfil the rights in the Bill of Rights – including s 19(1)(b) of the Constitution. In *Glenister v President of the Republic of South Africa*⁹⁶ the majority of the Constitutional Court invoked s 7(2) of the Constitution, which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights, to affirm that the Bill of Rights provisions may impose positive obligations on the state and its organs 'to provide appropriate protection to everyone through laws and structures designed to afford such protection'.⁹⁷ In *Glenister* the majority argued that implicit in s 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be 'reasonable

96 (CCT 48/10) 2011 (3) SA 347 (CC); [2011] ZACC 6; 2011 (7) BCLR 651 (CC) (17 March 2011).

97 Ibid para 181. See also *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); [2001] ZACC 22; 2001 (10) BCLR 995 (CC) para 44.

and effective'. These steps may go beyond the implementation of policies. Because s 8(1) of the Bill of Rights 'binds the legislature, the executive, the judiciary and all organs of state', it follows that the executive, when exercising the powers granted to it under the Constitution, including the power to prepare and initiate legislation, and in some circumstances Parliament, when enacting legislation, must give effect to the obligations s 7(2) imposes on the state.⁹⁸ Moreover, the Constitutional Court has already found in *August*⁹⁹ that s 19 of the Constitution imposes a positive duty on the legislature to pass legislation to give effect to it. According to the court: 'The right to vote [protected by s 19(3)] by its very nature imposes positive obligations upon the legislature and the executive.' Similarly, in the *NNP* case¹⁰⁰ the Constitutional Court said with reference to the right to vote guaranteed by s 19(3) of the Constitution:

Parliament is obliged to provide for the machinery, mechanism or process that is reasonably capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so.

The question raised here is whether the right of citizens to participate meaningfully in the activities of a political party (which I argued above, requires *democratic* participation) could be effectively protected in the absence of a 'party law' that sets out the minimum requirements that must be met by each political party in order to qualify for participation in elections. As the majority pointed out in *Glenister* 'there are many ways in which the state can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights'¹⁰¹ and the Constitutional Court 'will not be prescriptive as to what measures the state takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt'.¹⁰² Political parties must therefore be free to devise their own constitutions which regulate the affairs of the party. By arguing that the Constitution may well impose an obligation on the legislature to adopt a 'party law' this article is not arguing against the ability of political parties to arrange their internal affairs according to the customs and culture appropriate to the party. Instead, I am arguing for the need of adopting a threshold law that would stipulate the basic minimum democratic rights that such a party constitution must accord to its members.

VI CONCLUSION

In this article I contend that the Constitution – specifically s 19(1)(b) – may impose minimum requirements on political parties to facilitate intra-party democracy and may even oblige Parliament to pass legislation to impose such minimum requirements. If my contention is correct, difficult questions

98 *Glenister* (note 96 above) para 190. See also *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC); [2004] ZACC 20; 2005 (4) BCLR 301 (CC) para 69.

99 *August* (note 89 above) para 16.

100 Note 77 above.

101 *Glenister* (note 96 above) para 191.

102 See also *Rail Commuters Action Group* (note 98 above) para 86.

will arise about the nature of the proposed legislation and what the extent of the democratic participation of members in the activities of the political party would be that would be the minimum required by the Constitution; the minimum that a reasonable legislator would adopt. It is beyond the scope of this article to engage with this question. Instead I contend that a positive duty rest on the national legislature to pass a 'party law' which sets out the minimum requirements for the effective and meaningful participation of members of a political party in the formulation of the policies of the party, the election of office bearers of the party and the selection of candidates standing for public office by the party. The adoption of such legislature is necessary to give effect to the full enjoyment of s 19(1)(b) of the Constitution. Such legislation, which may be made applicable to all political parties who wish to contest elections at national, provincial or local government level, will go a long way to assist the Constitutional Court when, inevitably, it is called upon to consider whether the Constitution of a particular political party is itself unconstitutional. While *Ramakatsa* seems to suggest that even in the absence of the adoption of a 'party law' the Constitution of a political party can be tested against the provisions of the Bill of Rights,¹⁰³ the court seemed reluctant to interfere too drastically by prescribing to political parties how it must arrange its internal affairs. But as I have argued that does not give parties a free hand as the provisions of the Bill of Rights impose minimum requirements to ensure the facilitation of intra-party democracy in political parties. Ideally, the elected legislature (and not the judiciary) should flesh out these requirements by passing a 'party law' after considering the policy implications and consulting widely on the matter. If it fails to do this, so I contend, a court may well be convinced to order the national legislature to do so.

103 *Ramakatsa* (note 23 above) para 72.