



THE VOTING RIGHTS OF MENTALLY UNSOUND
OR DISORDERLY CITIZENS AND PERSONS
DETAINED INVOLUNTARILY UNDER THE
MENTAL HEALTH CARE ACT

Mini-thesis submitted in partial fulfilment
of the requirements for the LLM degree

by

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May 2022

DECLARATION

I, Sean Derrick Oliphant do hereby declare that, THE VOTING RIGHTS OF MENTALLY UNSOUND OR DISORDELY CITIZENS AND PERSONS DETAINED UNDER THE MENTAL HEALTH CARE ACT, is my own work, that it has not been submitted for another degree or to any other institution of higher learning, and that I have properly acknowledged all the sources which I have used by means of complete references.

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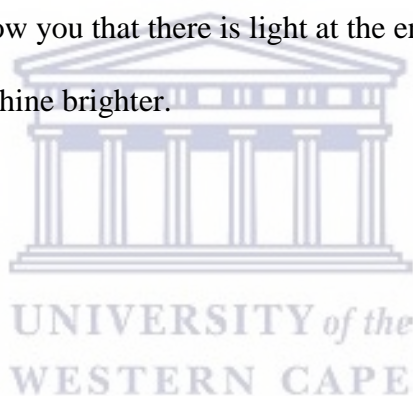
DEDICATION

I dedicate this to all those who are conquering mental illness. To the LGBTQIA+ who are having to face constant battles, who are being rejected by their families, friends, and society.

I dedicate this to all the queer community who has ever been called an abomination or a demon. This is for the queer community who is facing criminal prosecution for expressing themselves freely. Most importantly, to the only queer boy in the rugby or cricket team, to the girl who's ever been called a 'tom boy'. Dedicate this to all those who are battling with drug addiction. To all those who are battling suicide.

Not only have I done this to show you that there is light at the end of the tunnel, I came to change the bulb so that it may shine brighter.

I dedicate this to myself.



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KEYWORDS

Voting rights

Elections

Voter disqualifications

Active voting rights

Passive voting rights

Democracy

Participatory parity

All affected persons principle

Mental disorder

Mental illness

Mental disability

Curatorship



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Chapter 1

INTRODUCTION

1.1 Background

South Africa is a diverse country that plays host to various minority groups. By a minority group I mean a subordinate group whose members have significantly less power or control over their lives than members of a dominant or majority group.¹ Minority groups form part of the vulnerable groups in society and may easily fall prey to human rights violations that may often go unnoticed. Because these groups form a numerical minority, they require sufficient protection by the law, including effective enforcement of special laws by the government, to ensure their protection and to prevent political, economic and cultural oppression and unequal treatment.

For example, human rights violations and unequal treatment of the LGBTQI+ community have occurred for many years and were legally sanctioned under apartheid. Discrimination based on sexual orientation was first outlawed by the interim Constitution of the Republic of South Africa in 1994.² However, it was not until 1998 that the criminalisation of male same-sex relations was officially categorised as a form of unfair discrimination and declared unconstitutional in the first *National Coalition* case.³ This was a landmark judgment. However, the change in the law did not prevent further injustices from occurring. The legalisation of same sex-marriage was only ordered by the Constitutional Court in 2005 in the *Fourie* case.⁴ This resulted in the enactment of the Civil Union Act 17 of 2006. It was only after this intervention that same-sex couples were allowed full enjoyment of their rights as equal citizens. The long

¹ <https://academic.udayton.edu/race/01race/minor01.htm> 23 December 2007 (accessed on 6 August 2019).

² Section 8(2) of the Constitution of the Republic of South Africa Act 200 of 1993. Confirmed by section 9(3) of the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution').

³ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC).

⁴ *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

struggle for the recognition of gender non-conforming minorities took place in spite of the fact that section 9 of the Constitution explicitly declares that all people are equal before the law, and expressly states that no person may be unfairly discriminated against on grounds such as race, sex or sexual orientation. Section 10 of the Constitution further provides that all persons have the right to dignity. This means that all persons, even those of minority groups, are entitled to equal respect and a meaningful, humane, and autonomous life. Yet, even with express constitutional protection, it took more than a decade to transform the law to enable same sex couples to form legally protected intimate relationships. It might take many decades more to transform the cultural bias in society generally towards same sex couples.

The difficult struggle of the LGBTQI+ minority community for legal recognition suggests that less influential and less organised minority groups might be in even greater need of explicit protection by the law, government, and society. One such minority group that arguably needs special legal recognition and protection in our diverse society is people living with impaired mental capacity due to a mental disability, such as brain damage after an accident or dementia in old age, or a mental illness, such as schizophrenia.⁵ The daily media regularly reports incidents which illustrate the marginalised position in society of mentally impaired persons. The Life Esidimeni tragedy in 2016 dramatically and sadly highlighted the need for the greater legal protection of mentally disabled and ill persons. This tragedy, which involved the transfer

⁵ The technical definitions of mental illness and disability are discussed in chapter 3. As a starting point, it is sufficient to define *mental illness* as any health condition which involves a change in an individual's emotions, thinking or behaviour and refers collectively to all diagnosable mental disorders (Parekh R 'What is mental illness' August 2018 available at <https://www.psychiatry.org/patients-families/what-is-mental-illness> (accessed in 6 August 2019)). These disorders include mood disorders (such as depression or bipolar disorder), anxiety disorders, personality disorders, psychotic disorders (such as schizophrenia), eating disorders, trauma-related disorders (such as post-traumatic stress disorder) and substance abuse disorders ('Types of mental illness' November 2018 available at <https://www.healthdirect.gov.au/types-of-mental-illness> (accessed 6 August 2019)). *Mental disability*, which affects the brain, must be distinguished from physical disability, which affects the body ('What is the difference between a mental disability and a physical disability' available at <https://www.acmlcleveland.com/news/what-is-the-difference-between-a-physical-and-a-mental-disability/> (accessed on 28 January 2020)). While physically disabled persons also constitute a vulnerable minority, the focus of this mini-thesis falls on people affected by mental disability or illness, or as the South African courts have referred to mental illness or mental defect, as a 'disease of the mind' (*S v Mahlinza* 1967 (1) SA 408 (A)).

of an estimated 1371 mental health care users from the Life Esidimeni facility to hospitals and non-governmental organisations, some of which were unlicensed, saw the death of more than 140 persons with psychosocial and intellectual disabilities in the care of the state.⁶ More recently, Nathaniel Julies, a teenager with down syndrome, was gunned down by police in Eldorado Park outside Johannesburg in 2020, because of his inability to answer their questions due to his mental disability.⁷ These widely reported instances of abuse and neglect suggest that mentally disabled and ill persons constitute one of the most disadvantaged minority groups in post-apartheid society.⁸

People with mental illnesses are often stigmatised, which may lead them to live unfulfilling lives. According to Swanepoel, this stigmatisation leads to mentally ill persons being discriminated against, as people often find mentally ill persons to be less trustworthy and intelligent and more dangerous and incompetent.⁹

In sharp contrast to this social reality, section 7(2) of the Constitution read with section 9, imposes a legal duty on the state to ‘respect, protect, promote and fulfil’ the rights of all members of society, including mentally disabled and ill persons, without discrimination. In *Sonke Gender Justice NPC v President of the Republic of South Africa* the Constitutional Court explained the obligation of the state towards minority groups under section 7(2) of the Bill of Rights as follows:¹⁰

⁶ South African Human Rights Commission *Report of the National Investigative Hearing into the Status of Mental Health Care in South Africa* (2017) 8.

⁷ Fabian R ‘Nathaniel Julius, teen with down syndrome, killed by police in South Africa’ *The Mighty*, 8 September 2020 <https://themighty.com/2020/09/nathaniel-julius-killed-by-police/> (accessed 13 October 2020).

⁸ This view is shared by Swanepoel M ‘Human rights that influence the mentally ill patient in South African medical law: A discussion of sections 9; 27; 30 and 31 of the Constitution’ (2011) 14 *Potchefstroomse Elektroniese Regsblad* 1 20.

⁹ Swanepoel M ‘Human rights that influence the mentally ill patient in South African medical law: A discussion of sections 9; 27; 30 and 31 of the Constitution’ (2011) 14 *Potchefstroomse Elektroniese Regsblad* 1 20.

¹⁰ *Sonke Gender Justice NPC v President of the Republic of South Africa* 2021 (3) BCLR 269 (CC) paras 40-41.

‘[S]ection 7(2) of the Constitution requires the State to respect, protect, promote and fulfil the rights in the Bill of Rights. This makes clear that section 7(2) imposes both positive and negative duties on the State. The duty to “respect” is the negative duty on the State not to perform any act that infringes the rights in the Bill of Rights. The duty to “protect” refers to the positive duty that the Constitution imposes on the State to “provide appropriate protection to everyone through laws and structures designed to afford such protection”. This is a duty to prevent interference with, or infringement of, rights by others. The duty to “fulfil” is the positive duty that the Constitution imposes on the State, in certain circumstances, to “take positive measures that assist individuals and communities to gain access to and enjoy the full realisation of the relevant rights”. Finally, the State may also, where appropriate, have a duty to “promote” constitutional rights in the sense of undertaking “awareness-raising and educational measures concerning the rights”.’

This analysis makes clear that the state cannot simply leave mentally impaired persons to fend for themselves in, and often against, society. The state must take positive measures to protect and assist this vulnerable minority group. The preamble of the Constitution explains that this positive obligation is part of the quest to ‘establish a society based on democratic values, *social justice* and fundamental human rights’. The work of the American political philosopher, Nancy Fraser, enables us to better understand this constitutional obligation to ensure social justice towards persons with mental capacity impairments.¹¹

Fraser’s theory of justice defines social justice as the ‘participatory parity’ of everybody in society.¹² In terms of this theory, social justice obtains in a society when every member of that

¹¹ Fraser N ‘Reframing justice in a globalizing world’ in Fraser N *Scales of Justice* (2008) 12.

¹² Fraser N ‘Reframing justice in a globalizing world’ in Fraser N *Scales of Justice* (2008) 12.

society, especially the vulnerable and marginalised, have a substantially equal chance to participate meaningfully in society. Fraser identifies three factors that might prevent participatory parity and so cause injustice in society: cultural misrecognition, economic maldistribution, and political misrepresentation. From Fraser's perspective, social justice to minority communities requires positive and active cultural *recognition*, economic *redistribution*, and political *representation*.¹³ The state must take active steps to ensure that all three dimensions of social justice is achieved. Section 7(2) of the Bill of Rights confirms this.

Taking Fraser's three-dimensional theory of social justice as reference point, it may be asked whether mentally disabled or ill persons receive adequate *recognition*, *redistribution* and *representation* under South African law.

It cannot be disputed that mentally ill and disabled persons are legally *recognised* as a minority group in society. In the National Mental Health Policy Framework and Strategic Plan 2013-2020,¹⁴ the Minister of Health highlighted the need for the rights of mentally ill persons to be promoted and protected, and their rights to equality, dignity, respect and autonomy to be upheld. For example, section 10(1) of the Mental Health Care Act 17 of 2002 confirms that no person may be discriminated against on the basis of his or her mental health status.¹⁵ This provides persons who are mentally ill with the right to equality. One may add that the right to equality in section 9 of the Constitution includes persons who are mentally ill or impaired and

¹³ Fraser N 'Mapping the feminist imagination: From redistribution to recognition to representation' in Fraser N *Scales of Justice* (2008) 100.

¹⁴ Minister for Health 'National Mental Health Policy Framework 2013-2020' (2012) 20 available at <https://www.health-e.org.za/wp-content/uploads/2014/10/National-Mental-Health-Policy-Framework-and-Strategic-Plan-2013-2020.pdf> (accessed 7 August 2019).

¹⁵ Section 10 provides as follows: (1) A mental health care user may not be unfairly discriminated against on the grounds of his or her mental health status. (2) Every mental health care user must receive care, treatment and rehabilitation services according to standards equivalent to those applicable to any other health care user. (3) Policies and programmes aimed at promoting the mental health status of a person must be implemented with regard to the mental capacity of the person concerned.

any provisions contrary to this must be declared invalid and unconstitutional.¹⁶ Section 39 of the Constitution also places a duty on the courts, tribunal or forum, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on equality, dignity and freedom. Section 6 of the Promotion of Equality and Prevention of Discrimination Act 4 of 2000 also protects all persons against unfair discrimination by the state or any other person. The Employment Equity Act 55 of 1998 mandates affirmative action under section 13 and 15 in favour of people with mental disabilities in the employment context.¹⁷ This is both a form of cultural recognition and economic empowerment. Section 23(2) of the Road Accident Fund Act 56 of 1996 states that prescription does not run against any person ‘detained as a patient in terms of any mental health legislation’ or any person ‘under curatorship’. In *Van Zyl v Road Accident Fund* the Constitutional Court ruled that prescription under the Act also does not run in the case of a mentally impaired person who is not under curatorship or a detained patient.¹⁸ The right to equality and dignity also forms the basis of the value of ubuntu, which was recognised as a constitutional value in the case of *S v Makwanyane*.¹⁹

As far as *economic redistribution* or access to basic social goods and services are concerned, mention was already made to legislation that ensures that mentally impaired persons have equitable access to work and justice. In addition, the right to have access to health care under section 27(1)(a) expressly includes mental health care. The Social Assistance Act 13 of 2004 includes a grant in section 7 in favour of people who take care of dependents with physical or

¹⁶ Section 2 of the Constitution states that the Constitution is the supreme law of the Republic; law or conduct which is inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

¹⁷ The affirmative action provisions apply to ‘designated groups’ which is defined in section 1 as ‘black people, women and *people with disabilities*’ (my emphasis). The category of ‘people with disabilities’ is in turn defined in section 1 as ‘people who have a long-term or recurring physical *or mental impairment* which substantially limits their prospects of entry into, or advancement in, employment’.

¹⁸ *Van Zyl v Road Accident Fund* 2022 (2) BCLR 215 (CC).

¹⁹ *S v Makwanyane* 1995 (6) BCLR 665 (CC).

mental disabilities,²⁰ and a disability grant under section 9 provides temporary financial relieve.²¹

This brief analysis suggests that mentally impaired persons are legally recognised as a vulnerable group in society and have access to basic economic goods under the Bill of Rights, as the interpretation of section 7(2) through Fraser's theory demands. However, when it comes to *political representation*, the third element of Fraser's theory of social justice, the situation changes dramatically and unexpectedly. Several categories of mentally impaired persons are expressly excluded by statute from the right to vote (called active voting rights), and by the Constitution itself from the right to be voted for, or to be elected as a member of the national, provincial and municipal legislatures (called passive voting rights). As far as the first form of political misrepresentation is concerned, section 8(2) of the Electoral Act 73 of 1998 provides explicitly that the chief electoral officer may not register a person as a voter if that person 'has been declared by the High Court to be of unsound mind or mentally disordered' or if that person 'is detained under the Mental Health Care Act, 2002 (Act No. 17 of 2002)'. As far as the second form of political misrepresentation is concerned, the Constitution adds insult to injury by expressly disqualifying 'anyone declared to be of unsound mind by a court of the Republic' from being a member of Parliament or any provincial or municipal legislature.²²

In terms of Fraser's theory of justice, these exclusions result in the injustice she calls *political misrepresentation*. Mentally ill or disabled persons have no political voice and are unable to

²⁰ Under section 7 of the Act a person is eligible for a care dependency grant if he or she is a parent, primary care giver or foster parent of a child who requires and receives permanent care or support services due to his or her physical or mental disability. A person is not eligible for such a grant if the child is cared for on a 24 hour basis for a period exceeding six months in an institution that is funded by the State.

²¹ Under section 9 of the Act, a person between 18 and 59 is eligible for a disability grant, if he or she is, owing to a physical or mental disability, unfit to obtain the means needed to enable him or her to provide for his or her maintenance by means of any service, employment or profession.

²² Section 47(1)(d), read with section 106(1)(d) and section 158(1)(c) of the Constitution: 'Membership. Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except anyone declared to be of unsound mind by a court of the Republic'. The same disqualification applies to provincial legislatures and municipal councils.

directly influence government policy and law. As such they lack the means to hold government politically accountable. How are we to understand the ongoing political *misrepresentation* of people living with impaired mental capacity, given the constitutional commitment and quest for social justice?

On the face of it this blanket exclusion appears to be a constitutional anachronism. However, society remains divided on the question whether mentally ill persons should have the right to vote. A poll conducted by eNCA found that 60% of South Africans believe that mentally ill persons should have the right to vote, while only 40% were against the idea.²³ In spite of the strong public support for legal reform, Parliament, who officially represents the voice of the people, decided not to amend the Electoral Act before the 2014 general elections to allow for at least some mentally impaired citizens to vote, after a proposal to this effect was specifically presented to the Standing Committee in question.²⁴ Although the right to vote has been the subject of extensive litigation in the Constitutional Court,²⁵ the blanket exclusion of mentally disabled and ill persons from active and passive participation in elections has thus far not been challenged on judicial review.²⁶

²³ 'Mental health care users and the right to vote' SA Federation for Mental Health 1 June 2018 available at <https://www.safmh.org.za/index.php/news/item/175-mental-health-care-users-and-the-right-to-vote> (accessed on 8 August 2018). See also Tshangela L 'Psychiatric patients have the right to vote' SABC News 16 March 2019 available at <http://www.sabcnews.com/sabcnews/psychiatric-patients-have-a-right-to-vote/> (accessed 26 February 2020).

²⁴ Electoral Amendment Bill [B22-2013]: Public Hearings 10 September 2013. A written record of the hearing is available at <https://pmg.org.za/committee-meeting/16327> (accessed 15 December 2021).

²⁵ See, for example, *Democratic Party v Minister of Home Affairs* 1999 (3) SA 254 (CC); *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC); *August v Electoral Commission* 1999 (3) SA 1 (CC); *Liberal Party v The Electoral Commission* 2004 (8) BCLR 810 (CC); *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC); *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC); *Richter v The Minister for Home Affairs* 2009 (3) SA 615 (CC); *Kham v Electoral Commission* 2016 (2) SA 338 (CC); *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC); *New Nation Movement NPC and Others v President of the Republic of South Africa* 2020 (6) SA 257 (CC); *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs* [2021] ZACC 29 (3 September 2021); *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance* 2022 (1) BCLR 1 (CC).

²⁶ Given the active involvement of civil society in social justice litigation, this failure calls for further investigation and explanation. Unfortunately, it is beyond the scope of this research project to provide answers to this gap in the trajectory of post-apartheid public interest litigation.

In light of the legislative inertia on the topic, and in the absence of any strategic litigation campaign around the issue, there is an urgent need to take a closer look *from an academic perspective* at the history, scope and ongoing constitutional justification (if any) of mental illness and disability as voter disqualifications in South Africa law. Such a study has not yet been undertaken. The existing literature is limited to a few short essay or chapter contributions.²⁷ The academic neglect of the issue has not gone unnoticed. In fact, one of the key findings by the South African Human Rights Commission after their public hearings into the state of mental health in South Africa was that:²⁸

‘[b]roader conversations about law reform of instruments such as the Mental Health Care Act and the Electoral Act are required. Particularly in light of their potential contravention of the Convention on the Rights of People with Disabilities and in light of ongoing debates regarding matters such as legal capacity.’



In addition, the Commission recommended that the Department of Justice and Constitutional Development:²⁹



‘[b]egin a review of the human rights impacts of the provisions in the Electoral Act relating to people with psychosocial and intellectual disabilities, containing recommendations for action and potential reform. Timeline: within 12 months of issuing this report.’

²⁷ Combrink H ‘Everybody counts: The right to vote of persons with psychosocial disabilities in South Africa’ (2014) 2 *African Disability Rights Yearbook* 75 100; McQuoid-Mason D and Naidoo N ‘Mental Health’ in *Law of South Africa* (LAWSA) Volume 29 3rd ed (2020); and Grobelaar-Du Plessis I ‘The Right of Persons with Intellectual Disabilities to Political Participation: The Legal Capacity to Vote - *Zsolt Bujdosó v Hungary* Communication No. 4/2011 (Committee on the Rights of Persons with Disabilities) (UN Doc CRPD/C/D/4/2011)’ (2020) 83 THRHR 455.

²⁸ SAHRC ‘Report of the national investigative hearing into the status of mental health care in South Africa’ (14-15 November 2017) 7.

²⁹ SAHRC ‘Report of the national investigative hearing into the status of mental health care in South Africa’ (14-15 November 2017) 69.

The recommendation has seemingly fallen on deaf ears. It was made in 2017 with a time-line of one year attached. It is now 2022 and since the Report was released two national elections have taken place in South Africa without any change to the law regulating the active and passive voting rights of mentally impaired persons. Against this background, this mini-thesis seeks to contribute in some small manner to the much-needed academic conversation about electoral reform, demanded by the Commission.

1.2. Aims of the research project

The main aim of the thesis is to establish whether the blanket disqualification of mentally disabled and mentally ill persons from voting in elections can be constitutionally justified, or whether the disqualification in its current form constitutes an unjustifiable human rights violation. My hypothesis is that the blanket exclusion of all mentally disabled and ill persons from active participation in elections is incompatible with the founding values of the Constitution and the rights entrenched in the Bill of Rights. My thesis is not that all adult citizens should have the right to participate in elections without regard for their mental ability or health, but that the current blanket exclusion is arbitrary and overbroad. The blanket exclusion can thus not be regarded as a reasonable and justifiable limitation of the right of every adult citizen to vote. There is a dire need for legislative reform.

As a means of defending my thesis, I establish, first, what the current voter disqualification entails, and which categories of citizens are denied the right to vote. I then indicate, secondly, why this disqualification is arbitrary and overbroad. Lastly, I propose a new and much narrower disqualification test based on international law and a comparative study of several democracies.

Given the scope of this thesis, I had to unfortunately limit my focus to the *active* voting rights of mentally unsound or disorderly citizens and detained involuntarily under the Mental Health

Care Act, or the right to vote elections. The current disqualification from voter registration for national elections is contained in the Electoral Act. The constitutionality of the statutory exclusion can thus be determined through a normal constitutional rights analysis. This is not the case where the denial of the *passive* voting rights of mentally unsound or disorderly citizens and persons detained involuntarily under the Mental Health Care Act, are concerned. The exclusion of persons who are of unsound mind from standing in national, provincial and local elections, and if elected to hold public office, is expressly included in the Constitution itself.³⁰ It is thus difficult, if not impossible, to argue that the disqualification from membership of Parliament and other legislatures is unconstitutional in the usual sense of the word. Such an argument will have to wait for another occasion. I return to the denial of passive voting rights later in the thesis, only in as far as it might be said to throw some light on the denial of active voting rights.³¹ In addition, the focus falls on national elections only, although the same principles apply to provincial and municipal elections as well.

1.3 Research Questions

In order to achieve the research objectives listed above, several research questions must be answered:

³⁰ Sections 47, 106 and 158 of the Constitution.

³¹ The same complex relationship between active and passive voting rights exists in the case of prisoners who are serving or has served a sentence of imprisonment for more than 12 months without the option of a fine. Such a prisoner or ex prisoner is disqualified by section 47(1)(e) of the Constitution from standing for public office in the first general election after the sentence has been completed. In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) Chaskalson CJ remarked as follows: 'Another relevant factor to consider is the fact that the Electoral Act prohibits all prisoners sentenced to imprisonment without the option of a fine from voting, while the Constitution permits a prisoner serving a sentence of imprisonment of less than 12 months without the option of a fine to stand for election. No explanation is given, and none is apparent, as to why a person who qualifies to be a candidate should be disqualified from voting'. This implies that a disqualification of prisoners from voting, provided they have been sentenced to imprisonment for more than a year, would pass constitutional muster. In fact, both Madala J and Ngcobo J remarked that the statutory exclusion of prisoners from active voting would be constitutional, if it mirrored the constitutional exclusion of passive voting rights. The same argument might apply in the case of citizens who have been declared to be of unsound mind. See further below chapter 4.

First, what is the right to vote and which other voter eligibility criteria exist that exclude adult citizens from voting? How, if at all, are these exclusions constitutionally justified?

Second, how is mental capacity due to a mental illness or mental disability regulated by statute and the common law? Which mentally impaired persons fall within the voter exclusions mentioned in the Electoral Act and Constitution?

Third, does international and African human rights law recognise a right to vote and if so, does the right include all adult citizens, including people with impaired mental capacity due to illness or disability?

Fourth, how is the right to vote of mentally disabled and ill persons regulated in democracies whose electoral law is comparable to our own, such as the United Kingdom, Germany, India and Kenya? In which democracies are mentally disabled persons allowed to vote? If the right to vote is granted to mentally disabled persons, what logistical and administrative arrangements apply to facilitate voting by mentally impaired persons?

Finally, after answering these questions, the question may then be raised: is the blanket exclusion in South Africa of mentally disabled persons from active participation in democratic elections constitutionally justified? If not, how should the Electoral Act and Constitution be amended to terminate and remedy these violations? Should mental disability or illness be removed completely as a voter disqualification criterion, or should the disqualification be more narrowly defined and not automatically linked to compulsory treatment and curatorship orders? In short, how should the Electoral Act be amended (if indeed it should be) to bring our law in line with the constitutional aspirations and best practices of our own democracy, that of other democratic states, and the international community?

In short, during the course of this mini thesis the following questions will be addressed: Who is targeted and included under the voter exclusions? What does the various categories mean and how is one excluded? Are the exclusions under South African law broader or narrower than those in other democracies where some mentally disabled or ill persons are excluded?

1.4 Structure of the mini-thesis.

In addition to this introduction, this mini-thesis is divided into several further chapters which are loosely divided into two parts.

The first part of the thesis consists of chapters two and three. This part is descriptive in nature and aims to provide an accurate description of the scope of the current exclusion of mentally disabled persons from voting in South African elections. Chapter two reveals that the Electoral Act makes extensive provision for the active participation of adult citizens in national elections. To this end the Act provides for the casting of special votes at home or in care facilities for those who cannot vote at a voting station due to physical infirmity or disability or pregnancy. However, as already mentioned above, at the same time the Act excludes thousands of citizens from active participation in these elections due to their impaired mental capacity. The chapter explores this voter disqualification in its historical context as the only pre-apartheid exclusions that has survived unchanged into the democratic era.³² Chapter three then explores in more detail which mentally impaired persons are

³² Even the disqualification based on age underwent significant changes over the years and has gradually been lowered from 23, to 21, to 18 years. Nelson Mandela actively but unsuccessfully campaigned for the reduction of the voting age for post-apartheid South Africa to 14. The citizenship requirement has likewise undergone change and contestation. It was abolished in our law for the 1994 elections and only reintroduced at national

currently included under the two voter exclusions. The analysis is based on the most rights friendly interpretation possible of the electoral and mental health legislation, as required by section 39(2) of the Constitution. The analysis reveals that every person under curatorship or receiving involuntary treatment in a mental care facility is automatically excluded from active participation in national elections, without any independent judicial assessment of their capacity to vote.

The second part of the thesis consists of chapters four, five and six. These chapters explore the constitutionality of the blanket exclusion of the categories of mentally impaired persons from voting in elections identified in chapters two and three. Relying on section 39(1) of the Constitution to structure the analysis, chapter four explores the rights and values, with specific reference to the founding value of democracy, that are at stake. How does the South African Constitutional Court understand democracy and the right to vote given its existing voting rights jurisprudence? Thereafter, chapter 5 considers foreign or comparative law on the topic. Chapter 6 evaluates the practice of democratic states from a transnational perspective, including both international and regional law. The constitutional, comparative and international analyses in chapters four, five and six, suggest that the current provisions of the Electoral Act violate the right to vote and can no longer be justified as a reasonable and proportional measure to ensure the democratic integrity of elections.

Finally, the thesis concludes in chapter 7 with several concrete proposals for legislative reform aimed at amending the Electoral Act.

level for the 1999 elections. The more controversial disqualifications based on race, gender, class (literacy and property ownership), criminal behaviour, and drug or alcohol dependency no longer apply in our law.

Chapter 2

ELECTIONS AND ACTIVE VOTER PARTICIPATION

2.1 Introduction

In this chapter I review the provisions of the Electoral Act of 1998 to gain a fuller picture of the current voter registration and eligibility criteria in South African law, and the various ways in which a vote can be cast by those who are eligible to vote on election day. The key questions are: how do eligible voters participate in national elections, and which categories of adult citizens are excluded by the Act from active participation in national elections? The Chapter starts with a brief discussion of the constitutional importance of elections and whether South Africa can best be described as a typical representative democracy. Thereafter I explore the practicalities of voting in a national election. The administration of a free and fair election, such as voter registration and identification, by necessary implication excludes some adult citizens from voting due to their failure to comply with registration or other logistical requirements.³³ This is especially so in the case of voters with physical or mental impairments. This form of constructive exclusion therefore deserves close attention. Finally, I turn to the three voter exclusions expressly listed in the Act (age, nationality, and mental capacity). The aim of the chapter is two-fold: in the first place, to understand the scope of the voter exclusion based on mental capacity, and second, to understand how far the voting rights of mentally unsound or disorderly citizens and persons detained involuntarily under the Mental Health Care

³³ In *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) the Court ruled that it was not a violation of the right to vote to require citizens to identify themselves with a green bar-coded identification document before registration and voting. The Court held that indirect exclusions due to the logistics of a free and fair election are only subject to rationality review. The issue of voter suppression in the USA, through logistical changes to the times and places and modes of voting and voter identification, is a burning topic that deserves a study on its own. See *Brnovich v Democratic National Committee* 141 SCt 2321 (2021), in which the US Supreme Court ruled that a ban on out of precinct voting did not have a racially discriminatory effect.

Act, could be accommodated within the present electoral process or would require amendments to the process.

2.2 Elections and democracy

The Preamble of the Constitution is a short but powerful first-person narrative in which ‘the people of South Africa’ tells the story of their past and shares their national vision for the future. The Preamble explains that the Constitution was adopted so as to ‘establish a society based on democratic values’ and so as to ‘lay the foundations of a democratic and open society in which government is based on the will of the people’. The Preamble concludes with the nation’s vision for the future:

‘[A] united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.’

The founding provisions of the Constitution begin to unpack the founding values embedded in this vision. The first element or value is the advancement of human rights.³⁴ Section 7(1) of the Constitution adds that the Bill of Rights ‘is a cornerstone of democracy in South Africa’. The second component or value is the rule of law.³⁵ The third founding value underpinning the democratic vision is ‘regular elections’ which in turn implies ‘[u]niversal adult suffrage, a national common voters’ roll, regular elections, and a multi-party system of democratic government’. In short, South Africa’s constitution vision is to be an internationally respected *multi-party electoral democracy*, in which government is based on the will of the people.

Section 19(2) of the Bill of Rights converts the vision of South Africa as a multi-party electoral democracy into a set of legally enforceable obligation and rights by declaring that:

³⁴ In terms of section 1(a) and 1(b) of the Constitution, this element includes the values of human dignity, equality, freedom, non-racialism and non-sexism.

³⁵ Section 1(c) of the Constitution.

‘[e]very citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution’.

In the national sphere of government, the legislative body referred to by section 19 is Parliament. Parliament consists of the National Assembly and National Council of Provinces. In terms of section 42(3) of the Constitution, the members of the National Assembly are elected to represent the people and to ensure government by the people under the Constitution. Section 46(1) provides more detail. It stipulates that the National Assembly consists of no fewer than 350 and no more than 400 women and men, elected every five years:³⁶

‘[i]n terms of an electoral system that (a) is prescribed by national legislation; (b) is based on the national common voters roll; (c) provides for a minimum voting age of 18 years; and (d) results, in general, in proportional representation.’

The vision of South Africa as a multi-party democracy confirms that post-apartheid South Africa is a *representative* democracy. As recently said by the Constitutional Court:³⁷

‘[A] multi-party system of democratic government also necessarily implies a representative democracy, founded on the principle of elected officials representing a group of people.’

The logic of representation can be further developed. As will be seen in chapter four, it could be radicalised to insist that *every affected interest or person* must be included in the demos and be represented. Valid as this might be as a principle of democracy, more is at stake in multi-party democratic elections than merely electing political representatives, even where the Constitution insists that representation must be in mathematical proportion to the interest that they represent. Elections also present a unique opportunity to debate and thus participate in the

³⁶ Section 49(1) of the Constitution.

³⁷ *New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC) para 203.

ongoing political dialogue in the life of the nation. The Constitutional Court has also recognised this aspect of multi-party democracy:³⁸

‘[A]s we have said in the past, one of the defining features of our constitutional democracy is that it is both representative and participative. These two elements should not be seen as being in tension with each other. On the contrary, they are mutually supportive as we noted in *Doctors for Life*: “In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. *General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters.* 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.’

³⁸ *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) para 283. The reference is to *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 115.

The focus on active citizen participation and participatory democracy as a counter to the influence of powerful economic interest groups, lobbying, and influence-peddling; as a celebration of civic dignity and the spirit of democratic and pluralistic accommodation, brings another dimension of our democracy into focus. The Constitution envisages democratic citizens who participate in elections and other processes in a civic spirit, and not in the strategic pursuit of private interests, economic or otherwise. A citizen is not someone who wishes to see his or her private interest prevail. A citizen is someone who participates in politics in order to ensure social justice in society or the common good of all. In this regard, the Constitutional Court distinguishes between a deliberative and a statistical (or majoritarian) concept of democracy.³⁹

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

The open and *deliberative nature of the process* goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility

³⁹ *Democratic Alliance v Masondo* 2003 (2) SA 413 (CC) paras 42 to 43.

for serious and *meaningful deliberation* and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not to exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, “South Africa belongs to all who live in it”.’

The deliberative character of our multi-party democracy is entrenched by the requirement that the electoral system must result, in general, in proportional representation.⁴⁰ In effect, this guarantees quotas for minority parties in parliament - thus ensuring a better quality of representation and the equality of voice that enables the deliberation between a plurality of voices celebrated by Sachs J in the passage above.⁴¹

Elections as an element of our multi-party democracy can thus be approached with an emphasis on representation or participation. Section 57(1) of the Constitution stipulates that the National Assembly may make rules concerning its internal arrangements, proceedings and procedures ‘with due regard to representative and participatory democracy’ and section 57(2) adds that these rules must provide for participation in the proceedings of the Assembly and its committees ‘of minority parties represented in the Assembly’.

⁴⁰ Section 47(1)(d) of the Constitution.

⁴¹ *New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC) para 220 to 221: ‘That brings one to the constitutional norm that our electoral system must result, in general, in proportional representation. [...] However, the “never again” impulse of section 19 does not boil down to the simplistic view that our past of disenfranchisement means that the ambit of constitutionally protected interests in section 19(3)(b) should be set as widely as possible to supposedly promote enfranchisement. [...] The entrenchment of proportional representation, and its achievement through the vehicle of political parties, flows from the prioritisation of equality in political voice (every vote counts equally) over the accountability that might be better secured through a constituency-based system or a mixed system. The “never again” impulse of section 19 is therefore not merely that whole categories of citizens must not be disenfranchised, but also that never again must some people’s voices count more than others in our representative democracy. The rationale thus goes beyond disenfranchisement, to the distortion of equality in political voice.’ The implicit distinction between the *quantity* of democratic participants (‘the ambit set as widely as possible’) and the possibility of voter restrictions, such as proportional party representation, to enhance the *quality* of democratic participation and debate is fundamental. The issue is further discussed in chapter 4 below.

In constitutional and political philosophy, the contrast drawn by the Constitutional Court (per Sachs J) between mathematical and deliberative democracy is often described as the difference between civic republican and liberal democracies, or between deliberative and strategic conceptions of politics. American constitutional scholar, Frank Michelman, famously explained the difference between these two conceptions of democratic participation as follows:⁴²

‘[I]n this Essay, I restrict the focus to a certain ambiguity in the way that participants in American constitutional-legal discourse envision the *quality or character of popular politics in ordinary legislative settings*. This ambiguity turns on a distinction between two models of communicative activity—two kinds of politics, if you like to which we can assign the names “deliberative” and “strategic”. *Deliberative politics* connotes an argumentative interchange among persons who recognize each other as equal in authority and entitlement to respect, jointly directed by them towards arriving at a reasonable answer to some question of public ordering [...]. As I mean to use the term here, deliberation [...] refers to a certain attitude toward social cooperation, namely, that of *openness to persuasion by reasons* referring to the claims of others as well as one's own. The deliberative medium is a good faith exchange of views—including participants' reports of their own understandings of their respective vital interests - in which all participants remain open to the possibility of persuasion by others and in which a vote, if any vote is taken, represents a pooling of judgments. But a deliberative style of politics may be fully confrontational and contestative. [...] By contrast with deliberation, *strategic interaction* aims at coordination rather than cooperation. In the last analysis, it asks people to consider no one's interest but their own. Its medium is bargain, not argument. Its tools of

⁴² Michelman F ‘Conceptions of democracy in American constitutional argument’ (1989) 56 *Tenn L Rev* 291 293.

persuasion are not claims and reasons but conditional offers of service and forbearance. Whether formally embodied in a vote or in contract, or just informally carried out in social behaviors, a strategic outcome represents not *a collective judgment of reason* but *a vector sum in a field of forces.*'

In terms of the mathematical or strategic conception of politics, the democratic nature of decisions depends on the *quantity* or number of people supporting the decision; in terms of the deliberative conception of politics, the democratic nature of a decision depends on the open and deliberative *quality* of the debate that preceded the decision.

As will be seen in more detail in chapter four below, these two conceptions of democracy give rise to two competing conceptions about the nature of elections and active citizens participation in elections or the right to vote. The democratic nature of an election can be measured either in terms of the *quantity* of citizens who participated, that is the number of voters, or the open and deliberative *quality* of the electoral debates among voters. According to the first conception, there is no incentive to limit the right to vote and every citizen or affected person should participate. According to the second conception there is an incentive to limit participation only to those citizens who are capable of contributing meaningfully and rationally to political debate and deliberation. The exclusion of children, for example, is fully justified within this second conception.

Given these two perspectives on voter participation and the democratic integrity of an election, we can restate the basic question investigated in this mini-thesis as follows: Can a reduction in the *quantity* of voters, through well-designed voter disqualifications, ever be justified as a means to enhance the deliberative *quality* of elections and political debate generally?

The answer provided by section 19(3) of the Bill of Rights, understood in its historical context, seems always to have been and continues to be in the affirmative. It is precisely on this basis

that women were previously excluded from voting. The same can be said of the voter exclusion of illiterate and uneducated citizens. The section retains two categories of persons who continue to be excluded in large numbers in order to ensure *the deliberative quality of elections*: those who are not members of the community (foreigners) and those who are children. The Electoral Act expands the same exclusionary constitutional logic to a third category of voters: those who suffer from a mental disability or a mental illness of a sufficiently serious nature to have attracted the attention of our courts in the ways specified in the Act. The question remains whether this third exclusion is compatible with the vision of South Africa as a multi-party electoral democracy? Before reaching a definite answer, it is first necessary to return to the logistics of participation in elections.

2.3. The logistics of voting in national elections

The Constitution makes clear that multi-party elections must be held in terms of an electoral system that 'is prescribed by national legislation'.⁴³ The national legislation in question is the Electoral Act 73 of 1998 (hereafter 'the Act') and the Electoral Regulations of 2004 enacted in terms of the Act (hereafter 'the Regulations'). The Act regulates all aspects of national elections. In the next subsection the provisions of the Act are introduced in some detail. The focus falls on two issues: who can vote (voter eligibility) and where and how voting takes place. Both these questions have an impact on the ability of adult citizens to vote. The reason for focussing on these two aspects is to understand how far the voting rights of mentally unsound or disorderly citizens and detained involuntarily under the Mental Health Care Act, could in principle be accommodated within the present electoral process and procedures, should their participation be mandated by vision, values and rights included in the Constitution.

2.3.1 Voter registration and compilation of the voter's roll

⁴³ Section 46(1)(a) of the Constitution.

In order to vote in a national election, a citizen must be registered as a voter on the certified and officially published voters' roll that is to be used for that election.⁴⁴ Only South African citizens in possession of an identity document who are at least 18 years of age may apply to be registered as a voter.⁴⁵ Upon registration, the name of the citizen is entered in the voters' roll for one of the voting districts within the electoral ward in which that citizen is ordinarily resident.⁴⁶ The registration of voters on the voter's roll must be constantly updated. The Chief Electoral Officer must deregister a voter, after giving the voter notice,⁴⁷ if the voter no longer qualifies for registration.⁴⁸ Before every election a cut-off date is prescribed for the closing of registration.⁴⁹ Only a voter who applied for registration prior to the proclamation of an election may vote in that election.⁵⁰ The Chief Electoral Officer must close and certify the voters' roll to be used in an election before the date stipulated in the notice of the election.⁵¹

2.3.2 Voting at a voting station on the day of an election

Once a citizen has been registered as a voter, that citizen may cast a vote in the election. In order to facilitate voting at national level, the Electoral Commission must divide the country into voting districts,⁵² and establish one or more voting stations per voting district.⁵³ Before voting starts at a voting station, the voting officer must be supplied with ballot papers, ballot boxes and voting compartments to be used at the voting station.⁵⁴ On election day, a voting station must open from 07:00 to 21:00 hours.⁵⁵ Any citizen who is registered as a voter in the voting district where the voting station is located may vote at that station during the hours of

⁴⁴ S 24 of the Act.

⁴⁵ S 6(1) of the Act.

⁴⁶ S 8(3) of the Act.

⁴⁷ S 12(1)(c) of the Act.

⁴⁸ S 11(1)(b) of the Act.

⁴⁹ S 14(2)(a) of the Act.

⁵⁰ S 24(1A) of the Act.

⁵¹ S 24(2) of the Act.

⁵² S 60(1) of the Act.

⁵³ S 64(1) of the Act.

⁵⁴ S 71(1) of the Act.

⁵⁵ S 36(1) of the Act.

voting.⁵⁶ The citizen must vote in person and no vote by proxy or mail is allowed under the Act. Before a citizen will be handed a ballot paper, and allowed to mark the ballot paper inside the voting compartment, the citizen must produce his or her identity document.⁵⁷ When a voter produces an identity document to a presiding officer or voting officer, the presiding officer or voting officer must examine the identity document and determine whether the voter is the person described in that identity document; the voter's name is in the certified segment of the voters' roll for the voting district concerned; and that voter has not already voted in the election.⁵⁸ The officer must mark the hand of the voter in the prescribed manner, mark the back of a ballot paper for that election, and hand the ballot paper to the voter. Once the voter has received a ballot paper the voter must enter an empty voting compartment; mark the ballot paper in a way that indicates the registered party or candidate the voter wishes to vote for; fold the ballot paper to conceal the voter's vote; place the ballot paper in the ballot box; and without delay leave the voting station.⁵⁹

2.3.3 Assisted voting at a voting station

Although every voter must vote in person at a voting station in terms of the procedure explained above, the Act makes provision in section 39 for assistance to certain voters at the voting station. Assisted voting is in principle crucial in the case of mentally impaired voters and it is therefore worth quoting the provisions of the Act in full:

'[A]ssistance to certain voters. (1) The presiding officer or a voting officer, at the request of a voter *who is unable to read*, must assist that voter in voting in the presence of (a) a

⁵⁶ S 38(2)(a) of the Act: 'A voter may only vote once in an election, and may vote only at the voting station in the voting district for which that voter is registered'.

⁵⁷ S 38(2)(a) of the Act.

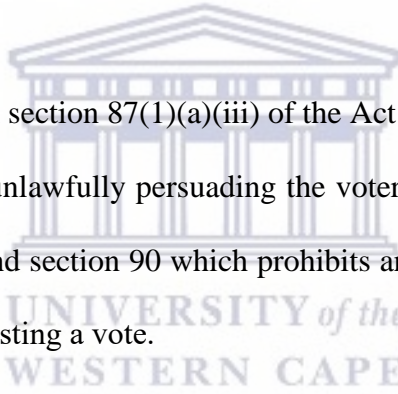
⁵⁸ S 38(3) of the Act.

⁵⁹ S 38(6) of the Act.

person appointed by an accredited observer, if available; and (b) two agents from different parties, if available.

(2) A person may assist a voter in voting if (a) the voter requires assistance *due to a physical disability, including blindness or other visual impairment*; (b) the voter has requested to be assisted by that person; and (c) the presiding officer is satisfied that the person rendering assistance has attained the age of 18 years and is not an agent or a candidate.

(3) The secrecy of voting contemplated in section 38 must be preserved as far as possible in the application of this section.’



Section 39(3) must be read with section 87(1)(a)(iii) of the Act which prohibits anybody from unduly influencing a voter by unlawfully persuading the voter to vote or not to vote for any registered party or candidate, and section 90 which prohibits anybody from interfering with a voter’s right to secrecy while casting a vote.

Although the scope of assisted voting is currently limited to voters who cannot read or who requires assistance due to *a physical disability*, the principle of assisted voting is well established and can easily be extended to other categories of voters who might need assistance. Indeed, the Act already makes extensive provision for voters who cannot cast a vote at a voting station, even with the necessary assistance. Of particular importance are those in health care institutions or home care who cannot get to voting station in person. These voters are allowed to apply for and cast a special vote. Again, these provisions are potentially applicable to voters with mental impairments. For this reason, the procedure of voting at home or in a health care facility is discussed in detail below.

2.3.4 Special voting procedures for physically infirm, disabled and pregnant voters

Section 33 of the Act makes provision for voting otherwise than at a voting station. The section provides as follows:

‘[S]pecial votes in election for National Assembly. (1) In an election for the National Assembly, the Commission must allow a person to apply for and cast a special vote, prior to election day, if, on election day, that person cannot vote at a voting station in a voting district in which he or she is registered as a voter, due to his or her (a) physical infirmity or disability, or pregnancy; (b) absence from that voting district while serving as an officer in the election; or (c) being on duty as a member of the security services in connection with the election.’

The focus here falls only on voters who cannot vote at a voting station on election day due to a *physical* infirmity or disability, or pregnancy. The Electoral Commission has the duty to prescribe the procedure for the casting and counting of special votes.⁶⁰ The procedure for voting at home or in a health care facility, which are casted as special votes, are regulated by Electoral Regulation, 2004.⁶¹ Among the categories of persons who qualify for a special vote in terms of section 33(6) of the Electoral Act, are persons who cannot vote at a voting station in the voting district in which they are registered as voters due to their physical infirmity or disability or pregnancy.⁶² The procedure regulating the casting of a special vote by persons who have a physical infirmity or disability or pregnancy, who wish to vote inside the voting district where he or she is registered, is set out in regulation 7 of the Electoral Regulations, 2004. Such persons may apply for a special vote,⁶³ by delivering or causing to be delivered a written application on the prescribed form, to the municipal electoral officer of the municipality within

⁶⁰ S 33(6) of the Act.

⁶¹ GN R12 in GG 25894 of 7 January 2004.

⁶² S 6(1)(a) of the Electoral Regulations, 2004.

⁶³ S 7(1) of the Electoral Regulations, 2004.

whose area he or she is registered as a voter by not later than the relevant date or dates stated in the election timetable.⁶⁴ Alternatively, he or she may apply for a special vote by submitting or causing to submit an application electronically to the chief electoral officer through the special vote system, no later than the date stated in the election timetable.⁶⁵

The chief electoral officer, or an officer appointed by the chief electoral officer, must consider every written or electronic application received, and if he or she is satisfied, (i) that the applicant is registered as a voter in that voting district,⁶⁶ and (ii) cannot vote at that voting station due to physical infirmity or disability, or pregnancy,⁶⁷ approve the application and if not, reject the application.⁶⁸ The applicant must be informed of the outcome of the application in the most convenient method available, including short message system (SMS) or electronic mail as soon as possible but not later than two days before voting day.⁶⁹

If the application is approved, the presiding officer must ensure that the applicant is visited by at least two voting officers, at an address within that voting district, specified in the application, on the date or dates stated in the election timetable.⁷⁰ Once the applicant has produced his or her identity document and if the voting officers are satisfied that the applicant is the person described in that identity document,⁷¹ the applicant's identity document and hand are marked and he or she is handed a ballot paper, marked on the back for that election.⁷² The applicant is allowed to mark the ballot paper in secret, and to place and seal it in an unmarked envelope identified for this purpose, which is in then placed and sealed in another envelope which is

⁶⁴ S 7(1)(a) of the Electoral Regulations, 2004.

⁶⁵ S 7(1)(b) of the Electoral Regulations, 2004.

⁶⁶ S 7(3) of the Electoral Regulations, 2004.

⁶⁷ S 7(3)(a) of the Electoral Regulations, 2004.

⁶⁸ S 7(3)(b) of the Electoral Regulations, 2004.

⁶⁹ S 7(4) of the Electoral Regulations, 2004.

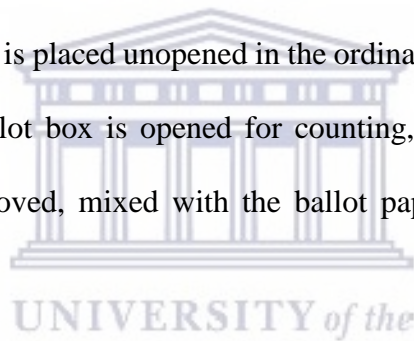
⁷⁰ S 7(5) of the Electoral Regulations, 2004.

⁷¹ S 7 (5)(a) of the Electoral Regulations, 2004.

⁷² S 7 (5)(b) of the Electoral Regulations, 2004.

marked on the outside with the applicant's name, identity number and the voting district number.⁷³

The marked envelope must be taken, by the voting officers, to the office of the presiding officer, where the applicants name appears on the voters roll marked with the letters SV.⁷⁴ The envelope is then placed and securely kept in a sealed ballot box for special votes.⁷⁵ During the course of voting day or after the closing of voting, in the presence of the party agents being present, the ballot box for special votes is opened and each marked envelope is scrutinised and compared with the marked voters roll, the applications for special votes and the records of applications for special votes.⁷⁶ If no irregularity is detected that renders the special vote unacceptable, the marked envelope is opened in the presence of the party agents being present, the unmarked envelope inside is removed and is placed unopened in the ordinary ballot box then in use in the voting station.⁷⁷ Once that ballot box is opened for counting, the unmarked envelopes are opened, the ballot papers removed, mixed with the ballot papers from the ballot box and counted together.⁷⁸



Exactly the same procedure is prescribed for voters who wish to cast a special vote *outside the voting district*, at a health care facility located elsewhere, for example, due to physical infirmity or disability or pregnancy.⁷⁹

The discussion above of the logistics of casting a vote during a national election reveals that a citizen who wishes to participate in an election might need to be assisted (i) to apply for registration as a voter in the correct voting district, and (ii) to cast a vote at a voting station in

⁷³ S 7(6) of the Electoral Regulations, 2004.

⁷⁴ S 7(7)(a) of the Electoral Regulations, 2004.

⁷⁵ S 7(7)(b) of the Electoral Regulations, 2004.

⁷⁶ S 12(1) of the Electoral Regulations, 2004.

⁷⁷ S 12(2) of the Electoral Regulations, 2004.

⁷⁸ S 12(3) of the Electoral Regulations, 2004.

⁷⁹ S 8 of the Electoral Regulation, 2004.

that district, or to apply for and cast a special vote at home in that district, or in a health care facility either in or outside that district. The Act goes a long way towards facilitating the voting of vulnerable citizens, such as illiterate voters, blind or visually impaired voters, and old or physically frail voters. Logistically speaking, the Act comes close to making universal adult suffrage a reality in South Africa. In principle, these provisions could easily be extended to also apply *mutatis mutandis* to people in care due to a mental illness or impairment.

2.4. Voter eligibility and voter exclusions

However, not everybody who lives and works in South Africa are able to make use of the various opportunities the Act provides for the casting of a vote during national elections. Some citizens might be disqualified from voting due to their own lack of civic responsibility and a failure to obtain the necessary identification documents needed to register and to vote, or a failure to register in time, or to make their way to a voting station during voting hours. This is an inevitable feature of the administration of a free and fair election. In *Richter v Minister for Home Affairs* the Court considered what the government can expect of citizens in this regard:⁸⁰

‘[J]ust as the state bears a responsibility to take positive steps to enable elections to take place, the right to vote itself cannot be exercised by a citizen unless he or she takes the trouble to exercise it. The very process of regulating the elections which requires the composition of a national voters’ roll, the establishment of voting stations and voting times will impose burdens upon members of the public who wish to exercise their right to vote. First, they will have to register in good time. Then, on polling day, they may

⁸⁰ *Richter v The Minister for Home Affairs* 2009 (3) SA 615 (CC) paras 55 – 56.

have to journey some distance to a voting station; they will have to be in possession of a bar-coded identity document; and they may have to stand in a long queue to vote. These burdens are largely unavoidable.’

In assessing whether the restrictions or burdens placed on a voter who wishes to exercise his or her right to vote are inconsistent with the constitutional protection of the right to vote, a court will accept that a voter may not complain if the burden imposed does not prevent the voter from voting, *as long as the voter takes reasonable steps to do so*.

Of more concern is the fact that a large proportion of the permanent South African population are expressly disqualified from voting, even if they are willing to take reasonable steps to do so. Those excluded include large immigrant populations, all children, and most pertinently for this study, many adult citizens who live with a mental impairment due to a mental illness or disorder or a mental disability.

The Constitution expressly excludes non-citizens and children from active participation in national elections. The Act simply implements those express exclusions. In addition, it adds an exclusion based on the mental capacity of voters. This third voter disqualification does not appear in the Constitution itself. It is thus of special significance.

The constitution restricts the right to vote in section 19(3)(a) to ‘every *adult citizen*’. In line with this narrow formulation of the right to vote, section 1(d) speaks about ‘universal *adult* suffrage’, section 46(1)(c) requires an electoral system for the election of members of the National Assembly that provides ‘for a minimum voting age of 18 years’, and section 158(1) states that ‘every *citizen*’ who is qualified to vote is eligible to be a member of a Municipal Council.

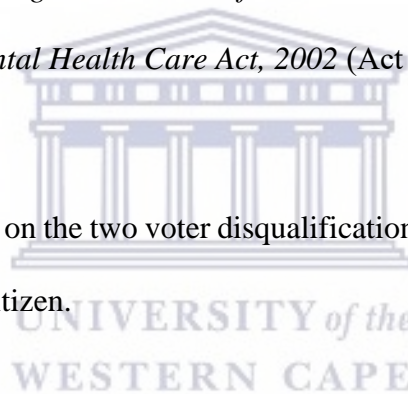
The Act confirms these two constitutional restrictions on the right to vote as registration disqualifications under section 8, but then proceeds to add an additional registration disqualification of its own.⁸¹ Section 8 provides as follows:

‘[R]egistration.

(1) If satisfied that a person’s application for registration complies with this Act, and that the person is a *South African citizen* and is at least *18 years of age*, the chief electoral officer must register that person as a voter by making the requisite entries in the voters’ roll.

(2) The chief electoral officer may not register a person as a voter if that person [...] (c) *has been declared by the High Court to be of unsound mind or mentally disordered*; (d) *is detained under the Mental Health Care Act, 2002 (Act No. 17 of 2002) [...]. . .*’

The rest of this Chapter focuses on the two voter disqualifications based on the mental capacity of an otherwise eligible adult citizen.



2.4.1 Colonial roots and apartheid elections

A closer look at the legal history of the two voter exclusions based on mental capacity reveals that these disqualifications are the only voter disability criteria that were taken over from apartheid into the era of democracy, without any obvious reconsideration or amendment. The exclusion of mentally disabled persons from voting in South Africa dates back to long before apartheid. In fact, Combrinck traces the history of mental illness as a ground for voter exclusion or participation in politics generally back to ancient times.⁸² The language that currently

⁸¹ S 8(2)(a) of the Act includes a 3rd category that is not relevant to this discussion, namely, persons who have applied for registration fraudulently or otherwise than in the prescribed manner.

⁸² Combrink H ‘Everybody Counts: The right to vote of persons with psychosocial disabilities in South Africa’ (2014) 2 *African Disability Rights Yearbook* 75 100.

appears in the Electoral Act of 1998 dates back to at least the Franchise Laws Amendment Act 41 of 1931. The colonial Act limited the right to register and to vote to white men and women over the age of 21,⁸³ who were South African citizens on the date of registration,⁸⁴ and not otherwise disqualified due to prior criminal behaviour,⁸⁵ or ‘insanity’.⁸⁶ As far as the last-mentioned disqualification is concerned, section 4 of the colonial Act provided as follows:

‘[D]isqualification in respect of insanity. A person who is subject to an order of court of law declaring him to be of unsound mind or mentally disordered or defective, or who is lawfully detained as mentally disordered or defective under the Mental Disorders Act, 1916 (Act No. 38 of 1916), shall not be entitled to be registered as a voter, or if registered, to vote.’

When the last national election took place under apartheid on 6 September 1989, almost 60 years after this exclusion became law, the provisions of section 4 had been incorporated into sections 4(2)(b) and (c) of the Electoral Act 45 of 1979 but essentially remained the same in letter and spirit:

‘[I]f any person is subject to an order of a court declaring him to be of unsound mind or mentally disordered or defective; or is detained as a mentally ill person under the Mental Health Act, 1973 (Act No. 18 of 1973) [...] he shall not be entitled to be registered or to vote in any division.’

2.4.2 Embracing democracy: The founding election of 1994

⁸³ S 1 of the Franchise Laws Amendment Act 41 of 1931.

⁸⁴ S 2 of the Franchise Laws Amendment Act 41 of 1931.

⁸⁵ S 3 of the Franchise Laws Amendment Act 41 of 1931.

⁸⁶ S 4 of the Franchise Laws Amendment Act 41 of 1931.

During the negotiated transition from apartheid to democracy in the early 1990s, the Electoral Act 202 of 1993 was enacted in anticipation of the first democratic elections which were scheduled for 27 April 1994. In the process of drafting the Act to regulate the first democratic elections in South Africa, even well-established voter eligibility criteria, such as age and citizenship, were subjected to some debate and scrutiny. First, there was a debate whether the voting age should be lowered to 14 years (a view advocated by Nelson Mandela). Second, it was debated whether non-citizens should be allowed to vote. The decision was eventually taken that non-citizens could vote in the 1994 elections, but that children under 18 could not do so. The Electoral Act of 1993 thus removed all existing voter exclusions based on race and nationality and extended the right to vote to all citizens and all long-term residents, including foreigners without permanent residence status who had been lawfully living in South Africa since 1986.⁸⁷

There was seemingly no interest in rethinking the inherited two-fold exclusion of adult citizens on the basis of their mental capacity. No voter registration was required under the Electoral Act of 1993, but certain people were not allowed to vote and were prevented from voting at polling stations on the day of the elections. Section 16(a) and (b) of the Electoral Act of 1993 was copied almost verbatim from its colonial and apartheid predecessors:

‘[N]o person shall be entitled to vote in the election if that person is (a) subject to an order of court declaring him or her to be of unsound mind or mentally disordered or affected; (b) detained as a mentally ill patient under the Mental Health Act, 1973 (Act No. 18 of 1973), or any other applicable law of the Republic, as the case may be.’

⁸⁷ S 15(1) of the Electoral Act of 1993.

It is worth noting that section 16 of the Electoral Act of 1993 also excluded two further categories of adult citizens from voting in the historic founding elections of 1994. First, persons detained for rehabilitation under the Prevention and Treatment of Drug Dependency Act, 1992 (Act No. 20 of 1992), or any other applicable law of the Republic, as the case may be.⁸⁸ Second, persons detained in a prison after being convicted and sentenced without the option of a fine for murder, robbery with aggravating circumstances and rape (or any attempt to commit any of these offences).⁸⁹

2.4.3 Electoral amendments in the democratic era

South Africa's electoral law underwent a dramatic overhaul during the late 1990s with the enactment of the current Electoral Act 73 of 1998 in anticipation of the second democratic election in 1999. First, the Act reintroduced nationality as a voter disqualification and so disenfranchised all foreigners, even those with permanent or long-term residence status who could vote in the 1994 elections.⁹⁰ Second, the Act removed the disqualification of all prisoners and those detained as drug and alcohol dependents.⁹¹ However, as noted above, the 1998 Act again essentially re-enacted the exclusion of mentally disabled persons inherited from the colonial and apartheid past. Those exclusions dating back to the early 1900s now appear in sections 8(2)(c) and (d) of the Electoral Act of 1998 as quoted above.

Since its enactment in 1998, the Electoral Act has undergone several amendments aimed at further redefining the electorate through a series of express voter disqualifications. Most notably, the former disqualification of imprisoned criminals was reintroduced in 2003 for the

⁸⁸ S 16(c) of the Electoral Act of 1993.

⁸⁹ S 16(d) of the Electoral Act of 1993.

⁹⁰ S 6(1) of the Act provides as follows: 'Any South African citizen in possession of an identity document may apply for registration as a voter'. Permanent residents remain excluded from participating in all elections.

⁹¹ The voter exclusion of prisoners was reintroduced in 2003, declared unconstitutional as being overbroad by the majority of the Constitutional Court in 2004, and has not been reintroduced in amended form since then.

2004 national elections. The majority of the Constitutional Court ruled in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* that the voter disqualification was overbroad and unconstitutional.⁹² A new voter disqualification deliberately targeting expatriate citizens who temporarily or permanently lived and worked abroad was also introduced in time for the 2004 national election. The disqualification was challenged shortly before the 2009 national elections and the Constitutional Court declared the disqualification of the expatriate community unconstitutional in *Richter v Minister for Home Affairs*.⁹³

When the amendment of the Electoral Act was debated in 2013 to allow for the registration and voting of expatriate citizens in line with the *Richter* judgment, an attempt was made by several civil society organisations to convince the portfolio committee on Home Affairs to also revisit the voter disqualification of adult citizens on the basis of their mental capacity. The Ubuntu Centre of South Africa made submissions to the Department of Home Affairs Portfolio committee, where they commented on the Electoral Amendment Bill 22 of 2013. The Ubuntu Centre put forward that section 8(2)(c) and (d) of the Electoral Act unfairly discriminated against persons with psychosocial disabilities and those detained under the Mental Health Care Act, and that these exclusions were in conflict with the Constitution.⁹⁴ The Ubuntu Centre added that the Mental Health Care Act made provision for mental health care users to enjoy all the rights in the Constitution.⁹⁵ In its response, the Electoral Commission stated that there were

⁹² *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC).

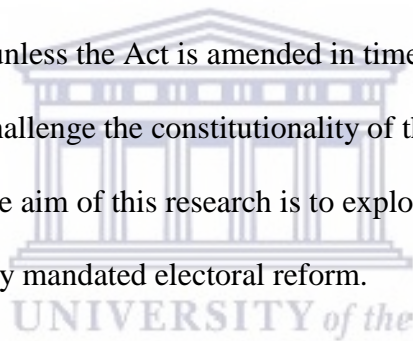
⁹³ *Richter v The Minister for Home Affairs* 2009 (3) SA 615 (CC).

⁹⁴ Department of Home Affairs Portfolio Committee *Electoral Amendment Bill: Electoral Commission response to comments from public* (2013) 2. Electoral Amendment Bill [B22-2013]: Public Hearings Standing Committee on Home Affairs 10 September 2013 (<https://pmg.org.za/committee-meeting/16327/>) last accessed 21 December 2021).

⁹⁵ Department of Home Affairs Portfolio Committee *Electoral Amendment Bill: Electoral Commission response to comments from public* (2013) 2. Electoral Amendment Bill [B22-2013]: Public Hearings Standing Committee on Home Affairs 10 September 2013 (<https://pmg.org.za/committee-meeting/16327/>) last accessed 21 December 2021).

many jurisdictions that excluded persons with mental disabilities from registering as voters, due to concerns about the inability to form informed political opinions.⁹⁶ The Commission opposed the amendment and maintained that the exclusion was not arbitrary and automatic, as it only came into operation once the High Court has made a decision that a person must be placed under curatorship or be committed to a mental health care facility for treatment, after considering the medical evidence brought before it.⁹⁷ In the end, section 8(2)(d) the Act was amended, but only to substitute the reference to the repealed Mental Health Act 18 of 1973 with a reference to the current Mental Health Act 17 of 2002.

This was a failed attempt to gain majority support in Parliament for an amendment to the Act. The 2014 and 2019 national elections excluded adult citizens with mental impairments. The same will be the case in 2024, unless the Act is amended in time. The avenue of litigation remains an option in order to challenge the constitutionality of the blanket disqualification. As stated in the introduction, the aim of this research is to explore whether there exists any constitutional case for judicially mandated electoral reform.



2.5 Conclusion

In this chapter I provided a brief overview of the most important provisions of the Electoral Act which regulate when and how elections take place and how citizens can actively participate in elections. I did so after distinguishing between two competing conceptions of democracy and then situating the history of voter exclusions within the tradition of civic republican democracy. In this conception it is the civic duty of every eligible voter to take reasonable

⁹⁶ Department of Home Affairs Portfolio Committee *Electoral Amendment Bill: Electoral Commission response to comments from public* (2013) 2. Electoral Amendment Bill [B22-2013]: Public Hearings Standing Committee on Home Affairs 10 September 2013 (<https://pmg.org.za/committee-meeting/16327/>) last accessed 21 December 2021).

⁹⁷ Department of Home Affairs Portfolio Committee *Electoral Amendment Bill: Electoral Commission response to comments from public* (2013) 2. Electoral Amendment Bill [B22-2013]: Public Hearings Standing Committee on Home Affairs 10 September 2013 (<https://pmg.org.za/committee-meeting/16327/>) last accessed 21 December 2021). See further the discussion in Chapter 3 below.

steps to vote in an election. The state facilitates voting by providing assisted and special voting procedures. However, the analysis of the current legal position in its historical perspective further revealed that the exclusion of otherwise eligible voters due to their mental capacity has been a constant feature of our law for many decades. While some of the older exclusions based on age, nationality, race, gender, class, prior criminality, and drug or alcohol dependency have all been removed or revised, the disqualification of adult citizens who have been ‘declared by the High Court to be of unsound mind or mentally disordered’ or who are ‘detained under the Mental Health Care Act, 2002 (Act No. 17 of 2002)’ remains on the statute book as the only voter disqualification expressly added to the constitutional voter disqualifications other than those based on nationality and age. I indicated above that the voter exclusion is somewhat clumsily formulated in language that dates back almost a century to early colonial legislation.

It is thus not immediately clear exactly which adult citizens are disqualified today under our modern health care legislation by these provisions. Which adult citizens are typically declared to be of unsound mind by our courts, or detained in mental hospitals under the Mental Health Care Act, and so deprived of their right to vote? To answer these questions, our focus must turn to the regulation of mental health care in South Africa. I do so in the next chapter.

Chapter 3

VOTER DISQUALIFICATIONS BASED ON LACK OF MENTAL CAPACITY

3.1 Introduction

Legal capacity refers to the ability to acquire and exercise legal rights. We saw in Chapter 2 that the ability or capacity to acquire and exercise the right to vote in a national election can potentially be affected by three factors: nationality, age, and mental capacity. Electoral law generally does not provide for personalised voter assessments but rely on blanket rules to determine who is eligible to vote. In our law, all foreigners and all children (persons under the age of 18 years) *as a blanket rule* lack the capacity to exercise the right to vote. In Chapter 2 we saw further that certain adult citizens are not allowed to vote (or stand as a candidate to be voted for) because section 8 of the Electoral Act 73 of 1998 currently disqualifies them from registering as voters and voting in a national election if they have been declared of unsound mind or mentally disordered by the High court,⁹⁸ or if they are detained involuntarily under the Mental Health Care Act.⁹⁹

In this Chapter I undertake a descriptive account of the current law regulating mental health in South Africa in order to give content to these two voter disqualifications. The aim of the chapter is to gain a better understanding of exactly who among adult citizens fall within the stipulated categories, starting with those who have been declared to be of unsound mind or mentally disordered, and thereafter moving on to those citizens who are detained as mental

⁹⁸ S 8(2)(c) of the Electoral Act.

⁹⁹ S 8(2)(d) of the Electoral Act.

patients in a mental health care provider. The question has also been asked by McQuoid-Mason and Naidoo and answered as follows:¹⁰⁰

‘[I]n general it may be stated that this refers to a person for whom a curator bonis has been appointed under the High Court Rules and a person in respect of whom an order for assisted or involuntary care, treatment and rehabilitation has been issued. On a strict interpretation of the Electoral Act, it would seem that voluntary and assisted patients also do not qualify to vote.’

In my view this statement cannot be accepted as an accurate reflection of the current law and the voter disqualifications in the Electoral Act. In this Chapter I explain why not and arrive at a slightly different understanding of the current legal position.

3.2 The proper approach to the interpretation of voter exclusions

To determine the scope and content of the voter disqualifications in sections 8(2)(c) and (d), we are obliged to adopt the most rights friendly version of the voter exclusions that are reasonably possible, considering the language of the disqualifications, the structure and scheme of the rest of the Act, the purpose of the Act and the voter disqualifications,¹⁰¹ and, finally, but in this instance most importantly, the constitutional purpose or telos of the Act, as a means to promote and facilitate the right of every adult citizen to participate in the election of members of the National Assembly. Indeed, section 39(2) of the Bill of Rights mandates every interpreter of legislation to ‘promote the spirit, purport and object of the Bill of Rights’. In the same vein, the Electoral Act adds its own interpretive mandate in section 2 which reads as follows:

¹⁰⁰ McQuoid-Mason, DJ and Naidoo, N ‘Mental Health’ in *Law of South Africa (LAWSA)* Volume 29 3rd ed (2020) para 288.

¹⁰¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

‘[I]nterpretation of this Act. Every person interpreting or applying this Act must do so in a manner that gives effect to the constitutional declarations, guarantees and responsibilities contained in the Constitution.’

In *African Christian Democratic Party v Electoral Commission* the Constitutional Court summarised the correct approach to the Electoral Act as follows:¹⁰²

‘[T]hese foundational values require a court of law, and the Electoral Commission, when interpreting provisions in electoral statutes to seek *to promote enfranchisement rather than disenfranchisement and participation rather than exclusion*. The exercise, however, remains one of interpretation.’

Under section 39(2) the same presumption against disenfranchisement applies to legislation, other than the Electoral Act, that purports to regulate the affairs of mentally impaired citizens. The same approach arguably also applies to the regulation of mental and legal capacity under the common law.

3.3 The link between mental capacity and legal capacity

There are a number of factors which influence legal capacity in South African law. These factors include nationality, domicile, age, illegitimacy, adoption, mental ability, prodigality, insolvency, and marriage.¹⁰³

Mental disability affects a person’s legal capacity to perform juristic acts (active legal capacity).¹⁰⁴ The legal capacity afforded to mentally disabled persons is not regulated by law but rather left to be determined by the courts through common law principles,¹⁰⁵ These principles apply equally to all mentally disabled persons, irrespective of how the mental

¹⁰² 2006 (3) SA 305 (CC) para 23.

¹⁰³ South African Law Commission (Project 122) *Report on Assisted Decision Making* (2015) para 2.14.

¹⁰⁴ South African Law Commission (Project 122) *Report on Assisted Decision Making* (2015) para 2.14.

¹⁰⁵ South African Law Commission (Project 122) *Report on Assisted Decision Making* (2015) para 2.16.

disability was caused.¹⁰⁶ In terms of the common law, if a person is ‘generally unable to manage his or her affairs’ then they will be deemed to lack active legal capacity.¹⁰⁷ If a person is “incapable of understanding the nature and consequences of a particular act” then he or she will be deemed to completely lack capacity for specific juristic acts.¹⁰⁸ A person cannot perform valid legal transactions if he or she completely lacks active legal capacity for that act.¹⁰⁹ A curator will be required to perform juristic acts on behalf of a person who completely lacks active legal capacity for that act, as transactions entered into by persons who completely lack active legal capacity are void from the outset and cannot be ratified.¹¹⁰

3.4 Curatorship under the common law

A definition for the term ‘unsound mind’ is not provided in the Electoral Act or the Mental Health Care Act 17 of 2002 and there are no statutory provisions dealing with the procedure for the treatment of patients or persons who have been declared of unsound mind by a competent court. It is therefore necessary to look further to obtain a definition of ‘unsound mind’, the criteria which informs such a decision, and the procedure which is to be followed when dealing with such a person. The term appears in Rule 57(1) of the Uniform Rules of the Court which states:¹¹¹

‘[A]ny person desirous of making application to the court for an order

declaring another person (hereinafter referred to as ‘the patient’) to be of unsound

¹⁰⁶ Dubois F (ed) *Willie’s Principles of South African Law* 9 ed (2007) 218.

¹⁰⁷ South African Law Commission (Project 122) *Report on Assisted Decision Making* (2015) para 2.17.

¹⁰⁸ *Pheasant v Warne* 1922 AD 481 488; *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361. In *Lange v Lange* the 1945 AD 332 the court stated the if a person is motivated or influenced by delusions due to mental disabilities but understands the nature and consequences of the transaction, the persons is still regarded at lacking legal capacity.

¹⁰⁹ South African Law Commission (Project 122) *Report on Assisted Decision Making* (2015) para 2.17.

¹¹⁰ South African Law Commission (Project 122) *Report on Assisted Decision Making* (2015) para 2.18.

¹¹¹ See generally, McQuoid-Mason, DJ and Naidoo, N ‘Mental Health’ in *Law of South Africa (LAWSA)* Volume 29 3rd ed (2020) paras 208 to 301; Landman, A and Landman, W *Practitioner’s Guide to the Mental Health Care Act* (2014).

mind and as such incapable of managing his affairs, and appointing a curator to the person or property of such patient, shall in the first instance apply to the court for the appointment of a curator ad litem to such patient.’

One may therefore infer that an essential characteristic of a person who is of ‘unsound mind’ for the purposes of the Electoral Act would be that he or she would be incapable of managing his or her own affairs and for that reason had a curator of the person or property appointed to take binding legal decisions on behalf of the patient.

3.4.1 Having a curator appointed for someone

In proceedings under rule 57, the court is normally requested to do three things: (a) to declare the patient of ‘unsound mind and incapable of managing his or her affairs’; (b) to appoint a curator *ad litem*; and (c) to appoint a curator *bonis* or curator *personae* or both.

In terms of the common law, a person declared to be of ‘unsound mind and incapable of managing their affairs’ may thus be placed under curatorship. A person may become incapable of managing their affairs due to mental illness or due to factors such as physical disability, old age, serious illness, mental weakness or mental retardation.¹¹² In terms of South African common law, a *curator bonis* may be appointed to manage such a person’s property. A *curator bonis* is appointed when an individual has been found by a court to be incapable of managing his or her own finances or property. It is the duty of a *curator bonis* to take care of an individual’s property and aid them when engaging in contracts.¹¹³ A *curator in personae* may be appointed in order to aid persons in areas where they lack capacity

¹¹² *Ex Parte Dixie* 1950 (4) SA 748 (W); *Minister of the Interior v Cowley* 1955 (1) SA 307 (N).

¹¹³ South African Law Commission (Project 122) *Report on Assisted Decision Making* (2015) para 2.28.

relating to their personal welfare.¹¹⁴ A *curator personae* may be appointed for general acts or for specific acts such as granting a medical operation.¹¹⁵

A closer look at the procedure reveals the nature of the legal enquiry. It is significant that neither the capacity to vote nor the right to vote is something that needs to be considered during the process. The appointment of a curator is regulated by Rule 57(2)(e) of the Uniform Court Rules which reads as follows:

‘[S]uch application shall be brought *ex parte* and shall set forth fully the facts and circumstances relied on to show that the patient is of unsound mind and incapable of managing his affairs.’

This provision must be read together with rule 57(3)(a) and (b) of the Uniform Court Rules. According to these Rules, the application is brought by way of notice of motion and should include: a) full particulars of the locus standi of the applicant; b) jurisdiction of the court; c) ‘the patient’s’ age and sex, full particulars of his/her means, and information as to his/her general state of physical health; d) the relationship between ‘the patient’ and the applicant, and the duration and intimacy of their association (if any); f) the name, occupation and address of the respective persons suggested for appointment by the court as *curator ad litem*, and subsequently as curator of ‘the patient’s’ person or property, and a statement that these persons have been approached and have indicated that, if appointed, they would be able and willing to act in these respective capacities.¹¹⁶

¹¹⁴South African Law Commission (Project 122) *Report on Assisted Decision Making* (2015) para 2.27.

¹¹⁵ *Ex Parte Powrie* 1963 (1) SA 299 (W); *Ex Parte Dixie* 1950 (4) SA 748 (W).

¹¹⁶ Meyer, M ‘Legal Position of persons incapable of managing their own affairs’ Masters Training: Justice College March 2016 available at <https://www.justice.gov.za/juscol/docs/note-MOH01.pdf> (accessed 14 April 2020).

Having received the application in the prescribed format, the court will consider the evidence before it. Rule 57(3) provides that each application must, as far as possible, be supported by an affidavit by at least one person to whom the patient is well known. The affidavit must contain such facts and information as are within the deponent's own knowledge concerning the patient's mental condition. If such person is related to the patient or has any personal interest in the terms of any order sought, full details of such relationship or interest, as the case may be, must also be included in the affidavit. The application must also be supported by affidavits by at least two medical practitioners, one of whom must as far as possible be an 'alienist', who have conducted recent examinations of the patient with a view to ascertaining and reporting upon his mental condition. The affidavit must state all such facts as were observed by them at such examinations in regard to such condition, the opinions found by them in regard to the nature, extent and probable duration of any mental disorder or defect observed and their reasons for the mental disorder or defect and whether the patient is in their opinion incapable of managing his affairs. The two medical practitioners must, as far as possible, be persons unrelated to the patient, and without personal interest in the terms of the order sought.

By reading these provisions together, we see that there are no set criteria for determining whether a person is of 'unsound mind'. The High Court will make such a determination based on the merits of each case. In the case of *In Re Ruca v Road Accident Fund*,¹¹⁷ the court stated that Rule 57 cannot be ignored where there is a credible allegation that a patient is in need of a curator to his persons or property.¹¹⁸

After hearing the application, the court may choose to either dismiss the application or to appoint *curator ad litem* who will perform further inquiries into the matter and report to the

¹¹⁷ *Modiba obo Ruca; In Re: Ruca v Road Accident Fund* (2014) ZAGPPHC 1071.

¹¹⁸ *Modiba obo Ruca; In Re: Ruca v Road Accident Fund* (2014) ZAGPPHC 1071 para 32.

master.¹¹⁹ The Master will then comment on ‘the patient’s’ means and circumstances and on the *curator ad litem*’s suitability, and make further recommendations on the powers and security of the *curator ad litem*.¹²⁰ Once the court has considered the report from the *curator ad litem* together with the Masters Report, the Court will then make a determination as to whether to dismiss the application or to declare the patient of ‘unsound mind’. In doing so the High Court will take into consideration the evidence brought forward by the applicant together with the affidavit of a person who is known to ‘the patient’ or allegedly mentally ill person. Then, the High Court will consider the evidence of the medical practitioners who have examined the persons alleged to be of unsound mind. After considering all this evidence, the High Court will make a determination of whether ‘the patient’ or mentally ill person is capable or incapable of managing their own affairs and then declare the mentally ill person of ‘sound mind’ or ‘unsound mind’.

Although the capacity of mentally disabled persons may vary from case to case, the determination will remain a question of fact.¹²¹ This is not the case in practice, however, as persons placed under curatorship, or administration, are often treated as if they are completely incapable of making their own decisions.¹²² There are cases where persons of sound mind have been placed under curatorship, because they display unsound habits, or have severe physical defects,¹²³ but still maintain the ability to understand the nature of court proceedings.¹²⁴ McQuoid-Mason and Naidoo explain the essence of the judicial enquiry as follows:¹²⁵

¹¹⁹ Rule 57(4) and (5) of the Uniform Court Rules, 2009.

¹²⁰ Rule 57(7).

¹²¹ Cronjé, D & Heaton, J *The South African Law of Persons* 2ed (2003) 125.

¹²² Meyer, M ‘Legal Position of persons incapable of managing their own affairs’ Masters Training: Justice College March 2016 available at <https://www.justice.gov.za/juscol/docs/note-MOH01.pdf> (accessed 14 April 2020).

¹²³ *Modiba obo Ruca; In Re: Ruca v Road Accident Fund* (2014) ZAGPPHC 1071 para 32.

¹²⁴ *Delius v Delius* 1960 (1) SA 270; *Ex parte Hardwood* 1960 (4) SA 757 (T).

¹²⁵ McQuoid-Mason, DJ and Naidoo, N ‘Mental Health’ in *Law of South Africa (LAWSA)* Volume 29 3rd ed (2020) para 287.

‘[T]he principle to be applied may be stated as follows: a person lacks capacity to perform a specific act if, as the result of mental illness or mental defect he or she is not able fully to comprehend or interpret all the consequences of their actions. In each case this will depend on the nature of the mental illness or mental defect in question and the effect which that illness or defect has on the specific act or transaction. An enquiry into the state of a person’s mind is, from the nature of things, a very difficult and delicate one.’

A person who has been declared to be of ‘unsound mind’ may, once ‘the patient’ has become capable of managing his own affairs, make an application to have the order removed, and must give the Master fifteen (15) days-notice after making such an application.¹²⁶ The Master will then review the application and report to the High Court.¹²⁷ The High court will consider the evidence brought before it and make a decision as to whether the matter should be dismissed or whether ‘the patient’ should be declared of sound mind and be released from curatorship, the High court may also request that judgement be postponed in order to obtain further evidence.¹²⁸

Under section 8(2)(c) of the Electoral Act, the disqualification from voting equally applies to persons who have been declared ‘mentally disordered’ by a court of law under the common law. The phrase appears in Rule 57(12) which ensures that the same approach applies to both persons of unsound mind, or the mentally disabled, and persons living with a mental disorder, or the mentally ill. These are persons who are not detained in a metal health care facility and have not, as such, been placed under administration of property.¹²⁹

¹²⁶ Rule 57(14).

¹²⁷ Rule 57(15).

¹²⁸ Rule 57(17).

¹²⁹ The status of these detained patients is discussed in more detail below.

‘[T]he provisions of subrules (1), (2) and (4) to (10) inclusive shall in so far as the same are applicable thereto, also apply mutatis mutandis to any application for the appointment by the court of a curator under the provisions of section 56 of the Mental Health Act, 1973 (Act 18 of 1973), to the property of a person detained as or declared mentally disordered or defective, or detained as a mentally disordered or defective prisoner or as a State President's decision patient and who is incapable of managing his affairs.’

3.4.2 The consequences of being under curatorship

Of crucial importance is the consequence of being placed under common law curatorship of the person, or curatorship of property, after having been declared to be mentally disordered or of unsound mind. Under the common law, being placed under curatorship of the person or of property does not result in the automatic loss of all capacity to act.¹³⁰ In the case of *Pienaar v Pienaar's Curator* Judge President De Villiers forcefully stated:¹³¹

‘[T]he mere fact that such a person has been declared insane or incapable of managing his affairs, and that a curator is appointed to such person, does not deprive him of the right of administering his own property and entering into contracts and other legal dispositions to the extent of which he may de facto be capable, mentally and physically, of so doing. Such mental or physical capacity may vary from day to day, but at all times it remains a question of fact. The object of appointing a curator is merely to assist the person in question in performing legal acts to the extent of which such assistance is from day to day, in varying degrees, necessary. Thus, even a person who has been

¹³⁰ Cronjé, DP & Heaton, J *The South African Law of Persons* 2ed (2003) 113.

¹³¹ *Pienaar v Pienaar's Curator* 1930 OPD 171 174-175.

declared insane and to whose estate a curator has been appointed can dispose of his property and enter into contract whenever he is mentally capable of doing so.’

Under the common law a person who has been placed under curatorship still has the capacity to make a will,¹³² enter into a contract,¹³³ and to litigate,¹³⁴ provided that he or she was capable of doing so at that particular moment.¹³⁵

That being said, the general rule is that adult citizens are presumed to be mentally and legally competent to manage their own affairs until the contrary is proved. However, where the High Court has declared a person to be of unsound mind, and incapable of managing his or her own affairs, and placed that person under curatorship, a rebuttable presumption of incapacity is created. The onus shifts to the person under curatorship to prove that he or she had the necessary legal capacity at the time to conclude a contract or other legal act. It is also necessary to point out that there are legal limits to the types of decisions that can be taken on behalf of an adult citizen by his or her curator. A curator cannot perform personal acts and take personal decisions on behalf of a person of disordered or unsound mind. There are acts which the law considers too personal in nature to be performed by a legal representative such as contracting a marriage, seeking a divorce, exercising parental power and making testamentary dispositions on behalf of the person under curatorship.¹³⁶

The South African Law Reform Commission regards the right to vote as one of the decisions that is too personal to be exercised on behalf of a person of unsound or disordered mind by a curator.¹³⁷

¹³² *Spies v Smith* 1957 (1) SA 539 (A).

¹³³ *Ex parte De Bruin* 1946 OPD 110.

¹³⁴ *De Villiers v Espach* 1958 (3) SA 91 (T).

¹³⁵ Cronjé, DP & Heaton, J *The South African Law of Persons* 2ed (2003) 115.

¹³⁶ *Ex Parte AB* 1910 TPD 1332; *Estate Watkins-Pitchford v Commissioner for Inland Revenue* 1955 (2) SA 437 (A) 458.

¹³⁷ South African Law Commission (Project 122) *Report on Assisted Decision Making* (2015) paras 6.20 and 6.41.

Under the common law, and but for the purposes of section 8 of the Electoral Act, an adult citizen who has been placed under curatorship of his or her property or person would thus retain the capacity to cast a legally valid ballot, provided he or she can do so personally, independently, and in person.

Having investigated the common law of curatorship, the practical effect of section 8(2)(c) can now be restated as follows: Section 8(2)(c) of the Electoral Act turns the *rebuttable* common law presumption that a person under curatorship lacks the legal capacity to perform a legal action into an *irrebuttable* presumption that the person lacks the legal capacity to vote. The question thus becomes, if a person who has been declared to be of unsound mind or to be mentally disordered, can still establish that he or she retained the legal capacity to enter into contracts or any of the personal decisions a curator cannot take on her or his behalf, why can the same common law principle not be applied to the legal capacity to vote? Conceptually and legally speaking, there is no reason why the right to vote needs to be singled out by statute as an exception to the common law position. In light of the discussion in Chapter 2, could the logistics of administering a free and fair election provide a constitutionally justified reason for doing so? It would seem not. I return to this question in more detail below.

3.5 Administration under the Mental Health Care Act 17 of 2002

The Mental Health Act 18 of 1973 has been repealed. The appointment of a curator under Rule 57(12) and the common law has been supplemented by the appointment of an administrator under the provisions of the new Mental Health Care Act. Chapter VIII of the Mental Health Care Act provides for the appointment of an administrator to manage and administer the property of a person who has a mental illness or severe or profound intellectual disability. The administrator under the Act corresponds closely with the common

law *curator ad bonis* under the common law. The Electoral Act does not make any reference to administration under the Act but does explicitly refer to detention under the Act (see below). As pointed out in Chapter 2, the wording of section 8(2)(c) dates back almost a century and cannot be squared with the new provisions of the Mental Health Care Act, which postdates the enactment of the Electoral Act, without interpretive difficulty. The matter is further complicated because the administration procedure seems to have replaced the curatorship procedure under Rule 57(12) of the Uniform Rules of Court.

Under the new statutory procedure, any person over the age of 18 may apply to a Master of a High Court for the appointment of an administrator for a mentally ill person or a person with severe or profound intellectual disability. The application must be made in writing, under oath or solemn affirmation and must set out the relationship of the applicant to that person and include all available mental health related medical certificates or reports relevant to the mental health status of that person and to his or her incapability to manage his or her property.

The Master of the High Court must, within 30 days of receipt of the application, cause an investigation into the merits of the application to be conducted by a suitably qualified person. The Master must, within 14 days after considering the report, appoint an administrator; or decline to appoint an administrator; or refer the matter for consideration by a High Court Judge in chambers. The High Court Judge in chambers can recommend the appointment of an administrator and can also do so in the course of any legal proceeding, if the Judge in chambers has reason to believe that a person ‘in respect of whom an enquiry or legal proceeding is held or conducted may be incapable of managing his or her property’. The

Master of the High Court must thereafter appoint an administrator as recommended by the Judge in chambers.

A 'mental illness' under the Act is defined as a 'positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis'. The Act defines a 'severe or profound intellectual disability' as a 'range of intellectual functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self-care and requiring constant aid and supervision, to severely restricted sensory and motor functioning and requiring nursing care'.

Redefined in these terms, the appointment of an administrator under the Act to manage the property of a mentally ill or intellectually disabled person throws new light on the research question behind this thesis. Do these two categories qualify as examples of an unsound or disordered mind as used in the Electoral Act? If so, does a decision of a Master of a High Court to appoint an administrator to care for and administer the property of a person have any bearing on the mental ability and legal capacity to exercise a choice between political parties listed on a ballot paper? Recall that an administrator can be appointed for a person who is capable of partial self-maintenance under close supervision. In addition, recall that a person under administration retains the capacity to enter into legally binding contacts as far as that capacity can be established. Whatever the answer to the question posed above, the voting capacity of a person is not a factor that must be considered before an administrator is appointed. I return to this issue later in the thesis.

3.6 Detention under the Mental Health Care Act 17 of 2002

The second category of citizens disqualified by section 8 of the Electoral Act is persons who are detained under the provisions of the Mental Health Care Act 17 of 2002. In this section of the thesis, I take a closer look at the provisions of the Mental Health Care Act and the different categories of persons who may potentially be receiving in-patient treatment in a psychiatric hospital on a particular election day. This equally includes a large category of persons, such as those suffering from severe depression, many of whom do *not* obviously lack the mental capacity to understand the nature and legal consequences of legal transactions, including voting in a national election. What is more, a person may be treated as an in or out patient in a mental health care facility without being placed under administration or curatorship. This arguably makes the link between a detention or committal order and the legal capacity to vote even more tenuous than that between curatorship or administration and the capacity to vote.



3.6.1 A new approach to mental health care

Mental illness is regulated in South Africa by the Mental Health Care Act 17 of 2002. With the enactment of the Constitution in 1996 and with it the Bill of Rights, the Mental Health Care Act 18 of 1973 became outdated and was thus replaced by the Mental Health Care Act 17 of 2002 in order to bring the mental health care laws in line with the new constitutional dispensation.¹³⁸ The new Mental Health Care Act is based on the ten basic principles set out by the World Health Organisation (WHO).¹³⁹ These principles brought about a ‘patient centred’ approach and incorporates basic human rights into mental health care.¹⁴⁰ The Mental

¹³⁸ Szabo C and Kaliski S ‘Mental health and the law: A South African Perspective’ (2017) 14 *B J Psych Int* 69.

¹³⁹ Mental Health Care Law: Ten Basic Principles, WHO/MNH/MND/96.9, available at https://www.who.int/mental_health/media/en/75.pdf?ua=1 (accessed 15 October 2020).

¹⁴⁰ Mental Health Care Law: Ten Basic Principles, WHO/MNH/MND/96.9, available at https://www.who.int/mental_health/media/en/75.pdf?ua=1 (accessed 15 October 2020).

Health Care Act brought about a new level of accountability and shaped a foundation upon which humane mental health care can be ensured.¹⁴¹ The aim of the Mental Health Care Act, as set out in the long title thereof, reads as follows:

‘[T]o provide for the care, treatment and rehabilitation of persons who are mentally ill; to set out different procedures to be followed in the admission of such persons; to establish Review Boards in respect of every health establishment; to determine their powers and functions; to provide for the care and administration of the property of mentally ill persons; to repeal certain laws; and to provide for matters connected therewith.’

For the purposes of this mini thesis, it is necessary to highlight a section of the preamble of the Mental Health Care Act which states that the Act was enacted to address the stigmatisation of and discrimination against people living with a mental disability:

‘[R]ECOGNISING that the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), prohibits against unfair discrimination of people with mental or other disabilities [...].’

The Mental Health Care Act explicitly prohibits unfair discrimination against any person who is mentally ill, on any grounds. This would reinforce the application of the equality clause and promote the equal treatment of persons with mental illnesses. It must be noted that, in so much as the Mental Health Care Act was enacted to protect mentally ill persons, or mental health care users, and their rights, the Mental Health Care Act was also enacted to protect members of the public from mentally ill persons. In the Preamble of the Mental Health Care Act, we also read the following:

¹⁴¹ Mental Health Care Law: Ten Basic Principles, WHO/MNH/MND/96.9, available at https://www.who.int/mental_health/media/en/75.pdf?ua=1 (accessed 15 October 2020).

‘[R]ECOGNISING that the person and property of a person with mental disorders or mental disabilities, may at times require protection and that members of the public and their properties may similarly require protection from people with mental disorders or mental disabilities [...].’

According to section 3 of the Mental Health Care Act, the objects of the Act are as follows:

‘[T]he objects of this Act are to (a) regulate the mental health care in a manner that - (i) makes the best possible mental health care, treatment and rehabilitation services available to the population equitably, efficiently and in the best interest of mental health care users within the limits of the available resources; (ii) co-ordinates access to mental health care, treatment and rehabilitation services to various categories of mental health care users; and (iii) integrates the provision of mental health care services into the general health services environment; (b) regulate access to and provide mental health care, treatment and rehabilitation services to (i) voluntary, assisted and involuntary mental health care users; (ii) State patients; and (iii) mentally ill prisoners; (c) clarify the rights and obligations of mental health care users and the obligations of mental health care providers; and (d) regulate the manner in which the property of persons with mental illness and persons with severe or profound intellectual disability may be dealt with by a court of law.’

From the objects section, one can see that the aim is to provide equal access to the best possible quality and affordable mental health care, treatment and rehabilitation ‘within the limits of available resources’, while also providing a clear picture of the rights and obligations afforded to mental health care users and practitioners. The Mental Health Care Act goes further in section 4 and regulates the implementation of policies in a manner that

best promotes the interests and rights of mental health care users and promotes and improves the mental health status of the population.

The Mental Health Act makes provision for the establishment of places of confinement. The Head of the National Department of Health may designate a health establishment as a psychiatric hospital,¹⁴² or a care and rehabilitation centre.¹⁴³ Psychiatric hospitals may admit (a) voluntary mental health care users,¹⁴⁴ (b) assisted mental health care users,¹⁴⁵ (c) involuntary mental health care users,¹⁴⁶ (d) state patients,¹⁴⁷ (e) mentally ill prisoners;¹⁴⁸ (f) persons referred by court for psychiatric observation in terms of the Criminal Procedure Act,¹⁴⁹ and (g) persons admitted for a long period as part of their care, treatment and rehabilitation.¹⁵⁰ Care and rehabilitation centres may (a) conduct assessments of intellectual abilities, and (b) provide care, treatment and rehabilitation services to persons with severe or profound intellectual disabilities, including assisted and involuntary mental health care users.¹⁵¹ Private hospitals may apply to admit assisted or involuntary mental health care users.¹⁵²

The question remains who should be regarded as being in detention at a health care facility under the new approach to health care for the purposes of voter disqualification in section 8(2)(c) of the Electoral Act. Treatment is provided at health care facilities on an inpatient and outpatient basis, and both on a voluntary and involuntary basis. At its strictest and narrowest

¹⁴² S 5(1)(a) of the Mental Health Care Act 17 of 2002.

¹⁴³ S 5(1)(b) of the Mental Health Care Act.

¹⁴⁴ S 6(6)(a) of the Mental Health Care Act 17 of 2002.

¹⁴⁵ S 6(6)(b) of the Mental Health Care Act 17 of 2002.

¹⁴⁶ S 6(6)(c) of the Mental Health Care Act 17 of 2002.

¹⁴⁷ S 6(6)(d) of the Mental Health Care Act 17 of 2002.

¹⁴⁸ S 6(6)(e) of the Mental Health Care Act 17 of 2002.

¹⁴⁹ S 6(6)(f) of the Mental Health Care Act 17 of 2002.

¹⁵⁰ S 6(6)(g) of the Mental Health Care Act 17 of 2002.

¹⁵¹ S 6(7)(b) of the Mental Health Care Act 17 of 2002.

¹⁵² Reg 42(2) of the General Mental Health Regulations, 2004 GN R1467 *Government Gazette* 27117 15 December 2004.

interpretation, a person is detained under the Mental Health Care Act, for the purposes of the Electoral Act, only if he or she is receiving treatment as an inpatient on an involuntary basis. At its broadest interpretation, as suggested by McQuoid-Mason and Naidoo, a person is detained for purposes of the Electoral Act if he or she receives treatment of any type under the Mental Health Care Act. I submitted above that the broad interpretation cannot be supported but this still leaves me to answer what alternative meaning should be ascribed to the term ‘detention’ under the Mental Health Care Act for the purposes of the Electoral Act.

Technically speaking, psychiatric hospitals treat voluntary mental health care users, assisted mental health care users, and involuntary mental health care users. In addition, certain persons are diverted from the criminal justice system into the health care system as state patients. I discuss each category in turn to give content to the voter disqualification based on the ‘detention’ of an adult citizen in a health care facility.

3.6.2 Voluntary mental health care users

A mental health care user may voluntarily submit for rehabilitation, care and treatment.¹⁵³ Voluntary care, treatment and rehabilitation is defined in the Act as the provision of health interventions to a person who gives consent to such interventions. A voluntary mental health care user may be treated as an inpatient, where the mental health care user will live in a psychiatric facility while receiving treatment, or as an outpatient, where the mental health care user will live at home but will attend the psychiatric facility to receive treatment. Voluntary outpatients are seemingly allowed full enjoyment of their rights to vote and, to stand for and hold office, as guaranteed by the Constitution. However, according to McQuoid-Mason and

¹⁵³ S25 of the Mental Health Care Act 17 of 2002: ‘25. Voluntary care, treatment and rehabilitation services. A mental health care user who submits voluntarily to a health establishment for care, treatment and rehabilitation services, is entitled to appropriate care, treatment and rehabilitation services or to be referred to an appropriate health establishment’.

Naidoo,¹⁵⁴ voluntary in-patients, by contrast, fall under the disqualification in section 8 of the Electoral Act. It is easy to see the interpretive conundrum that brings them to this conclusion. If the only difference between a voluntary inpatient and an involuntary, or detained, inpatient lies in the committal requirements and not in the actual mental illness that is treated, then the broad disqualification in the Electoral Act can only be sustained under section 9(1) of the Bill of Rights if the term ‘detention’ includes both categories. I argue, on the contrary, that the glib treatment of the issue by the Electoral Act cannot be rescued in this manner as this interpretation stretches the meaning of the term beyond what the language can reasonably bear. What then is the difference under the Health Care Act between voluntary treatment and assisted treatment, on the one hand, and involuntary treatment on the other?

3.6.3 Assisted mental health care users

A person may be provided with assisted care treatment and rehabilitation.¹⁵⁵ This category is defined by the Act as ‘the provision of health interventions to people incapable of making informed decisions due to their mental health status and who do not refuse the health interventions’. The persons who need to be assisted do not resist the health care interventions but also do not have the capacity to approach a health care provider out of their own volition for care or treatment.

A mental health care user may only be provided with assisted care, treatment and rehabilitation, at a health establishment, on an inpatient or outpatient basis, *without his or her active consent*, if a written application for care, treatment and rehabilitation is made to the head of the health establishment and is subsequently approved by the head of that health establishment.¹⁵⁶

¹⁵⁴ McQuoid-Mason, DJ and Naidoo, N ‘Mental Health’ in *Law of South Africa (LAWSA)* Volume 29 3rd ed (2020) para 288.

¹⁵⁵ S26 of the Mental Health Care Act 17 of 2002.

¹⁵⁶ S26(a) of the Mental Health Care Act 17 of 2002.

Furthermore, at the time the application for assisted care is made, there must be a reasonable belief that the mental health care user is suffering from a mental illness or severe or profound intellectual disability and requires care, treatment and rehabilitation in order to maintain their health and protect other people.¹⁵⁷ Finally, the mental health care user must be incapable of making an informed decision on the need for care, rehabilitation and treatment services, in order to be provided with assisted care without his or her consent.¹⁵⁸ In other words, assisted care will be provided without the consent of the mental health care user, if three conditions exist. The mental health care user must (i) be suffering from a mental illness or severe or profound mental disability; (ii) require care, treatment and rehabilitation services for his or her health or safety, or for the health and safety of other people; and (iii) is incapable of making an informed decision on the need for the care, treatment and rehabilitation services.

The application for assisted care, treatment and rehabilitation may be made by a next of kin, spouse, partner, parent associate or guardian of the mental health care user.¹⁵⁹ The head of the health establishment may only approve assisted care, treatment and rehabilitation of a prospective user as an inpatient if the findings of two mental health care practitioners concur that conditions for inpatient care, treatment and rehabilitation exist,¹⁶⁰ and the head is satisfied that the restrictions and intrusions on the rights of the mental health care user to movement, privacy and dignity are proportionate to the care, treatment and rehabilitation services required.¹⁶¹ Notably, no mention is made about the impact of the inpatient treatment on other rights, such as the right to vote. If the head is satisfied that the grounds for assisted

¹⁵⁷ S26(b)(i) of the Mental Health Care Act 17 of 2002.

¹⁵⁸ S26(b)(ii) of the Mental Health Care Act 17 of 2002.

¹⁵⁹ S27(1)(a) of the Mental Health Care Act 17 of 2002.

¹⁶⁰ S27(8)(a) of the Mental Health Care Act 17 of 2002.

¹⁶¹ S27(8)(b) of the Mental Health Care Act 17 of 2002.

treatment are present, he or she must give written notice to the patient.¹⁶² Thereafter he or she must, within five days, cause the mental health care user to be admitted to that health establishment or to be referred to another health establishment with appropriate facilities.¹⁶³

The question is whether an assisted inpatient is in ‘detention’ and thus barred from registering or voting under section 8(2)(d) of the Electoral Act? Even on a narrow interpretation of the term, it must be conceded that assisted mental health care users are ‘detained’ and thus disqualified from voting while under treatment. This is so because a patient who has been admitted as an assisted or involuntary health care user may not abscond. An ‘absconding patient’ is an assisted or involuntary patient who have absented himself or herself from institutions without leave.¹⁶⁴ The head of a mental health care establishment may request the South African Police Services to locate, apprehend and return the absconded patient to the health care establishment.¹⁶⁵ This clearly amounts to a form of detention.

The next question is whether an assisted inpatient should also be regarded as in detention if he or she is on approved leave of absence? The head of a health establishment may grant leave of absence to an assisted or involuntary mental health care user for a period not exceeding two months at a time.¹⁶⁶ This absence is conditional and thus implies that the in-patient is still under assisted treatment and thus for purposes of section 8(2)(c) of the Electoral Act under ‘detention’.

¹⁶² S27(9) of the Mental Health Care Act 17 of 2002.

¹⁶³ S27(10) of the Mental Health Care Act 17 of 2002.

¹⁶⁴ McQuoid-Mason, DJ and Naidoo, N ‘Mental Health’ in *Law of South Africa (LAWSA)* Volume 29 3rd ed (2020) para 234.

¹⁶⁵ S 34(6) read with s 40(4) of the Mental Health Care Act 17 of 2002.

¹⁶⁶ Reg 26(1) of the General Mental Health Regulations, 2004 GN R1467 *Government Gazette* 27117 15 December 2004.

3.6.4 Involuntary mental health care users¹⁶⁷

The last category of health care users under the Mental Health Care Act is ‘involuntary care, treatment and rehabilitation’. This category includes persons who are ‘incapable of making informed decisions due to their mental health status *and who refuse health intervention* but require such services for their own protection or for the protection of others’.

According to former Director General for Health, Ms MP Matsoso, the Mental Health Care Act provides specific procedural protection for a person who is committed to involuntary care, treatment and rehabilitation to prevent discrimination, violation of their rights, and inappropriate restrictions on autonomy and liberty, which is in line with the Bill of Rights contained in our Constitution regarding human rights.¹⁶⁸ Section 32 of the Mental Health Care Act provides that a mental health care user *must* be provided with care, treatment and rehabilitation services without his or her consent at a health establishment, on an outpatient or inpatient basis, if the user (i) has a mental illness that is of such a nature that the user is likely to inflict serious harm to himself or herself or others, or care, treatment and rehabilitation of the user is necessary for the protection of the financial interests or reputation of the user; (ii) is incapable of making an informed decision on the need for the care, treatment and rehabilitation services and (iii) is unwilling to receive the care, treatment and rehabilitation required.

Zabow contends that determining the competency of a patient to accept or refuse treatment is mainly based on a clinical assessment of the patient’s rationality and understanding of the

¹⁶⁷ See generally, Kersop, M and Van den Berg, F ‘Obtaining involuntary mental health care in the South African constitutional dispensation’ (2015) 36 *Obiter* 679 701; Ndou, M ‘Detention without consent: Protection of mentally ill person’s financial interest’ (2016) *De Rebus* 137 138.

¹⁶⁸ Policy Guidelines on 72-hour Assessment of Involuntary Mental Health Care Users’ (2012) available at <file:///C:/Users/27828/Downloads/Policy%20Guidelines%20on%2072%20hours%20Assessment%20of%20Involuntary%20Mental%20Health%20Care%20Users.pdf> (accessed on 15 April 2020).

situation.¹⁶⁹ The diagnosis of whether a person has a ‘mental illness’ requires a positive diagnosis of a mental health-related illness in terms of accepted diagnostic criteria made by mental health practitioner authorised to make such diagnosis. The diagnosis of mental illness is generally made according to the classification system of the Diagnostic and Statistical Manual of Mental Disorders (DSM) or the International Classification of Diseases (ICD). These classification systems generally distinguish between mood disorders (such as depression, anxiety and bipolar disorder); psychotic disorders (such as schizophrenia); eating disorders; and personality disorders.¹⁷⁰

The procedure for having a person detained involuntarily is a statutory procedure and can be made by way of an application. An application to obtain involuntary care, treatment and rehabilitation may be made in terms of section 33 of the Mental Health Care Act. The application may only be made by the spouse, next of kin, partner, associate, parent or guardian of a mental health care user.¹⁷¹ Where these persons are not available or incapable of making an application on behalf of the person being detained, the application may be made by a health care provider.¹⁷²

For the same reasons discussed above in the case of assisted inpatient care, persons who are detained as involuntary inpatient mental health care users fall within the core of the voter disqualification in section 8(2)(b) of the Electoral Act. Are involuntary outpatients also ‘detained’ for the purposes of the Electoral Act? Again, for much of the same reasons mentioned above in the cases of assisted outpatient care, the answer must be in the affirmative, even if the provisions of section 39(2) are kept in mind. The Mental Health Care

¹⁶⁹ Zabow T ‘Competence and Decision-making: Ethics and Clinical Psychiatric Practice’ (2008) 1 *SAJBL* 61 62.

¹⁷⁰ Ndou, M ‘Detention without consent: Protection of mentally ill person’s financial interest’ (2016) *De Rebus* 137 138.

¹⁷¹ S33(1)(a) of the Mental Health Care Act 17 of 2002.

¹⁷² S33(1)(a)(ii) of the Mental Health Care Act 17 of 2002.

Regulations makes this clear. Regulation 18 deals with involuntary outpatient mental health care. The regulation states that an involuntary inpatient may be released into the care of a custodian subject to a ‘schedule of conditions’ in order to continue treatment on an involuntary outpatient basis.¹⁷³ A mental health care user who does not accept the conditions regarding his or her involuntary outpatient care, treatment and rehabilitation must remain an involuntary inpatient mental health care user.¹⁷⁴ A custodian into whose control a mental health care user has been entrusted must take responsibility for that user when the user is discharged from the health establishment concerned where he or she received inpatient care.¹⁷⁵ Where a mental health care user does not present himself or herself for monitoring and review according to the schedule of conditions, such user must be deemed to have absconded in terms of the Act. In such a case the health establishment concerned must inform the South African Police Service,¹⁷⁶ to locate, apprehend and return the absconded outpatient to the health care establishment.¹⁷⁷ Given the purpose of section 8(2)(c) of the Electoral Act, the conditional conversion of inpatient treatment to outpatient treatment, makes no difference to the substance of the matter, as far as mental illness is concerned, and should both be regarded as ‘detention’ for purposes of election law.

3.6.5 Criminal accused (state patients)

Section 1 of the Mental Health Care Act defines a state patient as:

‘[A] person so classified by a court directive in terms of section 77(6)(a) or 78(6) of the Criminal Procedure Act.’

¹⁷³ 18(1) of the Mental Health Care Act 17 of 2002.

¹⁷⁴ 18(5) of the Mental Health Care Act of 2002.

¹⁷⁵ 18(6) of the Mental Health Care Act 17 of 2002.

¹⁷⁶ 18(9) of the Mental Health Care Act 17 of 2002.

¹⁷⁷ S 34(6) read with s 40(4) of the Mental Health Care Act 17 of 2002.

If during a criminal trial a court finds that the accused committed the act in question but that, at the time when the act was committed, the accused was by reason of mental illness or intellectual disability not criminally responsible for such act the court must find the accused not guilty.¹⁷⁸ Where the accused is charged with murder or culpable homicide or rape or compelled rape, or another charge involving serious violence, or if the court considers it to be necessary in the public interest, the court may order that the accused be detained in a psychiatric hospital,¹⁷⁹ or admitted to and detained in a designated health establishment stated in the order and treated as if he or she were an involuntary mental health care user contemplated the Mental Health Care Act.¹⁸⁰ In other cases than those mentioned above, the court may direct that the accused be admitted to, detained and treated in an institution as if he or she were an involuntary mental health care user contemplated in the Mental Health Care Act.¹⁸¹

It is the duty of the head of the national department of health to determine where a state patient must be detained.¹⁸² After the head of health has made such a determination, the head of the relevant provincial department may then transfer the state patient to another health establishment, designated in terms of section 41 of the Mental Health Care Act, to a province where the head of the relevant provincial department has jurisdiction,¹⁸³ if it necessary for the care, treatment or rehabilitation of the state patient.¹⁸⁴ If a state patient is likely to cause harm to others,¹⁸⁵ the Review Board may order that the state patient be transferred to another designated health establishment with maximum security facilities in terms of section 41, despite the determination made by the national department.¹⁸⁶ If the state patient has absconded

¹⁷⁸ S 78(6) of the Criminal Procedure Act 51 of 1977.

¹⁷⁹ S 78(6)(b)(i)(aa) of the Criminal Procedure Act 51 of 1977.

¹⁸⁰ S 78(6)(b)(i)(cc) of the Criminal Procedure Act 51 of 1977.

¹⁸¹ S 78(6)(b)(ii)(aa) of the Criminal Procedure Act 51 of 1977.

¹⁸² S 42(3)(a) of the Mental Health Care Act 17 of 2002.

¹⁸³ S43(1)(a) of the Mental Health Care Act 17 of 2002.

¹⁸⁴ S43(2) of the Mental Health Care Act 17 of 2002.

¹⁸⁵ S43(4)(a) of the Mental Health Care Act 17 of 2002.

¹⁸⁶ S43(3) of the Mental Health Care Act 17 of 2002.

or is deemed to have absconded, the head of the health establishment must notify the South African police service, in order to locate, apprehend and return the state patient.¹⁸⁷ A state patient may be granted a leave of absence from the health establishment, by the head of the health establishment,¹⁸⁸ who will provide written notice of the commencement and return date of the leave of absence, to the head of the national health department,¹⁸⁹ together with the terms and conditions.¹⁹⁰ The leave of absence may be cancelled, by the head of the health establishment, if there is reason to believe that the state patient failed to comply with the terms and conditions.¹⁹¹ The state patient will be deemed to have absconded if he or she fails to return on the specified date.¹⁹²

The state patient's mental health status must be reviewed every six (6) months from which the care, treatment and rehabilitation commenced, and every twelve (12) months thereafter, if the state patient is admitted, on conditional discharge or on a leave of absence.¹⁹³

In light of the discussion above, both state patients who are detained and those who has been released on conditional leave of absence must be regarded as under detention under the mental Health Care Act for the purposes of section 8(2)(d) of the Electoral Act.

3.7 Conclusion

In this chapter I explored the various categories into which persons with mental illness or mental disability are legally divided. The spectrum ranges from persons who live and function with some form of mental illness or disability, including those who might from time

¹⁸⁷ S44(1)(a) of the Mental Health Care Act 17 of 2002.

¹⁸⁸ S45(1) of the Mental Health Care Act 17 of 2002.

¹⁸⁹ S45(2)(a) of the Mental Health Care Act 17 of 2002.

¹⁹⁰ S45(2)(b) of the Mental Health Care Act 17 of 2002.

¹⁹¹ S45(3) of the Mental Health Care Act 17 of 2002.

¹⁹² S45(4) of the Mental Health Care Act 17 of 2002.

¹⁹³ S46(1) of the Mental Health Care Act 17 2002.

to time be admitted voluntarily or involuntarily to a psychiatric hospital, receive assisted care, and state patients. This chapter also covered the law relating to persons who have been declared to be of unsound mind or mentally disordered or defective due to severe or profound intellectual disability, who are incapable of managing their own affairs. This chapter further included a discussion on curatorship, power of attorney and administration under the Mental Health Care Act.

The chapter concludes the descriptive account of those adult citizens who would otherwise have qualified to vote in a national election but for the provisions of section 8 of the Electoral Act. In summary: Section 8(2)(c) includes every adult citizen under common law curatorship or statutory administration. In this regard I pointed out that the Electoral Act draws a problematic link between mental capacity and legal capacity that is not derived from or established by the common law. Section 8(2)(d) must be narrowly interpreted to only affect those adult citizens who are receiving assisted and involuntary treatment in a health care facility, whether as in patients or out patients, and state patients. Adult citizens who receive voluntary treatment in a health care facility, even on an in patient basis, retain the right to vote and are not included under the scope of section 8(2)(d) (contrary to the position adopted by McQuoid-Mason and Naidoo). What strikes one is the wide spectrum of people and circumstances that are involved. The only common factor shared by them all is that they are equally affected by the same voter disqualification in section 8(2)(c) and (d) of the Electoral Act.

Being declared of unsound mind, mentally disordered, or detained involuntary under the Mental Health Care Act, relates to the degree or extent of which a disability or illness affects ones mental and legal capacity. As stated in the introduction, examples of mental disorders include mood disorders (such as depression or bipolar disorder), anxiety disorders, personality disorders, psychotic disorders (such as schizophrenia), eating disorders, trauma-

related disorders (such as post-traumatic stress disorder) and substance abuse disorders. In this mini-thesis I have mainly referred to mental disability or illness as an umbrella term. However, intellectual disabilities such as mental retardation, which refers to persons who have a low IQ, specifically below a score of 70,¹⁹⁴ dementia or brain damage, are also ground for declaring a person incapable of managing their own affairs.

Hypothetically speaking, person A could have severe bipolar illness,¹⁹⁵ and be subsequently declared to be of unsound mind, mentally disordered, and placed under curatorship or administration, or detained involuntarily under the Mental Health Care Act for treatment. As a result, person A would be excluded by the Electoral Act from exercising their active voting rights.

Person B, however, has a severe substance abuse disorder,¹⁹⁶ and is also declared to be of unsound mind, mentally disordered and placed under curatorship or administration, or detained involuntarily under the Mental Health Care Act for treatment. As a result, person B would also be excluded from exercising their active and passive voting rights.

¹⁹⁴ Swanepoel M 'Legal aspects with regard to mentally ill offenders in South Africa' (2015) 18 *Potchefstroomse Elektroniese Regsblad* 324. Committee to Evaluate the Supplemental Security Income Disability Program for Children with Mental Disorders; Board on the Health of Select Populations; Board on Children, Youth, and Families; Institute of Medicine et al *Mental Disorders and Disabilities Among Low-Income Children* (2015) 169-170 states: '[D]SM-5 defines intellectual disabilities as neurodevelopmental disorders that begin in childhood and are characterized by intellectual difficulties as well as difficulties in conceptual, social, and practical areas of living. The DSM-5 diagnosis of ID requires the satisfaction of three criteria: 1. Deficits in intellectual functioning—'reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience'—confirmed by clinical evaluation and individualized standard IQ testing (APA, 2013, p. 33); 2. Deficits in adaptive functioning that significantly hamper conforming to developmental and sociocultural standards for the individual's independence and ability to meet their social responsibility; and 3. The onset of these deficits during childhood.'

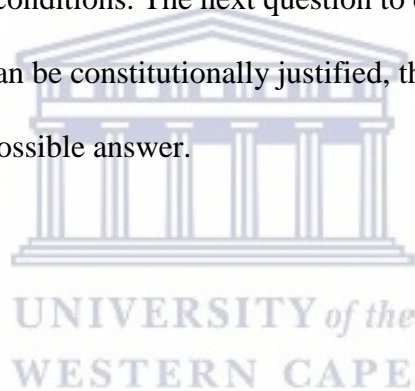
¹⁹⁵ Bipolar is a condition characterised by extreme moods, persons go from states of being highly energised and happy, to being extremely low and sad. Bipolar affects the persons affects a person's behaviour, sleep, thinking and energy.

¹⁹⁶ Substance abuse disorders involve the excessive use of psychoactive drugs, it may lead to social, physical and emotional harm. Psychoactive drugs include alcohol, pain medication or illegal drugs.

Person C could have a low IQ and may be found by a court to be incapable of managing their own affairs due to a severe intellectual disability. As a result, person C would then be disqualified from voting in terms of section 8 of the Electoral Act.

Alternatively, as stated previously, person D could be of sound mind but suffer from a severe physical defect and be declared incapable of managing their own affairs and placed under curatorship or administration. Such persons would then also be disqualified in terms of section 8 of the Electoral Act.

All these persons are deemed by the Electoral Act to have the same lack of voting capacity, that is to *not* understand the nature and consequences of voting in a national election, irrespective of their respective conditions. The next question to consider is whether this blanket voter disqualification can be constitutionally justified, the next three chapters of this mini-thesis are dedicated to a possible answer.



Chapter 4

THE RIGHT TO VOTE AND THE PRINCIPLE OF DEMOCRACY

4.1 Introduction

In this chapter I change perspective from *describing* the current law to *evaluating* the constitutional validity of the current law. The key question in this and the next two chapters is whether the voter disqualification of adult citizens on the basis of mental capacity, as discussed in chapters two and three, would survive a constitutional challenge. More than 25 years into our democracy, these voter exclusions have not once been challenged in our courts. There seems to be a wide consensus within civil society that the voter disqualification is constitutionally justified and that such a challenge will be unsuccessful. The aim of the next three chapters is to subject that consensus to closer scrutiny. Relying on section 39(1) of the Bill of Rights to structure the rest of the discussion, I focus in this chapter on first principles or the values of democracy and universal adult suffrage, as *mandated* by section 39(1)(a). A key question is whether the voter disqualifications under discussion can be constitutionally justified as a reasonable means to protect the democratic integrity of the election process in South Africa. In doing so I return to and pick up on the earlier discussion of the two conceptions of democracy introduced in chapter two. Thereafter, in chapter five, I explore the issue from a comparative law perspective (as *permitted* by section 39(1)(c)). In chapter six I turn my attention to international human rights law (as is *required* by section 39(1)(b)). Once the issue has been considered in light of the principle of democracy, comparative law, and international law, respectively, I submit that sections 8(2)(c) and (d) of the Electoral Act are

overbroad and thus not justifiable in our open and democratic society. I conclude the discussion in the final chapter by suggesting a redrafted version of the sections that would pass the test of constitutionality.

4.2 Do sections 8(2)(c) and (d) of the Electoral Act violate the right to vote?

Modern constitutional law recognises the human right of every person to participate in the political life of his or her community. This recognition confirms that human beings are political animals who can only fully flourish once their civic virtues have developed as citizens of their communities. While questions may be asked whether this flourishing is possible within the confines of representative democracies, we saw above that political theorists, like Nancy Fraser, regard effective political representation as a key to social justice. In the South African Constitution, the political dimension of social justice is guaranteed as a fundamental human right in section 19(3)(a) of the Bill of Rights:

‘[E]very adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret.’

The first question is whether this right also applies to adult citizens with such severe mental illnesses or intellectual disabilities that a court of law has deemed it appropriate to order their detention in a health care facility, or to place the management of their property rights in the hands of an administrator or curator.

The language used in the formulation of the afore mentioned rights are broad and unqualified.

The rights literally apply to every adult citizen and must be enforced as such.¹⁹⁷ This

¹⁹⁷ *New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC) para 151: ‘To avoid the exclusion of other people as it happened under apartheid, the right is conferred upon every adult

interpretation is confirmed by the textual context in which section 19(3) operates. Section 1(a) recognises ‘*universal* adult suffrage’ as a founding value. Section 39(1)(a) mandates an interpretation that promotes this value. Section 9(1) confirms that all citizens (and other persons) ‘are equal before the law’, and section 9(3) adds that the state may not ‘unfairly discriminate’ between citizens (or other persons). This confirms that ‘all citizens are equally entitled to the rights, privileges and benefits of citizenship’ as stated in section 3(1)(a) of the Constitution. These provisions all support a literal and unqualified interpretation of the right of every adult citizen to vote.

Even stronger textual support for the broad and literal interpretation of section 19(3)(a) is provided by section 47(1)(d) of the Constitution. The section provides that ‘every citizen *who is qualified to vote*’ is eligible to be a member of the National Assembly ‘except, anyone declared to be of unsound mind by a court of the Republic’. The necessary implication is that even those citizens who have been declared to be of unsound mind remain qualified to vote under section 19(3)(a) of the Bill of Rights. However, these citizens are excluded from standing for office or exercising their passive voting rights. If this were not the case, then the express exclusion from membership of parliament would not have been necessary. In my view, this express disqualification upon the back of an unqualified right to vote cannot be explained away as an attempt by the drafters to make an exclusion clear, out of an abundance of caution, that is already implied in section 19(3). Interpretations that render provisions superfluous must be avoided.¹⁹⁸ From a literal and schematic perspective, this settles the question of the scope of section 19(3) and the right to vote, if not the constitutionality of the statutory exclusion.

citizen. And to safeguard the free exercise of the right, the Constitution demands that the actual voting must be conducted in secret. This is a singular condition that section 19(3) imposes for the exercise of the right to vote’.

¹⁹⁸ *Wellworths Bazaars Ltd v Chandler’s Ltd* 1947 (2) SA 37 (A) para 43: ‘a Court should be slow to come to the conclusion that words [in a statute] are tautologous or superfluous’; *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) para 99: ‘[a] longstanding precept of interpretation is that every word must be given a meaning. Words in an enactment should not be treated as tautologous or superfluous’.

The literal interpretation of section 19(3)(a) is also reinforced by a historical and purposive interpretation of the right. The Constitutional Court has said on numerous occasions that the right to vote must be interpreted in light of the history of apartheid. In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* Chaskalson CJ stated the following:¹⁹⁹

‘[I]n the light of our history where denial of the right to vote was used to entrench white supremacy and to marginalise the great majority of the people of our country, it is for us a precious right which must be vigilantly respected and protected.’

In *New National Party v Government of the Republic of South Africa*, O’Regan J explained the importance of the right to vote in a constitutional democracy and why the struggle against apartheid was primarily directed at first securing voting rights for all:²⁰⁰

‘[T]he right to vote is more than a symbol of our common citizenship, it is also an instrument for determining who should exercise political power in our society. It is in this sense that the United States Supreme Court held that the right to vote is “preservative of all rights.” Its role in determining who should exercise political power, makes the right to vote worthy of particular scrutiny by a court to ensure that fair participation in the political process is afforded.’

Most famously of all, is the explanation by Sachs J in *August v Electoral Commission* of the reasons why universal adult suffrage is constitutionally important in post-apartheid South Africa:²⁰¹

¹⁹⁹ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) para 47.

²⁰⁰ 1999 (3) SA 191 (CC) para 122.

²⁰¹ *August v Electoral Commission* 1999 (3) SA 1 (CC) para 17.

‘[U]niversal 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.’

Against the background of these statements about the historical and constitutional significance of the right to vote, it must be remembered that the struggle for voting rights in South Africa has not been limited to the struggle against voter exclusions based on race. When elections by means of polling was introduced in the 1830s, only the Cape aristocracy consisting of rich, well-schooled, white, men could vote. The struggle for universal adult suffrage has since then also been a struggle against the exclusion of many classes of citizens who were regarded as unfit for politics and incapable of political judgment, such as women, illiterate people, poor people, and black people.²⁰² The struggle by people living with mental illnesses or impaired intellectual abilities for equal voting rights must be interpreted in this historical context as part of the ongoing struggle against prejudice and exclusion.

Given the language, textual context, and history of section 19(3)(a), I conclude that the right to vote guaranteed in the Bill of Rights applies equally to all adult citizens, including all adult citizens living with mentally illnesses or intellectual disabilities regardless of the seriousness

²⁰² For a recent overview of this history see Blackman, M and Dall, N *Spoilt Ballots: The Elections that Shaped South Africa, from Shaka to Cyril* (2022).

or effect of the illness or disability.²⁰³ There is no constitutional ground upon which an implied disqualification can be read into the wording of section 19(3).

This conclusion does not mean that the provisions of sections 8(2)(c) and (d) of the Electoral Act are therefore constitutionally invalid. It is certainly possible to push the implication of section 47(1)(d) further than I did above, and to argue that the wording of the section establishes conclusively any adult citizen ‘declared to be of unsound mind by a court of the Republic’ is otherwise ‘qualified to vote for the National Assembly’. However, it is not necessary to do so here, as I will argue below that the existing disqualification contained in sections 8(2)(c) and (d) of the Electoral Act in any case does not pass the limitation test imposed by section 36 of the Bill of Rights. However, section 47(1)(d) does raise the question whether any disqualification of voters based on mental capacity could ever be justified: does section 47(1)(d) govern the limitation analysis in section 36 of the Bill of Rights?

4.3 Is the limitation of the right to vote justified?

Although it is frequently cited, it is still worth reminding ourselves that section 36(1) reads as follows:

‘[L]imitation of rights

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation

²⁰³ In fact, I already relied on this interpretation in Chapters 2 and 3 when I discussed the scope of the voter disqualification by interpreting the statutory provisions as narrowly or strictly as possible.

between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.’

The section essentially requires a proportionality analysis of means and ends. In order for the voter disqualifications based on mental capacity to be justified, they must (i) serve a sound constitutional purpose, and (ii) do so in a manner that is proportional to that end. Where, for example, the disqualification is overbroad and not specifically tailored to its purpose, it would not be a justifiable limitation.²⁰⁴ Before I explore which ends the disqualifications in section 8(2)(c) and (d) might be serving and whether these disqualifications are sufficiently narrowly tailored, a preliminary question must first be answered: is the right to vote subject to a limitation analysis under section 36?

4.3.1 Is the right to vote subject to limitation?

Before I turn to the limitation analysis in more detail, it is first necessary to ask whether sections 1(d) and 3(2) of the Constitution, which arguably mandates that every adult citizen should be afforded the right to vote regardless of his or her mental capacity, are subject to a limitation analysis. Section 7(3) and section 36 clearly states that only the ‘rights *in the Bill of Rights*’ are subject to reasonable and justifiable limitations. This would seem to exclude the founding provisions of chapter 1. Are sections 8(2)(c) and (d) invalid because they violate these founding provisions? In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* the Constitutional Court correctly rejected the claim that the right of every adult citizen to vote is absolute or sacrosanct and not subject to limitation:²⁰⁵

²⁰⁴ *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) para 122.

²⁰⁵ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) para 19.

‘[I]n the founding affidavit the applicants rely in the first instance on sections 1(d) and 3(2) of the Constitution which form part of the first chapter that contains the founding provisions of the Constitution. They contend that [the sections] of the Electoral Act, which disenfranchise them, are inconsistent with these provisions *which are absolute and not subject to limitation* in terms of the Constitution. There is no substance in this contention and counsel for the applicants correctly did not seek to support it. Section 1 deals with the values of the Constitution and section 3 with the rights of citizenship. *Neither of these sections requires voting rights to be absolute and immune from limitation.*’

The Court proceeded to explain what role the founding values play in the rights analysis or constitutional review of legislation:²⁰⁶

‘[T]he values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. [...] The rights entrenched in the Bill of Rights include equality, dignity, and various other human rights and freedoms. These rights give effect to the founding values and must be construed consistently with them. [...] To sum up, the right to vote is vested in all citizens. It is informed by the foundational values in section 1 of the Constitution and in particular section 1(d). It is, however, not an absolute right. It is subject to limitation in terms of section 36.’

In short: whether the current denial of voting rights due to mental capacity is constitutional requires an ordinary limitation analysis under section 36(1) of the Bill of Rights.

²⁰⁶ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) para 25.

4.3.2 The poverty of our voting rights jurisprudence

As stated before, the disqualification of adult citizens on the basis of their mental capacity has not been challenged in our courts. However, several other voter disqualifications have been challenged. A brief overview of this voting rights jurisprudence reveals an unfortunate lack of argumentative depth when it comes to the justification of voter disqualifications under section 36 of the Bill of Rights. In case after case the government has either not put any justification forward or attempted to justify the exclusion on the basis of *logistical considerations* alone. There is thus almost nothing in our case law from which the reasonableness (or not) of the disqualification based on the mental capacity of a voter can be inferred. Given the limited scope of this mini-thesis, the existing voting rights jurisprudence cannot be discussed here in any detail. Highlights from some of the key cases and dicta will have to suffice.

In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)*, for example, the Constitutional Court set aside an attempt to disqualify adult citizens who were serving a prison sentence without the option of a fine.²⁰⁷ The court referred to Canadian law and stated that the right to vote may only be limited for legitimate policy reasons, and underscored that there must be a legitimate purpose for limiting the rights of prisoners, or any person for that matter. In reaching its judgement, the court stated that the government had failed to disclose the purpose of the voter disqualification. The court also added that a blanket ban of all prisoners who had no option to pay a fine made it more difficult to make a judgement in favour of the government.²⁰⁸ The government unsuccessfully sought to justify the exclusion on the basis that it would be unfair to make provision for voting by prisoners and not to do the same for law abiding citizens

²⁰⁷ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC).

²⁰⁸ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) para 67.

unable to vote;²⁰⁹ that it would impose costly logistical burdens on the state;²¹⁰ and that it would weaken the fight against crime.²¹¹ The Court rejected these justifications because the government had failed to lay the factual or policy foundation for any of them:²¹²

‘[I]n a case such as this where the government seeks to disenfranchise a group of its citizens and the purpose is not self-evident, there is a need for it to place sufficient information before the Court to enable it to know exactly what purpose the disenfranchisement was intended to serve. [...] *In short we have wholly inadequate information on which to conduct the limitation analysis that is called for.*’

In *Richter v The Minister for Home Affairs* the Court declared invalid an attempt to disqualify adult citizens who live and work overseas on a temporary or permanent basis. Again, once the logistical argument about voting stations and the cost of overseas voting were rejected, the government failed to put forward any other justification for the disqualification.²¹³ The Court commented as follows:²¹⁴

‘[T]here is nothing to be found either in the affidavit lodged by the Minister in the High Court, the affidavit opposing direct access to this Court or in the written argument submitted to this Court to constitute justification of the restrictive classes contained in section 33(1)(e). Indeed, during oral argument, counsel for the Minister conceded that restricting the class of registered voters who are abroad on polling day to obtain special

²⁰⁹ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) para 45.

²¹⁰ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) para 51.

²¹¹ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) para 56.

²¹² *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) paras 65-67.

²¹³ *Richter v The Minister for Home Affairs* 2009 (3) SA 615 (CC).

²¹⁴ *Richter v The Minister for Home Affairs* 2009 (3) SA 615 (CC) para 72.

votes was a limitation of section 19 of the Constitution and that *he could proffer no justification for the limitation.*'

Finally, the unfortunate pattern is confirmed in *New Nation Movement NPC v President of the Republic of South Africa* where the Court lamented as follows:²¹⁵

'[O]n the papers before us there was *no attempt to justify the limitation* imposed on the section 19(3) rights. [...] In sum, the Speaker did not address justification. As we will soon see, the Minister's affidavits *did not address justification*. [...] The state respondents on whom the onus rested have thus failed to proffer justification for the limitation.'

Looking at previous cases and the justifications provided for other voter exclusions therefore leaves one surprisingly empty handed. Given the poverty of the attempts to justify the exclusion of sentenced prisoners and non-resident citizens from voting in national elections, it is best to start our analysis with the two voter disqualifications currently recognised in our law that we know pass constitutional muster: the exclusion of foreigners,²¹⁶ and the exclusion of children. These exclusions are constitutionally entrenched. The statutory exclusions in section 8(2)(c) and (d) of the Electoral Act must be assessed with reference to these two established constitutional reference points. If children are constitutionally excluded from participation in elections, presumptively because of a lack of understanding or ability to make sound political judgments, can the same be said about adult people living with mental illness or intellectual disabilities?

²¹⁵*New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC) paras 137; 115 and 119.

²¹⁶*New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC) para 148: 'It is the birth-right of citizens to determine within the bounds of the Constitution, the type of government they want and generally the people who should lead that government. Non-citizens are excluded from that process so as to insulate it from foreign interference and influence'.

As will be discussed shortly, most of the possible justifications for the disqualification of adult citizens on the basis of their mental capacity rest on the claim that the disqualification is necessary to protect the democratic integrity of the elections. This claim can be understood in one of two ways: (i) the disqualification is necessary to ensure the integrity of the election or voting process and procedures from a logistical perspective; and (ii) the disqualification is necessary to ensure the democratic character of our representative democracy.

Before I take a closer look at the second argument, it is first necessary to explore whether there are any logistical reasons relating to the election process that might justify the provisions of section 8(2)(c) and (d) of the Electoral Act. Recall that the logistical problems faced by the Electoral Commission in securing free and fair election in prison or overseas were presented to the Court but rejected in the *NICRO* and *Richter* cases. Will this line of reasoning have more success in the case of the exclusions in section 8(2)(c) and (d) of the Electoral Act?

4.3.3 Excluding citizens with mental illnesses and disabilities for logistical reasons to ensure a free and fair election

At least two logistical difficulties might provide possible justification for the ongoing disqualification of mentally ill and disabled persons under section 8 of the Electoral Act. The first is based on cost and logistics, the second on undue influence and voter fraud.

4.3.3.1 Cost and logistics

First, voters who need assistance to vote cannot be accommodated within the existing voting procedures and it would be too costly to provide for their assistance. This argument has little merit. As we saw above in chapter two, the existing electoral process and voting procedure already enables voters to receive assistance when voting at a voting station and already provides elaborate procedures to apply for and cast special ballots at home or in hospitals and

other care facilities. These provisions were discussed in detail in chapter two and can easily be expanded to include the casting of ballots by mentally ill and disabled voters. In this regard the logistical justification for sections 8(2)(c) and (d) must fail.

4.3.3.2 Undue influence and voter fraud?

A second argument against the participation of mentally impaired or ill citizens might be that it would still be impossible to secure the integrity of the vote of mentally ill and disabled persons under curatorship, administration, custodianship or medical supervision, by insulating them from undue influence by care givers. To evaluate the second logistical argument, it is instructive to look at literature on the issue from the USA.

When studying the development of disability exclusions in the United States, Schriner and Ochs make the compelling point that the question of ‘who votes’ has been a historically contentious one, because the issue is ‘so basic to the functioning of a representative democracy’.²¹⁷ The United States began to develop disability-based exclusions at the same time it started to exclude outsiders such as ‘foreigners, the free negro and [women]’.²¹⁸ The disability exclusions were initially linked to economic dependency.²¹⁹ Bindel adds that in 1880, when thirty eight American states enacted laws disenfranchising persons with ‘diminished capacity’,²²⁰ the motivation was first, that persons with mental illness were considered to have

²¹⁷ Schriner K et al ‘Democracies dilemmas: Notes on the ADA and voting rights of cognitive emotional impairments’ (2000) 21 *Berkley Journal of Employment and Labour Law* 437 483.

²¹⁸ Bindel JA ‘Equal protection jurisprudence and the voting rights of persons with diminished mental capacities’ (2009) 65 *New York University Annual Survey of American Law* 87 101.

²¹⁹ In Massachusetts, for example, the constitution was amended in 1821 in two respects. First, the property qualification was dropped in favour of a taxpaying qualification; second, ‘paupers and persons under guardianship’ were excluded from the electorate. This exclusion was justified on the basis that paupers (persons who had no means of self-support and thus were dependent on public relief) and persons under guardianship (insane persons, drunkards and others whose financial affairs were managed by a guardian for the primary purpose of avoiding dependence on public relief) were viewed as unworthy because of their economic dependency. See Schriner K et al ‘Democracies dilemmas: Notes on the ADA and voting rights of cognitive emotional impairments’ (2000) 21 *Berkley Journal of Employment and Labour Law* 437 490.

²²⁰ Bindel JA ‘Equal protection jurisprudence and the voting rights of persons with diminished mental capacities’ (2009) 65 *New York University Annual Survey of American Law* 87 101.

‘no intellect at all’.²²¹ The second motivation for the laws was the Social Darwinist theory that ‘some persons are more socially desirable than others’, and that the future generations can be improved biologically by increasing the proportion of ‘desirable individuals’ and decreasing the rate of propagation of ‘inferior individuals’.²²² Combrinck adds that the third motivation was one of electoral advantage, which entailed that political parties perceived an advantage in limiting the pool of potential voters by excluding certain groups who might not support their policy platform. None of these historical justifications need to be further explored here.

The more modern justifications for excluding persons with psychosocial disabilities from voting are described as ‘preserving the political community’²²³ or ‘preserving the integrity of the election process’,²²⁴ as well as prevention of voter fraud.²²⁵ There is a prevailing belief that persons with a mental health diagnosis are intrinsically irrational and incapable of participating in civic functions.²²⁶ The concern about voter fraud consists of first, that persons with psychosocial or intellectual disabilities may receive inappropriate assistance when voting (for example, from caregivers) or may be unduly influenced.²²⁷ Secondly there is a concern about fraudulent absentee voting.²²⁸

²²¹ Bindel JA ‘Equal protection jurisprudence and the voting rights of persons with diminished mental capacities’ (2009) 65 *New York University Annual Survey of American Law* 87 101.

²²² In the late 19th and 20th centuries there was a great concern about the increase in the rate of mental illness in America which led to a view that society needed to be protected from the actions of those who were less capable- which included voting see Bindel JA (note 217 above) 104-105. Social Darwinism also gave rise to the eugenics movement, which saw prohibitions on marriage and procreation of people with especially intellectual disabilities and also encouraged laws permitting involuntary sterilisation, see Glen KB ‘Changing paradigms: Mental Capacity, legal capacity, guardianship and beyond’ (2012) 44 *Columbia Human Rights Law Review* 93 104-105.

²²³ Karlan PS ‘Framing the voting rights claims of cognitively impaired individuals’ (2007) 38 *McGeorge Law Review* 917 925.

²²⁴ Karlan PS ‘Framing the voting rights claims of cognitively impaired individuals’ (2007) 38 *McGeorge Law Review* 917 925.

²²⁵ Schriener K et al ‘Democracies dilemmas: Notes on the ADA and voting rights of cognitive emotional impairments’ (2000) 21 *Berkley Journal of Employment and Labour Law* page 486.

²²⁶ Brescia NF ‘Modernizing state voting laws that disenfranchise the mentally disabled with the aid of past suffrage movements’ (2010) 54 *Saint Louis University Law Journal* 943.

²²⁷ Bindel JA ‘Equal protection jurisprudence and the voting rights of persons with diminished mental capacities’ (2009) 65 *New York University Annual Survey of American Law* 87 101.

²²⁸ Bindel JA ‘Equal protection jurisprudence and the voting rights of persons with diminished mental capacities’ (2009) 65 *New York University Annual Survey of American Law* 87 101.

In the case of voter fraud there are two concerns.²²⁹ First, that mentally disabled persons may receive inappropriate assistance when voting or possibly be unduly influenced.²³⁰ Second, there is also a concern about fraudulent or absentee voting.²³¹ Combrinck states that the question of undue influence ultimately becomes one of degree.²³² Combrinck asks how to determine when candidates' electioneering promises cross the line to 'undue influence'. A practical illustration of Combrinck's example would be where the Community Safety MEC of Gauteng bought prison inmates KFC.²³³ This is argued to be a plot to secure votes. It is clear that the MEC is taking advantage of prisoners, who are a vulnerable group much like mentally disabled persons. The US Regulations for the Protection of Human Subjects specifically identifies 'prisoners' as a group that is vulnerable to coercion or undue influence, due to their circumstances of detention.²³⁴ However, prisoners are allowed full enjoyment of their right to vote in terms of section 19(3)(a) of the Constitution. Similarly, religious influence may also be regarded as undue influence.²³⁵ Religious leaders have a great standing within their respective communities and congregants. These communities and congregants, who may be in vulnerable states, often look to their religious leaders for direction. As a result, religious leaders have a great moral influence which gives them the power to influence thinking, foster dialogue and set priorities

²²⁹ Combrink H 'Everybody counts: The right to vote of persons with psychosocial disabilities in South Africa' (2014) 2 *African Disability Rights Yearbook* page 81.

²³⁰ Bindel JA 'Equal protection jurisprudence and the voting rights of persons with diminished mental capacities' (2009) 65 *New York University Annual Survey of American Law* 87 101.

²³¹ Bindel JA 'Equal protection jurisprudence and the voting rights of persons with diminished mental capacities' (2009) 65 *New York University Annual Survey of American Law* 87 101.

²³² Combrink H 'Everybody counts: The right to vote of persons with psychosocial disabilities in South Africa' (2014) 2 *African Disability Rights Yearbook* page 81.

²³³ Chabalala J 'Community safety MEC spends more than R120K on KFC for prisoners' News 24 30 March 2017 available at <https://www.news24.com/news24/SouthAfrica/News/community-safety-mec-spends-more-than-r120k-on-kfc-for-prisoners-20170330> (accessed 22 December 2020). Writer S 'MEC spent R60,000 on KFC for prisoners to show them what they're missing: report' BusinessTech 28 February 2017 available at <https://businesstech.co.za/news/government/160831/mec-spent-r60000-on-kfc-for-prisoners-to-show-them-what-theyre-missing-report/> (accessed 22 December 2020).

²³⁴ Hanson R, Letourneau E, Olver M et al. 'Incentives for offender research are both ethical and practical' (2012) 39 *Criminal Justice and Behaviour* 1392.

²³⁵ Sherman J 'Can religious influence ever be undue influence' (2007) 73 *Brook. L. Rev.* 579 644.

for their communities.²³⁶ Yet there is no law excluding all person's subject to religious influence from voting. It is necessary to highlight that religious leaders have the allegiance of billions of believers,²³⁷ and thus have a wide reach. Allan suggests that undue influence may be present in any form of relationship between people, as there is an opportunity for a power imbalance.²³⁸ Research does suggest that where mental illness or diminished capacity is present, there is a susceptibility to undue influence.²³⁹ Research also suggests that there are other factors that make one susceptible to undue influence, such as the death of a loved one or isolation.²⁴⁰ Based on the evidence presented, it does not stand that vulnerability, or susceptibility, to undue influence is a justifiable ground for the exclusion of voting rights, as it is not applied uniformly to all cases where undue influence is present. Granted that the law cannot be applied mechanically and must be assessed on a case-by-case basis, in light of the evidence presented, it may be inferred that mentally disabled persons are being held to a higher standard in this regard, possibly even a double standard.

Where voter fraud is concerned, Bindel states that the same concerns apply to voters with physical or communicational disabilities or newly registered voters,²⁴¹ yet these groups are afforded full enjoyment of their voting rights in terms of section 19(3)(a) of the Constitution. Fiala-Butora observes that, in the light of the lack of any empirical evidence that persons with

²³⁶ UNICEF 'Why work with religious communities?' 1 June 2017 available at https://www.unicef.org/about/partnerships/index_60389.html#:~:text=Religious%20leaders%20shape%20social%20values,for%20social%20change%20and%20transformation_ (accessed 23 December 2020).

²³⁷ Health Community Capacity Collaborative 'The role of Religious leaders and faith communities' available at <https://healthcommcapacity.org/i-kits/role-religious-leaders-faith-communities/> (accessed 23 December 2020).

²³⁸ Allan B 'Trust me I'm your husband: Undue influence and *Royal Bank of Scotland v Etridge*' (2006) 11 *Otago L. Rev.* 248.

²³⁹ Plotkin D, Spar J, Horwitz H 'Assessing undue influence' (2016) 44 *The Journal of the American Academy of Psychiatry and the Law* 348.

²⁴⁰ 'The psychological ramifications of undue influence' 4 June 2018 available at <https://www.mayalaw.com/2018/06/04/psychological-ramifications-undue-influence/> (accessed 23 December 2020).

²⁴¹ See mote 217.

disabilities are either ‘generally more susceptible or relatively more prone to becoming victims of fraud’, concerns about this aspect must be attributed to prejudice and stigma.²⁴²

I agree with this conclusion. Claims that the exclusion of certain adult citizens under section 8(2)(c) and (d) is necessary and reasonable to ensure the democratic integrity of the voting process cannot be sustained. The protection currently provided under the Electoral Act in the case of assisted and special votes, as discussed above in Chapter two, must be regarded as sufficient to protect mentally ill and intellectually disabled citizens from voter exploitation. Where this is not the case, the solution is not to disenfranchise these already vulnerable citizens, but to amend the Electoral Act to protect, promote, and fulfil their right to vote by catering specifically for the circumstances and challenges faced by this category of voters. How this could be done is illustrated in more detail in chapter five where the best practice followed in other democracies is explored.

The true logistical challenge is whether it is possible to define a voter disqualification test in place of a blanket ban that narrowly serves its purpose. Such a disqualification will have to accurately determine the capacity to vote on an individualised basis, and at the same time be general enough for election officials to apply without having to decide on the voter capacity of individual voters at the point of registration or the point of voting. I submit that such a test can be formulated and will do so in the conclusion, after having considered how other democracies deal with the logistical challenge. Before doing so, I first turn my attention to the second version of the argument that sections 8(2)(c) and (d) are necessary to ensure the democratic integrity of our elections.

²⁴² Fiala-Butora et al ‘The democratic life of the Union: Toward equal voting participation for Europeans with disabilities’ (2014) 55 *Harvard International Law Journal* 86.

4.3.4 Excluding citizens with mental illnesses and disabilities to ensure the democratic character of an election

The second possible justification for the voter disqualification of mentally ill and intellectually disabled citizens derives from the principle or value of democracy itself.²⁴³ It might be said that allowing mentally ill and mentally disabled citizens to vote will make a mockery of democracy, much as the same could be said if we allowed children of all ages to vote. What lies behind this argument and what is understood by the principle of democracy in this context?

Justifying the voter disqualification of mentally ill and disabled citizens as a means to ensure the democratic character of the elections is immediately more plausible than the justifications based on the logistics of a free and fair election. Although the Constitution does not define what democracy means,²⁴⁴ we saw in chapter two that the principle of democracy and universal adult suffrage are two of the foundational pillars upon which the Constitution is based.²⁴⁵ Recall that section 1 of the Constitution reads as follows:

[T]he Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters

²⁴³ Conceptually the principle of democracy plays a role at two paces in the argument. First, in the interpretation of the right to vote or the wording of section 19(3) in order to promote the ‘values that underlie an open and democratic society’ as required by section 39(1)(a), and, second, as a possible justification for the limitation of the right to vote. The attempt by Froneman J to limit the express terms of section 19(3) with an appeal to the value of democracy, as the terms was understood by the drafters of the Constitution, was thoroughly discredited in *New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC). I therefore introduce the argument here as part of the limitation analysis under section 36. It should be noted that Froneman J (para 219) responded by conceding that if the literal interpretation of section 19(3) stands, then the limitation will still be reasonable under section 36. In the end these are two paths to the same conclusion.

²⁴⁴ *New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC) para 200.

²⁴⁵ There are also various sections in the Constitution which are enacted in favour of advancement or in line with either democracy or participatory democracy, but the theme of democracy is highlighted throughout the Constitution. See Sections 7;57(1)(b);57(2)(b);61(3); 70(1)(b);70(2)(b)-(c);116(1)(b);116(2)(b);160(8)(b). Chapter 9 of the Constitution also regulates the institutions supporting constitutional democracy.

roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.’

The principle of democracy and universal adult suffrage may be inseparable, as one of the ways to give effect to representative and participatory democracy is through universal suffrage. Democracy may be viewed as the most just way to govern a country and universal suffrage provides citizens with the opportunity to part take in the decision-making process of their country. Oppression and disenfranchisement of voting rights is a world-wide pandemic that has affected many nations.²⁴⁶ Democracy and universal adult suffrage are tools used to combat and prevent dictatorships and abuses of power by government which may lead to oppression or unjust disenfranchisement of constitutionally guaranteed rights. Universal suffrage is also a measure by which we may hold the government accountable,²⁴⁷ together with other measures such as judicial review. It is pivotal for a healthy democracy, for a government to be held accountable by its people and to ensure its actions are reasonable and constitutionally valid. In so doing we ensure that government maintains the best interests of its people when making

²⁴⁶ The Holocaust, which took place between 1933 and 1945, saw the oppression of Jewish people (including Gypsies and intellectually disabled persons) in Germany and later the rest of Europe, and eventually led to World War II, *The Diary of a Young Girl* by Anne Frank was also written during this time, for more information see <https://www.history.com/topics/world-war-ii/the-holocaust> (accessed 23 June 2020). In the United States of America, Black people (African Americans) were kidnapped from Africa and taken to America where they were sold as slaves. The slave-trade saw the oppression and exploitation of African Americans for hundreds of years. The Civil War then ended the slave-trade in America; however African Americans were still disenfranchised from voting and other civil liberties. The Civil Rights Movement, which saw the rise of freedom fighters such as Malcom X, Muhammad Ali, Rosa Parks and Martin Luther King Jr., eventually led to the emancipation of African Americans, for more information see <https://www.history.com/topics/black-history/slavery> (accessed 23 June 2020). In South Africa, Apartheid began in 1948 which saw the oppression of all non-white citizens, who were the majority. Apartheid lasted for a period of 51 years and is referred to by the locals as ‘the struggle’. During this time, many demonstrations were held to fight against the Apartheid government, such as the Youth Day protests, which took place on 16 June 1976, also known as the Soweto uprising, where many unarmed school children were massacred by the apartheid government. There were many notable struggle icons who sacrificed their lives for freedom, such as Steve Biko, Chris Hani, Richard Goldstone J, Jakes Gervel, Trevor Manuel, Albie Sachs J, Winnie Mandela and most notably Nelson Mandela. Apartheid ended in 1990 and the first democratic election was held on 27 April 1994, now known as Freedom Day. For more information see [https://www.history.com/topics/africa/apartheid#:~:text=Apartheid%20\(%E2%80%9Capartness%E2%80%9D%20in%20the,existing%20policies%20of%20racial%20segregation.](https://www.history.com/topics/africa/apartheid#:~:text=Apartheid%20(%E2%80%9Capartness%E2%80%9D%20in%20the,existing%20policies%20of%20racial%20segregation.) (accessed 23 June 2020). This is not a closed list, there are many human rights violations that have occurred and still continue to occur across the world, I have just highlighted some of the few to give an understanding of why democracy and universal suffrage are important tools for liberation.

²⁴⁷ Elahi A ‘The all affected principle: Does it create a right to vote’ 2017 *University of Toronto Political Science Undergraduate Research Colloquium* 2017 2.

decisions. 'Power to the people' or '*Amandla!... Awethu!*',²⁴⁸ are the most common phrases used when referring to democracy. The standard dictionary definition of democracy is a system of government in which the power is vested in the people and power is either exercised by the people or through chosen representatives and is characterized by formal equality and privileges which includes social and political equality.

The question remains however, who forms part of the demos or the people? And who should enjoy the right to universal suffrage? Can we infer who should have the right to vote in a democracy from the principle of democracy itself? In Chapter two we explored how the central role of elections in our constitutional democracy can be understood from either a representative or participatory perspective. The right to vote which is entrenched in section 19(3) of the Bill of Rights can also be understood in light of these two conceptions of democracy. Section 39(1)(a) mandates us to interpret the right as a means to promote the values of democracy and dignity.

To repeat: The meaning of democracy is contested. It therefore all depends on how the founding principle or value of democracy is understood. One conception of the principle of democracy links democracy to the power or rights of all those affected by or subjected to the jurisdiction of the state. The state may not treat anybody under its jurisdiction as a means to an end. A second conception of the principle of democracy links democracy to the right of a community to self-government. The first concept understands 'the people' as the population under state control. The second concept understands 'the people' as the nation and its members. The first conception is a radical version of representative democracy, the second a radical version of participatory democracy. As will be seen below, there is a close relationship between the civic republican conception of democracy introduced in chapter two and the participatory conception

²⁴⁸ This is a rally cry used in the Nguni languages, in South Africa. The leader will shout '*Amandla!*' (Power) and the crowd will respond '*Awethu!*' (To the people). The phrase has its origins from apartheid (the struggle).

of democracy – both seeks to ensure the quality of voter participation by carefully screening out certain categories of citizens, such as children and mentally impaired persons.

4.3.4.1 Representing all affected interests or persons

The All Affected Persons Principle (AAP) establishes that the exercise of power is only just if it is democratically authorised by all those who will be affected, and giving citizens a vote is the best way to justify the exercise and the use of power by a political entity.²⁴⁹ The principle actually provides a sound basis for the case *in favour of* voting rights for mentally disabled and ill persons, on the basis that they are directly affected by political decisions and therefore has the right to participate, through elected representatives, in those decisions. Any election that systematically excludes persons directly affected by the outcome of the elections would per definition or in principle be undemocratic. The principle seems to exclude any justification of section 8(2)(c) and (d) as a means of safeguarding the character of our post-apartheid democracy. However, the AAP principle creates problems for supporters of voting rights for the mentally ill and disabled, because it logically extends the right to vote to all persons who live and work within the boundaries of the state, including foreigners and children who are both explicitly excluded by section 19(3)(a) from voting. It can thus not easily be argued that section 19(3) seeks to give effect to this principle of democracy.

There are other problems with the radical scope of the AAP principle as well. Le Roux states that being affected is a subjective temporal state which results in a demos or people that shifts from issue to issue and undermines the formal equality between citizens by grading participation according to the degree of affectedness.²⁵⁰ The principle thus leaves the demos

²⁴⁹ Elahi A 'The all affected principle: Does it create a right to vote' 2017 *University of Toronto Political Science Undergraduate Research Colloquium 2017* page 1.

²⁵⁰ Le Roux W 'Residence, representative democracy and the voting rights of migrant workers in post-unification Germany (1990-2015)' (2015) 48 *Verfassung und Recht in Übersee* 295.

boundless.²⁵¹ Le Roux suggests combining or supplementing the AAP principle with other principles of democratic self-government in order to limit its scope.²⁵² For example, in order to find a workable definition of ‘the people’ as a self-governing constitutional subject, Robert Dahl suggested that the wide reach of the AAP principle needs to be ‘curbed’ by criteria such as competence, size (economy of scale), and political equality.²⁵³ Likewise, Brun-Otto Bryde states that not everybody who is affected must be included, because the criteria of affectedness (the quantity of participants) must be balanced with the criteria of self-government (the quality of the participation).²⁵⁴ Similarly, Song believes that the AAP principle must be balanced with issues of size, stability, and solidarity.²⁵⁵ Le Roux adds that the question of how to achieve the balance and degree of democratic self-government would be a political judgment.²⁵⁶ The AAP principle therefore seems to be far too demanding to serve as basis for the allocation of voting rights to person living under the jurisdiction of a state. Because it is not strictly speaking a justification for the exclusion of mentally ill and impaired citizens, the argument can be put aside for the purposes of this thesis.

This brings us to the second principle of democracy that section 19(3)(a) could be said to embody, and which can be invoked to justify the exclusion of foreigners, children, and by analogy, the mentally ill and intellectually disabled: democracy as the participatory self-government of a nation or people.

4.3.4.2 Participating in the self-government of the nation

²⁵¹ Le Roux W ‘Residence, representative democracy and the voting rights of migrant workers in post-unification Germany (1990-2015)’ (2015) 48 *Verfassung und Recht in Übersee* 295.

²⁵² Le Roux W ‘Residence, representative democracy and the voting rights of migrant workers in post-unification Germany (1990-2015)’ (2015) 48 *Verfassung und Recht in Übersee* 296.

²⁵³ Dahl R *After the revolution? Authority in a good society* (1970) 66.

²⁵⁴ Le Roux W ‘Residence, representative democracy and the voting rights of migrant workers in post-unification Germany (1990-2015)’ (2015) 48 *Verfassung und Recht in Übersee* 297.

²⁵⁵ Le Roux W ‘Residence, representative democracy and the voting rights of migrant workers in post-unification Germany (1990-2015)’ (2015) 48 *Verfassung und Recht in Übersee* 298.

²⁵⁶ Le Roux W ‘Residence, representative democracy and the voting rights of migrant workers in post-unification Germany (1990-2015)’ (2015) 48 *Verfassung und Recht in Übersee* 297.

The second conception of democracy that I wish to explore here is the idea of democracy as a form of collective self-government or collective self-determination of a specific community. My right to participate in political processes, such as an election, does not stem from the fact that I am subject to the jurisdiction of the state, but from the fact that I am an active participant in the political life of the community or nation. The community must protect its democratic character by excluding from elections outsiders (foreigners) and citizens who lack the legal capacity to make informed political decisions in the public interest (children and by extension also persons with mental illnesses and mental impairments). The disqualification of foreigners and children can both in principle be justified under our constitution on this ground (an argument that might be extended to include serious criminals while they are serving their sentences).

As said above, this view of democracy as communal self-government is closely related to the deliberative conception of democracy identified in chapter two above. Recall that deliberative democracy is a political theory which states that all political decisions should result from constructive debate and reasonable discussions among citizens.²⁵⁷ Deliberative democracy is not concerned with the number of participants in this debate for its own sake, a numbers game that translates into majoritarianism, but with the *deliberative quality* of the participation. On the output side, the Constitution contains many design elements to ensure the deliberative quality of democratic decision-making. In chapter two I mentioned proportional representation, for example, and minority participation in parliamentary portfolio committees. On the input side, it could be argued that only those who are capable of grasping or understanding the common good though a deliberative exchange of political arguments should be allowed to

²⁵⁷ Egan J 'Deliberative democracy' Encyclopaedia Britannica available at <https://www.britannica.com/topic/deliberative-democracy> (accessed 6 July 2020). Young I 'Communication and the other: Beyond deliberative democracy' *Democracy and Difference* (1996) 121 135. Benhabib S 'Toward a deliberative model of democratic legitimacy' *Democracy and Difference* (1996) 67 94. Michelman F 'Conceptions of democracy in American constitutional argument: Voting rights' (1989) 41 *Florida Law Review* 443 490.

participate in elections and politics. It is valuable to quote again extensively from the case of *Doctors for Life International v Speaker of the National Assembly* where Sachs J wrote the following:²⁵⁸

‘[A] vibrant democracy has a qualitative and not just a quantitative dimension. Dialogue and deliberation go hand in hand. This is part of the tolerance and civility that characterise the respect for diversity the Constitution demands. Indeed, public involvement may be of special importance for those whose strongly-held views have to cede to majority opinion in the legislature. Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy. Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections. Public involvement accordingly strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits. A long-standing, deeply entrenched and constantly evolving principle of our society has accordingly been subsumed into our constitutional order. It envisages an active, participatory democracy. All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and

²⁵⁸*Doctors for Life International v The Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC). para 234-235.

practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws. An appropriate degree of principled yet flexible give-and-take will therefore enrich the quality of our democracy, help sustain its robust deliberative character and, by promoting a sense of inclusion in the national polity, promote the achievement of the goals of transformation.’

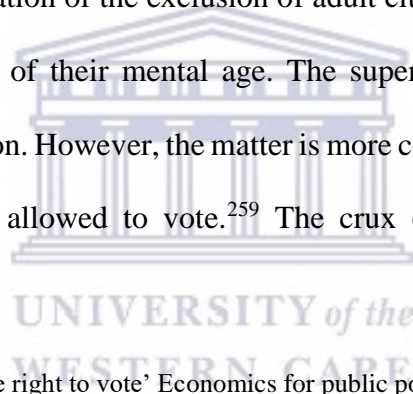
Sachs J emphasises that it is about the quality of the discussion between citizens and not merely how many citizens take part in the discussions. The content of the dialogue is important and public involvement is of utmost importance when making decisions. Having the public’s voices heard is of special importance given South Africa’s history of oppression, this is also why we need to ensure that minority groups also take part in the debates. Sachs J states that both having a chance to speak and to be listened to are inherently tied to our dignity. Deliberative democracy is especially important for persons who are uneducated and do not have any political connections. Engaging the public is also a tool that can be used to strengthen formal democracy, as it allows the public’s voice to be heard and that their opinions will be listened to and could possibly influence the decisions that will be taken. Sachs J concludes in saying that this will ultimately promote the country’s goals and transformations.

However, the deliberative democracy theory and its tradition of capacity testing has a long and dark history. Over the years the criteria for participation has been manipulated to exclude women, black people, slaves, the illiterate and the poor as not being fit for politics. Against this long history, any claim that all mentally ill persons who are undergoing involuntary treatment in a health care facility are automatically unfit for politics and should be prevented from voting in order to secure the character of our democracy must be regarded with great scepticism. The same applies to similar claims made about everybody who lives under the curatorship of administration of another person.

4.3.4.3 Does the voter disqualification of children justify the voter disqualification of mentally ill and disabled citizens by parity of reasoning?

Section 19(3)(a) expressly excludes children from the right to vote, seemingly in violation of the AAP principle discussed above and in accordance with the capacity testing implicit in the idea of democracy as communal self-government in the public interest. Children are irrebutably or conclusively presumed to lack the capacity for political judgment in the common good, which arguably requires the ability to imagine yourself in the position of others and act against your own self-interest in the common interest.

The next facet to be dealt with is how the constitutional exclusion of children on capacity grounds impacts on the justification of the exclusion of adult citizens, not on the basis of their physical age, but on the basis of their mental age. The superficial argument points in the direction of voter disqualification. However, the matter is more complicated. Research suggests that older children should be allowed to vote.²⁵⁹ The crux of the arguments against the



²⁵⁹ Corak M 'How to give children the right to vote' Economics for public policy April 2012 available at <https://mileskorak.com/2012/04/20/how-to-give-children-the-vote/> (accessed 01 July 2020). Wagner M, Johann D, Kritzinger S 'Voting at 16: Turnout and quality of vote choice' (2012) 31 *Electoral Studies* 372 383. National Youth Rights Association 'Top ten reasons to lower the voting age available at <https://www.youthrights.org/issues/voting-age/top-ten-reasons-to-lower-the-voting-age/> (accessed 01 July 2020). Wall J 'Why children and youth should have a right to vote: An argument for proxy claim suffrage' (2014) 24 *Children, Youth and Environments* 108 123. Moorhead J 'Should we give children the vote? We asked nine kids what they think' The Guardian 23 December 2018 available at <https://www.theguardian.com/global/2018/dec/23/should-we-give-children-the-vote-voting-at-age-6-politics-interviews> (accessed 1 July 2020). Gans J 'Why it's time to give children the right to vote' Forbes 20 April 2012 available at <https://www.forbes.com/sites/joshuagans/2012/04/20/its-time-to-give-children-the-vote/#522066a4a0d3> (accessed 1 July 2020). Pevsner L 'Give children the right to vote. Even 13-year-olds.' The Washington Post 27 October 2017 available at <https://www.washingtonpost.com/posteverything/wp/2016/10/27/let-children-vote-even-13-year-olds/> (accessed 1 July 2020). Priest M 'Why children should be allowed to vote' (2016) 30 *Public Affairs Quarterly* 215 238. Brando N 'Why should children have the right to vote' Justice Everywhere 15 April 2019 available at <http://justice-everywhere.org/democracy/why-should-children-have-the-right-to-vote/> (accessed 1 July 2020). The Canadian Bar Association available at <https://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/theChild/Competence,-Capacity-and-Consent> (accessed 1 July 2020). Rutherford J 'One child, one vote: Proxies for parents' (1998) *Minnesota Law Review* 1464 1525. European Agency for Fundamental Rights 'Children's right to vote' available at <https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/right-to-vote> (accessed 1 July 2020). NYCI 'Vote at 16' available at <https://www.youth.ie/get-involved/campaigns/vote-at-16/> (accessed 1 July 2020). '9 reasons we need young voters more than ever' The Best Colleges available at <https://www.thebestcolleges.org/9-reasons-we-need-young-voters-more-than-ever/> (accessed 1 July 2020). Oosterhoff B 'Should 16-and 17-year-olds be able to vote?' Psychology Today 24

enfranchisement of children's voting rights are that they lack capacity and are easily manipulated. Priest argues that the voting age should be pegged at the age that young people begin to possess voting capabilities.²⁶⁰ This goes to say that one should be able to vote once being capable of becoming politically informed. Priest goes on to argue that if children are capable of advanced mathematics and understanding great works of literature, and they are also required to analyse public policy in school, it proves that children are capable of becoming politically informed.²⁶¹ Wall states that competency is not a criteria in any democracy for the right to vote and that adults often acquire the right to vote without having the necessary competency nor capacity for reflection, reciprocity and courtesy.²⁶² Brando notes that there is a lack of equal standards when adjudicating children's and adult's rights.²⁶³ He notes that children are held to a higher standard in this regard, which is not fair and completely flies in the face of an equal and just society.²⁶⁴ If adults had to prove their capacity to vote many of them would fail, Brando adds, as many adults are politically and socially miss informed.²⁶⁵ Furthermore, with the technologically advanced era that we are living in, the younger population have more access to political information than ever and are more capable of becoming politically informed in today's modern age.²⁶⁶

October 2018 available at <https://www.psychologytoday.com/za/blog/civically-engaged/201810/should-16-and-17-year-olds-be-able-vote> (accessed 1 July 2020).

²⁶⁰ Priest M 'Why children should be allowed to vote' (2016) 30 *Public Affairs Quarterly* 222.

²⁶¹ Priest M 'Why children should be allowed to vote' (2016) 30 *Public Affairs Quarterly* 222.

²⁶² Wall J 'Why children and youth should have a right to vote: An argument for proxy claim suffrage' (2014) 24 *Children, Youth and Environments* 110.

²⁶³ Brando N 'Why should children have the right to vote' Justice Everywhere 15 April 2019 available at <http://justice-everywhere.org/democracy/why-should-children-have-the-right-to-vote/> (accessed 1 July 2020).

²⁶⁴ Brando N 'Why should children have the right to vote' Justice Everywhere 15 April 2019 available at <http://justice-everywhere.org/democracy/why-should-children-have-the-right-to-vote/> (accessed 1 July 2020).

²⁶⁵ Brando N 'Why should children have the right to vote' Justice Everywhere 15 April 2019 available at <http://justice-everywhere.org/democracy/why-should-children-have-the-right-to-vote/> (accessed 1 July 2020).

²⁶⁶ '9 reasons we need young voters more than ever' The Best Colleges available at <https://www.thebestcolleges.org/9-reasons-we-need-young-voters-more-than-ever/> (accessed 1 July 2020).

Black people and women were previously denied the right to vote on the same biased perception about their capacity for politics.²⁶⁷ Pevsner adds that black people were deemed to lack the relevant capacity to vote which led to them being subject to a literacy test.²⁶⁸ And it is because of their discriminatory nature that literacy tests aren't used anymore.²⁶⁹ Gans argues that informed judgment decreases with age,²⁷⁰ this would then mean that the elderly should also be excluded from voting as they would also have decreased mental capacities or no capacity at all, and if the elderly may vote with decreased mental capacities then so should persons with mental disabilities.

In response to the claim that children are easily manipulated, Wall states that no one acts independent of relationships, families of origin, cultures, socio-economic background, historical context or mass media environment.²⁷¹ He adds that children are likely to vote along similar lines as their parents, in the same way that spouses and members of the same cultural groups, social or ethnic groups vote along the same lines.²⁷² Priest goes further and states that the elderly would be more susceptible to manipulation by politicians than children,²⁷³ and yet the elderly still maintain their voting rights. Priest adds that spouses also influence one another

²⁶⁷ Gans J 'Why it's time to give children the right to vote' Forbes 20 April 2012 available at <https://www.forbes.com/sites/joshuagans/2012/04/20/its-time-to-give-children-the-vote/#522066a4a0d3> (accessed 1 July 2020). Pevsner L 'Give children the right to vote. Even 13-year-olds.' The Washington Post 27 October 2017 available at <https://www.washingtonpost.com/posteverything/wp/2016/10/27/let-children-vote-even-13-year-olds/> (accessed 1 July 2020).

²⁶⁸ Pevsner L 'Give children the right to vote. Even 13-year-olds.' The Washington Post 27 October 2017 available at <https://www.washingtonpost.com/posteverything/wp/2016/10/27/let-children-vote-even-13-year-olds/> (accessed 1 July 2020).

²⁶⁹ National Youth Rights Association 'Top ten reasons to lower the voting age available at <https://www.youthrights.org/issues/voting-age/top-ten-reasons-to-lower-the-voting-age/> (accessed 01 July 2020).

²⁷⁰ Gans J 'Why it's time to give children the right to vote' Forbes 20 April 2012 available at <https://www.forbes.com/sites/joshuagans/2012/04/20/its-time-to-give-children-the-vote/#522066a4a0d3> (accessed 1 July 2020). Pevsner L 'Give children the right to vote. Even 13-year-olds.' The Washington Post 27 October 2017 available at <https://www.washingtonpost.com/posteverything/wp/2016/10/27/let-children-vote-even-13-year-olds/> (accessed 1 July 2020).

²⁷¹ Wall J 'Why children and youth should have a right to vote: An argument for proxy claim suffrage'' (2014) 24 *Children, Youth and Environments* 110.

²⁷² Wall J 'Why children and youth should have a right to vote: An argument for proxy claim suffrage'' (2014) 24 *Children, Youth and Environments* 110.

²⁷³ Priest M 'Why children should be allowed to vote' (2016) 30 *Public Affairs Quarterly* 228.

when voting and the same goes for religious leaders influencing their adherents or professors influencing their students.²⁷⁴ Brando states that adults are also influenced by social media, famous singers and movie stars' political choices,²⁷⁵ which is no different from children. There is also no reason to believe that children will vote against their own best interest by voting, for example, for the party or person who will close school early or give them sweets. As Wall argues, even adults vote against their own self-interest by making decisions which favour the wealthy and disenfranchise the poor.²⁷⁶ Oosterhoff notes that the voting age in Austria, Brazil, Malta and Scotland have been lowered to 16-years-old.²⁷⁷ This could be a call for governments to be pro-active and allow children to vote.

From this perspective, it is therefore no longer necessary to differentiate sharply between children and mentally disabled persons, as both groups should be *enfranchised* under the same principle of democracy. To continue to exclude all children and all mentally ill or disabled persons from voting would therefore undermine the democratic process, and not enhance or protect it.

However, even if we were to accept the current law and the fact that section 19(3)(a) expressly introduces a form of capacity testing, based on the nationality and age of the person involved, this would still *not* mean that the voter disqualifications embodied in section 8(2)(c) and (d) of the Electoral Act would be justified by the following analogy: if mentally immature children cannot vote, then the mentally affected adults listed in the Electoral Act should also not be allowed to vote. At best, the analysis of children's voting rights has clarified exactly what is at

²⁷⁴ Priest M 'Why children should be allowed to vote' (2016) 30 *Public Affairs Quarterly* 222.

²⁷⁵ Brando N 'Why should children have the right to vote' Justice Everywhere 15 April 2019 available at <http://justice-everywhere.org/democracy/why-should-children-have-the-right-to-vote/> (accessed 1 July 2020).

²⁷⁶ Wall J 'Why children and youth should have a right to vote: An argument for proxy claim suffrage' (2014) 24 *Children, Youth and Environments* 114.

²⁷⁷ Oosterhoff B 'Should 16-and 17-year-olds be able to vote?' Psychology Today 24 October 2018 available at <https://www.psychologytoday.com/za/blog/civically-engaged/201810/should-16-and-17-year-olds-be-able-vote> (accessed 1 July 2020).

stake in the case of adult citizens who are disqualified on the basis of mental capacity. The constitutional drafters adopted a blanket minimum age of 18 years as voter capacity test. Even if we assume that other voter capacity tests, such as those contained in section 8(2)(c) and (d) of the Electoral Act, could in principle also be justifiable, the key question becomes how those tests are formulated and whether they only exclude adult citizens who indeed lack the capacity to vote.

The real problem with the capacity-based argument for voter exclusions is how to formulate a blanket test to determine who has the mental capacity to vote. In the case of children, a universally applicable minimum voting age, whether 18 or 16, is used as test to screen for voter capacity. The question is whether a similar blanket test can be formulated to screen adult citizens for voter capacity, given the long and controversial history of such voter capacity tests based on race, gender, wealth and literacy levels, on the one hand, and the wide variety of factors affecting mental capacity, on the other. As we saw in chapters two and three, the Electoral Act relies on two tests: the key is whether a court of law has ordered the citizen to be detained in a mental care facility, or placed the person under administration or curatorship.

Even if we accept the need for some form of adult voter screening based on mental capacity, these tests date back to the colonial era and have survived in our law unchallenged. This explains why these tests are far too crude as tests for voter capacity and for this reason must fail the limitation analysis. Chapter 3 revealed that there is no necessary connection between the court orders listed in the Electoral Act and the capacity of the citizen involved to understand the nature and consequences of voting on election day. We saw in chapter three that the question of voting capacity never enters the judicial enquiry as a factor to be considered before somebody is admitted for involuntary treatment in a mental health care facility, or before a curator is appointed for somebody. What makes the position worse is that the Electoral Act goes against the common law view that even persons under curatorship retain their legal

capacity to take legal decisions, such as signing a contract, when and where that capacity still exists.

The arbitrariness of the current voter disqualifications goes against both the common law and the new constitutional vision of a democratic South Africa. This arbitrariness is clearly illustrated in the case of a person who has been committed to a mental health care facility to be treated for a psychological disorder, such as clinical depression, which has no impact on his or her voting capacity. There is simply no justification for arbitrarily denying this patient the right to vote, by casting a special vote in the mental health care facility, based on an overbroad colonial conception of mental health.

4.4 Conclusion

The discussion above revealed that the constitution protects the right of every adult citizen to vote; that the disqualifications of otherwise eligible voters by sections 8(2)(c) and (d) of the Electoral Act infringe on this protection and is invalid, except to the extent that the disqualifications can be justified under section 36 of the Constitution. The purpose of the limitation, and the relationship between the limitation and its purpose, play a crucial role in the analysis. Previous attempts to justify voter disqualifications suffered from a poverty of argument. Against this background, I argued that the limitation cannot be justified as a means to ensure the integrity of the voting process. The disqualifications can only be justified as a means to protect the principle of democracy itself. However, this is only so if we understand the essence of democracy to lie in communal self-government and thus also accept the historically controversial principle of voter capacity testing. The all-affected persons principle, for example, points in the opposite direction towards the mandatory inclusion of everybody under the jurisdiction of the state. Section 19(3)(a) links voter capacity to minimum age and adopts a universal voter disqualification of 18 years. I pointed out that this voter

disqualification is increasingly contested, but even if we accept it as it stands, the analysis highlighted the heart of the research question: is it constitutionally justified to adopt a voting capacity test among adult citizens and if so does the tests currently used by the Chief Election Officer under the Electoral Act fit for purpose?

I suspend a final answer to this question to the end of the thesis, after first exploring how other democracies have sought to deal with the question (chapter five) and what international human rights law prescribes as far as the issue is concerned (chapter six).



Chapter 5

MENTAL CAPACITY AND VOTING RIGHTS

FROM A FOREIGN LAW PERSPECTIVE

5.1 Introduction

Every democracy around the world regularly holds elections. Every time an election takes place the question must be resolved whether an otherwise eligible voter must be excluded on the basis of his or her mental capacity and if so, what test must be used to identify and disqualify such voters. We saw in the preceding chapters that South Africa have resolved these questions by relying on a blanket rule of exclusion, as opposed to an individualised voter capacity assessment, based on a prior court order that placed the voter under curatorship, administration, or in detention in a health care facility. In the preceding chapter I tentatively concluded that this blanket exclusion might constitute an unjustifiable limitation on the right of every adult citizen to vote in an election. How does the current South African answer to the question compare with the solutions adopted in other open and democratic societies? The answer to this question is relevant both under section 36 of the Bill of Rights and section 39(1)(c) of the Bill of Rights. The latter section contains a permissive provision which allows a court to ‘consider foreign law’ as an interpretive guide ‘when interpreting the Bill of Rights’. In line with the permitted comparative methodology of constitutional interpretation, in this Chapter I explore how the issue of voting rights of mentally affected persons are regulated in two established democracies and two developing democracies – the United Kingdom and Germany, on the one hand, India and Kenya, on the other. The aim of

the chapter is to determine what the current best practice on the issue is and how far South African law is aligned with that practice.²⁷⁸

5.2 United Kingdom (UK)

The United Kingdom has a constituency based electoral system in which one member of Parliament is elected by the residents of a constituency on a first past the post basis.

Eligibility to vote in parliamentary elections is regulated by the Representation of the People Act of 1983. Section 1 of the Act provides as follows:

‘[A] person is entitled to vote as an elector at a parliamentary election in any constituency if on the date of the poll he (a) is registered in the register of parliamentary electors for that constituency; (b) *is not subject to any legal incapacity to vote (age apart)*; (c) is either a Commonwealth citizen or a citizen of the Republic of Ireland; and (d) is of voting age (that is, 18 years or over).’

While this section recognises that some citizens may lack the legal capacity to vote, beyond the age of a voter, mental capacity is not regarded under the Act as a ground for the legal incapacity to vote. By contrast, certain forms of criminal behaviour constitute a legal incapacity to vote.²⁷⁹ The only mentally ill or intellectually disabled citizens who are disqualified from voting are offenders who are subject to criminal proceedings. Section 3A(1) of the Act provides as follows:

‘[D]isfranchisement *of offenders* detained in mental hospitals.

²⁷⁸ In *Bujdosó et al. v. Hungary*, CRPD Committee, Communication No. 004/2011, UN Doc. CRPD/C/10/D/4/2011 (2013) para 5.2 it was found that according to a study from 2001, 56 out of the 60 surveyed countries restricted the right to vote in some way on the basis of disability.

²⁷⁹ S 3(1) of the Representation of the People Act 1983: ‘Disfranchisement of offenders in prison etc. A convicted person during the time that he is detained in a penal institution in pursuance of his sentence or unlawfully at large when he would otherwise be so detained is legally incapable of voting at any parliamentary or local government election’.

A person to whom this section applies is, during the time that he is (a) detained at any place in pursuance of the order or direction by virtue of which this section applies to him, or (b) unlawfully at large when he would otherwise be so detained, legally incapable of voting at any parliamentary or local government election.’

This means that every otherwise eligible citizen can register and vote in a parliamentary election, regardless of that person’s mental capacity. A lack of mental capacity is not a legal incapacity to vote: persons who meet the other registration qualifications are eligible for registration regardless of their mental capacity. The philosophy adopted in the UK seems to be that the issue should be left to regulate itself. If a citizen is able to register as a voter and is able on election day to cast a vote, then that vote should be regarded as a valid vote, regardless of the mental state or status of the voter involved. In this manner the issue is left to take care of itself. This pragmatic policy was boldly introduced in 2006 when any residual, non-statutory voter disqualifications based on mental capacity were abolished by the Electoral Administration Act of 2006. Section 73(1) of the Electoral Administration Act provided without qualification that ‘any rule of the common law which provides that a person is subject to a legal incapacity to vote by reason of his mental state is abolished’.

Electoral and health care legislation in the UK is therefore aimed at facilitating the right of mentally ill and intellectually disabled citizens to vote, rather than to suppress and restrict that ability. In this regard, particular attention is given to people with mental illnesses and intellectual disabilities in institutional care. For example, special arrangement is made for the registration of mental health care patients in the constituency where they are treated or detained. Section 7 of the Representation of the People Act provides as follows:

‘[R]esidence: patients in mental hospitals who are not detained offenders or on remand.

(1) This section applies to a person who (a) is a patient in a mental hospital (whether or not he is liable to be detained there), but (b) is not a person to whom section 3A above [...] applies.

(2) A person to whom this section applies shall be regarded for the purposes of [voter registration] as resident at the mental hospital in question if the length of the period which he is likely to spend at the hospital is sufficient for him to be regarded as being resident there for the purposes of electoral registration.

(3) A person registered in a register of electors in pursuance of an application for registration made by virtue of subsection (2) above is entitled to remain so registered until (a) the end of the period of 12 months beginning with the date when the entry in the register first takes effect, or (b) another entry made in respect of him in any register of electors takes effect [...].’

WESTERN CAPE

The Electoral Administration Act also makes provision for persons who are detained or treated in a mental hospital to vote in person, by post, or by proxy. Section 35 of the Electoral Administration Act was amended by Schedule 4 of the Representation of the People Act of 2000 to provide expressly that voters to whom section 7 of the Representation of the People Act of 1983 apply, that is, mental patients who are not detained offenders (see above), may vote (a) in person (where he or she is granted permission to be absent from the hospital and voting in person does not breach any condition attached to that permission), or (b) by post or by proxy (where he or she is entitled as an elector to vote by post or, as the case may be, by proxy at the election).

The right to vote is further regulated by the Mental Capacity Act of 1985 (the Mental Capacity Act). The Mental Capacity Act 2005 provides the framework for making decisions on behalf of people who lack mental capacity. Section 2 of the Mental Capacity Act defines a person who lacks capacity as follows:

‘[F]or the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. It does not matter whether the impairment or disturbance is permanent or temporary.’

Section 16 of the Mental Capacity Act provides for decisions to be made on behalf of a person who lacks the capacity to do so:

‘[P]owers to make decisions and appoint deputies: general

(1) This section applies if a person (“P”) lacks capacity in relation to a matter or matters concerning (a) P’s personal welfare, or (b) P’s property and affairs.

(2) The court may (a) by making an order, make the decision or decisions on P’s behalf in relation to the matter or matters, or (b) appoint a person (a “deputy”) to make decisions on P’s behalf in relation to the matter or matters.’

However, there are certain decisions which are listed in sections 27-29 and 62 of the Mental Capacity Act which can never be made by a deputy or the court on behalf of someone who lacks capacity, because these decisions are either too personal to the individual, or governed by other legislation. Voting rights fall within this category with section 29 stating that:

‘[V]oting rights

(1) Nothing in this Act permits a decision on voting at an election for any public office, or at a referendum, to be made on behalf of a person.’

This means that it is up to the individual to decide whether or not they want to vote. The Act allows family members, carers, and appointed Deputies to support somebody in their care to take part in any vote. However, the person must choose who to vote for themselves. This decision cannot be made on their behalf, even by an appointed Deputy.

In spite of these explicit statutory interventions to safeguard the right of mentally ill and disabled voters to vote, in practice, mental health patients remain one of the most disenfranchised groups in the UK.²⁸⁰ A study of the 2010 General Election found that psychiatric in-patients who were eligible to vote were half as likely to register as the general population, and if registered, were half as likely to vote.²⁸¹

5.3 Germany

The right to vote in federal (national) elections in Germany is regulated by the Federal Elections Act,²⁸² and its Regulations.²⁸³ In order to exercise the right to vote, a person must be entered in a voters’ register or have a polling card.²⁸⁴ Persons who are entered in a voters’ register may

²⁸⁰ NHS Foundation Trust ‘Voting rights for mental health patients’ (30 March 2015) available at <https://www.candi.nhs.uk/news/voting-rights-mental-health-patients> (accessed 12 December 2021).

²⁸¹ McIntyre J (et al) ‘Uptake and knowledge of voting rights by adult in-patients during the 2010 UK general election’ (2012) 36 *The Psychiatrist* 126-130.

²⁸² Federal Elections Act, 1993. Version as promulgated on 23 July 1993 (Federal Law Gazette I pp. 1288, 1594), last amended by Article 1 of the Act of 25 June 2020 (Federal Law Gazette I p. 1409).

²⁸³ Federal Electoral Regulations, 2002. Version as promulgated on 19 April 2002 (Federal Law Gazette I p. 1376), last amended by Article 10 of the Ordinance of 19 June 2020 (Federal Law Gazette I p. 1328).

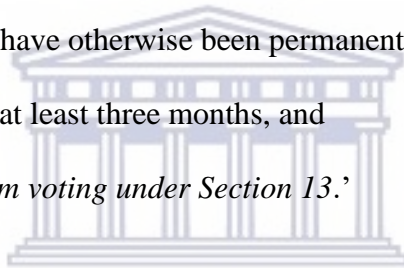
²⁸⁴ Section 14 paragraph (1) of the Federal Elections Act, 1993. Version as promulgated on 23 July 1993 (Federal Law Gazette I pp. 1288, 1594), last amended by Article 1 of the Act of 25 June 2020 (Federal Law Gazette I p. 1409).

only vote in the polling district in which he or she is registered.²⁸⁵ Persons possessing a polling card may either vote in the polling district of the constituency in which the polling card was issued,²⁸⁶ or by postal ballot.²⁸⁷ Persons eligible to vote may only vote once and must do so personally. Proxy voting is forbidden.²⁸⁸ The right to vote is determined by section 12 of the Federal Election Act which reads as follows:

‘[1]2. Eligibility to Vote

(1) All Germans as defined in Article 116 paragraph (1) of the Basic Law shall be eligible to vote, provided that, on the day of the election, they

1. have reached the age of 18 years,
2. have had a domicile or have otherwise been permanently resident in the Federal Republic of Germany for at least three months, and
3. *are not disqualified from voting under Section 13.*



Before it was recently amended in June 2020, the voter disqualifications permitted under section 12.1.3 of the Act, read with section 13 provided for the automatic exclusion of the following categories of otherwise eligible voters:

‘[1]3. Disqualification from voting

A person shall be disqualified from voting if

²⁸⁵ Section 14 paragraph (2) of the Federal Elections Act, 1993. Version as promulgated on 23 July 1993 (Federal Law Gazette I pp. 1288, 1594), last amended by Article 1 of the Act of 25 June 2020 (Federal Law Gazette I p. 1409).

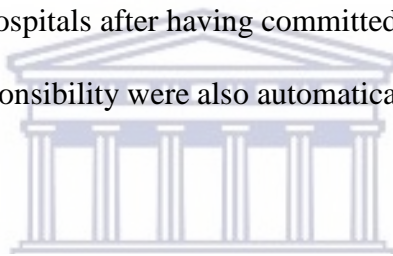
²⁸⁶ Section 14 paragraph (3)(a) of the Federal Elections Act, 1993. Version as promulgated on 23 July 1993 (Federal Law Gazette I pp. 1288, 1594), last amended by Article 1 of the Act of 25 June 2020 (Federal Law Gazette I p. 1409).

²⁸⁷ Section 14 paragraph (3)(b) of the Federal Elections Act, 1993. Version as promulgated on 23 July 1993 (Federal Law Gazette I pp. 1288, 1594), last amended by Article 1 of the Act of 25 June 2020 (Federal Law Gazette I p. 1409).

²⁸⁸ Section 14 paragraph (4) of the Federal Elections Act, Version as promulgated on 23 July 1993 (Federal Law Gazette I pp. 1288, 1594), last amended by Article 1 of the Act of 25 June 2020 (Federal Law Gazette I p.1409).

1. [...]
2. a custodian has been appointed, not only through a restraining order, to attend to all his or her affairs; this also applies when the custodian's sphere of duties does not include the affairs set forth in Article 1896, Paragraph (4) and Article 1905 of the Civil Code (Bürgerliches Gesetzbuch),
3. he or she is accommodated in a psychiatric hospital under an order pursuant to Article 63 in conjunction with Article 20 of the Penal Code.'

In practical terms, this meant that before June 2020, section 13(2) automatically disqualified persons under permanent full guardianship from voting.²⁸⁹ Under section 13(3), persons who were detained in a psychiatric hospitals after having committed an offence for which they were exempt from criminal responsibility were also automatically disqualified from voting in an election.²⁹⁰



This legal position, which closely mirrored that currently in force in South Africa, was abolished in June 2020 due to its discriminatory nature. The history of the legal reform is instructive for legal reform in South Africa.

The coalition agreement between the CDU, CSU and SPD of 7 February 2018 included a commitment to amend section 13 and to repeal the voter disqualifications listed there.

However, before the Act could be amended, the constitutionality of these exclusions was challenged in the German Federal Constitutional Court.²⁹¹

²⁸⁹ This is the same position as currently applies in South Africa under section 8(2)(c) of the Electoral Act.

²⁹⁰ This partly represents the same position as currently applies in South Africa under section 8(2)(d) of the Electoral Act.

²⁹¹ BVerfG, Order of the Second Senate of 29 January 2019 - 2 BvC 62/14 -, paras. 1-142 (English translation). Available at http://www.bverfg.de/e/cs20190129_2bvc006214en.html (last accessed on 4 December 2020). Hereafter referred to as *K v Bundestag*.

In *K v Bundestag* the applicant argued that his exclusion from voting in the 2013 federal elections, on the ground that, due to his mental disability a guardian had been appointed to assist him to manage some of his personal affairs, violated his right to vote under article 38(1) of the German Federal Constitution. The German Federal Constitutional Court upheld the challenge and declared both sections 13(2) and 13(3) unconstitutional. In doing so the Court explained the German constitutional philosophy and concept of democracy behind the exclusion of certain categories of voters. The appeal to the character of democracy itself, rather than to any logistical difficulties, stands in sharp contrast with the South African case law where the latter type of argument has dominated the debates. The German Federal Constitutional Court understands the concept of democracy as the collective self-government of a people. This concept resonates with the deliberative, dialogical or communicative concept of democracy discussed earlier in Chapters two and four above. Recall that in this conception of democracy, politics is a self-transformative public dialogue about social justice within a community, and not the strategic pursuit of private interests shorn of any non-instrumental communal concerns. From this perspective, elections play a key role in the communicative or deliberative integration of the political community and is not merely a mechanism for identifying a numerical or statistical majority. The German Constitutional Court accepted that voter restriction can be adopted in order to protect the deliberative character of democracy.²⁹²

‘[R]easons that can justify restrictions of the principle of universal suffrage, and thus differentiations between voters, include in particular the objectives, pursued by way of democratic elections, of safeguarding the function of elections as integrative processes for the formation of the political will of the people (*Integrationsfunktion der Wahl*) and

²⁹² *K v Bundestag* para 44.

of guaranteeing the proper functioning of the parliament to be elected. The first objective encompasses the safeguarding of the function of elections *as a communication process*. Provided that democracy should not be limited to a mere formal link between those governing and those governed, it depends on free and open communication. [...] Otherwise, elections cannot develop the integrative effects assigned to them. *Exclusions from the right to vote may thus be justified under constitutional law if a group of persons must be considered not sufficiently capable of participating in the communication process between the people and state organs.*'

According to the jurisprudence of the German Federal Constitutional Court, these groups of persons include children, and expatriate citizens who have not lived in Germany as teenagers or adults for at least one uninterrupted period of three months.²⁹³ The question before the Court was whether this list should be expanded to include (i) all persons under permanent guardianship, or in South African terms, persons for whom a curator *bonis* or curator *ad personam* have been appointed; and (ii) all persons who are confined in a psychiatric hospital after having committed an offence for which they are exempt from criminal responsibility due to their mental illness or disability, or in South African terms state patients.

In the course of its judgment the Court discussed the implications of article 29 of the Convention on the Rights of People with Disabilities (CRPD). The CRPD is discussed in more detail in Chapter six below, but it is instructive at this point to note what the German Court had to say about the issue:²⁹⁴

²⁹³ For a more detailed discussion of the German jurisprudence see Le Roux, W 'Residence, representative democracy and the voting rights of migrant workers in post-apartheid South Africa and post-unification Germany (1990-2015)' (2015) 48 *Verfassung und Recht in Übersee / Law and politics in Africa, Asia, Latin America* 263.

²⁹⁴ *K v Bundestag* para 72.

‘[E]ven if an exclusion from voting rights affects only or primarily persons with disabilities, an absolute prohibition of exclusions from voting rights cannot be inferred from Art 29 letter a (iii) CRPD. According to the provision, States Parties to the CRPD shall guarantee the “free expression of the will” (French: libre expression de la volonté) of persons with disabilities as electors and, where necessary, allow assistance in voting by another person to this end. Accordingly, the provision is aimed at the non-discriminatory development of the free electoral will by persons with disabilities. However, *this requires the ability to form and express an independent electoral will*. Thus, the persons concerned must have the cognitive skills necessary to make a free and self-determined electoral decision [...]. *If, even when using all possible means of assistance, persons lack the ability to participate in the democratic communication process and to make a self-determined electoral decision on this basis*, a corresponding exclusion from voting rights does not violate Art 29 CRPD.’



Who must determine, and how must it be established, whether an individual or group of similarly placed individuals ‘lack the ability to make a self-determined electoral decision’? Do the tests contained in sections 13(2) and 13(3) succeed in identifying two such groups of persons? According to the Court, both tests fail to achieve this objective because there is no necessary connection between the capacity to vote and being under custodianship or being in detention due to an earlier criminal act committed without criminal capacity due to a mental illness or defect.

The old section 13(2) of the Federal Election Act, or the automatic disqualification from voting of citizens under guardianship (or curatorship in South African terms) therefore

violated the right to vote. As said above, the aim of the disqualification was to exclude persons from voting rights who lack the mental capacity to understand the nature and significance of elections and the act of voting. The Act thus sought to safeguard the democratic function of elections as an integrative process for the formation of the political will of the people. The provision was only capable of achieving this objective if the identified group of persons was ‘not sufficiently able to participate in the democratic communication process’. Yet this was not the case here. When a court decides whether to appoint a guardian, it is not required to assess whether the person in question has the capacity ‘to make a self-determined electoral decision’. Some people under guardianship might thus still have the capacity to vote, while some people who lack that capacity might not be placed under guardianship. In short, whether a person has been placed under guardianship or not, is no indication of that person’s lack of capacity to vote. The blanket exclusion of all persons for whom a guardian or curator has been appointed is ‘not suitable for identifying persons who are generally incapable of participating in the democratic communication process’.²⁹⁵

According to the Court the same applied to the old disqualification in section 13(3), that is, the exclusion of persons accused of a crime who is detained in a psychiatric hospital due to their lack of criminal capacity at the time the crime was committed.²⁹⁶

‘[A] relevant lack of the mental capacity required to exercise voting rights can neither be generally inferred from an exemption from criminal responsibility established for the time a crime was committed and from the illnesses underlying it [...], nor from the fact that the other requirements for ordering confinement in a psychiatric hospital [...] are met. [...] For instance, psychotic episodes or withdrawal syndrome with or without

²⁹⁵ *K v Bundestag* paras 84-106.

²⁹⁶ *K v Bundestag* paras 112-124.

delirium are temporary phenomena which go into remission when treated adequately, and which thus cannot affect a lack of ability to make electoral decisions [...]. This shows that it is not possible to infer from the finding that a person was exempt from criminal responsibility at the time a crime was committed that mental capacity to appreciate the nature and significance of elections is typically lacking.’

As a result, the Court declared both sections 13(2) and 13(3) unconstitutional and void, but nevertheless left the door open for the Bundestag (German Parliament) to redraft and refine a better test for the voter disqualification of persons with mental disabilities and illnesses to identify those persons who lack the mental capacity ‘to appreciate the nature and significance of elections’ and ‘to make a self-determined electoral decision’.²⁹⁷ The Bundestag has not accepted this challenge. Instead, it has opted, first, to leave the assessment of the capacity to vote to the judgment of the court, and second, to introduce a procedure for assisted voting for persons with mental disabilities or illnesses, which do not have the effect of excluding the voting capacity of the person in question.

After its amendment the disqualification under section 13 of the Act now reads as follows:

‘[1]3. Disqualification from Voting

A person shall be disqualified from voting if he or she is not eligible to vote *owing to a judicial decision.*’

²⁹⁷ *K v Bundestag* para 136.

This means that all resident German citizens today have the right to vote and to be voted for, unless a court of law has specifically declared that the citizen lacks the capacity to vote, or to stand for public office, or both, after *an individualised voting capacity inquiry*.

Before taking a closer look at the test applicable to this process of judicial capacity testing, it is important to note that section 14(5) of the Federal Election Act was also amended in 2020 to introduce a system of assisted voting. Assistance is now available to persons who are eligible to vote but are illiterate or prevented by a physical or mental disability from voting.²⁹⁸ Section 14 of the Federal Election Act provides as follows:

‘14. Exercise of the Right to Vote

(1) Only such persons as are entered in a voters' register or have a polling card may vote.

(2) Anyone entered in a voters' register may only vote in the polling district of the voters' register in which he or she is entered.

(3) Anyone possessing a polling card may vote in the constituency in which the polling card was issued

a) by casting his or her vote in any polling district of this constituency, or

b) by postal ballot.

(4) Each person eligible to vote may vote only once and *must do so personally*. Persons eligible to vote must not exercise their right to vote by proxy.

²⁹⁸ Section 14 paragraph (5) of the Federal Elections Act, 1993. Version as promulgated on 23 July 1993 (Federal Law Gazette I pp. 1288, 1594), last amended by Article 1 of the Act of 25 June 2020 (Federal Law Gazette I p. 1409).

(5) Persons eligible to vote who are illiterate or *prevented by a disability from casting their vote may avail themselves of another person's assistance* for that purpose. Such support shall be limited to practical assistance in communicating an electoral decision which has been taken and expressed by the person eligible to vote. Such assistance is inadmissible in cases where an abusive influence is exercised while it is rendered, where it replaces or alters the self-determined opinion forming or decision taken by the person eligible to vote or where there is a conflict of interests for the person rendering assistance.’

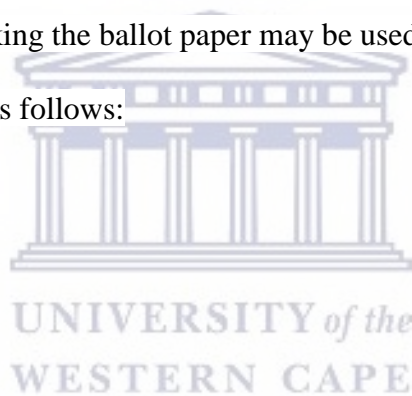
Section 18 of the Federal Election Regulations permits a person with disabilities who is eligible to vote to ‘avail himself or herself of another person’s assistance’ in order to apply for voter registration. On election day, a registered voter must vote in person. A vote by proxy, cast by a curator or guardian is not permitted under section 14(4) of the Act. Given that a mentally disabled person must personally cast his or her vote, section 14(5) allows another person to assist the voter to effectively communicate a voting decision taken independently by the voter. Where assistance amounts to abusive influence, alters the self-determined opinion forming or decision taken by the persons eligible to vote, or where there is a conflict of interest for the persons rendering the assistance, such assistance shall be inadmissible.²⁹⁹

More detail about the nature and limit of the assistance that may be rendered to a mentally disabled person is provided by section 57 of the Federal Election Regulations. A voter may designate another person, whose assistance the voter wishes to avail himself or herself, for casting his or her vote or putting it in the ballot box if, such voter is illiterate or is prevented

²⁹⁹ Section 14 paragraph (5) of the Federal Elections Act, 1993. Version as promulgated on 23 July 1993 (Federal Law Gazette I pp. 1288, 1594), last amended by Article 1 of the Act of 25 June 2020 (Federal Law Gazette I p. 1409).

by disability from marking or folding the ballot.³⁰⁰ Such persons must indicate their decision to the Election board.³⁰¹ A member of the Election board may also be designated by the voter as a helper.³⁰² Only practical assistance in communicating an electoral decision, which has been taken independently by the person eligible to vote, is permitted.³⁰³ Where assistance amounts to abusive influence, alters the self-determined opinion forming or decision taken by the persons eligible to vote, or where there is a conflict of interest for the persons rendering the assistance, such assistance shall be inadmissible.³⁰⁴ The person providing the assistance is permitted to enter the polling booth together with the person eligible to vote if necessary.³⁰⁵ The person providing assistance is bound to secrecy, in respect of any information obtained about the other persons' vote.³⁰⁶

Ballot paper templates for marking the ballot paper may be used by blind or visually impaired voters.³⁰⁷ Section 57 provides as follows:



³⁰⁰ Section 57 paragraph (1) of the Federal Electoral Regulations, 2002. Version as promulgated on 19 April 2002 (Federal Law Gazette I p. 1376), last amended by Article 10 of the Ordinance of 19 June 2020 (Federal Law Gazette I p. 1328).

³⁰¹ Section 57 paragraph (1) of the Federal Electoral Regulations, 2002. Version as promulgated on 19 April 2002 (Federal Law Gazette I p. 1376), last amended by Article 10 of the Ordinance of 19 June 2020 (Federal Law Gazette I p. 1328).

³⁰² Section 57 paragraph (1) of the Federal Electoral Regulations, 2002. Version as promulgated on 19 April 2002 (Federal Law Gazette I p. 1376), last amended by Article 10 of the Ordinance of 19 June 2020 (Federal Law Gazette I p. 1328).

³⁰³ Section 57 paragraph (2) of the Federal Electoral Regulations, 2002. Version as promulgated on 19 April 2002 (Federal Law Gazette I p. 1376), last amended by Article 10 of the Ordinance of 19 June 2020 (Federal Law Gazette I p. 1328).

³⁰⁴ Section 57 paragraph (2) of the Federal Electoral Regulations, 2002. Version as promulgated on 19 April 2002 (Federal Law Gazette I p. 1376), last amended by Article 10 of the Ordinance of 19 June 2020 (Federal Law Gazette I p. 1328).

³⁰⁵ Section 57 paragraph (3) of the Federal Electoral Regulations, 2002. Version as promulgated on 19 April 2002 (Federal Law Gazette I p. 1376), last amended by Article 10 of the Ordinance of 19 June 2020 (Federal Law Gazette I p. 1328).

³⁰⁶ Section 57 paragraph (3) of the Federal Electoral Regulations, 2002. Version as promulgated on 19 April 2002 (Federal Law Gazette I p. 1376), last amended by Article 10 of the Ordinance of 19 June 2020 (Federal Law Gazette I p. 1328).

³⁰⁷ Section 57 paragraph (4) Federal Electoral Regulations, 2002. Version as promulgated on 19 April 2002 (Federal Law Gazette I p. 1376), last amended by Article 10 of the Ordinance of 19 June 2020 (Federal Law Gazette I p. 1328).

[5]7. Voting by Persons with Disabilities

(1) A voter who is illiterate or who is prevented by a disability from marking or folding the ballot paper or putting it in the ballot box shall designate another person of whose assistance the voter wishes to avail himself or herself for casting his or her vote and intimate this to the Electoral Board. The helper may also be a member of the Electoral Board designated by the voter.

(2) Such support shall be limited to practical assistance in communicating an electoral decision which has been taken by the person eligible to vote. Such assistance must not be granted in cases where an abusive influence is exercised while it is rendered, where it replaces or alters the self-determined opinion forming or decision taken by the person eligible to vote or where there is a conflict of interests for the person rendering assistance.

(3) The helper may enter the polling booth together with the voter if necessary. The helper shall be bound to secrecy in respect of any information obtained about another person's vote while rendering assistance.

5.4 India

The right of persons with mental disabilities or illnesses to vote in India cannot differ more dramatically from that of the United Kingdom or Germany. The Constitution of India, 1950 states in its preamble that it will secure all its citizens' political justice, equality of status and opportunity, and to assure their dignity. Article 14 of the Constitution of India prevents the state from denying any person equality before the law or equal protection from the law. This ensures that all persons are treated equally, including those with mental disabilities, and prevents the state from stigmatising them. Article 15 of the Constitution of India states:

‘[1] The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to *any disability*, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.’

Article 15 explicitly prevents discrimination on the grounds of disability and makes provision for disabled persons, or any person in need, to be assisted where necessary. In addition, article 19(1)(a) of the Constitution of India confers on all citizens the right to freedom of speech and expression. As stated previously, this may be extended to freely express oneself in the form of a vote. However, as far as voting rights are concerned, article 326 of the Constitution of India reads as follows:

‘[T]he elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than [eighteen years] of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise *disqualified* under this Constitution or any law made by the appropriate Legislature *on the ground of* non-residence, *unsoundness of mind*, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.’

Article 326 confers on to all citizens, who are over the age 18, the right to vote. However, as in South Africa, it prevents persons who have been declared of unsound mind, together with other disqualified persons, from voting. The difference is that this disqualification is expressly entrenched in the Constitution itself while in South Africa it is located in statute law. Similarly, section 16(1)(b) of the Representation of the Peoples Act, 1950 states:

‘[A] person shall be disqualified for registration in an electoral roll if he *is of unsound mind and stands so declared by a competent court.*’

These two sections, read together, prohibit persons of unsound mind from taking part in the electoral process and exercising their democratic right to vote. Several Indian scholars have questioned the blanket voter disqualification of everybody who has been declared to be of unsound mind. These scholars appeal to the common law principle that legal capacity is retained by persons of unsound mind under curatorship as far as such capacity exists in fact.³⁰⁸ For example, Pathare points out that section 12 of the Indian Contract Act of 1872 states as follows:

‘[A] person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.’

³⁰⁸ See, among others, Pathare S ‘Does Indian law disqualify persons with mental illness from voting’. The Wire, 5 April 2019, available at <https://thewire.in/health/mental-illness-right-to-vote> (accessed 22 July 2020).

Section 12 of the Indian Contract Act allows persons of unsound mind to contract when they are of sound mind or have an interval of sound mind. One may infer that a state of ‘unsound mind’ is not permanent. More so, this section could be extended to allow persons who have been declared of unsound mind to vote during their periods of ‘sound mind’. Psychiatrists in India agree that persons declared of unsound mind should be allowed to vote during periods of sound mind.³⁰⁹ Pathare states that capacity, as discussed in section 12 of the Indian Contract Act, is task specific.³¹⁰ While a person may be declared of unsound mind, it is possible for him or her to maintain capacity to perform other tasks, such as voting. It must be noted that the courts have failed to state what the criteria are for determining a person’s mental capacity and how a court should reach the determination of whether a person is of unsound mind.³¹¹ It is important for the court to provide this criterion, as the declaration of unsound mind is a legal and not a medical determination.³¹²

In spite of this argument, Indian jurists could not reach a consensus whether voting rights should be extended to 192 inmates detained at the Institute of Mental Health at Kilpauk.³¹³ Some scholars argue that doing so will make a mockery of the right to vote.

India adopted the Rights of Persons with Disability Act in 2016. The Act defines a person with disability as ‘a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in

³⁰⁹ ‘Election commission yet to reach mentally ill people who can decide’. The Times of India, 10 April 2019 available at <https://timesofindia.indiatimes.com/city/jaipur/ec-yet-to-reach-mentally-ill-people-who-can-decide/articleshow/68802463.cms> (accessed 22 July 2020).

³¹⁰ Pathare S ‘Does Indian law disqualify persons with mental illness from voting’. The Wire, 5 April 2019, available at <https://thewire.in/health/mental-illness-right-to-vote> (accessed 22 July 2020).

³¹¹ Tiwari T ‘Mental illness: A curious case in adult suffrage’. Indian National Interest, 20 June 2017 available at <https://nationalinterest.in/mental-illness-a-curious-case-in-adult-suffrage-bf15c4d15946> (accessed 22 July 2020).

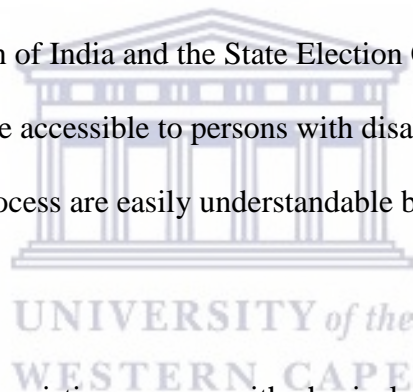
³¹² Pathare S ‘Does Indian law disqualify persons with mental illness from voting’. The Wire, 5 April 2019, available at <https://thewire.in/health/mental-illness-right-to-vote> (accessed 22 July 2020).

³¹³ Subramani A ‘Questions raised over judgment, fairness of vote.’ The Times of India 21 March 2019 available at <https://timesofindia.indiatimes.com/city/chennai/questions-raised-over-judgment-fairness-of-vote/articleshow/68605404.cms> (accessed 22 July 2020).

society equally with others'.³¹⁴ Section 3(1) of the Act imposes an obligation on government to 'ensure that the persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others'. Furthermore, section 3(2) obliges government to 'take steps to utilise the capacity of persons with disabilities by providing appropriate environment'. In order to give further effect to these obligations, the Act deals specifically with elections and voting. Unfortunately, the Act focuses almost exclusively on the *physical* disabilities of registered voters (understandable given that citizens with mental disabilities are constitutionally excluded from registering as voters and voting in elections). Nevertheless, section 11 provides as follows:

'[1]1. Accessibility in voting.

The Election Commission of India and the State Election Commissions shall ensure that all polling stations are accessible to persons with disabilities and all materials related to the electoral process are easily understandable by and accessible to them.'



India has made great efforts in assisting persons with physical disabilities to participate in elections.³¹⁵ However, persons with mental disabilities remain neglected and excluded from political participation once placed under curatorship, partly because this disqualification is constitutionally entrenched.

³¹⁴ Section 2 of The Rights of Persons with Disabilities Act, 2016.

³¹⁵ See *National Federation of Blind vs. Union Public Service Commission and Ors* (1993) 2 SCC; See also *Govt. of NCT of Delhi vs Bharat Lal Meena* (CWP No. 2490 of 2002). Vishoni A 'Election Commission takes a giant step forward' *The Economic Times* 21 July 2018 available at <https://economictimes.indiatimes.com/news/politics-and-nation/election-commission-takes-a-giant-step-forward/articleshow/65075518.cms?from=mdr> (accessed 22 July 2020).

5.5 Kenya

The voting rights of people with mental disabilities or illnesses in Kenya is marked by numerous contradictions and ironies. On the one hand, the Convention on the Rights of People with Disabilities (CRPD) forms part of Kenyan law by virtue of article 2(6) of the Constitution, 2010 which provides that international treaties to which Kenya is a party form part of Kenyan laws (under the monistic approach to international law). As will become clearer in Chapter six, this means that every adult citizen has the right to vote regardless of his or her mental ability or health. On the other hand, as is the case in India, the Kenyan Constitution, 2010 expressly denies citizens of ‘unsound mind’ their active and passive voting rights. As far as the right to vote is concerned, section 83 of the Constitution provides as follows:

‘[8]3. Registration as a voter

(1) A person qualifies for registration as a voter at elections or referenda if the person (a) is an adult citizen; (b) *is not declared to be of unsound mind*; and (c) has not been convicted of an election offence during the preceding five years.

[...]

As far as passive voting rights is concerned, section 99 of the Constitution includes being of ‘unsound mind’ among the long list of disqualifications from membership of Parliament:

‘[9]9. Qualifications and disqualifications for election as member of Parliament

[...]

(2) A person is disqualified from being elected a member of Parliament if the person (a) is a State officer or other public officer, other than a member of Parliament; (b) has, at

any time within the five years immediately preceding the date of election, held office as a member of the Independent Electoral and Boundaries Commission; (c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election; (d) is a member of a county assembly; (e) *is of unsound mind*; (f) is an undischarged bankrupt; (g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or (h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six.’

This internal contradiction in the laws of Kenya remains unresolved, in spite of calls to bring the domestic law of Kenya in line with the CRPD.³¹⁶ As the law stands, the persons of unsound mind who are constitutionally excluded from participation in elections are those persons declared to be of ‘unsound mind’ under Part XII of the Mental Health Act of 1989. Section 26(1)(a) of the latter Act provides that a court may make an order for the management of the estate of any person suffering from mental disorder to such an extent as to be incapable of managing his or her affairs. A manager under Kenyan law plays the same role as the *curator bonis* in South African law. Section 26(1)(b) provides for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person. A guardian under Kenyan law plays a similar role as the *curator personae* under South African law.

The Elections Act provides only brief respite to persons who have been declared to be of unsound mind and placed under management or guardianship, but who still wish to register as voters. Such a person may apply to the Electoral Commission to not disqualify him or her

³¹⁶ Lawrence Mute ‘Moving from the Norm to Practice Towards Ensuring Legal Capacity for Persons with Disabilities in Kenya’ (2012) 9 *Equal Rights Review* 132.

for such period as may be needed *to pursue an appeal against the declaration*. Section 9 of the Act provides as follows:

‘[9]. Postponement of disqualification to enable appeal

Where a person has been adjudged or declared to be of unsound mind [...] and is thereby disqualified from being registered as a voter, then, if that person is entitled to appeal against the decision, that person shall not be disqualified from being so registered until the expiration of thirty days after the date of the decision or such further period as the Commission may, at the request of the person, direct in order to enable the person to appeal against the decision.’

However, once their appeals are concluded, all persons who have been declared to be of unsound mind and in need of a manager or guardian are automatically or *ex lege* prohibited from participating in any election in Kenya. In this sense, the Kenyan position is the same as that in South Africa, except that in Kenyan law (as in Indian law) the voter disqualification of mentally unsound persons is contained in the Constitution itself and not, as in South Africa, in statute law.

Persons declared to be of unsound mind, as explained above, are also disqualified from being elected as members of a county assembly.³¹⁷ Persons of unsound mind are also disqualified from voting in local elections.³¹⁸ The blanket denial of voting rights to persons under management or guardianship is part of a greater marginalisation of persons with mental impairments. For example, the National Land Commission Act 5 of 2012 states that a secretary may be removed from office due to inability to perform the functions arising out of

³¹⁷ Section 25(2)(d) of the Elections Act 24 of 2011.

³¹⁸ Section 53C of the Local Government Act 2010.

physical or mental incapacity.³¹⁹ The Commission for the Implementation of the Constitution Act 9 of 2010 states the secretary may be removed by the Commission for inability to perform the functions of his office arising out of physical or mental incapacity,³²⁰ and that the Chairperson of the Commission may be removed from office due to inability to complete the functions of the office arising out of mental incapacity.³²¹

In practice, there are reports of mentally disabled persons being hidden from society, by their family members, and as a result cannot access Identity Documents.³²² This may be due to stereotypes, bad omens and curses associated with mental illness in African cultures.³²³

Mentally disabled persons are also denied inheritance, and are prevented from marrying and having families and denied the right to participate in cultural practices such as circumcision, which is seen as a rite of passage into adulthood.³²⁴

The formal and informal exclusion of mentally disabled persons from public life seems on the face of it incompatible with the general spirit and purport and object of the Kenyan Constitution and Bill of Rights and some of the specific rights protected by the Bill of Rights. The blanket exclusion is ironic given that article 38(3) of the Constitution guarantees the active and passive voting rights of all citizens without distinction:

‘[3] *Every adult citizen* has the right, without unreasonable restrictions (a) to be registered as a voter; (b) to vote by secret ballot in any election or referendum; and (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.’

³¹⁹ Section 21(1) of the National Land Commission Act 5 of 2012.

³²⁰ Section 13 (4) of the Commission for the Implementation of the Constitution Act 5 of 2010.

³²¹ Section 11(1) of the Commission for the Implementation of the Constitution Act 5 of 2010.

³²² Mental Disability Advocacy Centre ‘The Right to Legal Capacity in Kenya’ *Mental Disability Advocacy Centre* (2014) 23.

³²³ Mental Disability Advocacy Centre ‘The Right to Legal Capacity in Kenya’ *Mental Disability Advocacy Centre* (2014) 23.

³²⁴ Note 322, page 24.

The qualification of the right pertaining to reasonable restrictions applies on the face of it to the registration process and not to the eligibility of adult citizens. This understanding is in line with the interpretive clause of the Constitution. The national values and principals which bind State officers, public officers, and any person when applying or interpreting the Constitution or any public policy,³²⁵ include democracy and participation of the people,³²⁶ human dignity, and equality.³²⁷ The Constitution of Kenya also states that every person is entitled to the rights, benefits and privileges of citizenship subject to the limitations found in the constitution.³²⁸ The rights and fundamental freedoms found in the Bill of Rights may only be limited by provisions found within the constitution.³²⁹ When applying the Bill of Rights, the Constitution places a duty on courts to develop the law to the extent that it does not give effect to a right or fundamental freedom found in the Bill of Rights,³³⁰ and to adopt an interpretation that favours enforcement of the said rights or fundamental freedoms.³³¹ There is also a duty placed on a court, tribunal or any other authority, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality, equity,³³² and freedom and the spirit, purport and objects of the Bill of Rights.³³³ The duties of the State and every state organ include protecting, promoting and fulfilling the rights and fundamental freedoms in the Bill of Rights.³³⁴ It is imperative to highlight that the Constitution of Kenya places a duty on State organs and all public officers to address the needs of vulnerable groups within society including persons with disabilities

³²⁵ Article 10(1) of the Constitution of Kenya, 2010.

³²⁶ Article 10(2)(a) of the Constitution of Kenya, 2010.

³²⁷ Article 10(2)(b) of the Constitution of Kenya, 2010.

³²⁸ Article (12)(1)(a) of the Constitution of Kenya, 2010.

³²⁹ Article 19(3)(c) of the Constitution of Kenya, 2010.

³³⁰ Article 20(3)(a) of the Constitution of Kenya, 2010.

³³¹ Article 20(3)(b) of the Constitution of Kenya, 2010.

³³² Article (20)(4)(a) of the Constitution of Kenya, 2010.

³³³ Article 20(4)(b) of the Constitution of Kenya, 2010.

³³⁴ Article 21(1) of the Constitution of Kenya, 2010.

and members of a minority or marginalised groups.³³⁵ This includes the duty to enact and implement legislation to fulfil its international obligation.³³⁶

Here, it is necessary to note the Kenya has ratified and is a member to the CRPD, and thus has a duty to fulfil rights conferred unto disabled persons by this convention, most notably the political rights conferred in Article 29 of the CRPD. In fact, as noted above, article 2 of the Constitution incorporates the provisions of the CPRD into Kenyan domestic law.

The Constitution of Kenya states that all persons are equal before the law and that all persons are entitled to equal protection and benefit of the law,³³⁷ which includes full and equal enjoyment of the rights and fundamental freedoms provided for in the constitution.³³⁸ The State may not discriminate against any person, directly or indirectly, on a number of grounds, including disability.³³⁹ There is a further duty placed on the State to give effect to the rights to equality and freedom from discrimination, by using legislative and other means including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.³⁴⁰ The Constitution of Kenya states that every persons has inherent dignity and the right to have that dignity respected and protected,³⁴¹ this may be extended to include the inherent dignity attached to being provided with the right to vote and being treated as equals with other citizens. Every person is provided with the right to freedom of expression,³⁴² which, as we see over and over again, may also be extended to include the right to express one's political ideology when voting. There seems to

³³⁵ Article 21(3) of the Constitution of Kenya, 2010.

³³⁶ Article 21(4) of the Constitution of Kenya, 2010.

³³⁷ Article 27(1) of the Constitution of Kenya, 2010.

³³⁸ Article 27(2) of the Constitution of Kenya, 2010.

³³⁹ Article 27(4) of the Constitution of Kenya, 2010.

³⁴⁰ Article 27(6) of the Constitution of Kenya, 2010.

³⁴¹ Article 28 of the Constitution of Kenya, 2010.

³⁴² Article 33(1) of the Constitution of Kenya, 2010.

be a coupling of the right to equality, freedom of expression and the denial of the right to vote.

If a persons' rights in the Bill of rights have been violated, denied, infringed or threatened that person has the right to institute court proceedings in order to seek an appropriate remedy.³⁴³ Article 24 of the Constitution of Kenya allows for the limitation of rights and freedoms in the Bill of Rights, subject to certain conditions, it states that:

'[1] A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom (a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation; (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

³⁴³ Article 22(1) of the Constitution of Kenya, 2010.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.’

Finally, there is a duty on the State which includes, ensuring that minority or marginalised groups participate in governance and other spheres of life.³⁴⁴

The Persons with Disabilities Act 14 of 2003 places a duty on Government to take steps to maximize its available resources in order to achieve in the full realization of the rights of persons with disabilities.³⁴⁵ A ‘disability’ is defined as ‘a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation’.³⁴⁶ The Act also provides persons with physical and mental disabilities, excluding those persons who have been declared to be of unsound mind, the right to receive assistance when voting.³⁴⁷

‘[2]9. Voting

(1) All persons with disabilities shall be entitled at their request, to be assisted by persons of their choice in voting in presidential, parliamentary and civic elections.

(2) A person who undertakes to render assistance under subsection (1) shall do so strictly in accordance with the instructions of the voter.

(3) A person described in subsection (2) shall bind himself, in the prescribed form, to comply with that subsection.

(4) A person who contravenes subsection (2) is guilty of an offence.’

³⁴⁴ Article 56(a) of the Constitution of Kenya, 2010.

³⁴⁵ Section 11 of the Persons with Disabilities Act 14 of 2003.

³⁴⁶ Section 1 of the Persons with Disabilities Act 14 of 2003.

³⁴⁷ Section 29 of the Persons with Disabilities Act 14 of 2003.

Polling states are also required to be made accessible to persons with disabilities:³⁴⁸

‘[3]0. Polling stations.

Polling stations shall be made accessible to persons with disabilities during elections, and such persons shall in addition be provided with the necessary devices and assistive devices and services to facilitate the exercise of this right under this section.’

The exclusion of inmates from the referendum which preceded the adoption of the 2010 Constitution was challenged in the Interim Constitutional Dispute Resolution Court.³⁴⁹ In discussing the legal status of voter disqualifications, the Court noted that, from the perspective of political theory, there are two approaches to voter disqualifications:

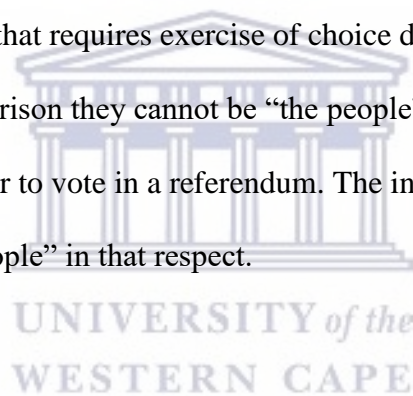
‘[A]t the level of political theory there are two justifications for criminal disenfranchisement. The Lockean social contract theory and the Republican citizenship theory. The Lockean theory asserts that criminals have broken the “Social Contract” and should consequently lose the right to participate in the political process. The first objective of denying the inmates the right to vote is enhancing civic responsibility and respect for the law. The social rejection of serious crime reflects a moral line which safeguards the social contract and rule of law and bolsters the importance of nexus between the individual and the community. Republican citizenship theory argues that criminals are less virtuous than other citizens and should therefore be deprived of the right to vote in order to maintain “purity of the ballot box”.’

³⁴⁸ Section 30 of the Persons with Disabilities Act 14 of 2003.

³⁴⁹ *Kanyua v Attorney General* Constitutional Petition 1/2010 [2010] eKLR 1 (23 June 2010).

The civic republican citizenship theory referenced here shows close resemblance with the citizenship model associated with the capacity for deliberation discussed above in Chapters two and four. In the end, the Court did not rely on any of these conceptions of citizenship but on the commitment to human rights which necessitates that the rights of detained persons must be restricted as little as possible. On this basis, the Court ruled that all persons in lawful detention have the right to vote in the 2010 referendum, *except those who are detained due to their mental ability or illness*:

‘[I]t is the courts considered view that the “people” can only apply to the people of *sound mind and in control of their faculties*. People of unsound mind cannot be able to take part in any function that requires exercise of choice due to their status. Whether or not they are in or out of prison they cannot be “the people” in respect of the exercise of their Constitutional Power to vote in a referendum. The inmates of unsound mind cannot be part of the “people” in that respect.



[...]

The rationality of the Constitution barring any Kenyan who is of unsound mind to vote need not be gain said. A person who is in prison and is of unsound mind is not in control of his faculties and may not be able to know the magnitude of any election let alone the referendum. The exclusion of that class of inmates is therefore obvious and self-explanatory.’

The matter has not served again before any Kenyan court after the Interim Constitutional Dispute Resolution Court declared the blanket exclusion of persons of ‘unsound mind’ from both the ‘the people’ and the electorate as ‘obvious and self-explanatory’.

5.6 Conclusion

The discussion above reveals that democratic states around the world have vastly different approaches to the voting rights of mentally unsound or disorderly citizens and persons detained involuntarily under the Mental Health Care Act. The approaches vary from full participation in the UK, to limited participation in Germany based on an individualised assessment by a court of law and finally to blanket exclusion as found in South Africa, Kenya and India.

There is thus no uniform state practice. Some states like India and Kenya (and South Africa as far as passive voting rights are concerned) have constitutionally entrenched certain exclusions into their Constitutions, which makes it difficult to change and challenge constitutionally. Other states such as Germany, and partly RSA and Kenya as well, recognise certain exclusions via statute law which allows constitutional challenges and leaves open possibilities for legal reform. The successful constitutional challenge against the exclusion of mentally disabled persons in Germany provides a good example.

The comparative perspective highlighted two issues. First, how does the state in question determine who retains the capacity to vote? Does the state adopt a rule and status-based approach, or a standard and functional approach? The first approach formulates a general rule which excludes certain defined classes of mentally disabled or ill persons across the board. Such a rule is easy to administer by election officials but may be over-inclusive or broad.

This approach applies in India and Kenya and used to apply until 2020 in Germany. It is also the approach in South Africa.

The second approach adopts a standard or multi-factor test which must be applied from case to case in an individualised enquiry. The standard relies on a functional definition of mental ability and voting capacity. It is difficult to administer by courts and election officials and may be open to inconsistent and unfair applications. This approach applies in Germany since 2020. Thus, States must first decide whether to regulate the voting rights of people with mental disabilities by means of a clear rule ('all persons detained under a certain statute' are excluded) or a vague standard ('all persons who lack the legal capacity to vote' are excluded). If a functional definition or standard of voting capacity is adopted, the next question is when and by whom the standard must be applied? Adopting a vague standard of voting capacity means that an individualised enquiry needs to take place at some point in the process to determine whether an individual meets the standard and still has the capacity to vote. This voter vetting can be done by a court during a prior status determination process, or by election officials at voter registration before an election, or as part of the voting process during an election, for example, at a voting station. In order to assist courts and other officials to objectively apply the standard of voting capacity, some psychologists have responded to the inherent uncertainty involved in the standard by translating the standards formulated by some courts into measurable variables and a test which can be administered to determine a voter capacity score.³⁵⁰

³⁵⁰ Applebaum P, Bonnie R and Karlawish J 'The capacity to vote of persons with Alzheimer's disease' (2005) 162 *American Journal of Psychiatry* 2094 2100; Hurme S and Appelbaum P 'Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters' (2007) 38 *McGeorge Law Review* 937; Raad R, Karlawish J and Applebaum P 'The capacity to vote of persons with serious mental illness' (2009) 60 *Psychiatric Services* 624 628. Marcus F and Nel Y 'An assessment of voting knowledge and related decisions among hospitalised mental healthcare users in South Africa' (2021) 27 *South African Journal of Psychiatry* 1529.

Most of these studies relies on the attempt to convert the voter capacity test formulated in *Doe v Rowe*,³⁵¹ a judgment delivered in the state of Maine in the USA, into what is known as the CAT-V test. This way, a rule-like approach is effectively restored. A legislature might adopt one of these tests as its reference point and exclude all voters below a certain predetermined score. A modified CAT-V test or MCAT-V test is being developed by a group of psychologists and psychiatrists for use under South African conditions.³⁵²

Given the wide array of democratic responses to the voting rights of mentally unsound or disorderly citizens and persons detained involuntarily under the Mental Health Care Act, I next turn to international human rights law as a means of selecting between the available national alternatives.



³⁵¹ *Doe v Rowe* 156 F Supp 2d 35, 59 (D Me 2001).

³⁵² Marcus F and Nel Y 'An assessment of voting knowledge and related decisions among hospitalised mental healthcare users in South Africa' (2021) 27 *South African Journal of Psychiatry* 1529.

Chapter 6

MENTAL CAPACITY AND THE RIGHT TO VOTE IN INTERNATIONAL LAW

6.1 Introduction

In Chapter 4 we explored whether it is possible to derive a right to vote for mentally defective persons under curatorship or in detention in a psychiatric hospital from the principle or value of democracy itself. We saw that the two conceptions of democracy work against each other. This left the argument inconclusive as to whether extending voting rights to mentally disabled persons would promote or undermine the value of democracy and the democratic character of elections. In Chapter 5 we therefore explored whether any inherently democratic practice can be discerned among democracies around the world. Again, the Chapter revealed a variety of democratic practices. In this Chapter I turn finally to the international and transnational human rights norms which govern the voting rights afforded to mentally ill and intellectually disabled persons. The Chapter begins with a discussion of the United Nations human rights regime, proceeds to look at the European human rights regime, and concludes with an investigation of the African human rights system. Diverse as these systems might be, they all regard the automatic and blanket denial of voting rights afforded to mentally ill or intellectually disabled persons as a human rights violation. But here also, as was the case with the discussions in the two preceding chapters, there is again not a uniform approach to the issue discernible.

6.2 The United Nations Human Rights regime

6.2.1 The Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights was adopted on 10 December 1948, international human rights day, by the General Assembly of the newly constituted United

Nations.³⁵³ It was proclaimed as ‘a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance’. The Declaration states in its preamble, in aspirational language, that equality and dignity are the foundations of freedom, justice and peace in the world. Article 1 of the UDHR states that human beings are born free and equal in dignity and rights. Article 7 of the UDHR states that all persons have the right to equal protection from discrimination. Article 21 of the UDHR explicitly links the dignity of the individual as a moral subject to the right of all persons to part take in the government of their country,³⁵⁴ and states that the will of the people shall be expressed through periodic elections based on universal suffrage:³⁵⁵

‘[2]1.1 Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

21.2 Everyone has the right to equal access to public service in his country.

21.3 The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.’

The UDHR established that voting rights are human rights and that states should progressively aspire to recognise ‘universal and equal suffrage’ in genuine elections. The right applies to ‘everyone’ and is not subject to, and express qualifications, such as age or

³⁵³ The United Nations General Assembly, Universal Declaration on Human Rights (1948) 217(III)A.

³⁵⁴ Article 21(1).

³⁵⁵ Article 21(3).

citizenship. How these rights are exercised in different jurisdictions were evidently at the discretion of the country in question, as there were no enforcement mechanisms responsible for the interpretation and application of the UDHR. This changed in the mid 1960s.

6.2.2 International Covenant on Civil and Political Rights (ICCPR)

Article 2 of the International Convention on Civil and Political Rights (ICCPR)³⁵⁶ states that all countries who have ratified the convention must ensure that all persons who are within their territory and jurisdiction fully enjoy the rights conferred unto them by this convention without any discriminations such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁵⁷ South Africa has since 1998 been one of those state parties, including the individual complaints procedure under the Optional Protocol since 2002. South Africa and other state parties are required to enact laws, in line with their respective constitutions, which give effect to the rights provided for by the ICCPR, if there are not already measures in place.³⁵⁸ There is a further duty on state parties to ensure that there are effective remedies available to persons whose rights and freedoms under the ICCPR have been violated;³⁵⁹ to ensure that a claim of said violation may be adjudicated by a competent authority;³⁶⁰ and to ensure that a competent authority will enforce the remedy.

Article 25 of the ICCPR deals explicitly with the right to participate in elections and restates the basic terms of article 21 of the UDHR in the following terms:

‘[E]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without *unreasonable* restrictions:

³⁵⁶ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, 171.

³⁵⁷ Article 2(1).

³⁵⁸ Article 2(2).

³⁵⁹ Article 2(3)(a).

³⁶⁰ Article 2(3)(b).

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.’

Article 25 confers upon all citizens the right to vote (active voting rights) and the right to stand for election (passive voting rights). These rights are however subject to reasonable restrictions, which indicates that these rights may be limited. In General Comment 25,³⁶¹ the Human Rights Committee stated that Article 25 lies at the core of a democratic government,³⁶² this is why the right to vote is of great importance in international law, as it is essential to giving effect to democracy. However, the Human Rights Committee noted that the rights conferred by Article 25 may be subjected to voter disqualifications, on grounds which are established by law and that are objective and reasonable, such as mental incapacity:³⁶³

‘[A]ny conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be suspended or excluded except on

³⁶¹ International Covenant on Civil and Political Rights Human Rights Committee, General Comment No. 25, 12 July 1996, UN Doc CCPR/C/21/Rev. 1/Add. 7.

³⁶² Para 1.

³⁶³ Para 4 (my emphasis).

grounds which are established by law and which are objective and reasonable. For example, *established mental incapacity may be a ground for denying a person the right to vote or to hold office.*'

In terms of this rather accommodating interpretation of the right to vote dating back to the 1960s, once a state has established that a person suffers from mental incapacity it would be reasonable to exclude that person on that basis from further participation in elections. Typical voter's disqualifications, based on mental incapacity, such as those under the South African Electoral Act discussed above, would be compliant with this interpretation of the ICCPR. However, since the 1960s, international human rights law has undergone dramatic developments, none more so than the adoption of the Convention on the Rights of Persons with Disabilities (CRPD) in 2007. Based on the principle of subsidiarity, the latter Convention has displaced the ICCPR as the applicable international law under the United Nations.

6.2.3 The Convention on the Rights of Persons with Disabilities (CRPD)

The Convention on the Rights of Persons with Disabilities (CRPD),³⁶⁴ which South Africa has ratified together with its protocol in 2007, governs the international rights of persons with disabilities, including those who are mentally ill. Article 2 of the CRPD defines 'discrimination on the basis of disability' as:

'[a]ny distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the

³⁶⁴UN General Assembly, Convention on the Rights of Persons with Disabilities (2007) United Nations General Assembly Resolution 61/106 (2007).

political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.’

Based on this definition alone, any law preventing a mentally disabled person from voting based on their disability amounts to discrimination. In article 3 of the CRPD it is stated that the general principles of the convention are respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons,³⁶⁵ non-discrimination,³⁶⁶ and full and effective participation and inclusion in society.³⁶⁷ Article 4 of the CRPD places a duty on state parties to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind. This includes the duty to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.³⁶⁸ There is a further duty on the state to take all appropriate measures to eliminate the discrimination on the basis of the disability.³⁶⁹ Article 5 of the CRPD states that state parties shall recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.³⁷⁰ There is a duty placed on state parties to prohibit all discrimination based on disability and to guarantee persons with disabilities equal and effective legal protection against discrimination on all grounds.³⁷¹ This includes taking steps to ensure that reasonable accommodation is provided, in order to promote equality and

³⁶⁵ Article 3(a).

³⁶⁶ Article 3(b).

³⁶⁷ Article 3(c).

³⁶⁸ Article 4(b).

³⁶⁹ Article 4(e).

³⁷⁰ Article 5(1).

³⁷¹ Article 5(2).

eliminate discrimination.³⁷² Then, state parties are to ensure that persons with disabilities enjoy equal recognition with other persons before the law,³⁷³ which includes the enjoyment of equal legal capacity with other persons in all areas of life,³⁷⁴ arguably, including political life.³⁷⁵ Appropriate measures are to be taken, by state parties, to ensure persons with disabilities are provided with access to the support they may require to exercise their legal capacity.³⁷⁶ Such measures must make provision for safeguards which prevent abuse in accordance with human rights law, and which respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.³⁷⁷ The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.³⁷⁸ The right to freedom of expression is also guaranteed to persons with disabilities (including mental illness) in Article 21 of the CRPD.

Within this broader context, article 29 of the CRPD provides explicitly for the right of mentally ill persons to participate in political and public life. It places a duty on state parties to guarantee disabled person's political rights and to enjoy them on an equal basis with other citizens. Article 29 of the CRPD reads as follows:

'[S]tates Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them *on an equal basis with others*, and shall undertake:

³⁷² Article 5(3).

³⁷³ Article 12(1).

³⁷⁴ Article 12(2).

³⁷⁵ Confirmed in *Zsolt Bujdosó & 5 Others v Hungary*, CRPD/C/10/D/4/2011 para 9.5, where the Committee held as follows: 'The Committee further recalls that under article 12, paragraph 2 of the Convention, States parties must recognize, and uphold the legal capacity of persons with disabilities "on an equal basis with others in all aspects of their lives", including political life, which encompasses the right to vote'.

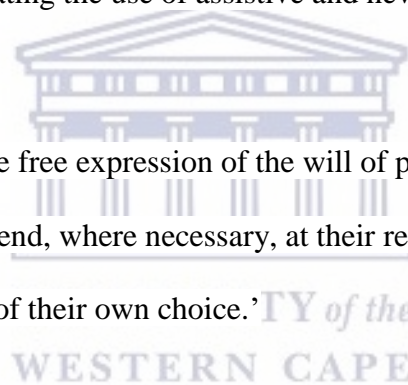
³⁷⁶ Article 12(3).

³⁷⁷ Article 12(4).

³⁷⁸ Article 12(4).

(a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including *the right and opportunity for persons with disabilities to vote* and be elected, inter alia, by:

- i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
- ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
- iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice.³⁷⁹



The Committee on the Rights of Persons with Disabilities ('the Committee') has clarified the meaning of article 29 in its general comments, concluding observations on state reports, and as part of the individual complaint procedure under the optional protocol. I briefly explore some highlights from this growing jurisprudence below.

6.2.3.1 General comments

Article 29 must be read together with article 12 of the CRPD. The Committee explained the shift in the approach to disability reflected by the CRPD in General Comment 1.³⁷⁹ The

³⁷⁹ Committee on the Rights of Persons with Disabilities General Comment 1: Article 12: Equal recognition before the law (2014) UN Doc CRPD/C/GC/1.

Committee opens the General Comment by noting that ‘there has been a general failure to understand that the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making’.³⁸⁰ This shift rests on an equally fundamental distinction between mental capacity and legal capacity. As the Committee explains:

‘[H]istorically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others. Article 12 of the Convention affirms that all persons with disabilities have full legal capacity. [...] The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others. Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights. It acquires a special significance for persons with disabilities when they have to make fundamental decisions regarding their health, education and work. The denial of legal capacity to persons with disabilities has, in many cases, led to their being deprived of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty’.

³⁸⁰ Committee on the Rights of Persons with Disabilities General Comment 1: Article 12: Equal recognition before the law (2014) UN Doc CRPD/C/GC/1 para 3.

The CRPD seeks to radically delink the legal capacity or right to vote and the mental capacity of the voter in question, with far-reaching implications.

6.2.3.2 Concluding observations on state reports

In its concluding observations on the initial report by South Africa,³⁸¹ the Committee was concerned that the discrimination of persons with psychosocial or intellectual disabilities and persons with albinism, including persons in rural areas with disabilities, remained widespread.³⁸² It recommended that South Africa adopt effective legislation and policies that will explicitly provide protection against multiple and intersectional forms of discrimination.³⁸³ However, the Committee failed to comment on South Africa's compliance with Article 29 of the CRPD and the validity of the current exclusions of mentally disabled persons from voting.

Nevertheless, when reviewing India's compliance with the CRPD, the Committee raised concerns over India's constitutional provisions which restrict the participation of persons with disabilities in political life on the basis of impairment, and the insufficient accessibility of information and electoral proceedings for all persons with disabilities.³⁸⁴ In this regard, the Committee recommended that India amend its constitutional provisions restricting the voting rights of all persons with disabilities to stand for and hold public office, and to promote the participation of persons with disabilities in political life and public decision-making process at all levels, including through affirmative action measures.³⁸⁵ India was also encouraged to ensure that the electoral process was accessible, including physical and informational

³⁸¹ UN Committee on the Rights of Persons with Disabilities (CRPD), Concluding observations on the initial report of South Africa, 23 October 2018, UN Doc CRPD/C/ZAF/CO/1.

³⁸² Para 8.

³⁸³ Para 9.

³⁸⁴ Para 60.

³⁸⁵ Para 61.

environments, in consultation with organisations of persons with disabilities taking into account the resolution of the sixth meeting of the Forum of Election Management Bodies of South Asia, in 2015 (the so-called Colombo Resolution).³⁸⁶

Likewise, in its review of Germany's compliance with the CRPD, the Committee raised concerns that persons with disabilities in Germany are not guaranteed meaningful and effective participation in decision-making related to their lives, and that accessible communication is insufficient.³⁸⁷ When assessing Germany's compliance with article 29 of the CRPD, the Committee was concerned about the exclusion of persons with disabilities from electoral rights stipulated in section 12 (2) and (3) of the Federal Electoral Law and equivalent provisions in Land legislation, as well as about practical barriers preventing persons with disabilities from exercising the right to vote on equal basis with others.³⁸⁸ The Committee recommended that Germany repeal all laws and regulations that deprive persons with disabilities of the right to vote, as well as reduce the barriers and put in place appropriate support mechanisms.³⁸⁹

6.2.3.3 Findings in individual complaint procedures

The clearest formulation of the right to vote under article 29 of the CRPD comes from the individual complaint procedure. In the case of *Bujdosó v Hungary*,³⁹⁰ the Committee dealt specifically with an alleged violation of article 29. Zsolt Bujdosó and five other people

³⁸⁶ Para 61.

³⁸⁷ Para 9.

³⁸⁸ Para 53.

³⁸⁹ Para 54.

³⁹⁰ UN Committee on the Rights of Persons with Disabilities (CRPD), Communication No. 4/2011, *Zsolt Bujdosó & 5 Others v Hungary*, CRPD/C/10/D/4/2011. See also Mgijima-Konopi, I 'The jurisprudence of the committee on the rights of persons with disabilities and its implications for Africa (Regional Developments)' (2016) *African Disability Rights Yearbook* 269-282, and Maphosa N, Moyo CG & Moyo B 'Left in the periphery: An analysis of voting rights for persons with disabilities in Zimbabwe' (2019) 7 *African Disability Rights Yearbook* 112-139, and Grobbelaar-Du Plessis I 'The Right of Persons with Intellectual Disabilities to Political Participation: The Legal Capacity to Vote - *Zsolt Bujdosó v Hungary* Communication No. 4/2011 (Committee on the Rights of Persons with Disabilities) (UN Doc CRPD/C/D/4/2011)' (2020) 83 *THRHR* 455.

complaint to the Committee that the rights conferred on them by article 29 of the CRPD were violated by Hungary.³⁹¹ The complainants were all placed under partial guardianship and as a result, in terms of article 70(5) of the Hungarian Constitution of 1949, they were automatically deleted from electoral roll. They were thus in the same position as persons who are placed under curatorship under South African law. The authors argued that this automatic disqualification violated their right to vote under article 29 of the CRPD.³⁹² The decisions to place them under partial guardianship did not address their ability to vote, and they were automatically and indiscriminately disenfranchised by operation of the constitutional provision, regardless of the nature of their disability, their individual abilities, and the scope of the guardianship.³⁹³

Hungary responded by pointing out that the new Fundamental Law of 2012 replaced section 75 of the old Constitution of 1949.³⁹⁴ Contrary to the previous rigid provision, which has become obsolete, the Fundamental Law now provides that court decisions on the exclusion from suffrage shall be made in guardianship procedures. Placement under guardianship is thus no longer an automatic ground for exclusion from suffrage. However, a decision shall be made on the exclusion from suffrage in respect of every person under guardianship. Courts shall exclude from suffrage any adult whose discretionary power required for exercising suffrage (a) has been significantly reduced, whether permanently or recurrently, due to his or her mental state, intellectual disability or addiction; or (b) is permanently missing in its entirety, due to his or her mental state or intellectual disability. Courts shall rely on expert opinions of forensic psychiatrists to decide on the exclusion from suffrage. Furthermore, a person under guardianship may reclaim suffrage without losing the protection offered by

³⁹¹ *Bujdosó v Hungary* para 1.

³⁹² *Bujdosó v Hungary* para 1.

³⁹³ *Bujdosó v Hungary* para 3.1.

³⁹⁴ *Bujdosó v Hungary* para 4.2.

guardianship, provided that he or she is capable of exercising the capacity to vote.³⁹⁵ In short, Hungary argued that it had changed the law from automatic disqualification based on curatorship or detention to disqualification after an individualised assessment during curator or detention applications.

The Harvard Law School Project on Disability (HPOD) submitted a third-party intervention against the argument by Hungary and in support of the complainants. The HPOD submitted that even the individualised assessment during an application for guardianship of the capacity to participate actively or passively in an election violates article 29.³⁹⁶ The HPOD stressed that article 29 of the Convention provides for an unconditional right to vote for all persons with disabilities, and does not allow any implicit restrictions on the basis of real or perceived ability to vote, whether imposed through an overall ban on broad categories of disabled persons, or on bans on all persons with particular types of disabilities who are presumed to have limited voting capability, or even through an individualized assessment of the voting capacity of specific disabled individuals.³⁹⁷ In short, the HPOD submitted that it is not permissible to subject persons with mental impairments to voting capacity testing in order to ‘protect the integrity of the political system from individuals who are unable to formulate a valid political opinion’. First, other citizens are not subjected to capacity testing, second, voting capacity cannot objectively be determined and, third, the goal of protecting the integrity of the electoral system is neither compelling nor legitimate given the small number of voters that are involved.³⁹⁸

³⁹⁵ *Bujdosó v Hungary* para 4.3.

³⁹⁶ *Bujdosó v Hungary* para 5.2.

³⁹⁷ *Bujdosó v Hungary* para 5.5.

³⁹⁸ *Bujdosó v Hungary* paras 5.7 to 5.9.

In its consideration of the merits, the Committee agreed with these submissions and ruled in favour of the complainants, adopting the submissions made by the HPOD as correctly reflecting the law under article 29 of the CRPD:³⁹⁹

‘[T]he Committee recalls that article 29 of the Convention requires States parties to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, including by guaranteeing their right to vote. Article 29 does not foresee any reasonable restriction, nor does it allow any exception for any group of persons with disabilities. Therefore, *an exclusion of the right to vote on the basis of a perceived, or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability*, within the meaning of article 2 of the Convention. [...] Having found the assessment of individuals’ capacity to be discriminatory in nature, the Committee holds that this measure cannot be purported to be legitimate. Nor is it proportional to the objective to preserve the integrity of the State party’s political system. The Committee recalls that, under article 29 of the Convention, the State party is required to adapt its voting procedures, by ensuring that they are “appropriate, accessible, and easy to understand and use”, and allowing, where necessary, assistance in voting upon request of the person with disability. It is by so doing that the State party will ensure that persons with intellectual disability cast a competent vote, on an equal basis with others, while guaranteeing the secrecy of the vote.’

The CRPD Committee concluded that Hungary still failed to comply with its obligations under article 29 of the Convention. In doing so it agreed, as will be discussed in the next

³⁹⁹*Bujdosó v Hungary* paras 9.4 to 9.6.

section, with the European Court of Human Rights which held in *Kiss v Hungary* that the automatic removal from the voter's roll of people under partial curatorship violated the right to vote under the European Convention on Human Rights. However, as will also be discussed, the Committee made clear that any interpretation of the *Kiss* judgment which would suggest that one's right to vote can be legitimately removed on the basis of an individualised judicial evaluation, does not comply with Articles 29 and 12 of the CRPD.⁴⁰⁰

The Committee concluded that Hungary (and the same would apply for all members states of the CRPD, such as South Africa) is under an obligation to prevent the ongoing violation by repealing the existing law and by:⁴⁰¹

‘[E]nacting laws that recognize, without any “capacity assessment” the right to vote for all persons with disabilities, including those with more need of support, and provide for adequate assistance and reasonable accommodation in order for them to be able to exercise their political rights.

Upholding, and guaranteeing in practice the right to vote to persons with disabilities, [...] by ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use, and where necessary, at their request, allowing assistance in voting by a person of their choice.’

The ruling by the Committee in *Bujdosó* has understandably formed the basis of claims by disability rights activists around the world for the political participation of mentally disabled or impaired persons. The question, according to the activists, is no longer whether people

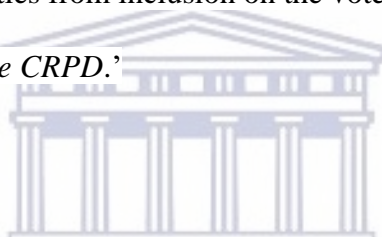
⁴⁰⁰ *Bujdosó v Hungary* para 9.4.

⁴⁰¹ *Bujdosó v Hungary* paras 10.2 b and c.

with mental impairments have the right to vote in elections, but only how this right can best be facilitated.⁴⁰²

South Africa's Initial State Report under the CRPD was due in 2009 but was only submitted in 2014.⁴⁰³ South Africa reported on its compliance with the Committee's interpretation of article 29.⁴⁰⁴ South Africa seemingly agreed with the interpretation of article 29 provided above and on that basis publicly conceded in its Report that the current law is not in compliance with the CRPD:⁴⁰⁵

'[A]s mentioned earlier, both the Constitution of the Republic of South Africa and section 8(c) and (d) of the Electoral Act, 1998, exclude certain categories of persons with psycho-social disabilities from inclusion on the voters roll, *and need to be reviewed to comply with the CRPD.*'



The Committee apparently accepted this concession and commitment to legal reform on the side of the South African government, and strangely did not provide specific recommendations for legal reform in its concluding observations to South Africa's Initial Report.⁴⁰⁶ The Committee expects South Africa's next periodic report in June 2022. This Report will have to include comments about progress made to align the Constitution and Electoral Act with art 29 of the CRPD as interpreted by the Committee. Since the Initial Report had been filed, South Africa has held three elections (3 August 2016; 8 May 2019;

⁴⁰² Grobbelaar-Du Plessis I, The Right of Persons with Intellectual Disabilities to Political Participation: The Legal Capacity to Vote - Zsolt Bujdosó v Hungary Communication No. 4/2011 (Committee on the Rights of Persons with Disabilities) (UN Doc CRPD/C/D/4/2011), 83 THHR 455 (2020).

⁴⁰³ South Africa: Initial State Party Report UN Doc CRPD/C/ZAF/1.

⁴⁰⁴ South Africa: Initial State Party Report UN Doc CRPD/C/ZAF/1 paras 330-345.

⁴⁰⁵ South Africa: Initial State Party Report UN Doc CRPD/C/ZAF/1 para 340 (my emphasis).

⁴⁰⁶ See further Grobbelaar-Du Plessis I, The Right of Persons with Intellectual Disabilities to Political Participation: The Legal Capacity to Vote - Zsolt Bujdosó v Hungary Communication No. 4/2011 (Committee on the Rights of Persons with Disabilities) (UN Doc CRPD/C/D/4/2011), 83 THHR 455 (2020) 467.

and 1 November 2021). In all three these elections the automatic disqualification of people with mental impairments applied, in direct violation of the CRPD.

Whether the exclusion of people with impaired mental capacity from these elections also amounted to a violation of section 19(3) of the South African Constitution, which limits the right to vote on capacity grounds to adult citizens, and which accepts that every right is in principle subject to reasonable limitations, is a different and more complex question that requires a further exploration of regional human rights regimes.

6.4 The Council of Europe and the European Human Rights Convention

The Council of Europe was founded in 1949 to protect human rights in Europe. Today it has 47 member states, with a population of approximately 820 million. All member states of the Council are subject to the European Convention on Human Rights, as interpreted and applied by the European Court on Human Rights. According to article 3 of Protocol 1 to the European Convention, all member states shall hold free and fair elections at regular intervals by secret ballot, under conditions ‘which will ensure the free expression of the opinion of the people in the choice of the legislature’.

The European Court of Human Rights dealt with the rights of mentally disabled persons to vote under article 3 of Protocol 1 in the case of *Alajos Kiss v Hungary*.⁴⁰⁷ At issue was section 70(5) of the Hungarian Constitution of 1949, which, as we saw in the previous section, automatically disenfranchised Mr Kiss after he was placed under partial guardianship due to manic depression.⁴⁰⁸ As starting point of its judgment, the court referred to one of its

⁴⁰⁷ *Kiss v Hungary* Application no. 38832/06, Council of Europe: European Court of Human Rights (2010).

⁴⁰⁸ *Kiss v Hungary* Application no. 38832/06, Council of Europe: European Court of Human Rights (2010) para 7.

previous judgments, *Hirst v the United Kingdom (no 2)*,⁴⁰⁹ in which the following was said:⁴¹⁰

‘[T]he right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion. ... Universal suffrage has become the basic principle’.

In that case the court also stressed that Article 3 of Protocol 1 is pivotal to establishing and maintaining an effective and meaningful democracy.⁴¹¹ The court also stated that the rights in Article 3 of protocol 1 are not absolute and that there is room for limitation of these rights.⁴¹² However, the limitation must not affect the right in such a way that it impairs the very essence of the right or deprive the right of its effectiveness, the limitation must have a legitimate aim and the means employed must be proportionate.⁴¹³ In applying the limitation analysis in the *Kiss* case, the court found that the aim of limiting the right to vote in this case was legitimate, as it was done to ensure that:

‘[o]nly citizens who were capable of assessing the consequences of their decisions and making conscious decisions we able to part take in public affairs’.⁴¹⁴

When assessing the proportionality of the limitation, the court accepted that it should leave each state with some margin of appreciation to determine what disqualifications would be

⁴⁰⁹ *Hirst v United Kingdom (no 2)* (2005) ECHR 681.

⁴¹⁰ *Hirst v United Kingdom (no 2)* (2005) ECHR 681 para 59.

⁴¹¹ *Hirst v United Kingdom (no 2)* (2005) ECHR 681 para 58.

⁴¹² *Hirst v United Kingdom (no 2)* (2005) ECHR 681 para 60.

⁴¹³ *Hirst v United Kingdom (no 2)* (2005) ECHR 681. para 62.

⁴¹⁴ *Kiss v Hungary* Application no. 38832/06, Council of Europe: European Court of Human Rights (2010) para 38.

proportional to achieve this aim.⁴¹⁵ However, this margin of appreciation is not all embracing:⁴¹⁶

‘[I]f a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.’

Looking at the issue from the perspective of the history of exclusion and disadvantage suffered by mentally disabled persons in European societies, the Court concluded that the *automatic* disqualification from participation in elections by persons under partial guardianship constituted an unjustifiable rights violation:⁴¹⁷

‘[T]he Court cannot accept, however, that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation.’

In other words, the Court concluded that the indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, constituted a human rights violation under the Convention.⁴¹⁸

⁴¹⁵ *Kiss v Hungary* Application no. 38832/06, Council of Europe: European Court of Human Rights (2010) para 41.

⁴¹⁶ *Kiss v Hungary* Application no. 38832/06, Council of Europe: European Court of Human Rights (2010) para 42.

⁴¹⁷ *Kiss v Hungary* Application no. 38832/06, Council of Europe: European Court of Human Rights (2010) para 42.

⁴¹⁸ *Kiss v Hungary* Application no. 38832/06, Council of Europe: European Court of Human Rights (2010) para 44.

The judgment in *Kiss* followed on an earlier recommendation of the Council of Europe to its member states that mentally disabled persons must be allowed to fully exercise their civil and political rights.⁴¹⁹ Furthermore, the Council stated that if there were to be any restrictions on these rights, that it would have to be in line with the provisions of the European Convention and cannot be based on the existence of a mental disability alone.⁴²⁰ In 2006 the Council of Europe adopted a recommendation which aimed to encourage the participation of disabled persons in social and political life and improving their over-all quality of life, as the democratic process is pivotal to the development of a democracy.⁴²¹ The council added that it is necessary for society to reflect the diversity of its population and it is of interest to society to share their various experiences and wealth of knowledge, thus it is of utmost importance that persons with disabilities exercise their rights to vote and participate in the democratic process.⁴²²

We saw in the previous section that, following the *Kiss* judgment, Hungary amended its constitution and electoral law to require an individualised assessment of voting capacity as part of the application process for the appointment of a guardian or curator. We also saw that this amendment, which is in line with the European Convention as interpreted in *Kiss*, was still found wanting under the CRPD in the *Bujdosó* communication.

The position adopted in the *Kiss* judgment, although not in any way binding on South Africa, seems more aligned with the structure of rights analysis under the South African Bill of Rights and therefore preferable.

6.5 The African Charter System

⁴¹⁹ Council of Europe Recommendation Rec (2004) 10 of 22 September 2004.

⁴²⁰ Council of Europe Recommendation Rec (2004) 10 of 22 September 2004.

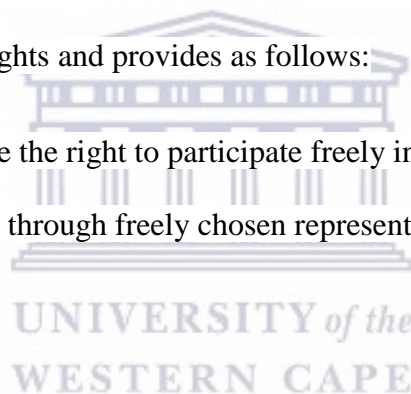
⁴²¹ Council of Europe Recommendation Rec (2006) 5 of 5 April 2006.

⁴²² Council of Europe Recommendation Rec (2006) 5 of 5 April 2006.

South Africa has been a party to the African Charter of Human and Peoples' Rights and its Protocol,⁴²³ the regional human rights regime of the African Union, since 2002. The regime consists out of a Charter of Rights and Duties, and two enforcement mechanisms, the African Commission on Human and Peoples' Rights (AComHPR) and the African Court on Human and Peoples' Rights (ACrtHPR).

The Charter provides all individuals with enjoyment of the rights and freedoms recognised and guaranteed in the Charter, and prevents discrimination on grounds such as race, ethnic group, colour, sex, language, religion, or any other opinion, national or social origin, fortune, birth or other status.⁴²⁴ Individuals are also provided equal protection before the law and the Charter ensures that all persons will be equal before the law.⁴²⁵ Article 13(1) of the Charter deals explicitly with political rights and provides as follows:

‘[E]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.’



The voting rights jurisprudence of the African system was pushed into the limelight recently when the Constitutional Court relied heavily on the judgment of the ACrtHPR in *Tanganyika Law Society v Tanzania; Mtikila v Tanzania*,⁴²⁶ to conclude that section 19(3) of the South African Bill of Rights guarantees the right of individuals to stand as independent candidates in South African national and provincial elections.⁴²⁷

⁴²³ Organisation of African, Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev.5, 21 I.L.M 58 (1982) and the *Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 10 June 1998.

⁴²⁴ Article 2.

⁴²⁵ Article 3.

⁴²⁶ *Tanganyika Law Society v Tanzania; Mtikila v Tanzania* (2013) 1 AfCLR 34.

⁴²⁷ *New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC) paras 38-44.

The voting rights of persons who are detained in a psychiatric hospital served before the AComHPR in the matter of *Purohit and Moore v The Gambia*.⁴²⁸ The disputed legislation prevented persons detained in a psychiatric unit from voting.⁴²⁹ Section 2 of the Gambian Lunatic Detention Act defined a ‘lunatic’ as including ‘an idiot or person of unsound mind’.⁴³⁰ The Act provided for the declaration of a person as a ‘lunatic’ and mandated the automatic and indefinite institutionalisation of lunatics. The Complainants submitted that the failure of the respondent to provide for and enable the detained ‘lunatics’ under the Act to exercise their civic rights and obligations, including the right to vote, violated article 13(1) of the African Charter.⁴³¹ The Respondent State admitted that the persons detained in the psychiatric hospital were not allowed to vote because they lacked the capacity to make an informed choice as to which candidate to vote for.⁴³² The African Commission stated that the rights conferred in terms of article 13(1) of the African Charter are extended to ‘every citizen’ and its denial can only be justified on the grounds of legal incapacity, such as an age restriction on voting.⁴³³ Mental incapacity does not imply legal incapacity, or the other way round.⁴³⁴ In order to limit the right to vote in article 13(1) of the African Charter, limiting provisions must conform to internationally acceptable norms and standards.⁴³⁵ In this regard the Commission adopted the standard set under the ICCPR. Voter disqualifications based on mental capacity would be compatible with the charter, provided the disqualification is based on objective and reasonable grounds and do not simply flow automatically from the decision

⁴²⁸ *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2001).

⁴²⁹ *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2001) para 7.

⁴³⁰ *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2001) para 44.

⁴³¹ *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2001) para 73. The other claims in the communication related the outdated mental health legislation, the definition and lack of provisions relating to lunatics as used in the LDA, overcrowding of psychiatric units, no requirement of consent to treatment, independent administration, management and living conditions and no provision for legal aid and/or for patients to seek compensation in the case of a rights violation. The Commission ruled on each ground in favour of the complainants.

⁴³² *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2001) para 74.

⁴³³ *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2001) para 75.

⁴³⁴ *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2001) para 75.

⁴³⁵ *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2001) para 75.

to detain a person in a psychiatric hospital. The Commission found that the Gambia had no objective ground for excluding patients in psychiatric hospitals from political participation, other than the question of whether mentally disabled persons could make informed choices.⁴³⁶ The African Commission thus found the Republic of The Gambia to be in violation of article 13(1) of the African Charter.

South Africa has also been a party to the African Charter on Democracy, Elections and Good Governance since 2011.⁴³⁷ The right to universal suffrage is recognised as an ‘inalienable right of the people’ in article 4(2) of the Charter:

‘[S]tate Parties shall recognize popular participation through universal suffrage as the inalienable right of the people.’

Article 8(1) of this Charter places a duty on the state to prevent discrimination on a number of grounds, and article 8(2) mandates states to:

‘[a]dopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, *people with disabilities*, refugees and displaced persons and other marginalized and vulnerable social groups.’

The blanket exclusion of people with mental illnesses and disabilities from elections and the failure to enact specific legislative and administrative measures to facilitate the voting rights of these citizens, thus also constitute violations of this Charter.

⁴³⁶*Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2001) para 76.

⁴³⁷ Adopted on 30 January 2007, came into operation 15 February 2012.

6.6 Conclusion

This brief overview of international and regional human rights law reveals that different human rights regimes impose different obligations on states as far as the active and passive voting rights of mentally unsound or disorderly citizens or persons detained involuntarily under the Mental Health Care Act, are concerned. Three positions exist and compete for dominance in international law:

(i) Mentally disabled citizens may be disqualified from active and passive participation in elections on the basis of objective and reasonable criteria set out in law; these criteria cannot be that a curator has been appointed or that a person is detained in a mental hospital (ICCPR and ACHPR);

(ii) Mentally disabled citizens may be disqualified from active and passive participation in elections but only on the basis of an individualised assessment of their capacity to vote i.e. to understand and make political choices (ECHR); and

(iii) No mentally disabled person under curatorship or in detention may be disqualified from participation in elections on the basis of their mental capacity (CRPD). States have an obligation to also enable people who are incapable of forming rational political decisions to vote.

It is beyond the scope of this mini-thesis to further explore how these tensions and contradictions in international human rights law should be resolved or which position prevails. It is sufficient to point out that the automatic disqualification under South African law,⁴³⁸ of persons under curatorship or in involuntary or assisted treatment in a psychiatric hospital, constitutes an international human rights violation under all three of these regimes.

⁴³⁸ Refer back to sections 2 and 3 above.

The three positions in international and regional human rights law present three potential reform possibilities to South African. In the next, and concluding chapter of this mini-thesis, I reveal which of the three options (if any) best aligns with the demands of the South African Constitution and its vision of South Africa as an internationally recognised and respected democratic state.



Chapter 7

CONCLUSION

7.1 Introduction

I started this mini-thesis with the aim of establishing whether sections 8(2)(c) and (d) of the Electoral Act of 1998 constitute an unjustifiable limitation of the right of every adult South African citizen to vote. During the course of the mini-thesis, I looked at the issue from various perspectives, including the history of voter exclusions in South Africa both during apartheid and thereafter, the founding values of the new constitutional order such as democracy and social justice, the way in which the issue is regulated in other open and democratic societies, and the rights obligations incurred by South Africa and other democracies under various regional and global human rights regimes. Having considered the question from all these perspectives, my conclusion is that sections 8(2)(c) and (d) are both unconstitutional.

The first aim of this conclusion is to present a brief overview and summary of the argument that points to this conclusion. Thereafter I will briefly explore what this conclusion requires by way of legal reform. The overbroad and blanket voter exclusion, based merely on the fact that a curator or administrator has been appointed by a court, or that a person is receiving assisted or involuntary treatment in a mental health care facility, can be remedied in one of three ways: (i) the voter disqualification can be refined to provide an objective and reasonable screening test for those adult citizens who lacks the legal capacity to form political opinions and to vote; (ii) the attempt to formulate a rule to regulate the issue can be discarded in favour of a more flexible, open-ended, and individualised judicial inquiry based on sound medical evidence; or (iii) capacity testing can be rejected as an anachronism with no place in modern

election law even, or perhaps especially so, in the case of person living with mental illness or disability. My concluding recommendation is that the Electoral Act must be amended in line with the second option listed above in time for the next general election in 2024.

7.2 Section 8(2)(c) and (d) of the Electoral Act of 1998 is unconstitutional

I started this mini-thesis by identifying the marginalised position of people living with mental illness and disability in South Africa. The Constitution imposes the positive obligation on the state to respect, protect, promote and fulfil the rights of this marginalised community. Most conceptions of social justice, such as that developed by Nancy Fraser, require no less. South Africa has made a valiant attempt through legislative and other measures to provide this community with cultural recognition and to ensure some form of economic redistribution to the benefit of this community. However, the political misrepresentation of this community remains one of the neglected issues in election law.

In chapter two of the mini-thesis I established that sections 8(2)(c) and (d) of the Electoral Act of 1998 prohibit the registration of adult citizens as voters, once they have been found to be of unsound mind or mentally disordered by a court or placed in detention by a court under the Health Care Act. A person who was registered as a voter before one of these court orders must be removed by the Chief Electoral Officer from the voters roll. This is so in spite of the fact that the historical voter exclusions have all been abolished, with the exception of nationality, age and mental capacity; and in spite of the fact that the right to vote is foundational to democracy. I established that the language used in section 8(2) of the Electoral Act dates back at least a century and therefore requires some interpretation in light of current law on the legal status of people with mental illnesses or disabilities.

In chapter three I explored how the voter disqualifications in section 8(2)(c) and (d) can be interpreted in order to limit the rights of adult citizens to vote as little as possible. The rights friendly interpretation of section 8(2) mandated by section 39(2) of the Bill of Rights developed in chapter three restricts the voter disqualification to the following adult citizens: (i) persons who have been placed under curatorship under the common law or administration under the Mental Health Care Act; (ii) persons who are receiving care as an assisted or involuntary patient in a mental health care facility under the mental Health care Act, whether as an in patient or out patient, but excludes patients who are receiving care and treatment on a voluntary basis; and (iii) persons who are detained as state patients in mental health care facilities.

In chapter four I measured this interpretation of sections 8(2)(c) and (d) against the Bill of Rights and the right to vote included in section 19(3) of the Bill. I established that the right to vote applies to all adult citizens, regardless of their mental capacity and that sections 8(2)(c) and (d) thus constitute a rights limitation. I then explored whether this limitation can be justified under section 36 of the Bill of Rights as serving a legitimate government objective in a proportional manner. Against the background of the recent voting rights jurisprudence of the Constitutional Court, I considered whether there are any logistical or administrative reasons implicit in the concept of a free and fair election to justify the blanket voter exclusions in question. I concluded that the ongoing disenfranchisement of mentally ill and disabled persons cannot be justified as a means to this end, that is, the need to ensure a free and fair election. The Electoral Act already provides for voter assistance at voting booths and special votes in care facilities or at home and protect voters from undue influence and mitigate against voter fraud. I then considered whether the disenfranchisement of mentally ill and disabled voters could be justified as a means to safeguard the democratic character of elections, where democracy is understood as ensuring the deliberative quality of politics and

political judgments. Section 19(3) implies that this is indeed a legitimate government objective. It does so by expressly limiting the right to vote to adult members of the nation (citizens). On this basis, I proceeded to explore whether section 8(2)(c) and (d) are proportional measures to achieve this potentially legitimate objective. I concluded that the disqualifications are not narrowly tailored and do not contain an objective and reasonable test to identify those citizens who lack the ability to understand politics and make independent political judgments as a precondition for exercising the right to vote. The disqualifications do not establish a close enough link between mental capacity and legal or voter capacity. Under the common law, for example, a person who lives with the assistance of a curator bonis retains the legal capacity to enter into contracts. Under the common law, such a person would arguably have retained the capacity to vote if he or she could have established such capacity at the time. The Electoral Act, understandable, imposes a blanket rule to determine voter capacity, but relies on a ground which even the common law would have found contestable. Under the Bill of Rights that test is not merely questionable but unconstitutionally crude and overbroad. The same applies to persons who are receiving treatment for a wide variety of mental illnesses in a mental health care facility. There is no reasonable link between the need to receive care and to be admitted as an assisted or involuntary patient, and the ability to understand and participate in an election.

In chapter five I tested this tentative conclusion against foreign law and what passes constitutional justification in other open and democratic societies. I established that open and democratic societies differ widely in their approach to the issue. Developing democracies, such as Kenya and India join ranks with South Africa by relying on a rule to disqualify adult citizens as voters based on their mental capacity. In most instances these blanket rules are crude and do not establish an objective link between legal or voting capacity and mental capacity. Germany resolves this unconstitutional result by mandating an individualised

assessment of the voting capacity of every adult citizen who is placed under curatorship or in detention in a health care facility. It is only when so determined by a court of law that an adult citizen is disqualified from voting in elections. The United Kingdom goes further and have completely abolished the traditional voter disqualification based on mental capacity.

In chapter six I explored whether there is a unified position in international law to the issue, which could assist us in choosing between the various national approaches to the question. I established that there is no single vision but that diverse approaches are adopted under the various United Nations and regional human rights regimes and sometimes also within each of these regimes. In spite of this diversity, what became clear is that the blanket disqualification of voters on the basis of no more than being placed under curatorship or receiving involuntary treatment in a mental care facility, such as is the position under section 8(2)(c) and (d), is universally regarded as a violation of international human rights obligations across all the international regimes.

My tentative conclusion at the end of chapter four that section 8(2)(c) and (d) is unconstitutional is reinforced and confirmed by the analyses in chapters five and six. Some open democracies, such as Germany, have found a way of regulating mental capacity as voter disqualification by means of a less restrictive means than a blanket exclusion. Secondly, sections 8(2)(c) and (d) violate international law from whatever perspective the Electoral Act is approached.

7.3 Possible remedies for the constitutional defect

Given that section 8(2)(c) and (d) are unconstitutional and in need of reform, the next question is how the invalidity can be remedied. The discussion above has revealed that there are essentially three avenues for the legal reform needed to remedy the constitutional defect:

(i) reformulate a new test or voter disqualification that includes objective and reasonable factors to screen for citizens who lack voting capacity; (ii) abandon the search for a blanket qualification rule in favour of an individualised judicial assessment of voting capacity; or (iii) abolish the disqualification of adult citizens on the basis of their mental and voting capacity and thus any form of voter capacity testing.

If the Constitutional Court were to find that sections 8(2)(c) and (d) are unconstitutional as argued above, the Court would most likely suspend the declaration of invalidity for a stipulated period of time and refer the Act back to Parliament to remedy the defect.⁴³⁹

Arguably, any of the three solutions listed above would pass constitutional muster and in addition find some support in foreign and international law. It would essentially be a political decision for Parliament as to which approach to adopt.⁴⁴⁰

Given the importance of the right to vote, I must favour a form of individualised capacity testing as the preferred remedy. As stated in *Bujoso v Hungry* and *Doe v Rowe*,⁴⁴¹ this assessment must be done in conjunction with medical professionals and based on a personalised investigation into the voting or decision-making capacity of the adult citizen alone. This assessment will only be triggered once the court has ordered the appointment of a curator or administrator or ordered the involuntary or assisted treatment of a person. In my view, neither of the other two alternatives are viable in the South African context. It seems impossible to formulate an objective and reasonable test for the disqualification of voters based on their mental capacity that could fairly be applied to the wide range of mental

⁴³⁹ The order in *New Nation Movement NPC v President of the Republic of South Africa* 2020 (8) BCLR 950 (CC) para 128 serves as example: 'It is declared that the Electoral Act 73 of 1998 is unconstitutional to the extent that it requires that adult citizens may be elected to the National Assembly and Provincial Legislatures only through their membership of political parties. The declaration of unconstitutionality referred to in paragraph 4 is prospective with effect from the date of this order, but its operation is suspended for 24 months to afford Parliament an opportunity to remedy the defect giving rise to the unconstitutionality'.

⁴⁴⁰ *AParty v The Minister for Home Affairs* 2009 (6) BCLR 611 (CC) para 5: 'Parliament has the constitutional authority and duty to design an electoral scheme to regulate the exercise of the right to vote'.

⁴⁴¹ See above the discussions in chapters five and six.

illnesses and impairments. On the other side of the spectrum, abolishing the voter disqualification completely, might easily be perceived as hollowing out the importance of sound political judgment and the right to vote. By contrast, the second option strikes a sound balance between the rights of people living with a mental illness or defect and the need to consolidate free and fair elections in our young democracy.

The remedy suggested above would mean that the electoral process will have to cater for many more persons in mental care facilities or people living with the care and support of a curator. The Electoral Act currently makes provision for assisted voting at voting stations and special voting in care facilities and at home. These provisions will also have to be revisited and expanded to cater for the specific needs of voters in care situations.

7.4 Concluding observations

A comment that cannot be ignored, and I think which needs further investigation, but does not fit the scope of this mini-thesis, is this: When discussing Kenya's views on the right on mentally disabled persons right to vote, in chapter five, it was noted that in African cultures, mental disability is associated with bad omens and demonic spirits. Similarly, in the time when religious texts are said to have been written, mental disabilities were also considered to be demonic, much like in African cultures. Given the rich history of Cannon Law and Customary Law in South African law, I cannot ignore their influences in our law and in society. Does society shape the law or does the law shape society? And to what extent are our laws affected by stigma, religion and culture? Can South Africa make the claim that our laws are secular?

In so much as this thesis aims to change the law, the denial of the voting rights of mentally unsound or disorderly citizens and persons detained involuntarily under the Mental Health

Care Act , points to a much deeper problem in society. That is, the stigma attached to mental disability and mental health. Thus, this thesis goes beyond changing the law but rather reshaping archaic mental constructs.

Using the example given in chapter one, same sex marriage has now been decriminalised. Yet, homophobia continues in South Africa as seen in the Belofdebos case, where the owners of a wine farm used their right to Freedom of Religion to deny a same-sex couple permission to get married on their property.⁴⁴² Here we may draw the inference that, it is not only the law that needs to change, but also society's and the law makers' perceptions.

This discussion, however, is beyond the scope of this mini-thesis. I would like to use this example simply to point out why legal reform needs to be combined with a broader education campaign of everybody involved in the care of people with mental illnesses or disabilities. Key here is the difference between mental capacity and the various aspects of legal capacity, most notably, voting capacity. . Furthermore, I advocate for education of the public, since this is a democracy, they too will be involved in the debate. First, people who are in the care of others due to a mental illness or disability need to be educated on the nature of the political process, with specific reference but not limited to: the structures of parliament; the voting process; political party manifestos; the current political climate in South Africa and the rest of the world; their basic rights as listed in the Bill of Rights; how to communicate in the deliberative process and have the voices heard; the context of the right to vote, given the struggle to acquire equal rights for all and the importance of the right to vote in South Africa

⁴⁴² Githahu M 'Belofdebos owners write to Human Rights Commission in a bid to resolve anti-gay controversy' Cape Argues 9 Feb 2022 available at <https://www.iol.co.za/capeargus/news/belofdebos-owners-write-to-human-rights-commission-in-bid-to-resolve-anti-gay-controversy-e8587896-d0b0-4c8e-9c12-b609ad69f4c7> (accessed 10 May 2022).

and the world over. This could be done by the curator, administrator, within the mental health care facility or by political parties when campaigning.

Second, the law makers are in dire need of education in the field of mental health. Having analysed the voting disqualifications and its history, the current blanket ban can only be attributed to sheer ignorance and pure laziness. There are too many categories grouped together. What these categories have in common is mental disability, but the difference between each category is too vast for all mentally disabled persons to be grouped together. It cannot be, in the current age, where we have access to information, faster than ever, that law makers are unaware of this.

Finally, I recommend that the public be educated on mental health. The stigma surrounding mental health is far too great, which perpetuates the human rights violations. We see this happening in many fields in our society, patriarchy giving rise to gender-based violence, heteronormativity giving rise to homophobia, the same said can be said for xenophobia and racism. This creates a feed-back loop, where society creates the stigma, law makers implement laws which reflect society, society builds the perception of what is right or wrong based on the law. Thus, the cycle perpetuates itself. The loop must be broken. The denial of the right to vote to many adult citizens living with a mental illness or defect can no longer be tolerated. It is an anachronism which needs to be remedied by parliament before the next general election in 2024.



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