

*Panel presentation prepared for the New York Law School workshop: “Twenty Years of South African Constitutionalism: Constitutional Rights, Judicial Independence, and the Transition to Democracy” November 13-16, 2014*

## **South African constitutionalism and the boundary problem of democracy: The right to vote during the first 20 years post apartheid**

Wessel le Roux<sup>1</sup>

### **1 Introduction**

The aim of this panel presentation is to review the impact of migration on the right to vote in post-apartheid South Africa. Each one of the five post-apartheid elections between 1994 and 2014 included (or excluded) a different group of migrants (immigrants and emigrants) as eligible voters. The presentation provides a brief overview of the post-apartheid struggle to arrive at a definition of the democratic people or demos. I begin with a brief discussion of the “boundary problem of democracy” and introduces the “all affected interest principle” as a possible solution to the problem (section 2). I then proceed to explore how South Africa has responded to this problem during the first 20 years of democracy by effectively disenfranchising resident foreigners and enfranchising non-resident citizens (section 3). I conclude that the celebration of diasporic nationalism poses a serious threat to the future of post-apartheid constitutional democracy.

### **2 Confronting the boundary problem of democracy**

“Amandla! Awethu!” According to the iconic struggle slogan, power belongs to the people. Constitutional law has traditionally concerned itself with the vertical and horizontal division or allocation of this power (or *kratos*) among the people. The post-apartheid constitution is no different. It divides power vertically between three spheres of government (cities, provinces, and the state) and horizontally between three branches of government. These classical divisions of liberal constitutionalism implies the existence of the people (demos) as an identifiable and bounded entity. This assumption is typical of what Nancy Fraser calls the era of “normal justice” or the liberal quest among citizens for social justice, that is, the achievement of “participatory parity” through recognition, redistribution and representation.<sup>2</sup>

#### **2.1 The boundaries of democracy**

But who belongs to the people? The South African Constitution has surprisingly little to say about the question. Unlike the Constitution of the USA,<sup>3</sup> or the Freedom

---

<sup>1</sup> Professor in the Department of Public Law and Jurisprudence, University of the Western Cape, South Africa ([wleroux@uwc.ac.za](mailto:wleroux@uwc.ac.za)). Many thanks to dr Dominik Steiger (Free University of Berlin) for many valuable discussions about participation and democracy, including the voting rights of migrants.

<sup>2</sup> Nancy Fraser *Scales of Justice* (2008) 58-61.

<sup>3</sup> USA Constitution, Amendment XIV, section 1 provides: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside”.

Charter which boldly proclaimed that South Africa “belongs to all who live in it”,<sup>4</sup> the Constitution does not contain an elaborate citizenship provision. On the contrary, it leaves the issue to the legislature,<sup>5</sup> and proceeds on the assumption that the question has been resolved.<sup>6</sup> This is not an atypical assumption of constitutional drafters or even theorists.

In his 1983 introduction to a series of essays on liberal democracy, Frederick Whelan reminded democratic theorists that democracy as a way of making collective decisions has a theoretical limit.<sup>7</sup> Before a democratic decision can be taken by a group of people, the logically prior decision must be taken who belongs to the group. It is necessary to decide who belongs to the people before “we, the people” can decide anything. Whelan called this the boundary problem of democracy. Having identified the problem, he continued to argue that democratic theory has neglected and provides no answer to the problem.<sup>8</sup>

---

<sup>4</sup> The Freedom Charter was adopted during the Congress of the People at Kliptown on 26 June 1955 as a constitutional charter for the struggle against apartheid. The opening words read as follows: “We, the People of South Africa, declare for all our country and the world to know: that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people”.

<sup>5</sup> Section 3 of the Constitution, which does not form part of the Bill of Rights, proclaims that “there is a common South African citizenship” but then provides that “national legislation must provide for the acquisition, loss and restoration of citizenship”.

<sup>6</sup> Jonathan Klaaren “Citizenship” in Woolman (ed) *Constitutional Law of South Africa* (2008; 2<sup>nd</sup> ed) 60-4 claims that the Constitution nevertheless contains a “substantive theory or vision of citizenship” and that the theory can be discerned through a historical interpretation of the citizenship provisions. This approach tends towards a conception of citizenship in which “all persons who are lawfully and permanently residing within a country are presumably full members of the national community”. Klaaren calls this the “lawful status” or residence based model of citizenship, and contrasts it with “cultural”, “membership” (republican) and “post-national” (cosmopolitan) models of citizenship. This reading is supported by what Seyla Benhabib calls the “disaggregation of citizenship rights” or the granting of civil and social rights to everyone in South Africa. In this regard Klaaren notes a tension in the jurisprudence of the Constitutional Court between lawful status or residence based notions of citizenship (what is better called denizenship), and a republican version of the membership based notion of citizenship (the equation of nationality and citizenship). Klaaren does not derive his understanding of constitutional citizenship from the concept of democracy embodied in the Constitution. See also Jonathan Klaaren “Constitutional citizenship in South Africa” (2010) 8 *International Journal of Constitutional Law* 94. If the citizenship provisions, including the right to vote in section 19(3) of the Constitution, are read through the value or principle of democracy (the “all affected interests principle”) then only the lawful status or residence based notion of citizenship (denizenship) has any democratic merit. From this perspective, the differences between Klaaren’s cultural and republican conceptions of citizenship becomes negligible and collapses into a new notion of diasporic nationalism. It is a notion that compromises the development of post-national citizenship and thus undermines the reframing of the social justice in a globalising world (see Fraser *Scales of Justice* 12).

<sup>7</sup> Frederick Whelan “Prologue: Democratic theory and the boundary problem” in J Pennock and J Chapman (eds) *Nomos XXV: Liberal Democracy* (1983) 13.

<sup>8</sup> Whelan “Prologue” 42. Robert Dahl *After the revolution?* (1970) 60 noted long before Whelan that the boundary problem of democracy is “almost totally neglected by all the great political philosophers who write about democracy”. For Dahl’s answer to the problem see Robert Dahl *Democracy and its critics* (1989) 119-131 (the demos must include all adult members of the association who are subject to the binding collective decisions of the association).

## 2.2 The all affected interest principle

During the past 30 years the boundary problem of democracy has been taken up with increasing regularity by democratic theorists.<sup>9</sup> In fact, the question of the demos now constitutes the core theoretical concern of what Fraser describes as the paradigm of “abnormal justice”.<sup>10</sup> These theorists accept that it is impossible to constitute the demos democratically, but, following Benhabib’s earlier rejection of the deconstructive implications of this impossibility,<sup>11</sup> argue that different responses to the boundary problem can be evaluated according to democratic principles (in the absence of a democratic procedure). For this purpose a number of theorists have suggested some version of the “all affected interest principle”.<sup>12</sup> In terms of this principle everybody who is directly affected by a decision has a democratic right to be included (directly or through elected representatives) in the decision-making process.

According to this democratic principle of inclusion or political integration, which operationalises the idea of constitutional patriotism defended by Habermas,<sup>13</sup> defining the demos in terms of nationality (or citizenship status) is both overinclusive and underinclusive. As Sarah Song points out, deriving the right to vote from the formal status of citizenship (nationality) is overinclusive because certain emigrants (expatriates) who are not directly affected by, or subject to, the coercion of the state are included in the demos, and it is underinclusive because certain resident foreigners such as permanent residents,<sup>14</sup> who are directly affected or coerced by the state, are excluded from the demos.<sup>15</sup>

Song’s formulation of the “all affected interest principle” implies that ordinary residence (as opposed to property ownership, for example, or the speculative right of citizens to return to the country of their nationality) is the appropriate criteria with which to test whether a person is sufficiently affected by a political decision, so as to

---

<sup>9</sup> See for example Terry Macdonald “Boundaries beyond borders: Delineating democratic ‘peoples’ in a globalising world” (2003) *Democratization* 10 173; David Owen “Constituting the polity, constituting the demos: on the place of the all affected interests principle in democratic theory and in resolving the democratic boundary problem” (2012) *Ethics & Global Politics* 129; Sarah Song “The boundary problem in democratic theory: why the demos should be bounded by the state” (2012) 4 *International Theory* 39.

<sup>10</sup> Fraser *Scales of justice* 53: “At issue here is the scope of justice, the frame within which it applies: *Who* counts as a subject of justice in a given matter?”.

<sup>11</sup> Seyla Benhabib “Democracy and Difference: Reflections on the metapolitics of Lyotard and Derrida” (1994) 1 *Journal of Political Philosophy* 1. Benhabib insisted that the difference between the constitutional and historical demos opens the door for a dialectic or internal critique which the deconstructive understanding of the indeterminacy of the people precludes. In her later work, *Another Cosmopolitanism* (2006), she returns to this notion of “democratic iteration” as the basis of immigrant politics and the struggle for voting rights.

<sup>12</sup> Dahl *After the revolution* 120, 129; Fraser *Scales of justice* 24-25; Robert Goodin “Enfranchising all affected interests, and its alternatives” (2007) 35 *Philosophy and Public Affairs* 40; Sofia Näsström “The challenge of the all-affected principle” (2011) 59 *Political Studies* 116; Song “The boundary problem” 48.

<sup>13</sup> Jürgen Habermas *Between facts and norms* (1996) 491-515.

<sup>14</sup> But see Ludvig Beckman “Irregular migration and democracy: the case for inclusion” (2013) 17 *Citizenship Studies* 48 who argues for the inclusion of all residents, whether formally documented or not.

<sup>15</sup> Song “The boundary problem” 40.

have a democratic right to vote.<sup>16</sup> The narrow interpretation of affected interest to mean ordinary residence has the additional benefit of responding effectively to concerns about the size (substantive equality) and stability (solidarity) of the demos, concerns attached to the “unbounded demos thesis” seemingly implied by the affected interest principle.<sup>17</sup>

Song’s formulation also suggests that the right to vote, conventionally formulated as the right of every adult citizens to vote, does not serve to guarantee the democratic nature of constitutional communities in contexts marked by significant levels of migration. Given South Africa’s controversial history of migrant labour, this is a conundrum which did not escape the attention of the drafters of the first post-apartheid Constitution.

### **3 The right to vote and post-apartheid constitutionalism**

#### **3.1 The right to vote in the interim Constitution**

The transitional (interim) Constitution contained two provisions which regulated the right to vote. The first was contained in the Bill of Rights as section 21(2) of the Constitution and read as follows:

“Every citizen shall have the right to vote, to do so in secret and to stand for election to public office”.

Section 6 of the Constitution, the second provision regulating the right to vote, read as follows:

*Every person who is (a)(i) a South African citizen; or (ii) not such a citizen but who in terms of an Act of Parliament has been accorded the right to exercise the franchise; b) of or over the age of 18 years; and (c) not subject to any disqualifications as may be prescribed by law, shall be entitled to vote in elections of the National Assembly, a provincial legislature or a local government and in referenda or plebiscites contemplated in this Constitution, in*

---

<sup>16</sup> A defence of her residence-based understanding of affected interest cannot be developed here. See Ludvig Beckman “Is residence special? Democracy in the age of migration and human mobility” in L Beckman and E Erman (eds) *Territories of citizenship* (2012) 12. Sufficient to say that the European Court of Human Rights has accepted that ordinary residence is a rational and reasonable test (at least in the case of expatriates) to determine who are sufficiently affected by political decisions to have a democratic right to vote. See *Sitaropoulos and Giakoumopoulos v Greece* (42202/07) 12 March 2012 para 69; *Shindler v United Kingdom* (19840/09) 7 May 2013 para 105. In both cases the court ruled that expatriate citizens do not have a right to vote in national elections merely by virtue of their status as citizens. If a residence based test is rejected, the case must still be made why the present nationality test (or the formal status of citizenship) provides a better indication of being directly affected; or why the principle of directly affected interest should not apply in the first place.

<sup>17</sup> Goodin “Enfranchising” argues that humanity is affected by every political decision taken on the planet Earth and that humanity is the true subject of democracy. This broad interpretation of the affected interest principle threatens the ideal of democratic self-government, in as far as the latter depends on a bounded demos of a particular size and solidarity. Once ordinary residence is accepted as criteria the question remains whether this criteria should be subject to lawfulness and durational requirements. See Ludvig Beckman “Irregular migration and democracy: the case for inclusion” (2013) 17 *Citizenship Studies* 48.

accordance with and subject to the laws regulating such elections, referenda and plebiscites.

There was no attempt by the drafters of the transitional Constitution to reconcile these two provisions. If anything, the drafters ensured that section 6 overrides section 21(1) by putting section 6 into operation on 9 March 1994, well in advance of section 21(2) and the rest of the Bill of Rights. This ensured that section 6 and the principle of non-citizen voting rights served as the pre-constitutional basis of the founding elections of 27 April 1994.

### **3.2 Voter eligibility and the Electoral Act 202 of 1993**

Further effect was given to section 6 of the transitional Constitution by the Electoral Act 202 of 1993.<sup>18</sup> The drafting of the Act began on 22 June 1993, when the Negotiating Council determined that sufficient progress had been made with the negotiations, and that 27 April 1994 could be confirmed as the date for the first democratic elections. In order to proceed with elections, the Council instructed the technical committee on constitutional matters to draft a transitional constitution and instructed the drafting of a new Electoral Bill. The Electoral Bill was endorsed by the final plenary session on 17 November 1993, subject to "further technical processing of this draft Electoral Bill" by the Negotiating Council before it was submitted to Parliament. The last apartheid Parliament passed the Electoral Act 202 of 1993 on 22 December 1993. The Act was promulgated on 14 January 1994 but amended no less of six times before the elections eventually took place.

Chapter III of the Act regulated the franchise. Section 15 listed the persons entitled to vote and provided as follows:

Any person of the age of 18 years or older who is a citizen of *or permanently resident in* the Republic and who is in possession of a voter's eligibility document shall [...] be entitled to vote at the election.<sup>19</sup>

Section 15(2) provided that "[a] person shall be permanently resident in the Republic if he or she holds a permit for permanent residence in the Republic or has been exempted from the requirement of holding a permit for permanent residence". The Electoral Act thus relied on the Aliens Control Act in order to extend the right to vote to foreign nationals with the right to permanently reside in the Republic. Section 15(3) went further and extended the right to vote to certain long term residents without official permanent residence status. Section 15(3)(c) originally provided that a person shall be deemed to be a permanent residence for the purposes of election law if he or she entered the Republic on or before 31 December 1978 and has been "ordinarily resident" in the Republic since the date of his or her entry into the Republic more than 14 years ago.

---

<sup>18</sup> The Electoral Act, 202 of 1993, was promulgated on 14 January 1994. The Act was amended on six occasions in order to accommodate political agreements and to meet administrative exigencies.

<sup>19</sup> In terms of section 1 of the Act a "voter's eligibility document" meant an ordinary identity document (or a temporary identity certificate) or a temporary voter's card; or a passport issued by one of the TBVC states; or a reference book.

The extension of voting rights to foreign nationals remained contentious even after the promulgation of the Act. On 21 April 1994, barely a week before the elections, section 15(3)(c)(i) was amended to change the date of continuous long term residence required, from 31 December 1978 to 13 June 1986. This meant that the period of residence required of foreign nationals without permanent residence status was reduced by half from 14 to seven years.

This late change in voter eligibility was made possible by the fact that the 1994 elections did not take place on the basis of a common voter's roll. In fact no system of voter registration was in place. A prospective voter could arrive at a polling station and vote, provided he or she properly identified him or herself. Foreign nationals could do so by obtaining a temporary voter identification card.

During the 1994 elections, 3.5 million temporary voter's cards were issued. According to Booyens and Masterton this number included 500 000 foreign nationals who were allowed to vote on the basis of section 6 of the transitional Constitution and section 15(1) of the Electoral Act.<sup>20</sup>

### **3.3 The abolition of non-citizen voting rights under the final Constitution**

Immediately after the 1994 elections a process of disenfranchising foreign nationals started with the drafting of the so-called final Constitution. The formulation of the right to vote in the interim Bill of Rights was retained in more or less its same form. Section 19(3)(a) of the 1996 Constitution states that:

"Every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution".

However, the qualification of this right by section 6 of the interim Constitution, which allowed for non-citizen voting rights, was removed. In its place the final Constitution contains a citizenship clause in section 3(3) which provides that national legislation must provide for the acquisition and loss of citizenship, and that all citizens are entitled to equal (voting) rights.

After the final Constitution entered into force on 2 February 1997, the rapid disenfranchisement followed of all the foreign nationals who voted or could have voted in 1994. Arguably to bring the legislative framework into line with the new anti-foreigner sentiment that informed the drafting of the final Constitution, section 15 of the Electoral Act was substituted by the Electoral Amendment Act 20 of 1997 with the following provision:

Any person of the age of 18 years or older who is a South African citizen, whose name is included in the voters' roll and who is in possession of a voters' eligibility document shall [...] be entitled to vote in an election in respect of which he or she is registered as a voter.

---

<sup>20</sup> Susan Booyens & Grant Masterton "Chapter 11: South Africa" in Denis Kadima and Susan Booyens (eds) *Compendium of Elections in Southern Africa 1989-2009: 20 Years of Multiparty Democracy* (2009) 405-406.

The disenfranchisement of permanent and long term residents was completed and consolidated when the Electoral Act 73 of 1998 finally repealed the Electoral Act of 1993, shortly before the 1999 general elections. The new Act retained the importance of residence for the allocation of the right to vote but, unlike the 1993 Act which accompanied the 1993 Constitution, added citizenship as an additional formal requirement for registration and voting. Section 6(1) of the Electoral Act provided that any "South African citizen in possession of an identity document" may apply for registration as a voter. Section 8(2)(b) originally explicitly stated that the chief electoral officer may not register a person as a voter, if that person is not a South African citizen. Section 8(2)(e) added the same disqualification where the citizen was not ordinarily resident in the voting district for which that person has applied for registration.

For the 1999 election a national common voters' roll was compiled on the basis set out in the Electoral Act of 1998. The voters roll contained only the names of South African citizens, who were 18 years old, and ordinarily resident in South Africa. This meant that non-resident citizens (emigrants or expats) were excluded, as were resident non-citizens (immigrants). The post-apartheid democratic experiment with non-citizen or resident voting rights had come to an abrupt end.

### **3.4 Taking stock of the brief experiment with foreigner voting rights**

Why was the right to vote, which formed the heart of the struggle against apartheid, so freely extended to non-national residents during the transition from apartheid to democracy, and why was it just as freely abolished from one election to the next?

One explanation is that the comparatively relaxed eligibility criteria must be understood against the background of the restrictive citizenship laws of the apartheid state. Many persons who were resident in South Africa in the early 1990s (in particular migrant mineworkers) could not or did not care to normalise their status. The normal avenue to voting rights (naturalisation) was thus either non-existent or unattractive. Before 1986 foreign black migrant (mine and farm) workers could not acquire permanent residence, let alone citizenship, in white South Africa. The drafters of the interim Constitution and the Electoral Act simply recognised that under normal circumstances most of these residents would have been naturalised citizens. The drafters accordingly treated all long term residents who might have qualified for naturalisation as naturalised citizens for the purposes of the 1994 elections. Paseka Ncholo proposed in 1993, along similar lines, that the right to vote should be extended to foreign residents who had already applied for naturalisation at a cut-off date before the elections.<sup>21</sup>

Another response is that the open eligibility criteria suited both major negotiating parties and thus amounted to a strategic deal between the drafters themselves. Jonathan Klaaren points out that the DP and NP embraced expatriate or non-resident citizen voters and foreign residents from Europe, while the ANC embraced resident non-citizen voters and foreign miners from Africa.<sup>22</sup> Neither party was willing

---

<sup>21</sup> Pacheka Ncholo "The right to vote" in Nico Steytler (ed) *Free and Fair Election* (1994) 57 64.

<sup>22</sup> Jonathan Klaaren "Contested citizenship in South Africa" in Penelope Andrews and Stephen Allman (eds) *The post-apartheid Constitutions* (2001) 303 309.

to turn this issue into a principled dispute about nationhood and membership and the identity of the polity and thus simply conceded to the other's demands.

The only comprehensive account available of the drafting of the Electoral Act is provided by Claire Robertson.<sup>23</sup> She tells a story of politicking in which debates were dominated by political concerns about the impact of decisions on the election outcome, rather than matters of political principle. She concludes her overview of the process on a cynical note, by praising those who eventually queued "to exercise a right they seemed to value more than their leaders" and by insisting that the election was a success "despite, not because of, the politicians".<sup>24</sup>

These three responses go a long way towards explaining the open eligibility criteria of the founding elections of 1994. These scholars seem to confirm Whelan's claim that the boundary problem of democracy can only be resolved pragmatically on the basis of historical contingencies.

At the same time, it cannot be denied that any polity willing to include foreign nationals as full members (as voters in its founding elections at national level) makes a very definite statement about the nature of its identity as a political community; and the basis of the bonds or integration between its members. Section 6 of the interim Constitution and section 15 of the Electoral Act was passed by the last white parliament against the background of the European debates during the early 1990s about the political integration of Europe and the voting rights of immigrants (and Germany after unification as a test case). Richard Wilson suggests that the European debates served as reference point for the architects of the South African transformation as well, and that the Habermasian idea of constitutional patriotism and denizenship played a key role during the early 1990s (both during the constitutional drafting process and subsequent TRC process where the new conception of nationhood was dramatically forged).<sup>25</sup>

What should be clear is that the disenfranchisement of foreigners was not an inevitable consequence of the normalisation of the electoral system. The principle of non-citizen voting rights could have been retained beyond the 1994 election. In fact, the residence based electoral system which was introduced for the 1999 elections introduced an "ordinary residence" eligibility test which favoured resident foreigners over non-resident (expatriate) citizens.

The disenfranchisement of foreigners cannot be separated from the rising xenophobia which gripped South Africa immediately after the elections. The final Constitution was in many respects far less accommodating towards foreigners than the 1994 interim Constitution. A number of commentators suggest that the division between white and black was quickly replaced by a new division between citizen and foreigner. The ANC government extended a general immigration amnesty to mineworkers in 1995, in an attempt to place foreign residents on the path to

---

<sup>23</sup> Claire Robertson "Contesting the contest: negotiating the election machinery" in Steven Friedman and Doreen Atkinson *The small miracle: South Africa's negotiated settlement* (1994) 44. Robertson relied heavily on interviews conducted during 1993 with members of the technical committee involved in the drafting of the legislation.

<sup>24</sup> Robertson "Contesting the contest" 65.

<sup>25</sup> Richard Wilson *The politics of truth and reconciliation in South Africa* (2001) 2.

naturalisation. One of the conditions for the amnesty was that the applicant had to prove that he or she had voted in the 1994 national election!

### 3.5 The struggle for expatriate voting rights

The complete disenfranchisement of foreign residents by the time of the 1999 elections was subsequently entrenched by a vocal campaign for the enfranchisement of expatriate or non-resident citizens. During the 1994 elections, 90 000 expatriates were permitted to vote.<sup>26</sup> The Electoral Act 73 of 1998 introduced a system of voter registration for the 1999 election and based registration on the requirement of ordinary residence. A citizen had to register where she was ordinarily resident and had to vote where she was registered. This residence requirement effectively disenfranchised all expatriate citizens. The Act did not provide special absentee ballots for the general public and limited absentee voting due to absence from the Republic to diplomats and their families on official government service.<sup>27</sup> (However, the Act did allow the Commission to prescribe other categories of citizens who could qualify for an absentee ballot.

Before the next election in 2004, the Commission requested government to formalise absentee voting. As a result, section 33 was extensively amended in 2003. The discretionary power of the Commission to grant absentee ballots was removed, and replaced with a closed list of citizens who qualified on a list of legislative grounds for an absentee ballot in the case of absence from the country on Election Day. To qualify for an absentee ballot during the 2004 election, a citizen had to be temporarily absent from the country (otherwise she would no longer be ordinarily resident and thus no longer comply with residence as voter registration requirement). The temporary absence had to be for one of four purposes: a holiday, a business trip, a sports event, or study. Notably absent from the list was absence due to temporary employment overseas. The decision not to grant a special absentee ballot for citizens who worked overseas reflected was highly controversial and reflected the negative perception of the ANC government towards outward migration during the first decade after apartheid.

Before the 2009 elections, the constitutionality of the refusal to extend an absentee ballot to citizens who temporarily worked abroad was challenged in *Richter v Minister of Home Affairs*,<sup>28</sup> and *AParty v Minister of Home Affairs*.<sup>29</sup> The Constitutional Court ruled in both cases that the exclusion could not be constitutionally justified. However, the manner in which the Court decided to remedy the defect created some disquiet.

---

<sup>26</sup> Susan Booysen & Grant Masterson "Chapter 11: South Africa" in Denis Kadima and Susan Booysen (eds) *Compendium of Elections in Southern Africa 1989-2009: 20 Years of Multiparty Democracy* (2009) 405-406.

<sup>27</sup> Section 33(1)(a)(ii) of the Act.

<sup>28</sup> *Richter v The Minister for Home Affairs* [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC).

<sup>29</sup> *AParty v The Minister for Home Affairs; Moloko v The Minister for Home Affairs* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC).

Having severed (deleted) the four grounds for absentee ballots listed in the Act (thus extending the same right to all absentees, regardless of the reason for the absence) the Court, without any apparent reason, proceeded to order the severance (deletion) of the temporary absent requirement as well. The effect of the order was to extend the right to vote to all absentees who were already registered voters.

The Court inexplicably (and without reasoned justification) extended this right to all registered voters, regardless of whether they were temporarily or permanently absent from the country (thus in effect doing away with the ordinary residence requirement for voter registration).<sup>30</sup> What made the court order so much more puzzling was that in the same case the Court refused a group of expatriates who were not (yet) registered as voters (and who were precluded from doing so by the ordinary residence requirement) to challenge the constitutionality of the ordinary residence requirement for voter registration.

Regardless of these concerns, the questionable order in the *Richter* and *AParty* cases was embraced by the expatriate voting rights lobby and became the basis of a claim that the right to vote should also be extended to expatriate citizens who were not yet registered as voters. It became a widely repeated and accepted fact of the subsequent reform process that further amendments to the Electoral Act were required in order to bring the law into line with the *Richter* judgment. That the expatriate voting rights lobby successfully managed to sustain this legal threat is a telling indictment on the whole legislative drafting process.

The Electoral Act 73 of 1998 was amended in December 2013 by the Electoral Amendment Act 18 of 2013 in order to allow non-resident citizens to register and vote abroad in national elections. In doing so the Act created a special registration mechanism for citizens who permanently live abroad, and extended the existing special voting mechanism (special absentee ballots) to citizens who permanently live abroad.

During the 2014 election, 6789 expatriate voters registered to vote. A total of 18 446 special absentee ballots were cast by overseas voters (including both expatriate and temporary absent voters). Of the overseas voters, 84.4% voted for the official opposition the Democratic Alliance.

#### **4 Conclusion**

The extension of the right to vote to all adult citizens, regardless of their immigration status or place of permanent residence, brings to a close the disenfranchisement of foreign residents which started with the drafting of the final Constitution. The impact of migration of voting rights in post-apartheid South Africa is therefore neatly framed by the 1994 and 2014 national elections. The 2014 election is the complete inversion

---

<sup>30</sup> For a fuller discussion and critique of the judgment see Wessel le Roux ““Migration, street democracy and expatriate voting rights” in Stu Woolman and David Bilchitz (eds) *Is this seat taken? Conversations at the Bar, Bench and the Academy about the South African Constitution* (2012) 141-166.

of the 1994 election. Whereas in 1994 all residents could vote, regardless of their citizenship status, in the 2014 elections all citizens could vote, regardless of their residence status.

We saw above that the boundary problem of democracy cannot be resolved with a democratic decision. The best we can hope for is to solve the problem in a manner that would be compatible with a value or principle of democracy. The post-apartheid constitutional order was initially aligned, consciously or not, with the all affected interests principle and a theory of constitutional denizenship. During the first 20 years of democracy this principle and the theory of denizenship were gradually replaced with a new (in the South African context) version of diasporic nationalism. This version of nationalism encourages and rewards the global economic mobility of citizens with voting rights. As an answer to the boundary problem of democracy, it lacks any democratic pedigree.