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The right to participation and the enjoyment of the right to development in South Africa: Some reflections

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Abstract: *Under article 1 of the 1986 UN Declaration on the Right to Development, participation is presented as one the cornerstones of the enjoyment of the RtD. It is central for its realisation. Against this backdrop, this chapter examines the extent to which the right to participation as implemented in South Africa can lead to the operationalisation of the RtD in the country. To this end, it uses a doctrinal methodology to evaluate the right to participation as implemented through electoral and decentralisation processes. In this vein, it explores the place of the RtD in the South African legal landscape before focusing on the right to participation and its implications for the enjoyment of RtD in the country. It finds that despite some limitations, the right to participation through electoral processes and*

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decentralisation is generally well implemented. Nevertheless, given the high level of poverty and inequality in the country, the RtD is not realised, but the implementation of the right to participation is likely to enhance its prospects in years to come.

Résumé : *En vertu de l'article 1er de la Déclaration des Nations unies de 1986 sur le droit au développement (DaD), la participation est présentée comme l'une des pierres angulaires de la jouissance du DaD. Elle est essentielle à sa réalisation. Dans ce contexte, le présent chapitre examine dans quelle mesure le droit à la participation, tel qu'il est mis en œuvre en Afrique du Sud, peut conduire à l'opérationnalisation du droit au développement dans ce pays. À cette fin, il utilise une méthodologie doctrinale pour évaluer le droit à la participation tel qu'il est mis en œuvre à travers les processus électoraux et de décentralisation. Dans cette optique, il explore la place du droit au développement dans le paysage juridique sud-africain avant de se concentrer sur le droit à la participation et ses implications pour la jouissance du droit au développement dans le pays. Il constate que, malgré certaines limites, le droit à la participation par le biais des processus électoraux et de décentralisation est globalement bien mis en œuvre. Néanmoins, compte tenu du niveau élevé de pauvreté et d'inégalités dans le pays, le droit au développement n'est pas encore pleinement réalisé, mais la mise en œuvre du droit à la participation est susceptible d'améliorer ses perspectives dans les années à venir.*

Key words: *right to participation; right to development; electoral processes; decentralisation; South Africa*

1 Introduction

While the South African legal architecture does not explicitly provide for the right to development (RtD), the government argues that its policies and national courts' jurisprudence demonstrate its firm implementation of the right.[1] Among others, the right to participation or the right to take part or to be involved in the affairs of the land is described as one of the cornerstones of the RtD. This is firmly provided for by the United

1 South Africa's First Periodic Report of South Africa to the African Commission para 325.

Nations (UN) Declaration on the Right to Development (DRtD)[2] in its first article. Not only participation should be full; it should be meaningful and not mere consultative.[3]

Against On this backdrop, this chapter assesses whether the implementation of the right to participation in South Africa can bolster its claim for the commitment to RtD. In other words, the extent to which the implementation of the right to participation in South Africa enhances the prospect for the enjoyment of the RtD. To answer this question, the chapter will rely on doctrinal methodology that provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between the rules, explains areas of difficulty, and predicts future developments. In this chapter, the legal categories to explore are the right to participation and its connection to the RtD. This research relies on primary sources such as law doctrines, case law and legislation.

In terms of structure, the chapter is divided into four parts, including this introduction. To set the scene, the first part of the chapter provides a snapshot of the RtD. The second part of the chapter explores the RtD in the South African legal architecture. The third part assesses the implementation of the right to participation and its potential effect on the RtD. The fourth and final part of the chapter provides concluding remarks.

2 The right to development in the South African legal architecture

2.1 The right to development: A snapshot

Article 1 of the UN Declaration on the RtD defines the right as follows:

> (1) The right to development is an inalienable human right by virtue of which every human person and all peoples are *entitled to participate in*, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.
> (2) The human right to development also implies the full realization of the right of peoples to self-determination which includes, subject to the relevant provisions

2 Adopted by the UN General Assembly in Res 41/128 of 4 December 1986.
3 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois*).

> of both international covenants on human rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.[4]

Accordingly, the RtD is inalienable, or cannot be bargained away; it is a process in which the right to participation is central; it is a process in which all human rights and fundamental freedoms should be realised; and it is an individual and collective right. In addition, the RtD emphasises the rights of people to self-determination.

Nevertheless, RtD has been the subject of controversy. For some, it is the right of rights or the alpha and omega for human rights, or the most important human right.[5] For others, it is simply a strange and bizarre claim that can only weaken the human rights discourse. Bello writes:[6]

> [The RtD is] too woolly and does not easily invite the degree of commitment that one expects unequivocally in support of an inescapable conclusion ... The right to development appears to be more like an idea or ideal couched in a spirit of adventure, a political ideology conceived to be all things to all men in a developing world, especially Africa; it lacks purposeful specificity; it is latent with ambiguity and highly controversial and 'directionless'; it strikes a cord of the advent of the good Samaritan.

The difference of views on the RtD cascades down to the UN where Western countries generally vote against the it or abstain, whereas the Global South countries vote for it.[7] However, the emerging view is that

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4 My emphasis.

5 A Sengupta 'Right to development as a human right' (2001) 36 *Economic and Political Weekly* 2527-2536; U Baxi 'The New International Economic Order, basic needs and rights: Notes towards development of the right to development' (1983) 23 *Indian Journal of International Law* 225, 234; SAD Kamga 'The right to development in the African human rights system: The *Endorois* case' (2011) 2 *De Jure* 381.

6 E Bello 'Article 22 of the African Charter on Human and Peoples' Rights' in E Bello & BA Adjibola (eds) *Essays in honour of Judge Taslim Olawale Elias* (1992) 462; A Rosas 'The right to development' in A Eide, K Krausus & A Rosas (eds) *Economic, social and cultural rights* (2001) 251; G Alfredsson 'The right to development: Perspective from human rights law' in LA Rehof & C Gulmann (eds) *Human rights in domestic law and development assistance policies of the Nordic countries* (1989) 84.

7 In 1998, Res E/CN.4/RES/1998/72 was adopted at the CHR without a vote, whereas, at the General Assembly, 125 votes in favour, one vote against and 42 abstentions were recorded for Res A/RES/53/155. In 1999, Res E/CN.4/RES/1999/79 was adopted at the CHR without a vote; at the General Assembly, 119 votes for, 10 against and 38 abstentions were recorded for Res A/RES/54/175. In 2000, Res E/CN.4/RES/2000/5 was adopted without a vote at the CHR; Res A/RES/55/108 was also adopted without a vote at the General Assembly. At the CHR in 2001, the EU (except the UK) was in favour of the DRtD; three

the RtD is a human right to be realised by the state and the international community.[8] This view has been recorded in the Vienna Declaration[9] and the UN Draft Covenant on the RtD.[10] Recognising the remarkable ascension of the RtD in the realm of human rights, Baxi argues that the RtD is now at the level of customary international law.[11] To this end, he demonstrates that the DRtD is the most quoted instrument after the Universal Declaration of Human Rights.[12] At the same time, the RtD is provided for by the African Charter on Human and Peoples' Rights (African Charter),[13] to which South Africa is party. Article 22 of the African Charter reads:

> (1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
> (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

South Africa is compelled to implement this provision of the Charter. The following part explores the place of the RtD in the South legal landscape.

2.2 The right to development in the South African legal landscape

While the South African Constitution[14] comprehensively provides for both civil and political rights and economic, social and cultural rights in its Bill of Rights, nothing is mentioned on the RtD. However, Gutto argues that the RtD is an 'implied right' in the South African Constitution.[15] According to him, all elements of the RtD are found in the South African Bill Rights, and it would be erratic to ignore this

abstentions (UK, Canada and the Republic of Korea) were recorded, and Japan and the USA voted against; see CHR Res 9, UN ESCOR, 57th sess, 68.

8 SD Kamga & CM Fombad 'A critical review of African Commission jurisprudence' (2013) 57 *Journal of African Law* 196, 203.

9 Vienna Declaration and Programme of Action 14-25 June 1993: UN GA A/Conf.157/23 12 July 1993.

10 Draft International Covenant on the Right to Development, Human Rights Council 54th session,11 September-6 October 2023.

11 U Baxi *Human rights in post human world: Critical essays* (2007) 124.

12 As above.

13 Adopted in June 1981 in Nairobi and came into force in 1985.

14 Constitution of the Republic of South Africa, 1996.

15 S Gutto 'The right to development: An implied right in South Africa's constitutional order' in SAHRC *Reflections on democracy and human rights:*

normative reality. In the same vein, in its report under article 22 of the African Charter to the African Commission on Human and Peoples' Rights (African Commission), the government of South Africa explicitly points out that its Bill of Rights and the decision on socio-economic rights are a clear demonstration of its commitment to implement the RtD.[16] Among others, given the significance of the right to participation for the enjoyment of the RtD, the next part will focus on its implementation in South Africa.

3 The right to participation in South Africa[17]

The South African legal and policy frameworks provide for the right to participation through electoral processes and through decentralisation

3.1 The right to participation through electoral processes

At the outset, it is important to note that electoral participation epitomises the right to participation to the process of development as provided for under article 1 of the UN Declaration on the Right to Development. After cleaning the ashes of apartheid, characterised by the exclusion of blacks from political and other forms of participation, the South African government has, since 1996, committed itself to guarantee the right to participation for all. The first step towards ensuring the right to participation is visible through the very first chapter of the 1996 Constitution, which reads as follows:

> (1) The 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;

A decade of the South African Constitution (2006) 113, http://www.sahrc.org.za (accessed 30 May 2026).

16 South Africa's first periodic report of South Africa to the African Commission para 325.

17 Aspects of this section the RtD are discussed by SAD Kamga 'Human rights in Africa: Prospects for the realisation of the right to development under the New Partnership for Africa's Development' unpublished LLD thesis, University of Pretoria, 2011.

> (d) universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

The underlying concepts of 'democratic state', 'achievement of equality', 'non-racism and non-sexism' clearly show that the government at the early stage of the transformation of the country intended to fix the wrongs of the past. Most importantly, this intention is highlighted by paragraph (1)(d), which stresses the importance of 'universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, [and the need] to ensure accountability, responsiveness and openness'. Put differently, free and fair elections seem to be the road map to ensure the right to participation in the country.

Besides the right to use 'indigenous' languages,[18] which entails participating in national affairs using indigenous languages, the Constitution through the Bill of Rights[19] clearly underlines the right to participation through its provision on political rights, which reads as follows:[20]

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

Again, this is an illustration of the fundamental place of the right to vote in South Africa. Apart from including the right to vote in the Bill of Rights, the South African government enacted several policies to ensure popular participation through free and fair elections. These policies include the Electoral Act 73 of 1998, dealing with the Municipal Electoral Act 27 of 2000, the Electoral Laws Amendment Act 34 of 2003 and the Electoral Laws Second Amendment Act 40 of 2003, all dealing with the regulation of elections of the National Assembly, the provincial legislatures and municipal councils, and to address related matters.

18 Constitution sec 6(2).
19 Constitution ch 2.
20 Constitution sec 19.

Among others, these laws address issues such as registration of voters and voters' roll;[21] proclamation and preparation for the election;[22] the election *per se*;[23] and elections agents.[24] Still, to ensure meaningful participation in the country, the government adopted the Electoral Commission Act[25] which establishes the Electoral Commission,[26] its powers, duties, functions and composition.[27] Furthermore, it provides for the accountability of the Commission and its staff,[28] the conditions of registration and cancellation of political parties[29] and, more importantly, the establishment of an electoral court[30] to handle electoral disputes.

Interestingly, the 'Electoral Commission is independent and subject only to the Constitution and the law'[31] and of its five members, one shall be a judge appointed by the President of the Republic.[32] Nevertheless, this is not a condition ensuring the victory of the President because, not only should his colleagues not have a high party-political profile,[33] but they should also be recommended by the National Assembly by a resolution adopted by a majority of the members of that Assembly.[34] More importantly, the five members of the Electoral Commission should be appointed by a committee of the National Assembly, proportionally composed of members of all parties represented in that Assembly, from a list of recommended candidates submitted to the committee[35] by a panel made up of:[36]

> (a) the President of the Constitutional Court, as Chairperson;
> (b) a representative of the Human Rights Commission established by section 115(1) of the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993);

21 Electoral Act 73 of 1998 ch 2.
22 Electoral Act 73 of 1998 ch 3.
23 Electoral Act 73 of 1998 ch 4.
24 Electoral Act 73 of 1998 ch 5.
25 Act 51 of 1996.
26 Act 51 of 1996 ch 2; also sec 190 of the Constitution.
27 Constitution sec 191.
28 Act 51 of 1996 ch 3.
29 Act 51 of 1996 ch 4.
30 Act 51 of 1996 ch 5.
31 Act 51 of 1996 sec 3(1).
32 Act 51 of 1996 sec 6(1).
33 Sec 6(2)(b).
34 Sec 6(2)(c).
35 Sec 6(2)(d).
36 Sec 3.

> (c) a representative of the Commission on Gender Equality (now called Commission for Gender Equality) established by section 119 (1) of the said Constitution; and
> (d) the Public Protector established by section 110(1) of the said Constitution.
> (4) The panel shall submit a list of no fewer than eight recommended candidates to the committee of the National Assembly referred to in subsection (2)(d).
> (5) The panel shall act in accordance with the principles of transparency and openness and make its recommendations with due regard to a person's suitability, qualifications and experience.

The involvement of numerous independent authorities in the constitution of the Electoral Commission should be applauded as it ensures its independence and legitimacy.

Overall, not only does the South African fundamental law[37] provide extensively to ensure the right to participation, but it also establishes several other national institutions[38] to give the opportunity to claim human rights, including the right to participate in case of violations. All these measures are strengthened by the Electoral Code of Conduct,[39] which aims to establish an environment appropriate for free and fair elections.

Notwithstanding the apparent solidity of the legal framework catering for the right to participation in South Africa, this right was undermined by the practice of 'floor crossing' institutionalised through the Constitution of the Republic of South Africa Fourth Amendment Bill of 2002, which was passed into law in February 2003. Floor crossing allowed elected representatives to change their political affiliation without losing their seats at the national, provincial and local levels. Such a practice distorts people's will and constitutes a serious loophole in the enjoyment of the right to participation. In an attempt to clarify the situation, Faull explains:[40]

37 Constitution secs 17, 18, 23, 30, 105, 118, 128, 151, 157, 211 & 214.

38 See ch 9 on state institution supporting constitutional democracy; art 181(1)(a) The Public Protector;(b) The South African Human Rights Commission; (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; (d) The Commission for Gender Equality; (e) The Auditor-General; (f) The Electoral Commission.

39 The Electoral Act of 1998, schedule 2.

40 J Faull 'Floor crossing is bad news for democracy' IDASA 12 September 2005, https://aceproject.org/ero-en/topics/parties-and-candidates/floor-crossing-is-bad-news-for-democracy (accessed 26 September 2026); also 'Floor crossing and its discontent' e*PoliticsSA* – (No 3, 2007), file:///C:/Users/KamgaSAD/

> The South African system of representative democracy is premised on proportional representation. In national and provincial elections, the total number of valid votes cast, constitutes 100% of the vote. Subsequent to elections, the votes accruing to each party are tallied proportionately, and seats are assigned accordingly in line with a formula for representation. When an individual MP crosses the floor, it distorts the balance of representation as determined by citizens through the ballot box.

Put differently, floor crossing ignores public opinion and, as correctly observed by Faull, referring to the 2004 elections at the National Assembly, 'a 2% shift toward a party through floor-crossing does not necessarily reflect a concurrent shift in voter intention towards that party'.[41]

Another reason for abolishing floor crossing is that it poses a serious challenge to the fundamentals of participatory democracy as prescribed by the founding provision of the South African Constitution, in the sense that elected delegates change their parties without consulting the grassroots and without an avenue to be held accountable.[42] As a result, it could be argued that floor crossing invalidates and weakens the constitutional provision guaranteeing 'the equality of all votes and voters, and the right to representation'.[43]

Furthermore, the practice of floor crossing had to be abandoned because it transformed the elections into a circus, which ended up by keeping people away from the ballot box as they choose to stay at home instead of going out to cast votes that are neglected when the floor crossing takes place. In this respect, Faull notes:[44]

> In 2004, turnout of voters in Kwa-Zulu Natal and the Western Cape, the two provinces most effected by the 2003 national and provincial defection period, registered the lowest levels of voter turnout for polls across the country, 73.51% and 73.05% respectively.

Downloads/ePolitics%20SA%20-%20Floor-Crossing%20and%20its%20Discontents.pdf (accessed 26 September 2026);, Konrad-Adenauer-Stiftung Seminar Report 19, 'The impact of floor crossing on party systems and representative democracy' (2007), https://www.kas.de/c/document_library/get_file?uuid=82f2204f-1611-d071-2236-314fa0e5bac8&groupId=252038 (accessed 26 September 2026).

41 Faull (n 40).

42 As above.

43 As above.

44 As above.

In *United Democratic Movement v President of South Africa*,[45] the Court observed the danger of floor crossing of in these terms:[46]

> There is a close link between the voter and party in proportional representation systems than may be the case in constituency-based electoral systems, and that for this reason the argument against defection may be stronger than would be the case in constituency-based electoral systems, and that for this reason the argument against defection may be stronger than would be the case in constituency-based elections. But even in constituency based election, there is a close link between party membership and election to a legislature. Floor crossing in the absence of a meaningful link between the voter and the political party he or she votes for under a closed list PR [proportional representation], system has the potential to make a relatively unresponsive system even less responsive.

In the same vein, a commentator observed that 'floor-crossing was a travesty of democracy'.[47] The shortcomings of floor crossing led to the abolition of the practice in South Africa. This was done in 2008 when the National Council of Provinces unanimously passed three Bills[48] 'that scrapped floor crossing at all levels of government'.[49]

The South African electoral system, however, continues to suffer from many pitfalls. For instance, the shortage of financial resources, which are unequally distributed across the country, creates a situation where well-funded voting stations face fewer challenges than their counterparts that have more money.[50]

In addition, it is compulsory to have a bar code identification document to register and vote. Nevertheless, the Department of Home Affairs mandated to issue the document is not always up to the task as its

45 *United Democratic Movement v President of South Africa* 2003 (1) SA 495 (CC), 2002 (11) BCLR (CC).

46 *United Democratic Movement* (n 45) para 34; also G Fick 'Elections' in S Woolman and others (eds) *Constitutional law of South Africa* (2004) 29-13.

47 'Floor-crossing scrapped' *News 24* 19 November 2008, https://www.news24.com/floor-crossing-scrapped-20081119 (accessed 26 September 2026); also M Monare 'Scrap floor-crossing in its totality' *IOL* 26 September 2006, https://iol.co.za/news/politics/2006-06-19-scrap-floor-crossing-in-its-totality/ (accessed 26 September 2026).

48 The Constitution 14th and 15th Amendment Bills and the General Laws Amendment Bills which were gazetted on 9 January 2009.

49 'Floor-crossing scrapped' (on file with author).

50 D Pottie & JS Saul 'Normalization? The South African election' (1999) 14 *Southern Africa Report* (1999) available in *Africa files* (on file with author); for more on the normalisation of South African elections, see A O'Brien *Against normalization: Writing radical democracy in South Africa* (2001); R Southall & J Daniel (eds) *Zunami! The South African elections of 2009* (2009).

work is constrained by numerous backlogs, which become a hindrance to the right to participate.[51] Nonetheless, it is important to note that the identification document and the registration process are mechanisms aiming at ensuring free and fair elections.[52] These mechanisms ensure that only people entitled to vote cast their ballots and do so only once.[53] Fick[54] correctly argues that in the *New National Party* case,[55] 'the court was satisfied that a bar-coded identity document constituted a rational means of realising the legitimate government purpose of enabling the effective exercise of the right to vote'.

The other hindrance to the right to participation, however, is that although the Constitution[56] and the Public Funding of Represented Political Parties Act of 1997 compel the state to fund 'political parties participating in national and provincial legislatures on an equitable and proportional basis', smaller parties are bogged down by the registration fees of R5 000 for elections and R150 000 for participation in elections. These fees are imposed on political parties by the Independent Electoral Commission.[57]

Still on the funding of political parties, the latter are allowed to seek private funding to conduct their electoral campaign. Nevertheless, such funding is yet to be regulated. This lacuna hinders people's ability to monitor how parties are funded; information is kept away from those who need it in order to participate meaningfully.[58]

The South African electoral system is also bogged down by the system of proportional representation in which elected representatives are drawn from a party's list of candidates. This system does not advance the right to participation as members of parliament (MPs) are elected through a tiny list by party dignitaries to whom they are faithful or accountable and not to the grassroots.[59] Even the establishment of constituency offices did not silence some critics of the system.

51 Pottie & Saul (n 50).
52 *New National Party of South Africa v Government of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC).
53 Fick (n 46) 29-3.
54 As above.
55 *New National Party of South Africa v Government of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) para 16.
56 Sec 236.
57 APRM Country Report South Africa (September 2007) 86 para 137.
58 APRM (n 57) 86 para 138.
59 APRM (n 57) 85 para 133.

Proportional representation, however, seems to be the solution for a country such as South Africa which, after the apartheid regime, has to involve all its citizens in its affairs. In fact, proportional representation provides room for the participation of all, including the smallest parties that have a say in the affairs of the land;[60] it empowers vulnerable groups such as women and children,[61] hence the correctness of the view that proportional representation[62]

> [h]as achieved the objectives for which it was designed, including fair distribution of votes cast, fair representation of parties in the National Assembly, reconciliation and harmony, containment of conflict, and enhancement of women's participation in the democratic process.

In fact, the right to participation of all, including prisoners, is guaranteed. The voting rights of prisoners were protected by the Constitutional Court in *August v Electoral Commission*.[63] According to the Court, notwithstanding the provision of the Electoral Act, which empowers the chief electoral officer 'not to register a person as a voter if that person is serving a sentence of imprisonment without the option of a fine',[64] prisoners had the right to register and vote; they 'could not be disenfranchised', to use the words of Fick.[65] In motivating its decision, the Court referred to *Haig v Canada*[66] to highlight the vital place of the right to vote in a democracy.[67] Quoting the *Haig* case, the Court declared:[68]

> All form forms of democratic government are found on the right to vote. Without that right democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is the proud badge of freedom. While the Charter guarantees certain electoral rights, the right to vote is generally granted and defined by statutes. That statutory right is so fundamental that a broad

60 APRM (n 57) 85 para 131.
61 As above.
62 APRM (n 57) 84 para 132.
63 *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) (*August*).
64 Electoral Act 73 of 1998 sec 8(2)(f).
65 Fick (n 46) 29-3.
66 *Haig v Canada* 105 DLR (4th) 577, 613 (SCC).
67 For more on the democracy in South Africa, see T Roux 'Democracy' in S Woolman and others (eds) *Constitutional law of South Africa* (2004) 10-I; also A Naicker 'South Africa's strong democracy' (2024), https://www.gov.za/blog/south-africas-strong-democracy (accessed 26 September 2026).
68 *August* (n 63) para 18.

> liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against disenfranchisement.

The Court was of the view that there was no reasonable justification under section 36 of the Constitution to limit prisoners' right to vote.[69] The *August* decision was upheld by the Constitutional Court in *Minister of Home Affairs v National Institute of Crime Prevention and the Re-Integration of Offenders*,[70] where it was decided that provisions that withdraw the right to vote from convicted prisoners, who had no option of a fine, violated the Constitution and, therefore, were unlawful.

While not perfect, it could be argued that the right to participation through electoral processes is comprehensive and empowering for citizens. Consequently, it represents a positive step towards the realisation of the RtD in a country where elections are generally free and fair and conducted under the oversight of a genuinely independent electoral commission.

3.2 The right to participation through decentralisation in South Africa

The first measure in terms of decentralisation was the adoption of the Local Government Transition Act of 1993, which was the result of consultations between the local forums and the National Local Government Negotiating Forum. This was translated in chapter 7 of the Constitution dealing with local government.[71] Among others, local governments are expected:[72]

> (a) to provide democratic and accountable government for local communities;
> (b) to ensure the provision of services to communities in a sustainable manner;
> (c) to promote social and economic development;
> (d) to promote a safe and healthy environment; and
> (e) to encourage the involvement of communities and community organisations in the matters of local government.

69 *August* (n 63) para 16; also Fick (n 46) 29-4.
70 *Minister of Home Affairs v National Institute of Crime Prevention and the Re-Integration of Offenders* 2004 (5) BCLR 445 (CC).
71 Secs 151-164 Constitution.
72 Sec 152.

In other words, the local government is a tool through which people should realise the political, economic, cultural empowerment which are the cornerstones of the RtD. The constitutional provisions on local government were strengthened by the Local Government Municipal Structure Act of 1998[73] which, among others, provides for the regulation of the internal systems, structures and office bearers of municipalities; for adequate electoral systems; and problems in connection therewith. Similarly, the Local Government Municipal Demarcation Act of 1998 provided for the reorganisation of all municipalities in the country. This is also reinforced by the Local Government Municipal System Act of 2000,[74] which calls upon municipalities to work in order to improve the socio-economic status of local communities and deliver services to all while ensuring a strong collaboration with all its structures to ensure popular participation.[75]

The Constitution provides for 'functional areas of concurrent national and provincial legislative competence'[76] which include education, housing, health and indigenous law and customary law. In addition, the South African fundamental law delineates exclusive areas for municipalities.[77] For example, the central authority is excluded from legislations related to beaches, cemeteries and dog licences. Such laws limit the power of the central authority. As a result, the President or the executive cannot unilaterally change the nature of a particular province or municipality. This cannot happen in South Africa without a constitutional amendment to be considered by the Constitutional Court. This practice serves to guard against the concentration of excessive power in the President or the executive.

The Constitution also provides for the equitable shares and allocations of revenue in the following terms:[78]

> (1) An Act of Parliament must provide for –
>
> (a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;

73 Act 117 of 1998, Government Gazette 18 December 1998.
74 Act 32 of 2000, Government Gazette 20 November 2000.
75 Introductory paragraph of the Act.
76 Constitution, sch 4, part A.
77 As above.
78 Sec 214.

> (b) the determination of each province's equitable share of the provincial share of that revenue; and
> (c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.

This provision was reinforced by the Intergovernmental Fiscal Relations Act 97 of 1997, enacted

> to promote co-operation between the national, provincial and local spheres of government on fiscal, budgetary and financial matters; to prescribe a process for the determination of an equitable sharing and allocation of revenue raised nationally; and to provide for matters in connection therewith.[79]

This provision is also strengthened by the Division of Revenue Act 12 of 2009,[80] which shields municipalities against the manipulation of the central authority. In this regard, the South African financial framework ensures that municipalities are all treated equally. The question of equitable share of revenue had been at the centre of a lawsuit. The Uthukela district council lodged an application in the Pietermaritzburg High Court against the national government claiming its equitable 'institutional capacity grant'.[81] Although the National Treasury claimed that the district did not qualify for the grant, the national government lost the case and decided to appeal. However, the matter was amicably settled and the district qualified for the grant.[82] This outcome is interesting, as it tackles governance and transparency issues. Wittenberg correctly notes that laws on equitable shares and allocations of revenue are 'enormous step[s] forward in breaking patronage networks'.[83]

The decentralisation also catered for the rights of individuals to participate through the legislative process at provincial level. Through its judgment of 17 August 2006 in *Doctors for Life*,[84] the Constitutional Court emphasised the right of individual to participate in law making.

As a matter of fact, the applicant, Doctors for Life International (DFL), lodged a complaint directly to the Constitutional Court, challenging

79 Act 97 of 1997, Government Gazette 17 December 1997.
80 Act 12 of 2009, Government Gazette 3 April 2009.
81 Pietermaritzburg High Court (NW 7 February 2002).
82 M Wittenberg 'Decentralisation in South Africa' (2003) 46 (on file with author).
83 As above.
84 *Doctors for Life International v The Speaker of the National Assembly and Others* CCT 12/05.

the constitutionality of four Bills: the Sterilisation Amendment Bill; the Traditional Health Practitioners Bill; the Choice on Termination of Pregnancy Amendment Bill; and the Dental Technicians Amendment Bill. It is important to note that at the time of launching the complaint, DFL was mistakenly under the belief that all the health legislation was still in bill form. However, in reality, all the legislation, except the Sterilisation Amendment Act, had been promulgated when these proceedings were launched on 25 February 2005.[85]

Nevertheless, DFL's complaint was based on the process followed by the National Council of Provinces (NCOP) that did not afford the complainant an opportunity to participate in the elaboration of the Bills; indeed, the NCOP failed to invite written submissions and conduct public hearings on these Bills as required by its duty to facilitate public involvement in its legislative processes and those of its committees.[86]

Although the constitutional challenge was primarily directed at the Speaker of the National Assembly and the Chairperson of the NCOP, the Speakers of the nine provincial legislatures and the Minister of Health were subsequently joined as further respondents in the matter.

The respondents opposed the charges and argued that they had complied with their respective duties to facilitate public involvement in the passing of the Bills. In addition, they claimed that the obligation to facilitate public involvement only requires that the public be given an opportunity to make either written or oral submissions some time during the process of making laws.[87] The issues before the Court were the following:

- whether the Constitutional Court is the only competent court to hear such a matter;
- whether the Court is competent to grant a declaratory relief in respect of the proceedings of Parliament;
- the nature and scope of the constitutional obligation of a legislative organ of state to facilitate public involvement in the law-making process; and
- whether on the facts of the case, the NCOP complied with that obligation when passing the health legislation under challenge and, if it did not, the consequences of its failure.

85 *Doctors for Life* (n 84) para 10.
86 *Doctors for Life* (n 84) para 7.
87 *Doctors for Life* (n 84) paras 1 & 4.

On the first point, the exclusive jurisdiction was not contested by respondents and this was established on the ground that the issue under discussion questioned whether Parliament had failed to fulfil a constitutional obligation and this is a constitutional matter to be addressed by the Constitutional Court.[88]

On the second point, it was held that the Court is competent to issue a declaratory relief only after a Bill has been signed into law and before it is brought into operation.[89] In such a situation, the Court can grant relief and declare the enacted law invalid. In the case under discussion, the Court found that the Traditional Health Practitioners Act, the Choice on Termination of Pregnancy Amendment Act and the Dental Technicians Amendment Act, which had already been signed into law, could be under consideration by the Court.

On the third point, questioning whether the NCOP and the provincial legislatures facilitate public involvement in their respective legislative processes as required by the Constitution, the Court observed that, although Parliament and the provincial legislatures have a broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, measures taken to ensure public participation should be reasonable.[90]

Answering the question whether the NCOP has complied with its obligation to facilitate public involvement in relation to the Traditional Health Practitioners Act, and the Choice on Termination of Pregnancy Amendment Act, Ngcobo J found that these two Bills generated public interest, and the NCOP promised to hold public hearings on the issues at provincial levels.[91] He also found that most of the provinces as well as the NCOP did not hold public hearings on the Traditional Health Practitioners Act[92] and the Choice on Termination of Pregnancy Amendment Act,[93] hence the conclusion that the NCOP did not comply with its obligation to facilitate public involvement in relation to these two Acts as contemplated by section 72(1)(a) of the Constitution.

88 *Doctors for Life* (n 84) para 30.
89 *Doctors for Life* (n 84) para 66.
90 *Doctors for Life* (n 84) paras 127 & 128.
91 *Doctors for Life* (n 84) para 158.
92 *Doctors for Life* (n 84) paras 170, 171, 173 & 181.
93 *Doctors for Life* (n 84) paras 183, 186.

As far as the Dental Technicians Amendment Act was concerned, the lack of public interest regarding the Bill led the Court to conclude that the NCOP did not act unreasonably in not holding public hearings on this statute, hence the dismissal of the claim relating to the Dental Technicians Amendment Act. The *Doctors for life* case is the operationalisation of the right to participation and should be emulated by other African countries.

However, decentralisation does not solve all problems related to the right to participation. The concerns raised by the shadow report to South Africa's first periodic state report to the African Commission[94] included the '[i]naccessibility of and lack of civil society involvement in preparation of periodic report'.[95] According to the shadow report, the South African government prepared the reports secretly and informed civil society only a few weeks before the tabling of the report at the African Commission. This manoeuvre did not allow civil society to have a say in the elaboration of the report.[96]

The secrecy around the elaboration of the report was also criticised by the African Commission, which also raised its concerns 'at the lack of involvement of civil society participation in the preparation of the report',[97] and called upon the South African government to share the reports 'with all sectors of the society to give them an opportunity to contribute in its preparation or to react thereto'.[98]

Notwithstanding the problems discussed above, South Africa offers several good practices in terms of implementing the right to participation. Initiatives towards ensuring a meaningful public participation include:

94 Shadow Report to the South Africa's first periodic state report to the African Commission presented at the 38th session of the Commission, 21 November-5 December 2005, Banjul, The Gambia. The report was prepared by the Centre for Human Rights, University of Pretoria; Socio-Economic Rights project, Community Law Centre, University of the Western Cape, the Human Rights Institute of South Africa, Lawyers for Human Rights, Central and Gauteng Mental Health Society, Gauteng Children's Rights Committee, Community Law and Rural Development Centre. (The Shadow Report is on file with author).

95 Shadow Report (n 94) para 2.

96 Shadow Report (n 94) para 2.

97 Thirty-eighth ordinary session of the African Commission, Concluding Observations and recommendations on the first periodic report of the Republic of South Africa para 17.

98 As above.

- the establishment of ward committees composed of a maximum of ten elected individuals, representing diverse interest in the ward and chaired by a ward councillor. These elected individuals are mandated to guarantee full participation of the grassroots in all government's activities;[99]
- the *Imbizo* and the 'Citizen forum', which is a public participation scheme allowing citizens and their leaders at national, provincial and local levels to discuss various topics through which the grassroots can air their views and address issues related to their communities;[100]
- the Presidential *Imbizo* through which the President of the Republic goes to the communities to monitor what is happening on the ground and to listen to the people;
- the *Batho Pele* scheme which compels service delivery institutions and staff to 'set and adhere to standards and practices when engaging with the public and conduct their work in a professional and transparent manner'.[101]

In sum, despite some challenges, the lack of involvement of civil society participation in some circumstances, the country enacted several policies such as the establishment of ward committees, the *Imbizo* and the 'citizen forum', the presidential *Imbizo,* and the *Batho Pele* schemes to ensure public participation in the affairs of the land.

4 Conclusion

Overall, although the implementation of the right to participation has few challenges, such as the expensive fees imposed on political parties by the Electoral Commission, the lack of transparency on the private funding of political parties and the secrecy around the preparation of the South Africa's first periodic state report to the African Commission, the determination of the judiciary to ensure the right to participation of all, including prisoners, as discussed through the *Doctors for Life* case, the *August* case and *Minister of Home Affairs v National Institute of Crime Prevention and the Re-Integration of Offenders* case demonstrate that the right to participation is taken seriously in South Africa.

Ultimately, the right to participation through electoral processes and decentralisation as implemented in South Africa is essential for the achievement of the RtD. However, given the high level of poverty and inequality in South Africa, the RtD is yet to become reality, but the

99 APRM (n 57) 88 para 149.
100 APRM (n 57) 89 para 149.
101 APRM (n 57) 101 & 106 para 216. Thirty-eighth ordinary session (n 97) para 17.

country is an example of good practice for the right to participation, which increases the prospect for the enjoyment of the RtD in years to come.

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