

**THE LEGAL REGULATION OF INTERNAL PARTY
DEMOCRACY – A STUDY OF SOUTH AFRICA AND
GERMANY**

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TABLE OF CONTENTS

I	INTRODCUTION.....	1
	(a) <i>Research topic – scope and limitations</i>	1
	(b) <i>Importance of the study</i>	3
	(c) <i>Structure of the thesis</i>	4
II	BASIS AND BACKGROUND.....	5
	(a) <i>Why are political parties important for a democracy?</i>	5
	(b) <i>Why is participation important for a democracy?</i>	6
	(c) <i>What is meant by ‘internal party democracy’?</i>	7
	(d) <i>Is internal party democracy desirable?</i>	11
III	GERMANY.....	13
	(a) <i>The role of political parties in Germany</i>	13
	(b) <i>The legal framework governing internal party democracy in Germany</i>	16
	(i) <i>Article 21 (1) of the Basic Law</i>	17
	(ii) <i>Implementation of article 21 (1) of the Basic Law into Federal Laws</i>	19
	(c) <i>The constitutions of the SPD and CDU</i>	26
	(i) <i>Ex-officio members</i>	26
	(ii) <i>Selection of the candidate for Chancellor</i>	28
	(d) <i>Enforcing internal party democracy</i>	30
IV	SOUTH AFRICA.....	33
	(a) <i>The role of political parties in South Africa</i>	33
	(b) <i>Are there provisions in South Africa that govern internal party democracy?</i>	36
	(i) <i>National legislation and regulations</i>	36
	(ii) <i>The Constitution</i>	39
	(c) <i>The constitutions of the ANC and DA</i>	43
	(d) <i>A party law for South Africa?</i>	49
V	CONCLUSION.....	51
	BIBLIOGRAPHY.....	54

I INTRODUCTION

(a) *Research topic – scope and limitations*

Political parties are important actors in modern democracies¹ as they ‘can help to articulate group aims, nurture political leadership, develop and promote policy alternatives and present voters with coherent electoral alternatives.’² Given this important position,³ it may be argued that political parties should not only claim to foster democracy⁴ but also actually apply democratic procedures internally by allowing party members to participate in decision making and deliberation. Particularly since the Second World War many countries have started to legally regulate the internal organisation of political parties in order to guarantee types of internal party democracy.⁵ Other countries, by contrast, decided to abstain from any form of explicit regulation.

These two different approaches raise questions. First, does the explicit legal regulation of the internal functioning of political parties necessarily mean that political parties are organised democratically? Put it differently, how much room to manoeuvre within a ‘party law’ do political parties actually have? Are there regulatory loopholes which have been exploited by political parties? Secondly, does the lack of provisions that expressly regulate internal party democracy⁶ necessarily mean that there are no rules, for instance in the constitutions of political parties,⁷ which are supposed to ensure democratic procedures?

¹ This was already recognised by Elmer Eric Schattschneider in 1942; see Elmer Eric Schattschneider *Party Government* (1942) 1.

² Susan Scarrow ‘Political Parties and Democracy in Theoretical and Practical Perspectives – Implementing Intra-Party Democracy’ 2005 *NDI Publications* 3.

³ I will deal in more detail with the importance of political parties in modern democracies in chapter II.

⁴ Indeed, one can hardly find a political party which openly admits that it is organised in a undemocratic manner.

⁵ For a worldwide overview of party laws that regulate the functioning of political parties, see, the database of the National Democratic Institute, available at <https://www.ndi.org/db>, accessed on 21 January 2015.

⁶ The terms ‘internal party democracy’ and ‘intra party democracy’ mean the same thing and are interchangeable. In this paper I will, however, use the term internal party democracy.

⁷ In contrast to the term ‘party law’, a constitution of a political party is the body of rules that political parties give themselves.

This paper attempts to expand the knowledge on these issues and therefore seeks to get a deeper understanding on the legal regulation of internal party democracy, which is widely considered as one of the most controversial topics concerning party regulation.⁸ This will be done by carrying out a case study of two constitutional democracies that handle party regulation differently. Germany, known as ‘heart land of party law’,⁹ constitutes the example of a state in which the internal organisation and functioning of political parties is regulated by both the Basic Law (the German Constitution)¹⁰ and federal laws. South Africa will be provided as the contrast example of a state that lacks express provisions that regulate the internal organisation and functioning of political parties. This paper does therefore not seek to conduct a ‘classical’ comparative study as the legal framework of two countries will be examined which deal in *different* ways with internal party democracy. However, this research approach promises to create a more holistic – even though certainly not complete – image of the challenges of the legal regulation of internal party democracy.

Against this background the thesis explores the following research questions:

- What lesson can we learn from Germany (express provisions) and South Africa (no express provisions) about the legal regulation of internal party democracy?
 - How does the legal framework work in Germany? Can one find regulatory loopholes? How does the legal framework impact on the constitutions of political parties in Germany?
 - How does South Africa handle political parties in terms of internal party democracy? Can one find provisions that impact on the internal functioning of political parties although there are no explicit state provisions in place in this regard? Do the constitutions of political parties stipulate forms of internal party democracy although there are

⁸ See, eg, Richard Katz ‘Democracy and the Legal Regulation of Political Parties’ *USAID Conference Paper* (2004) 2f.

⁹ Wolfgang Müller and Ulrich Sieberer ‘Party Law’ in Richard Katz and William Crotty (eds) *Handbook of Party Politics* (2006) 435.

¹⁰ All references hereinafter to ‘Basic Law’ are to the Basic Law (*Grundgesetz*) for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1.

no explicit state provisions in place which oblige political parties to do so?

These research questions will basically be answered by examining case-law, the Constitution of South Africa¹¹ and the German Basic Law, national legislation – where available, party laws – and constitutions of political parties. Hence, the study will be conducted from a formal perspective. Concerning party laws it must be noted that there is no commonly accepted definition of the term ‘party law’. Yet, party laws are often considered those state laws which specifically refer to the state regulation of aspects of internal party organisation and functioning. For the purpose of this dissertation the term ‘party law’ is to be understood in that sense.

It results from the above that it is beyond the scope of this thesis to conduct a field analysis by examining the extent to which party members are *in reality* allowed to democratically participate in the activities of a political party. Moreover, this thesis will not focus on the question whether the legal regulation of internal party democracy is desirable for political parties themselves in terms of preservation or extension of power.

(b) Importance of the study

There are several aspects that give rise to this research project. First, a study of internal party democracy which focuses on both South Africa and Germany has never been done before. Secondly, the South African Constitution contains no explicit provision which regulates the manner in which political parties must operate. However, the South African Constitution is commonly acknowledged as one of the most advanced legal tools worldwide.¹² Against this background, it seems to be worth considering if the South African Constitution may provide ‘alternative solutions’ with regard to internal party democracy. Furthermore, due to the fact that there are no express provisions that govern internal party democracy in South Africa, it appears that this research area has so far been slightly neglected.¹³ Finally, the

¹¹ All references hereinafter to ‘Constitution of South Africa’ are to the Constitution of the Republic of South Africa, Act 108 of 1996.

¹² See Ian Shapiro *The Real World of Democratic Theory* (2010) 1.

¹³ However, the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) recently held a conference on "Political Rights Since 1994: South

legal framework of party regulation in Germany has been into force for nearly 65 years now. From a South African perspective, it may be interesting to know where difficulties have arisen so far.

(c) *Structure of the thesis*

The structure of the thesis will be as following:

Chapter II sets out the basis of the case study. I explain in more detail the role and function of political parties in a democracy, the importance of participation for a democracy, the term ‘internal party democracy’ and its pros and cons. In chapter III, I present the situation in Germany by examining the legal framework of party regulation and by checking how the legal framework has been implemented in the constitutions of the two major German political parties (CDU¹⁴ and SPD¹⁵). In Chapter IV, I turn to the situation in South Africa. I will examine national legislation and the Constitution in order to show how they impact on internal party democracy. Furthermore, I analyse if rules and procedures in the constitutions of the two major South African political parties (ANC¹⁶ and DA¹⁷) can be found that ensure forms of internal party democracy. Finally, I will discuss a path towards the adoption of a party law in South Africa. Chapter V contains the conclusion of the thesis.

African and Comparative Perspectives" where the internal regulation of political parties was addressed. The results of the conference are being published in (2014) 30 *SAJHR*.

¹⁴ CDU stands for: *Christlich Soziale Union Deutschlands* (Christian Democratic Union of Germany).

¹⁵ SPD stands for: *Sozialdemokratische Partei Deutschlands* (Social Democratic Party of Germany).

¹⁶ ANC stands for: The African National Congress.

¹⁷ DA stands for: Democratic Alliance.

II BASIS AND BACKGROUND

(a) *Why are political parties important for a democracy?*

A study that covers the legal regulation of internal party democracy has to start with describing the relationship between, on the one hand, political parties and, on the other hand, democracy because the discussion about internal party democracy actually emerges from this relationship. However, the link between political parties and democracy is in detail certainly multilayered and complex.¹⁸ For the purpose of this study, I therefore focus on the main functions that political parties ideally are supposed to perform in a democracy.¹⁹

When the ‘phenomena’ of political parties emerged for the first time, it was not unusual that political parties and democracy were seen as a contradiction by scholars. The justification given was *inter alia* that political parties foster the forming of groups in society which merely focus on their own interests and thus harm the general public interests of the country.²⁰ However, over time, it has been found that political parties play a pivotal role in democracies. In fact, there are numerous reasons for this:²¹

First, political parties are able to pick up demands of society at any time and transfer them into policies. Hence, they promote active participation of the citizen in the process of political decision-making regardless of general elections.²² In that way they also create a link between on the one hand the citizens and on the other hand the legislative and executive.²³ Secondly, political parties provide a platform for political dialogue and debate. This dialogue helps in clarifying the advantages and disadvantages of the various opinions and thereby enables the electorate to

¹⁸ For a detailed study, see, eg, Russell Dalton *et al.* *Political Parties and Democratic Linkage: How Parties Organize Democracy* (2011).

¹⁹ The specific role of political parties in Germany and South Africa will be examined in Chapter III and IV.

²⁰ See Steven Calabresi ‘Political Parties as Mediating Institutions’ (1994) 61 *University of Chicago Law Review* 1484ff.

²¹ A good overview gives Richard Gunther and Larry Diamond ‘Types and Functions of Parties’ in Richard Gunther and Larry Diamond (eds) *Political Parties and Democracy* (2001) 7f.

²² Sigmund Neuman ‘The Party of Democratic Integration’ in Peter Mair (ed) *The West European Party System* (1990) 46.

²³ Giovanni Sartori *Parties and Party Systems: A Framework for Analyses* (2005) 11.

distinguish more easily between different views.²⁴ Furthermore, the dialogue forces political parties to compete in a discussion which generally leads to better outcomes. Thirdly, as political parties are in competition for power, they are willing to check and monitor the government and thus assist in holding the government accountable.²⁵ Finally, political parties are the main instruments for recruiting people for leadership²⁶ and, more importantly, in some countries the right to stand for public office can in fact only be realised by citizens that are member of a political party.²⁷ Summarising the above, it can be said that political parties are important tools for facilitating and entrenching democracy.

As mentioned above, a core function of political parties is to facilitate active participation of the citizens in *inter alia* the process of political decision-making. But why is participation important for a democracy? In the next subsection I will discuss that matter.

(b) *Why is participation important for a democracy?*

For very good reasons participation of citizens is considered a central pillar of every democracy²⁸ as active participation distinguishes democracy from autocratic state forms. In other words, the concept of democracy is based on the notion that governments must be responsive to the citizens and that this can only be attained by giving the citizens, at least to some extent, a say on decisions that affect them.²⁹ Thus, the commitment to participation – be it through participation in order to elect representatives, referendums, protest or, for instance, public participation in environmental decision-making – is in the nature of democracy itself.

²⁴ Arthur Schlesinger ‘Can The Party System Be Saved?’ in Patricia Bonomi *et al* (eds) *The American Constitutional System Under Strong and Weak Parties* (1981) 122f.

²⁵ Yigal Mersel ‘The dissolution of political parties: The problem of internal democracy’ (2006) 4 *Int'l. J. Const. L.* 91.

²⁶ Richard Gunther and Larry Diamond (note 21 above) at 7.

²⁷ This is, for instance, the case in countries where the head of state or the head of government respectively are not directly elected by the citizens but rather by the members of the majority party in the national parliament. In fact, this is the case both in Germany and in South Africa. I will deal with that in more detail in Chapter III and IV.

²⁸ Kathe Callahan *Elements of Effective Governance: Measurement, Accountability and Participation* (2007) 149.

²⁹ Pierre de Vos “‘It’s my party (and I’ll do what I want to)’”: Internal party democracy and section 19 of the South African Constitution’ draft paper at 1f. I am thankful to Professor Pierre de Vos who gave me this draft paper and permitted me to quote it in my dissertation. The final version is being published in (2014) 30 *SAJHR*.

However, as the few examples given show, participation of citizens can come in many forms, and indeed the extent to which active participation is needed in a democracy is highly controversial. On the one end of the spectrum one can find the supporters of the idea of direct or participatory democracy.³⁰ This is a form of democracy in which the citizens are heavily involved in the process of law and policy making.³¹ Hence, there is a strong emphasis on the participative aspects of democracy. On the other end of the spectrum one can find those who support indirect or representative democracy.³² This, by contrast, is a type of democracy in which elected representatives act on behalf of the citizens.³³ Certainly, both approaches have their advantages and disadvantages and a more detailed discussion of the necessary extent of public participation would go beyond the scope of this dissertation.³⁴ However, all of the above mentioned allows concluding that both political parties and participation of citizens are important for a democracy. Against this background, the question must be asked to what extent party members are supposed to participate in the activities of political parties and whether this participation is supposed to be facilitated in a democratic way. In the next subsection I deal with those issues.

(c) *What is meant by 'internal party democracy'?*

One could argue that the way political parties are supposed to 'fit in' a democratic state is twofold. First, and more well-known, there is the notion that the aims, activities and programs of political parties must not infringe upon the fundamental principles and values of a democratic society. This relates to cases in which goals and activities of political parties, for instance, promote terrorism³⁵ or right-wing

³⁰ Kathe Callahan (note 28 above) at 149.

³¹ Theo Schiller 'Local Direct Democracy in Europe – a comparative overview' in Theo Schiller (ed) *Local Direct Democracy in Europe* (2011) 10. Switzerland, for instance, has a long tradition of direct democracy.

³² Kathe Callahan (note 28 above) at 149.

³³ For more details, see, eg, Theo Schiller 'Direct Democracy and Theories of Participatory Democracy – some observations' in Zoltán Tibor Pállinger *et al* (eds) *Direct democracy in Europe: Developments and Prospects* (2007) 53f.

³⁴ See generally John Haskell *Direct Democracy Or Representative Government? Dispelling The Populist Myth* (2001).

³⁵ Leslie Turano 'Spain: Banning political parties as a response to Basque terrorism' (2003) 1 *Int'l. J. Const. L.* 730.

extremist groups.³⁶ One may call this ‘external democracy of political parties’.³⁷ This topic touches upon many interesting questions but obviously does not fall under the subject of this thesis and therefore will not be analysed in any further detail here.³⁸ Secondly, there is the internal democracy of political parties which, by contrast to the external democracy of political parties, has been partly neglected for long by scholars.³⁹ But, what does internal party democracy actually mean?

Indeed, there is no commonly accepted definition of the term ‘internal party democracy’. However, formulated in a most general and basic fashion, internal party democracy can be described as a method for ‘including party members in intra-party deliberation and decision making’⁴⁰ or in other words, the extent to which party members can influence the decisions taken by their political party.⁴¹ It is thus clear that the notion of internal party democracy is *inter alia* embedded in the theory of participatory democracy.⁴² To put it differently, those who believe that the main function of political parties is not merely to contribute to a stable government but rather to extend opportunities of citizen participation are more likely to promote the notion of internal party democracy.⁴³

However, what *exactly* does the term ‘internal party democracy’ include? What are the ‘ingredients’ of a democratically organised political party? Over time scholars have attempted to name these ‘ingredients’. Internal party democracy therefore may involve:⁴⁴

³⁶ See, eg, the judgment of the German Federal Constitutional Court (hereinafter the FCC) *NPD-Verbot (Ban of the NPD)* BVerfG, 2 BvB 1/01.

³⁷ Yigal Mersel (note 25 above) at 86.

³⁸ See generally on undemocratic actors in a democracy Gregory Fox and Georg Nolte ‘Intolerant Democracies’ (1995) 36 *Harv. Int’l. L. J.* 1 or William Downs *Political Extremism in Democracies: Combating Intolerance* (2012).

³⁹ See, eg, Ingrid van Biezen ‘Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe’ (2012) 42 *British Journal of Political Science* at 188 regarding, *inter alia*, internal party democracy and the relevance of constitutions.

⁴⁰ Susan Scarrow (note 2 above) at 3.

⁴¹ Josh Maiyo ‘Preaching Water, drinking Wine? Political Parties and Intra-Party Democracy in East Africa: Considerations for Democratic Consolidation’ Paper presented at the *ASC Leiden Seminar Series* (2008) 3.

⁴² *Ibid* at 3.

⁴³ Dieter Grimm ‘§14 Politische Parteien’ in Ernst Benda *et al* (eds) *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland* (1994) para 38.

⁴⁴ For a list of characteristics, see, Yigal Mersel (note 25 above) at 95 and the references there in footnote 55.

First, the members of a political party must be able to nominate those who will be the party's candidates for the upcoming local and general elections.⁴⁵ This includes candidates in, for instance, single member constituencies or on a party list.⁴⁶ Secondly, and sometimes overlapping with the first point, the members of a political party must be entitled to elect the leadership of their political party.⁴⁷ Thirdly, political parties have to comply with the principle of periodic elections.⁴⁸ In other words, every selection process must take place again after a certain period of time has elapsed. Fourthly, the members of a political party must be able to participate democratically in the process of policy making.⁴⁹ Fifthly, election processes and every other form of participation of the party members in the activities of their party must comply with the principle of majority rule.⁵⁰ Sixthly, minorities within the political party as well as aspects of gender and race must be represented proportionally.⁵¹ Seventhly, political parties have to guarantee freedom of association and freedom of speech within the political party itself and thus must particularly tolerate the establishment of party fractions.⁵² Eighthly, political parties must commit themselves to transparency. This means in particular that they have to disclose information regarding party funding.⁵³ Ninthly, political parties have to ensure fundamental rights for their party members. For instance, the decision to expel a party member has to be procedurally fair.⁵⁴ Finally, political parties have to submit themselves to the jurisdiction of an independent judicial body for reviewing matters which relate to internal party democracy.⁵⁵

⁴⁵ Susan Scarrow (note 2 above) at 7; for more details, see, eg, Gideon Rahat 'What Is Democratic Candidate Selection?' in William Cross and Richard Katz (eds) *The Challenges of Intra-Party Democracy* (2013) 136.

⁴⁶ Gideon Rahat (note 46 above) at 136.

⁴⁷ Yigal Mersel (note 25 above) at 95.

⁴⁸ Jörn Ipsen 'Art. 21 Parteien' in Michael Sachs (ed) *Grundgesetz Kommentar* (1999) para 59.

⁴⁹ Susan Scarrow (note 2 above) at 10.

⁵⁰ Yigal Mersel (note 25 above) at 95.

⁵¹ Ibid; Pierre de Vos (note 29 above) at 13.

⁵² Yigal Mersel (note 25 above) at 95.

⁵³ Susan Scarrow 'Intra-Party Democracy and Party Finance' in William Cross and Richard Katz (eds) *The Challenges of Intra-Party Democracy* (2013) 150; see also in this regard the 'My Vote Counts' campaign in South Africa. This campaign 'has lodged an application at the Constitutional Court on the 16 July 2014, for an order declaring that Parliament has failed to fulfil its constitutional obligation to enact national legislation to bring about transparency in the private funding of political parties.' See <http://www.myvotecounts.org.za/>, accessed on 21 January 2015.

⁵⁴ Yigal Mersel (note 25 above) at 95.

⁵⁵ Ibid.

Whether or not a political party must comply with all these features to be considered internally democratic is controversial.⁵⁶ However, there seems to be, at least in principle, agreement that political parties have to meet at least some of these requirements to be *not* clearly considered internally undemocratic. To put it differently, if one imagines internal party democracy as circle, some of the above-mentioned features could be found at the very centre of the circle whereas other characteristics could be found on the periphery. The characteristics that form the core of the notion of internal party democracy may include:⁵⁷

- selection of those who will be the party's candidates for the upcoming local and general elections by the party members;
- selection of the leadership of the political party by the party members;
- participation of the party members in the process of policy making;
- freedom of speech which means that party members is given the opportunity to express their opinions and preferences freely;
- compliance with the principle of majority rule;
- compliance with the principle of periodic elections.

In the following country analyses (chapters III and IV) I will mainly be focusing on these core features whose non-compliance with strike at the heart of the concept of internal party democracy. Yet, it could be argued with good reasons that this list should also include transparency with regard to the financial funding of political parties. The financial funding of political parties is, however, a subject in its own which raises many difficult questions.⁵⁸ A comprehensive study is therefore beyond the scope of this dissertation.

⁵⁶ For instance, the representation of minorities, gender or race aspects within political parties are sometimes considered as against the notion of internal party democracy. Regarding issues of gender, see Sarah Childs 'Intra-Party Democracy: A Gendered Critique and a Feminist Agenda' in William Cross and Richard Katz (eds) *The Challenges of Intra-Party Democracy* (2013) 81.

⁵⁷ For similar features, see, eg, Pierre de Vos (note 29 above) at 6 regarding the extent, required by the South African Constitution, to which party members must participate in the activities of political parties; Yigal Mersel (note 25 above) at 104; Jörn Ipsen (note 48 above) at para 57ff; Augustine Magolowondo 'Democracy within political parties: The state of affairs in East and Southern Africa' in Danwood Mzikenge Chirwa and Lia Nijzink *Accountable Government in Africa* (2011) 202.

⁵⁸ See generally on this topic, eg, Susan Scarrow (note 53 above); for a study about South Africa, see, Anthony Butler (ed) *Paying for Politics: Party Funding and Political Change in South Africa and the Global South* (2010).

But, before conducting the country analyses, it is important to consider whether or not internal party democracy is desirable at all. This is important as this paper is based on the notion that at least a minimum threshold of democratic participation is needed within political parties.

(d) *Is internal party democracy desirable?*

Whereas it is commonly accepted that democracy is a desirable goal for a state itself, and political parties ought to play a pivotal role in achieving it, this widely shared notion does not apply with regard to internal party democracy. This is mainly because political parties are in many countries considered private bodies.⁵⁹ Opponents of the legal regulation of internal party democracy therefore put the argument forward that political parties should remain independent of state regulation.⁶⁰ This independency is, the argument goes, important for various reasons. First, internal party democracy weakens political parties⁶¹ as it is, for instance, counterproductive for party discipline.⁶² Moreover, internal party democracy may prevent that political parties select those candidates for local or general election that are most likely to get elected by the voters.⁶³ This in turn means that the political success of political parties is at stake.⁶⁴ Secondly, it is argued that it is due to the independency of political parties that they are capable of playing a crucial role in a democratic state.⁶⁵ Only a non-regulated political party that is independent of the state can provide the electoral with proper electoral alternatives.⁶⁶ Finally, it should not be the state that decides how democracy within political parties should look like. There are actually many different forms of democracy, and if political parties become too ‘democratic’ the ‘political system shrinks in its ideological variety.’⁶⁷

These arguments are certainly not entirely wrong. Actually, they are touching on an important subject. Political parties must be given a certain margin of discretion in

⁵⁹ Ingrid van Biezen and Daniela Romée Piccio ‘On the Legal Regulation of Internal Party Organization’ in William Cross and Richard Katz (eds) *The Challenges of Intra-Party Democracy* (2013) 30.

⁶⁰ See, eg, Ingrid van Biezen (note 39 above) at 205.

⁶¹ Josh Maiyo (note 41 above) at 4.

⁶² Yigal Mersel (note 25 above) at 99.

⁶³ Josh Maiyo (note 41 above) at 4.

⁶⁴ Augustine Magolowondo (note 57 above) at 202.

⁶⁵ Samuel Issacharoff ‘Fragile Democracies’ (2007) 120 *Harvard Law Review* 1460f.

⁶⁶ *Ibid.*

⁶⁷ Yigal Mersel (note 25 above) at 100.

terms of the structuring of their internal affairs in order to preserve a degree of autonomy from the government.⁶⁸ However, for the following reasons I take the view that a minimum threshold of democracy, or in other words, core values of democracy need to be applied within political parties. First, the above-mentioned important role of political parties for a democracy must again be emphasised. If citizens enjoy the right of active and passive democratic participation in their country, this right should also apply within those bodies which actually facilitate democracy.⁶⁹ Furthermore, a political party that is organised in a democratic manner is rather capable of representing the interest of citizens than an undemocratic party.⁷⁰ Secondly, internal party democracy may foster party unity as it can prevent the fragmentation of political parties through using conflict resolutions based on democratic values such as equality.⁷¹ Thirdly, it is more likely that a country as a whole and especially the leadership of a country embraces democratic values if a culture of democracy is already applied within political parties.⁷² Finally, internal party democracy may prevent political parties with an unaccountable leadership from taking too much power and influence in a country.⁷³

⁶⁸ Ibid at 101.

⁶⁹ Ibid at 96.

⁷⁰ Augustine Magolowondo (note 57 above) at 202.

⁷¹ Josh Maiyo (note 41 above) at 2.

⁷² Ibid at 4; Augustine Magolowondo (note 57 above) at 202.

⁷³ James Gardener 'Can Party Politics be Virtuous?' (2000) 100 *Columbia Law Review* 685.

III GERMANY

Still under the impression of a fortunately defeated totalitarian system, the drafter of the new (West-) German constitution sought to ensure that undemocratic and extremist political organisations are never again able to hijack the country.⁷⁴ It is against this background that a legal obligation to organise democratically has been imposed on political parties in Germany nearly 65 years ago. But how does this legal framework work? Is it working effectively? Are political parties in Germany organised democratically or are there loopholes in the legal framework which have been exploited? In this chapter I will tackle these issues.⁷⁵ First, I will portray the country-specific role of political parties in Germany. I will then examine the legal framework of party regulation including the Basic Law and party laws, before I turn to the constitution of the CDU and SPD. At the end of this chapter I attempt to shed light on the enforcement of the legal framework of internal party democracy.

(a) *The role of political parties in Germany*

Although I already mentioned the significance of political parties in a democracy in general, I will now briefly contextualise the importance of political parties in Germany.⁷⁶ This seems necessary for two reasons: first, political parties do not act in a vacuum but rather in a specific social und legal environment which is why the role and importance of political parties varies from country to country. Furthermore, some of the remarks I will make below can only be understood properly by providing some background knowledge.

The role of political parties in Germany can hardly be underestimated. This is already apparent from a look at the Basic Law. Article 21 (1) of the Basic Law *inter alia* states:

⁷⁴ Judgment of the FCC *KPD-Verbot (Ban of the KPD)* 1973 BVerfGE 5, 85 at 138f.

⁷⁵ As is generally known, Germany is a federally structured country in which the 16 states (*Länder*), such as the Free State of Bavaria or Saxony, with their own governments and parliaments play a pivotal role in law-making and politics. In accordance with this federal structure, most political parties in Germany are also structured federally. In other words, almost every political party is organised on the federal level as well as on the state (*Länder*) level. A detailed analysis of the situation in all 16 German states is beyond the scope of this dissertation which is why I will mainly focus on the federal level.

⁷⁶ For a comprehensive analyses in English, see, eg, Geoffrey Roberts *Party Politics in the New Germany* (1997).

‘Political parties shall participate in the formation of the political will of the people ...’⁷⁷

Article 21 (1) of the Basic Law therefore recognises political parties as necessary for the formation of the political will of the people.⁷⁸ However, it is also clear by the wording of this article (‘participate’) that political parties are only one instrument among others to enable citizens to form the political will.⁷⁹ In particular those fundamental rights of the Basic Law which are designed to foster and promote democracy, such as freedom of expression⁸⁰ or freedom of assembly,⁸¹ are certainly of similar importance. But this fact does not lessen the significance of political parties in Germany. The position of article 21 within the Basic Law or to put it more precisely, the mention of political parties in article 21 directly after the important article 20, which compromises constitutional principles as sovereignty of the people and the right to vote,⁸² clearly indicates the great importance and central role political parties are called upon to play in this context. It is therefore not surprising that the German Federal Constitutional Court (*Bundesverfassungsgericht*, hereinafter the ‘FCC’) termed political parties⁸³ ‘factors of the constitutional life’⁸⁴ or ‘integrated components of the constitutional structure’⁸⁵ and eventually ranked them as a ‘constitutional “institution”’, which, however, must of course be strictly distinguished from official state bodies or authorities.⁸⁶

The described important role of political parties is, however, not only reflected by these specific articles of the Basic Law. Rather, political parties in Germany also play a pivotal role in particular when it comes to the formation of government and the election of the German Chancellor.

⁷⁷ Translated by Christian Tomuschat and David Currie in cooperation with the Language Service of the German *Bundestag*. All English quotations of the Basic Law hereinafter refer to this translation. It is available at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0114, accessed on 21 January 2015.

⁷⁸ Jörn Ipsen (note 48 above) at para 5.

⁷⁹ Philip Kunig ‘§ 40 Parteien’ in Josef Isensee and Paul Kirchhof (ed) *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (2005) para 19.

⁸⁰ Article 5 of the Basic Law.

⁸¹ Article 8 of the Basic Law.

⁸² Article 20 of the Basic Law *inter alia* states:

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

⁸³ For further references, see, Jörn Ipsen (note 48 above) at para 8.

⁸⁴ Judgment of the FCC *7,5%-Sperrklausel (7,5% threshold)* BVerfGE 1, 208 at 227.

⁸⁵ *Ibid* at 225.

⁸⁶ Judgment of the FCC *Parteispenden (party donations)* BVerfGE 52, 63 at 85.

The Chancellor is the head of government of Germany and therefore considered to hold the most influence and powerful office in the Federal Republic.⁸⁷ However, due to the election system, namely the so-called mixed-member proportional representation system,⁸⁸ citizens merely elect the members of the *Bundestag* (the German National Parliament) but not the Chancellor directly. The head of government is rather appointed by the majority of the members of the *Bundestag*.⁸⁹ This actually means that the candidate for Chancellor (*Kanzlerkandidat*)⁹⁰ either of the SPD or CDU becomes the Chancellor.⁹¹ In other words, in the month leading up to the Election Day the two largest political parties in Germany actually determine which person will become the Chancellor by appointing their respective candidate for Chancellor. On Election Day, the citizens then only vote indirectly for one of the candidates.

Furthermore, political parties in Germany perform a main function when it comes to government formation, or to put it more precisely, coalition formation.⁹² As I already mentioned, neither of the two largest political parties generally obtain the majority of the votes in the national elections.⁹³ This means that they need to form a coalition together or with one of the smaller parties to achieve a majority in parliament. In this respect those political parties which want to form a coalition usually conclude a so-

⁸⁷ Although the President of Germany is the head of state, he or she is mainly supposed to carry out representative tasks; see, eg, article 59 of the Basic Law.

⁸⁸ According to the mixed-member proportional representation system, one half of the members of the *Bundestag* is elected in constituencies by first-past-the-post voting while the other half is elected by party lists to ensure proportional allocation; for more details, see, eg, Pippa Norris 'Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems' (1997) 18 *International Political Science Review* 304.

⁸⁹ See article 63 of the Basic Law which *inter alia* states:

(1) The Federal Chancellor shall be elected by the *Bundestag* without debate on the proposal of the Federal President.

(2) The person who receives the votes of a majority of the Members of the *Bundestag* shall be elected. The person elected shall be appointed by the Federal President.

(3) If the person proposed by the Federal President is not elected, the *Bundestag* may elect a Federal Chancellor within fourteen days after the ballot by the votes of more than one half of its Members.

⁹⁰ Unlike in other countries, the candidate for Chancellor of a political party needs not to be the same person as the formal leader of the political party.

⁹¹ Although neither the SPD nor CDU normally obtain a majority of the votes and are therefore forced to form a coalition government together or with one of the smaller political parties, it has been an unwritten law that the candidate for Chancellor of the political parties which got the most votes will become the Chancellor. As until today, this has always been the candidate for Chancellor either of the CDU or SPD.

⁹² Klaus Stern *Das Staatsrecht der Bundesrepublik Deutschland – Band I* (1997) 343.

⁹³ As until today, there has only been one exemption: the (West) German federal election, 1957, in which the CDU obtained 50, 2 per cent of the votes.

called coalition agreement⁹⁴ that sets out the policy objectives and contents for the upcoming parliamentary term.⁹⁵ This agreement, which is internally negotiated in a coalition committee by the involved parties outside parliament, forms an important basis for all future decisions taken by the new government and parliament.⁹⁶

These examples clearly show the crucial and maybe even more importantly the very powerful role political parties play in Germany. It is against this background that it appears reasonable to regulate the internal functioning of political parties. In the next subsection I will shed more light on the legal framework governing internal party democracy in Germany.

(b) *The legal framework governing internal party democracy in Germany*

The legal framework which regulates internal party democracy in Germany mainly consists of three parts: Article 21 of the Basic Law, the Political Parties Act (*Gesetz über die politischen Parteien*, hereinafter PPA)⁹⁷ and the Federal Elections Act (*Bundeswahlgesetz*, hereinafter FEA).⁹⁸

⁹⁴ The current coalition agreement concluded by the CDU, CSU and SPD is available at <https://www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf>, accessed on 21 January 2015.

⁹⁵ Political parties in Germany are not legally obligated to conclude a coalition agreement. They are not legally obligated to disclose a concluded agreement either.

⁹⁶ In fact, these coalition committees (and the coalition agreements) have often been criticised for creating a kind of additional government which can not effectively be held accountable by parliament; see, eg, Wichard Woyke 'Koalition' in Uwe Andersen and Wichard Woyke (eds) *Handwörterbuch des politischen Systems der Bundesrepublik Deutschland* (1995) 253; Siegfried Heimann 'Sozialdemokratische Partei Deutschlands' in Richard Stöss (ed) *Parteien-Handbuch - Die Parteien der Bundesrepublik Deutschland 1945–1980* (1984) 2094.

⁹⁷ Political Parties Act, as promulgated on July 24, 1967 (Federal Law Gazette I, 773); as last amended on August 23, 2011 (Federal Law Gazette I, Page 1748); available in German at <http://www.gesetze-im-internet.de/partg/BJNR007730967.html>; available in English at <http://www.bundeswahlleiter.de/en/parteien/> downloads/parteiengesetz_engl.pdf, accessed on 21 January 2015.

⁹⁸ Federal Elections Act, as promulgated on July 23, 1993 (Federal Law Gazette I, 1288, 1594); as last amended on May 3, 2013 (Federal Law Gazette I, 1084); available in German at <http://www.gesetze-im-internet.de/bwahlg/BJNR003830956.html>; available in English at http://www.bundeswahlleiter.de/en/bundestagswahlen/downloads/rechtsgrundlagen/bundeswahlgesetz_engl.pdf, accessed on 21 January 2015.

(i) *Article 21 (1) of the Basic Law*

Article 21 (1) of the Basic Law sets out the basic principle according to which political parties are obligated to organise their ‘internal life’ democratically. Article 21 (1) states:

“Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.”⁹⁹

The wording of the emphasised passage is obviously very general. This is, however, not unusual but rather a characteristic feature of a constitutional text. But what does in particular the term ‘democratic principles’ mean? Or in other words, what are the democratic requirements imposed on political parties by the Basic Law?

In my view, it would be wrong to interpret article 21 of the Basic Law in the light of one specific theory of democracy. As article 21 of the Basic Law sets out a general obligation for all political parties, it cannot be assumed that the drafter of the constitution had one specific understanding of democracy in mind (for instance, participatory or direct democracy). Article 21 of the Basic Law therefore does not require political parties to internally apply the highest conceivable level of democracy, which for some might or might not be desirable depending on their preferred theory of democracy, but rather wants to ensure a minimum threshold of democracy within all political parties. Article 21 of the Basic Law thus leaves it up to the each party to implement higher standards, if desired.¹⁰⁰ This interpretation is also supported by the fact that the Basic Law does not require political parties to structure in one specific form of organisation. It seems rather appropriate to leave room for different models of internal organisation and participation as far as a minimum level of democracy is guaranteed.

On the basis of that examination, legal scholars and the FCC have progressively named some minimum requirements of democracy which in terms of article 21 of the Basic Law must be fulfilled by political parties. Although the debate on the precise

⁹⁹ Emphasis added.

¹⁰⁰ Jörn Ipsen (note 48 above) at para 55.

content of article 21 of the Basic Law is not over yet (and maybe will never be over), one can identify some features which are commonly accepted.

First, political parties have to be organised ‘from the bottom to the top’ and not the other way round.¹⁰¹ This means that a party assembly including all party members or their elected representatives must be the supreme authority of the party. A leader principle (*Führerprinzip*) or a quasi-dictatorship position of the party executive is therefore incompatible with article 21 of the Basic Law.¹⁰² Furthermore, every party member has to have a real opportunity to participate in the activities of the party such as policy development.¹⁰³ If, for instance, subdivisions of the party are oversized, this requirement may be adversely affected.¹⁰⁴

Secondly, the holders of party posts have to be elected by the party members or their representatives. Or in other words, party posts must be underpinned by democratic legitimacy.¹⁰⁵ Yet, that does not mean that the whole staff of a political party has to be elected democratically. Especially those members of staff which merely carry out instructions need not to be legitimised by elections.¹⁰⁶ However, the requirement of democratic legitimacy does not only cover party posts such as the leader or the executive board of a party but also, of course, the candidates for local or general elections.¹⁰⁷ Another important issue in this context, which is also covered by article 21 of the Basic Law, is the right of the party members to make proposals regarding the nomination of party posts or the party’s candidates for the upcoming elections. This is an essential element of freedom of speech.¹⁰⁸ Moreover, without being able to submit such proposals, an election would not longer be democratic but rather a process in which the members of a party merely rubber stamp those candidates already selected by the party elite.

Thirdly, party posts and the party’s candidates in the upcoming elections must be selected periodically as it is a fundamental democratic principle that the exercise of

¹⁰¹ Judgment of the FCC *SRP-Verbot (Ban of the SRP)* BVerfGE 2, 1 at 40.

¹⁰² *Ibid* at 41ff.

¹⁰³ Klaus Stern (note 92 above) at 334; Theodor Maunz ‘Art. 21’ in Theodor Maunz and Günter Dürig (eds) *Grundgesetz Kommentar* (1993) para 65.

¹⁰⁴ Jörn Ipsen (note 48 above) at para 61.

¹⁰⁵ *Ibid* at para 57.

¹⁰⁶ *Ibid*.

¹⁰⁷ Klaus Stern (note 92 above) at 335.

¹⁰⁸ Jörn Ipsen (note 48 above) at para 58.

power is limited in time.¹⁰⁹ Therefore, elections must take place again after a certain period of time has elapsed.

Finally, article 21 of the Basic Law requires political parties to comply with the principle of majority rule.¹¹⁰ This principle is rooted in the notion that elections must be held on the basis of equal suffrage to be considered democratic.¹¹¹

To summarise, the FFC and most of the scholars have *so far* interpreted article 21 of the Basic Law as a minimum threshold. Unsurprisingly, article 21 of the Basic Law therefore contains quite exactly does feature which were identified above as basic principles of the notion of internal party democracy.¹¹² To put it differently, article 21 of the Basic Law establishes rather a ‘floor’ of internal party democracy than a ‘roof’. By the same token, the Basic Law recognises that in the context of internal party democracy one should strike an appropriate balance between, on the one hand, ensuring to a certain extent active participation of the party members in the activities of a political party and, on the other hand, providing enough room for political parties to preserve their internal unity and autonomy from the government.

(ii) *Implementation of article 21 (1) of the Basic Law into Federal Laws*

The abovementioned rather broad requirements set out by the Basic Law in article 21 certainly need further clarification. Therefore, article 21 (3) of the Basic Law itself states:

‘Details shall be regulated by federal laws.’

Interestingly enough, it took the German parliament nearly 20 years – the PPA was only promulgated in 1967 – to fulfil this constitutional obligation. The reasons for that delay were twofold. First, the delay can be explained by the unwillingness of the political parties to submit themselves to rules and therefore limit their own freedom

¹⁰⁹ Ibid at para 59.

¹¹⁰ Ibid at para 60.

¹¹¹ Ibid.

¹¹² See chapter II (3).

of internal decision making.¹¹³ Secondly, the political parties could not come to an agreement on the regulation of public subsidies which at this time was a major source of income of political parties.¹¹⁴ In the end, it was a decision of the FCC in 1966¹¹⁵ that banned direct public funding of political parties and therefore indirectly forced political parties to pass a comprehensive party law.¹¹⁶ It is especially this party law – the PPA, which I will examine in the following paragraphs – that specified the content of internal party democracy in terms of article 21 of the Basic Law.

The PPA is a quite comprehensive law and regulates, like article 21 of the Basic Law, far more than the internal organisation of political parties.¹¹⁷ For the purpose of this paper, I will however focus on those provisions that concern internal party democracy.

As already mentioned above, according to article 21 of the Basic Law one cornerstone of internal party democracy is that political parties must be organised ‘from the bottom to the top’. This idea is especially reflected by article 7, 8 and 9 of the PPA. Article 8 (1) of the PPA *inter alia* states that ‘[t]he assembly of members and the Executive Committee are indispensable bodies of a political party and its regional/local branches. The statutes may stipulate that in supra-local branches, the members’ assembly may be replaced by a delegates’ assembly whose members shall be elected, for a maximum of two years, by the members’ or delegates’ assemblies of the subordinate branches.’ Furthermore, article 9 (1) of the PPA *inter alia* reads: ‘[t]he assembly of members or delegates ... is the supreme body of the respective regional/local branch. It is called a “party convention” in the case of higher-level branches, and a "general assembly" at the lowest level.’ The assembly or more precisely the assemblies of members or delegates must therefore be the major forums in every political party. Certainly, those who are in favour of the idea of direct

¹¹³ Heinrich Oberreuter ‘Politische Parteien: Stellung und System im Verfassungssystem der Bundesrepublik Deutschland’ in Alf Mintzel and Heinrich Oberreuter (eds) *Parteien in der Bundesrepublik Deutschland* (1992) 32.

¹¹⁴ Heino Kaack *Geschichte und Struktur des deutschen Parteiensystems* (1971) 367.

¹¹⁵ Judgement of the FCC *Parteienfinanzierung I* (public funding of political parties I) BVerfGE 20, 56.

¹¹⁶ Thomas Poguntke ‘Parties in a Legalistic Culture: The Case of Germany’ in Richard Katz and Peter Mair (eds) *How Parties Organize* (1994) 189f.

¹¹⁷ It also covers, for instance, detailed regulations about public financing; see articles 18ff of the PPA.

democracy in political parties may refuse to accept delegates' assemblies. Yet, as already mentioned above, the Basic Law is not underpinned by only one specific theory of democracy. This concept is also reflected by the PPA which allows delegates' assemblies. Moreover, the legitimacy of assemblies of delegates can also be explained by practical reasons. It is simply very difficult for political parties to act effectively without assemblies of delegates considering the fact that, for instance, the SPD nearly has 500,000 members.¹¹⁸ However, the possibility to establish assemblies of delegates in the end means that the members of a political party directly participate in the action of the party only at the lowest organisational level, namely the subdivisions of the respective regional/local branches.¹¹⁹ Therefore, the regional/local branches in particular at the lowest level are the places where the members mainly exercise their right to participate. It is against this background that the regional/local branches should not be oversized as effective participation, which is a necessary precondition according to article 21 of the Basic Law, can only take place in a forum in which any party member is actually able to contribute in debating and decision-making.¹²⁰ Article 7 (1) of the PPA therefore states: '[p]olitical parties shall be organised in regional and/or local branches. The size and level of regional/local branches shall be laid down in the party's statutes. Such territorial subdivisions must be developed to a sufficient degree to enable individual members to participate, on an adequate scale, in the party's policy and decision-making processes.'

To sum up, according to the PPA the members are the foundation of the political party. Above this foundation, political parties are allowed to establish a rather complex organisational structure of higher- and lower-level regional/local branches. Every regional/local branch needs to have a members' assembly or a delegates' assembly in which the members of the political party are represented.

The members' assemblies or delegates' assemblies undertake essential tasks. They decide on 'party policies, the statutes, rules on membership dues, rules on arbitration

¹¹⁸ See Federal Agency for Civic Education 'Mitgliederentwicklung der CDU und SPD ab 1990', available at <http://www.bpb.de/politik/grundfragen/parteien-in-deutschland/138672/mitgliederentwicklung-cdu-und-spd-ab-1990> accessed on 21 January 2015.

¹¹⁹ Stefan Ossege *Das Parteienrechtsverhältnis: Das Rechtsverhältnis zwischen politischer Partei und Parteimitglied* (2012) 149.

¹²⁰ Jörn Ipsen (note 48 above) at para 61.

procedures, the party's dissolution and its merger with other parties.'¹²¹ Furthermore, they elect the leadership of the party, namely 'the chairperson of the regional/local branch, his/her deputies, the other members of the Executive Committee and the members of any other bodies.'¹²² Additionally, and equally important, the members' assemblies elect the 'delegates ... to the bodies of higher-level regional branches.'¹²³ As already mentioned above, in order to guarantee freedom of speech, it is also important that the party members or their representatives have the right to make proposals regarding, for instance, the nomination or recalling of the leadership. This right is fleshed out in a quite general fashion by the PPA in article 15 (3) which *inter alia* states: '[t]he right to propose motions shall be designed in such a way as to ensure democratic policy formation and decision-making processes, and, in particular, adequate discussion also of the proposals submitted by minorities.' Finally, the PPA also embraces the essential principles of a democratic election. The principle of majority rule can be found in article 15 (1) of the PPA,¹²⁴ the principle of secret voting in article 15 (2),¹²⁵ and the principles of free and regular elections is implied by articles 8 (1), 11 (1) and 15 (3).¹²⁶

So far the PPA sets out a quite detailed legal framework which is supposed to guarantee the core values of internal party democracy. However, there are, in my view, two provisions of the PPA that must be considered problematic from a democratic point of view.¹²⁷ It is the legitimacy of ex-officio memberships in the delegates' assemblies and the Executive Committees. Ex-officio members are members of a body who are part of it by virtue of holding another office.¹²⁸ Article 9 (2) of the PPA states:

¹²¹ Article 9 (3) of the PPA.

¹²² Article 9 (4) of the PPA.

¹²³ Article 9 (4) of the PPA.

¹²⁴ Article 9 (1) of the PPA reads: 'The party's bodies shall adopt their resolutions by a simple majority vote unless a higher majority is prescribed by law or by the party statutes.'

¹²⁵ According to article 15 (2) of the PPA this principle, however, only covers the '[e]lections of the members of the Executive Committee and of the delegates to delegates' assemblies and to bodies of higher-level regional branches.'

¹²⁶ For the principle of regular elections see article 8 (1) of the PPA which *inter alia* states: 'the members' assembly may be replaced by a delegates' assembly whose members shall be elected, for a maximum of two years ...' and article 11 (1) of the PPA which *inter alia* reads: '[t]he Executive Committee shall be elected every two calendar years at least.' For the principle of free elections see article 15 (3) of the PPA which *inter alia* reads: '[f]or elections and polls, any commitment to resolutions passed by other bodies shall not be permitted.'

¹²⁷ On this point also critical, eg, Klaus von Beyme *Das Politische System Der Bundesrepublik Deutschland: Eine Einführung* (2010) 177.

¹²⁸ Wolfgang Rudzio *Das politische System der Bundesrepublik Deutschland* (2011) 145.

'Members of the Executive Committee, members of other bodies of the regional/local branch and any persons as defined in Section 11 para. 2 may, pursuant to the statutes, be members of a delegates' assembly, but in this case the number of those who are entitled to vote must not exceed one-fifth of the total number of assembly members as provided under the statutes.'

Furthermore, article 11 (2) of the PPA *inter alia* reads:

'The Executive Committee may, pursuant to the statutes, include members of parliament and other high-ranking persons in the party if they hold an office or a mandate as a result of an election. The proportion ... must not exceed one-fifth of the total number of Executive Committee members.'

These provisions, which have not yet been subject to a constitutional challenge before the FCC, can be considered as an 'historic remains' of the time before the PPA was enacted. In that time, following the end of the Second World War, it was generally accepted, even though already constitutionally problematic, that great numbers of ex-officio members were part of the assemblies and the Executive Committees of political parties with the result that the number of ex-officio members often exceeded the number of elected members in these bodies.¹²⁹ Although, according to the PPA, the number of ex-officio members is now limited to 20 per cent of the total membership of the delegates' assemblies and the Executive Committees respectively, it is still a remarkable number given the fact that article 21 of the Basic Law clearly obligates political parties to organise in a democratic manner. Indeed, these ex-officio members are democratically problematic because they are simply not elected into the respective delegates' assembly or the Executive Committee by the members of the political party. While it may be true that ex-officio members have a sort of democratic legitimacy as they were someday elected to hold *another* office, they are, however, not elected into the respective delegates' assembly or Executive Committee. Therefore, the model of ex-officio memberships in terms of article 9 (2) and 11 (2) of the PPA does not allow the members of political parties to decide who should represent their interest in the respective bodies. Furthermore, it is more difficult to hold ex-officio members accountable as they cannot be recalled directly but only indirectly by the members.

As already mentioned above, the PPA is not the only Federal Law that regulates internal party democracy in Germany. In particular concerning the nomination of

¹²⁹ Thomas Poguntke (note 116 above) at 190.

candidates for elections to parliaments the PPA does not contain detailed provisions. It is only article 17 of the PPA which states:

'Nomination of candidates for elections to parliaments must be by secret ballot. The nomination procedure shall be regulated by the electoral laws and by the statutes of the political parties.'

The main electoral law in Germany is the Federal Elections Act (FEA) which, indeed, comprises specific rules regarding the selection process of those who will be the party's candidates in the upcoming national election. These rules can be found in particular in article 21 of the FEA. According to article 21 (1) of the FEA '[a] person may only be named as a candidate of a party in a constituency nomination if he or she is not a member of another party and has been elected for this purpose at a members' assembly convened to elect a constituency candidate or at a special or general delegates' assembly.'¹³⁰ Furthermore, the FEA obligates political parties to accept proposals regarding candidates from every person who attends the assembly and to give every aspiring candidate the opportunity to present his or her political program.¹³¹ With regard to the electoral system in Germany,¹³² article 27 (5) of the FPA ensures that the principles set out in article 21 of the FPA does not only apply to the election of constituency candidates but also to the election of those who seek to get a place on the party's electoral list. Concerning the latter point, the party members or their representatives also determine the order of the candidates on the list.¹³³

At the end of this subsection, it seems to be important to highlight – besides the already mentioned ex-officio members – another instance of lack of internal party democracy within the described legal framework. It involves the German Chancellor or more precisely the selection of the candidate for Chancellor of the respective political party.

¹³⁰ According to article the 21 (1) of the FEA 'a *members' assembly* convened to elect a constituency candidate shall be an assembly of members of the party who at the time of their meeting are eligible to vote in the German Bundestag election in their constituency. A *special delegates' assembly* is 'an assembly of the delegates elected by such an assembly of members from their own ranks. A *general delegates' assembly* shall be a general assembly appointed in accordance with the statutes of the party (section 6 of the Act on Political Parties) by such an assembly of members from their own ranks in view of forthcoming elections.' Emphasis added.

¹³¹ See article 21 (3) of the FEA.

¹³² See note 88 above.

¹³³ See article 27 (5) of the FEA.

It follows from the forgoing subsections that all members of the Executive Committee of a political party (the leadership) as well as all candidates for elections to parliament must be elected democratically. However, neither the PPA nor the FEA requires the candidate for Chancellor of the respective political party to be a member of the Executive Committee or a candidate for the elections to parliament.¹³⁴ Furthermore, the PPA and the FEA do not require political parties to select their candidate for Chancellor democratically. Indeed, neither the PPA nor the FEA contain any provision regarding the candidate for Chancellor of political parties. In other words, there is no national legislation in place governing the selection of the candidate for Chancellor.

This can be explained by historic developments.¹³⁵ It has been and actually is still quite usual in Germany that the candidate for Chancellor is also the democratically elected Executive Chairman of the respective political party.¹³⁶ Therefore, when the PPA was enacted it was not considered necessary to include specific provisions regarding the candidate for Chancellor.¹³⁷ In the course of time some parties have, however, decided to split the post of the candidate for Chancellor and the Executive Chairman into two separate positions¹³⁸ in order to avoid internal conflicts and struggles for power.¹³⁹

As already mentioned above, it is very likely that the candidate for Chancellor of either the SPD or CDU becomes the German Chancellor after the general elections. Given this importance of the candidate for Chancellor and taking into account the abovementioned principles underlying article 21 of the Basic Law, it seems to be democratically and constitutionally problematic that neither the PPA nor the FEA contain rules that govern the selection procedure of the candidate for Chancellor.

¹³⁴ Hans-Peter Schwarz *Die Fraktion als Machtfaktor: CDU/CSU im deutschen Bundestag - 1949 bis heute* (2009) 218.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Hui Ding *Innerparteiliche Demokratie – Die Parteiführerauswahl in Deutschland und Großbritannien (1949-2009) im Vergleich* (2012) 152. See, for instance, the Liberal Democrats in the 2013 general elections, Die Zeit ‘Rösler bleibt FDP-Chef, Brüderle wird Spitzenkandidat’, available at <http://www.zeit.de/politik/deutschland/2013-01/fdp-roesler-bruederle-bundestagswahl>, accessed on 21 January 2015.

¹³⁹ Hans-Peter Schwarz (note 134 above) at 217.

(c) *The constitutions of the SPD and CDU*

The enactment of the PPA in 1967 led to the most extensive reforms regarding the constitutions of political parties since the end of the Second World War.¹⁴⁰ The reasons for that were as follows: First, the PPA (read with the FEA) set out a quite detailed legal framework which basically does not leave much room for manoeuvre for political parties in Germany with regard to the core values of internal party democracy. Secondly, until 1967 political parties tended to interpret their constitutional obligation to organise democratically rather widely. This was also reflected by their constitutions whose content needed to be considered democratically problematic at that time.¹⁴¹

Given today's dense legal framework, it seems not surprising that the constitutions of political parties exactly reflect the abovementioned content of the PPA and the FEA nowadays.¹⁴² Furthermore, because of the quite detailed regulation of internal party democracy, the internal structure of political parties in Germany is basically similar nowadays.¹⁴³ Therefore, I will at this point not examine the constitution of the SPD and CDU in great detail in that regard as it would only be a repetition of the foregoing paragraphs. However, it might nevertheless be interesting to have a brief look at the constitution of the SPD and the CDU in order to see how in particular the democratically problematic ex-officio memberships and selection of the candidate for Chancellor are being handled. I will focus in this regard on the highest level of the organisational structure of the SPD and CDU.

(i) *Ex-officio members*

The way the CDU and SPD deal with ex-officio members within their delegates' assemblies and the Executive Committees is indeed quite similar. As already mentioned above, the PPA allows in each of these bodies a number of ex-officio members up to 20 per cent of the total membership of the respective body. With regard to the delegates' assembly of the SPD, the 20 per cent scope is, however, by

¹⁴⁰ Thomas Poguntke (note 116 above) at 190.

¹⁴¹ Ibid.

¹⁴² See Ursula Heinz *Organisation innerparteilicher Willensbildung: Satzungen und innerparteiliche Demokratie* (1987).

¹⁴³ Thomas Poguntke (note 116 above) at 210.

far not exploited. According to article 15 read with article 23 of the constitution of the SPD,¹⁴⁴ the delegates' assembly at the highest level contains 600 members of whom a maximum of 35 members are allowed to be ex-officio members. This is approximately equivalent to 5 per cent.¹⁴⁵ Similarly, the CDU does not take full advantage of the scope given by the PPA either. According to article 28 of the CDU constitution,¹⁴⁶ the delegates' assembly at the highest level consists of (around) 1000 members of whom only the honorary chairs and the delegates of the 'overseas branches' must not be elected by the delegates' assemblies of the lower-level branches.¹⁴⁷ The number of ex-officio members is therefore normally well below the 20 per cent mark.¹⁴⁸

A similar picture emerges when it comes to the Executive Committees. Each members of the SPD Executive Committee must be elected democratically by the delegates' assembly according to article 23(3) of the SPD constitution.¹⁴⁹ There are no exceptions provided by the SPD constitution and therefore no ex-officio member is to be found in the SPD Executive Committee. In contrast to that, the number of ex-officio members in the CDU Executive Committee can vary from approximately 5 per cent to 15 per cent depending on the current distribution of political power on the federal level.¹⁵⁰

¹⁴⁴ SPD constitution (*SPD Organisationsstatut*) 26 January 2014, available in German at <http://www.spd.de/linkableblob/1852/data/Organisationsstatut.pdf>, accessed on 21 January 2015.

¹⁴⁵ Article 15 of the SPD constitution *inter alia* states: 'The Party Convention is the supreme body of the party. It comprises (1) 600 delegates who shall be elected by the delegates assemblies of the lower-level branches through a secret vote. ... (2) The members of the Executive Committee.' Article 23 (1) (f) *inter alia* states: 'The number of members of the Executive Committee shall not exceed 35.' The delegates' assembly of the higher-level branch is called 'Party Convention', see article 9 of the PPA.

¹⁴⁶ CDU constitution (*Statut der CDU*) 4 December 2007, available in German at <http://www.kas.de/upload/ACDP/CDU/Parteiodnungen/Statut2007.pdf>, accessed on 21 January 2015.

¹⁴⁷ Article 28 of the CDU constitution *inter alia* reads: 'The Party Convention comprises (1) 1000 delegates of the regional Party Conventions who shall be elected by the delegates' assemblies of the lower-level branches (2) the honorary chairs and the delegates of the overseas branches.'

¹⁴⁸ Klaus von Beyme (note 127 above) at 177.

¹⁴⁹ Article 23 (3) of the SPD Constitution *inter alia* reads: 'The Executive Committee shall be elected by the Party Convention...'

¹⁵⁰ According to article 29 of the CDU constitution, the elected member of the Executive Committee are *inter alia* the CDU chair, the Secretary General, the four deputy chairs, the treasurer, the honorary chairs, seven elected members of the presidium and further 26 elected board members. According to article 33 of the CDU constitution the unelected members of the Executive Committee are *inter alia* the Chancellor of Germany, the President or Vice President of the Bundestag, the chair of the CDU/CSU faction, the President of the European Parliament and the chair of the European People's Party if these are CDU members.

Therefore, although the PPA contains a loophole with regard to internal party democracy (the ex-officio memberships), the SPD and the CDU have not fully exploited it yet. The difference between the SPD (0 per cent) and CDU (5 to 15 per cent) regarding the number of ex officio members in the Executive Committee can in fact again be explained by the history of these political parties. Unlike the CDU, the SPD as a ‘Workers’ Party’ has ever been in favour of grassroots democracy which is why the SPD’s Executive Committee even prior the enactment of the PPA fully consisted of elected members.¹⁵¹

(ii) *Selection of the candidate for Chancellor*

As already mentioned above, the selection of the candidate for Chancellor is neither regulated by the PPA nor the FEA. Unlike the ex-officio memberships, this legal loophole has, in my view, been large exploited by the CDU and to a lesser extent by SPD. In fact, both political parties have no clear rules in place that govern the selection process of the respective candidate for Chancellor.¹⁵²

The CDU has several times attempted to amend its constitution in order to regulate the selection process and to grant the delegates’ assembly the right to make proposals and to elect the candidate for Chancellor.¹⁵³ All these attempts have however been unsuccessful so far.¹⁵⁴ Therefore, the question who has the formal competence for the selection of the candidate for Chancellor is still an unsolved one. For pragmatic reasons an unrivalled CDU candidate for Chancellor is however usually selected by the Executive Committee.¹⁵⁵ This selection procedure must however be considered nontransparent as it is not clear how the Executive Committee arrives at the result.¹⁵⁶ Sometimes, but not always, the selected candidate then gets approved by the delegates’ assembly.¹⁵⁷ Although the delegates’ assembly could therefore

¹⁵¹ Thomas Poguntke (note 116 above) at 190.

¹⁵² Hui Ding (note 138 above) at 156.

¹⁵³ Suzanne Schüttemeyer *Fraktionen im Deutschen Bundestag 1949-1997 – Empirische Befunde und Theoretische Folgerungen* (1998) 122; Ute Schmidt ‘Die Christlich Demokratische Union Deutschlands’ in Richard Stöss (ed) *Parteien-Handbuch – Die Parteien der Bundesrepublik Deutschland 1945-1980* (1983) 641.

¹⁵⁴ Suzanne Schüttemeyer ‘Fraktion und ihre Parteien in der Bundesrepublik Deutschland – Veränderte Beziehungen im Zeichen professioneller Politik’ in Ludger Helms (ed) *Parteien und Fraktionen* (1999) 51.

¹⁵⁵ Hui Ding (note 138 above) at 156.

¹⁵⁶ *Ibid* at 157.

¹⁵⁷ *Ibid* at 233.

theoretically vote against the proposed candidate, the ‘election’ of the candidate by the delegates’ assembly must indeed be named a mere rubber-stamping exercise for the following reason.¹⁵⁸ The election of the candidate for Chancellor normally takes place just a few months before the general election.¹⁵⁹ Hence, the delegates are under the pressure of showing unity within the party by accepting the proposed candidate with an overwhelming majority. It is against this background that a proposed candidate for Chancellor has never been rejected by the delegates’ assembly and always receives a large number of votes (more than 90 per cent).¹⁶⁰ All in all, it could thus be said that selection procedure within the CDU is rather determined by internal and secret tactical manoeuvring in a context of power and policy struggles than by democratic principles.¹⁶¹

The selection process of the SPD candidate for chancellor is not governed by clear rules either. By contrast to the CDU, the SPD however amended its constitution in 1993 to allow the party members to nominate the SPD candidate for chancellor through a ballot vote.¹⁶² Article 13 (1) of the SPD constitution *inter alia* reads: ‘the candidate for chancellor may be determined through ballot vote.’ However, article 13 (1) clearly says ‘may’ and not ‘must’ by which other selection procedures are not excluded. In fact, the SPD candidate for Chancellor has yet not been directly elected by the members through ballot vote.¹⁶³ One reason for this is the fairly high barrier for party members to initiate a ballot vote¹⁶⁴ which makes it actually impossible for the party members to exercise their rights in this regard.¹⁶⁵ Therefore and similar to the CDU, the SPD candidate for chancellor is usually nominated by the SPD’s Executive Committee through a nontransparent and secret selection procedure.¹⁶⁶ The decision taken by the Executive Committee is normally presented to the delegates’ assembly for approval which however, like the delegates’ assembly of the

¹⁵⁸ Ibid.

¹⁵⁹ For examples see, eg, Daniela Forkmann and Saskia Richter *Gescheiterte Kanzlerkandidaten: Von Kurt Schumacher bis Edmund Stoiber* (2007).

¹⁶⁰ Hui Ding (note 138 above) at 153.

¹⁶¹ Ibid at 156.

¹⁶² Ibid at 154.

¹⁶³ Ibid at 157.

¹⁶⁴ According to article 13 (3) of the SPD constitution party members who want to initiate a ballot vote must be supported by 10 per cent of the total number of the SPD’s members. Furthermore, the 10 per cent threshold must be attained within three month after officially indicating the subject of the potential ballot vote.

¹⁶⁵ Peter Lösche and Franz Walter *Die SPD – Klassenpartei – Volkspartei – Quotenpartei* (1992) 225ff.

¹⁶⁶ Hui Ding (note 138 above) at 157.

CDU, merely rubber-stamp the decision taken by the Executive Committee of the SPD.¹⁶⁷

The selection procedure of the candidate for chancellor of both the SPD and CDU must be considered constitutionally and democratically problematic. Although the delegates' assembly is sometimes somehow involved in the procedures, the selection process is basically dominated by the party-elite. Unlike the selection process of, for instance, the parties' Executive Committees, the party members or their representatives actually do not have a real and fair opportunity to participate in the nomination process of the candidate for Chancellor as they are, for instance, in fact not able to propose a candidate. Furthermore, evidence for the lack of internal party democracy regarding the selection procedure of the candidate for Chancellor can also be seen in the mere fact that there has never been public campaigning of different aspiring candidates for chancellor within a German political party.¹⁶⁸ This is a practice that is, for instance, well known by the United States presidential primaries.¹⁶⁹

(d) Enforcing internal party democracy

It goes without saying that it is more likely that a legal framework is effective when its provisions are actually enforceable. Of course the same applies to a legal framework that governs internal party democracy.¹⁷⁰ In the following paragraphs I will therefore have a brief look at the legal consequences resulting from a breach of article 21 (1) of the Basic Law.

In Germany,¹⁷¹ an infringement of article 21 (1) of the Basic Law can basically be caused by both a provision of a party's constitution or a decision taken by a political

¹⁶⁷ Ibid.

¹⁶⁸ Ibid at 155.

¹⁶⁹ For more details, see, eg, Rhodes Cook *United States presidential primary elections, 2000-2004* (2007).

¹⁷⁰ For instance, Nigeria has been facing problems relating to the enforcement of the respective legal framework; see International IDEA 'Nigeria: Country Report Based on Research and Dialogue with Political Parties' (2005) at 7, the report is available at http://www.idea.int/parties/upload/Nigeria_report_14June06.pdf, accessed on 21 January 2015..

¹⁷¹ For more details on the legal consequences of a violation of the legal framework in Germany, see, eg, Jörn Ipsen (note 48 above) at paras 87ff.

party.¹⁷² Such an infringement leads to the invalidity of the provision or the decision respectively.¹⁷³ An application for a declaration of invalidity can be made to a court of law by the persons involved.¹⁷⁴

However, a breach of article 21 (1) of the Basic Law can even have more serious consequences. According to the case-law of the FCC, an infringement of the constitutional precepts of democracy by a political party may constitute an election error¹⁷⁵ which in turn may affect the validity of the general elections.¹⁷⁶ Admittedly, it is rather unlikely that the FCC declares general elections invalid because of the big effect such a decision would have. Indeed, the FCC has so far never declared a general election invalid although (minor) infringements of the constitutional precepts of democracy have been found by the FCC. In, for instance, the case named *candidate selection (Kandidatenaufstellung)*¹⁷⁷ the FCC held that the limitation of the speaking time of an aspiring candidate for a place on the electoral list to three minutes constitutes a failure to satisfy the constitutional precepts of internal party democracy and therefore manifests an electoral error.¹⁷⁸ However, the court further held that in the circumstances of this case – the aspiring candidate eventually received only 2,1 per cent of the votes of the delegates – it cannot be assumed that a longer speaking time would have significantly changed his election result. Therefore, it can also not be assumed that a longer speaking time would have changed the result of the general elections.¹⁷⁹

Furthermore, a violation of the article 21 (1) of the Basic Law can even result in banning a political party. Article 21 (2) of the Basic Law states:

‘Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.’

¹⁷² Ibid at 87.

¹⁷³ Philip Kunig (note 79 above) at para 35.

¹⁷⁴ Theodor Maunz (note 103 above) at para 76.

¹⁷⁵ Judgement of the FCC *Kandidatenaufstellung (candidate selection)* BVerfGE 89, 243 para 38.

¹⁷⁶ Jörn Ipsen (note 48 above) at para 88.

¹⁷⁷ Judgement of the FCC *Kandidatenaufstellung (candidate selection)* BVerfGE 89, 243.

¹⁷⁸ Ibid at paras 62ff.

¹⁷⁹ Ibid at para 65.

Although article 21 (2) of the Basic law does not expressly name the internal structure of a political party as ground of a party-ban, in the *Ban of the Socialist Reich Party* case (*SRP-Verbot*) the FCC linked the obligation of political parties to organise democratically with article 21 (2) of the Basic Law. The Court held:

‘If a party's internal organisation does not correspond to democratic principles, one may generally conclude that the party seeks to impose upon the state the structural principles that it has implemented within its own organisation.’¹⁸⁰

The FCC eventually banned the Socialist Reich Party as the party was structured from the top to the bottom in a dictatorial manner which, according to the FCC, indicated that the aim of the Socialist Reich Party was to impose these structural principles upon the state.¹⁸¹ Although one should not place too much emphasis on this case as the Social Reich Party described itself as successor of the fascist NSDAP which is why the case was a very sensitive issue in post-war Germany of 1952, the FCC showed that it is willing to enforce internal party democracy and even does not shrink back from dissolving a political party that does not comply with their constitutional obligation to organise democratically. Generally, such as massive intervention as dissolving a political party due to its undemocratic structure will however remain very exceptional.¹⁸²

Summarising the above, in the most instances a violation of article 21 (1) of the Basic Law will ‘only’ cause the invalidity of the relevant provision of the party’s constitution or the affected decision. The other described measures have been and will be used rarely.

¹⁸⁰ FCC *Ban of the SRP* (note 101 above) at para 40; translated by Donald Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 220.

¹⁸¹ *Ibid.*

¹⁸² Bodo Pieroth ‘Art. 21’ in Hans Jarass and Bodo Pieroth *Grundgesetz für die Bundesrepublik Deutschland* (2005) para 26.

IV SOUTH AFRICA

In contrast to Germany, South Africa does not provide a comprehensive and uniform legal framework that governs internal party democracy. Or to put it differently, there is no party law in place aiming to regulate the internal structure of political parties and the degree to which party member's can exercise their right to participate within a political party. One may therefore conclude that political parties in South Africa are lacking internal party democracy. However, despite a missing comprehensive party law, a closer look perhaps reveals that isolated rules within the South African legal system exist which could at least have an effect on the internal life of political parties. Furthermore, the lack of a party law does of course not mean that political parties in South Africa are not allowed to voluntarily apply democratic standards internally. In this chapter I will therefore – similarly to the foregoing chapter – examine some *external* provisions which may impact on internal party democracy, and I will check the content of *internal* rules of political parties which may also govern internal party democracy. Regarding the latter I will focus on the constitutions of the ANC and the DA. In the last part of this chapter I will briefly discuss a possible approach towards the adoption of a party law in South Africa.

(a) *The role of political parties in South Africa*

As already noted in the foregoing chapter about Germany, it is simply not possible to talk about political parties without mentioning the country-specific setting they are acting in. For that reason I will at this point just briefly portray the role and importance of political parties in South Africa.¹⁸³

As accurately pointed out by the South African Constitutional Court in *Ramakatsa and Others v Magashule and Others*, in the South African 'system of democracy political parties occupy the centre stage and play a vital part in facilitating the exercise of political rights.'¹⁸⁴ This important role of political parties is indeed

¹⁸³ Generally on this topic, see Zaahira Tiry *Political Parties in South African Law* (2012).

¹⁸⁴ *Ramakatsa and Others v Magashule and Others* (CCT 109/12) [2012] ZACC 31; 2013 (2) BCLR 202 (CC) para 65.

underlined by many provisions of the South African Constitution.¹⁸⁵ These provisions mainly cover political parties with regard to their operation within elected institutions and, generally speaking, are based on the assumption that representative democracy in South Africa is ought to be stimulated primarily through them.¹⁸⁶ Accordingly, it is no wonder that even the significant section 1 of the Constitution states that South Africa is – among others things – founded on the values of ‘[u]niversal adult suffrage, a national common voters roll, regular elections and a *multi-party system* of democratic government, to ensure accountability, responsiveness and openness.’¹⁸⁷

The concept of multi-party democracy is also reflected by the South African electoral system. Unlike the German mixed-member proportional representation system, in South Africa the members of the National Assembly and the provincial legislatures are elected through using a system of pure proportional representation.¹⁸⁸ This means that citizens do not vote for individual candidates at all – for instance in a constituency – but only for political parties.¹⁸⁹ The voters can therefore only determine the distribution of seats in the National Assembly or the provincial legislatures, but they can not influence with their vote which persons will actually sit in parliament. This is decided by the respective political party.¹⁹⁰ As far as the electoral system is concerned, it can therefore be said that the role which political parties play in South African is even more important than in Germany as the electoral system is purely party-based.

The essential role which political parties play in South Africa is also present by a look at the process through which the President gets elected. Similar to the situation of the Chancellor in Germany, the South African President, which however in contrast to Germany is the head of government *and* the head of state,¹⁹¹ is elected by

¹⁸⁵ See, eg, sections 1(d), 19, 47(3)(c), 57(2)(c), 116(2)(c) and 263 of the Constitution. One could even argue that the important role political parties are supposed to play in South Africa is also reflected by the South African national flag which *inter alia* contains the ANC’s colours black, gold and green.

¹⁸⁶ Pierre de Vos (note 29 above) at 10.

¹⁸⁷ Section 1(d) of the Constitution. Emphasis added.

¹⁸⁸ See section 46(1)(d) and 105(1)(d) of the Constitution.

¹⁸⁹ See generally Loammi Wolf ‘The Right to Stand as an Independent Candidate in National and Provincial Elections: *Majola v The President*’ (2014) 30 *SAJHR* 159.

¹⁹⁰ Part 3 of the Electoral Act 73 of 1998; *Ramakatsa* (note 184 above) para 66.

¹⁹¹ See section 83(a) of the Constitution.

the National Assembly.¹⁹² This means that the citizens do not directly vote in the general election for a presidential candidate. The electoral rather indirectly indicate with their vote for a political party that they prefer the leader of the respective political party to become the President.¹⁹³

Finally, the high level of party discipline in South Africa needs to be noted.¹⁹⁴ The constitution of the DA, for example, states that '[m]embers [of a legislative caucus] must at all times adhere to and support the decisions of the relevant caucus and most not differ publicly from any decision once it has been taken except when it has been decided by the caucus that a member may on a question of conscience exercise a free vote.'¹⁹⁵ Further, section 2.5.3.1 of the DA constitution reads: '[a]ny member, including a public representative, is guilty of misconduct if he or she ... publicly opposes the Party's principles or repeatedly opposes published party policies, except in or through the appropriate Party structures.' In this context it is important to highlight that an infringement of these internal party rules can have an external effect as section 47(3)(c) of the Constitution states that a Member of Parliament loses its membership if he or she 'ceases to be member of the party that nominated that person as a member of the Assembly.' The party discipline in South Africa, which is reflected by these quoted provisions, therefore makes it often difficult for Members of Parliament to freely follow their consciences when voting.¹⁹⁶ In the same breath, it places political parties rather than the individual Member of Parliament at the centre of power.

¹⁹² Section 86(1) of the Constitution.

¹⁹³ Unlike in Germany, in South Africa the leader of a political party is typically identical with the candidate for President. See, for instance, the Resolution of the ANC's 52nd National Conference, 20 December 2007, which at point 57 states: 'At national government level, Conference agrees that the ANC President shall be the candidate of the movement for President of the Republic', available at <http://www.anc.org.za/show.php?id=2536>, accessed on 21 January 2015.

¹⁹⁴ On this topic, see, eg, Pierre de Vos and Warren Freedman (eds) *South African Constitutional Law in Context* (2014) at 140f and 182.

¹⁹⁵ Section 9.2.6 of the DA Federal Constitution 2010, available at <http://www.da.org.za/docs/542/DEMOCRATIC%20ALLIANCE%20FEDERAL%20CONSTITUTION%202010.pdf>, accessed on 21 January 2015.

¹⁹⁶ Cora Hoexter *Administrative Law in South Africa* (2012) 73, footnote 91.

(b) *Are there provisions in South Africa that govern internal party democracy?*

In this subchapter I will, first, examine national legislation and regulations to determine to what extent they impact on the internal organisation of political parties. Secondly, I will consider provisions of the constitution in this respect.

(i) *National legislation and regulations*

In South Africa elections are basically regulated by the Electoral Commission Act 51 of 1996, the Electoral Act 73 of 1998 and the respective regulations which specify these Acts.¹⁹⁷ This legal framework sets out rules *inter alia* for the registration of political parties and submission of candidate lists.¹⁹⁸ Both the registration as well as the submission of a list of candidates is a requirement for political parties to contest elections.¹⁹⁹ This raises the question whether these rules also lay down requirements which impact on the internal structure of political parties.

Sections 15 to 17 of the Electoral Commission Act regulate the registration of political parties for the national and provincial elections. According to section 15 of the Electoral Commission Act, parties that want to get registered for a election are required to provide basic information such as their name or their symbol.²⁰⁰ Furthermore, they – among other things – have to submit their constitution.²⁰¹ Section 15 of the Electoral Commission Act therefore tells us that political parties need to have a constitution to get registered. Section 15 does, however, not make any demands on the content of the constitution. It does not prescribe specific requirements in terms of the internal organisation of a political party or the degree of membership participation which must be met before a party is allowed to successfully register. This conclusion is pretty much confirmed by sections 16 and 17 of the Electoral Commission Act. These sections regulate that political parties whose

¹⁹⁷ Regulations specifying these Acts are, for instance, Regulations on Party Liaison Committees, 1998; Regulations for the Registration of Political Parties, 2004; Regulations relating to activities permissible outside voting stations on voting day; Regulations on the Accreditation of Voter Education Providers, 1998; Voter Registration Regulations, 1998; Regulations on the Accreditation of Observers, 1999; Election Regulations, 2004; Regulations Concerning the Submission of Candidate Lists, 2004.

¹⁹⁸ For a detail analysis of the framework work which governs the elections in South Africa, see, eg, Tom Lodge *Handbook of South African Electoral Laws and Regulations* (2004).

¹⁹⁹ Section 26 of the Electoral Act.

²⁰⁰ Sections 15(2)(a) and 15(2)(b) of the Electoral Commission Act.

²⁰¹ Sections 15(3)(d) of the Electoral Commission Act.

constitutions *inter alia* contain anything which, first, ‘portrays the propagation or incitement of violence or hatred or which causes serious offence to any section of the population on the grounds of race, gender, sex, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language’ or which, secondly, ‘indicates that persons will not be admitted to membership of the party or welcomed as supporters of the party on the grounds of their race, ethnic origin or colour’ may not get registered or lose their registration respectively.²⁰² As already mentioned elsewhere in this paper, proportional representation of minorities within political parties as well as aspects of gender and race are by some scholars considered an element of internal party democracy.²⁰³ One could also argue that the first step to enable participation of, for instance, women within a party is to actually admit women without creating discriminatory obstacles. Therefore, one could say that sections 16 and 17 of the Electoral Commission Act contain at least one requirement that promotes internal party democracy. However, in my view, it then has to be admitted that this solitary requirement is fairly useless regarding internal party democracy as there are no other rules in place which safeguard and regulate the actual degree of membership participation in, for instance, policy making or the procedure according to which the leader of a party must be elected.

The Electoral Act *inter alia* regulates the submission of candidate lists, which is necessary to give effect to the proportional representation electoral system. According to section 27 of the Electoral Act, a ‘registered party intending to contest an election must nominate candidates and submit a list ... of those candidates.’ Section 27 of the Electoral Act therefore shows that political parties need to produce a candidate list. While section 27 of the Electoral Act further compromises formalities to be carried out by political parties,²⁰⁴ it, however, does not prescribe the actual procedure which political parties must follow when nominating their candidates. This is left to the discretion of the respective political party. Other sections of the Electoral Act do not limit this discretion either. In particular section 30 of the Electoral Act which set out grounds on which a statement of objection to

²⁰² Sections 16(1)(c) and 17(1)(d) of the Electoral Commission Act.

²⁰³ Yigal Mersel (note 25 above) at 95.

²⁰⁴ For instance, each nominated candidate must indicate his or her acceptance of nomination by signature; see section 27(c) of the Electoral Act.

the nomination of a candidate may be admissible does not contain any rules on internal party democracy.

Besides the Electoral Commission Act and Electoral Act, internal party democracy could maybe be achieved through the application of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and in particular by applying the right to procedural fairness which is expressly entrenched in sections 3 and 4 of the PAJA in order to give effect to section 33(2) of the Constitution. However, there are many difficulties to overcome in order to be able to apply the PAJA regarding political parties. Firstly, one would have to determine whether the conduct concerned – for instance, the appointment of the leader by the Executive Committee of a political party – satisfies the requirements of the term ‘administrative action’ in terms of section 1 of the PAJA. This would *inter alia* include determining if political parties ‘exercising a public power or performing a public function’.²⁰⁵ This would further include stating the reasons for the fact that member’s rights or legitimate expectations have been materially and adversely affected²⁰⁶ and that the conduct concerned has ‘direct, external legal effect.’²⁰⁷ All these points raise interesting questions. However, to get straight to the point, I take the view that the PAJA and the right to procedural fairness is – regardless of the answer to those questions – of little help when it comes to internal party democracy.²⁰⁸ The concept of internal party democracy, as explained elsewhere in this paper, is *inter alia* underlined by the assumption that members of a political party are able to substantially influence the outcome of decisions of their political party by, for instance, debating and, more importantly, voting. Therefore, where internal party democracy is applied and enforced effectively, the members of a political party rather than the leadership or an individual must constitute the main decision-making body. The decisions taken by the political party are the decisions of its members. The members form the centre of power. By contrast, the right to

²⁰⁵ Section 1 (a) and (b) of the PAJA; see concerning the discussion whether political parties are private or public bodies the Judgment of the Western Cape High Court, Cape Town *Institute for Democracy in South Africa and Others v African National Congress and Others* (9828/03) [2005] ZAWCHC 30; 2005 (5) SA 39 (C) [2005] 3 All SA 45 (C) paras 37ff.; see also in this regard the application lodged at the Constitutional Court by My Vote Counts on 16 July 2014, information are available at <http://www.myvotecounts.org.za/>, accessed on 21 January 2015; see generally on section 33 of the Constitution and political parties Lisa Thornton ‘The Constitutional Right to Just Administrative Action – Are Political Parties Bound?’ (1999) 15 *SAJHR* 351.

²⁰⁶ Section 3(1) of the PAJA.

²⁰⁷ Section 1 of the PAJA.

²⁰⁸ See for a different view Jason Brickhill and Ryan Babiuch ‘Political Rights’ in Stu Woolman *et al* (eds) *Constitutional Law of South Africa* (2nd ed) Chapter 45.8.(b).

procedural fairness is, according to the PAJA, mainly concerned with giving a person *inter alia* ‘reasonable opportunity to make representations’²⁰⁹ or ‘adequate notice of the nature and purpose of the proposed administrative action.’²¹⁰ This does, however, not mean that the concerned person determines the outcome of the decision. At the end it is still the administrator who decides. In an internal party democracy context, one, however, does not want the administrator – or to put it differently, the Executive Committee – to decide key issues such as who becomes the leader. It is, by contrast, the totality of the members who should decide (even if only indirectly). I therefore take the view that although the right to procedural fairness as *inter alia* entrenched in the PAJA can in specific circumstances be helpful in terms of internal party procedures as, for instance, regarding the exclusion of a party member without first giving him or her a hearing,²¹¹ the right to procedural fairness is, however, not very useful when it comes to the protection and enforcement of the above-mentioned *core* values of internal party democracy.

(ii) *The Constitution*

By contrast to the German Basic Law, the South African Constitution does not provide an express provision that imposes a duty on political parties to handle their internal affairs democratically. However, section 19 of the Constitution states:

- ‘(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.’

From an internal party democracy perspective, in particular section 19(1)(b) of the Constitution seems to be of interest. But what does the right to participate in the activities of a political party comprise? Which degree of participation is required

²⁰⁹ Section 2(b)(iv) of the PAJA.

²¹⁰ Section 2(b)(i) of the PAJA.

²¹¹ For instance, under the common law it is recognised that the rules of natural justice such as the principle of *audi alteram partem* may also apply in a private setting, see Cora Hoexter (note 196 above) at 125ff.

by section 19(1)(b) of the Constitution? And does the participation need to be carried out democratically? Unfortunately, neither the Constitution nor national legislation specify the term participation in this respect. Jason Brickhill and Ryan Babiuch, for instance, state that section ‘19(1) does not entitle a person to participate in any particular activity of the party of her choice’²¹² which is certainly correct, but does not give content to section 19(1)(b) of the Constitution either. However, the Constitutional Court’s judgment in *Mpho Ramakatsa and other v Elias Magashule and Others*²¹³ may give a little guidance in this regard.

This case was concerned with irregularities which occurred in general meetings of ANC branches in January and February 2012. At those meetings the branches had elected delegates to the Free State Provincial Conference of the ANC. In June 2012 this Provincial Conference eventually adopted several policies and elected the Free State Provincial Executive Committee of the ANC. Against this background, the appellants, ‘six members of the ANC in the Free State, sought an order setting aside the Provincial Conference ... including all decisions and resolutions taken during the Conference.’²¹⁴ Moseneke DCJ and Jafta J, writing for the majority, held that the irregularities proved by the appellants infringed the constitution of the ANC²¹⁵ and the appellants’ right to participate in the activities of the ANC.²¹⁶ Accordingly, the concerned Free State Provincial Conference was ‘declared unlawful and invalid.’²¹⁷

Concerning the interpretation of section 19(1) of the Constitution, the Court, first of all, spoke about the historical context against which this section is need to be interpreted.²¹⁸ The Court emphasised that during apartheid only the minority of the people were allowed to exercise political rights and that organisations which campaigned for equal rights for black people were banned. People who participated in these organisations exposed themselves to serious danger. Preventing ‘this wholesale denial of political rights to citizens of the country from ever happening again’ is therefore, according to the Court, the purpose of section 19 of the

²¹² Jason Brickhill and Ryan Babiuch (note 208 above) chapter 45.8.(b).

²¹³ *Ramakatsa* (see note 184 above).

²¹⁴ *Ibid* para 59.

²¹⁵ *Ibid* para 119.

²¹⁶ *Ibid* para 110.

²¹⁷ *Ibid* para 133.

²¹⁸ *Ibid* para 64.

Constitution.²¹⁹ Moreover, the Court underlined the important role that political parties play in today's constitutional democracy on several paragraphs.²²⁰ Having said that the Court held:

‘In relevant part section 19(1) proclaims that every citizen of our country is free to make political choices which include the right to participate in the activities of a political party. This right is conferred in unqualified terms. Consistent with the generous reading of provisions of this kind, the section means what it says and says what it means. It guarantees freedom to make political choices and once a choice on a political party is made, the section safeguards a member's participation in the activities of the party concerned. In this case the appellants and other members of the ANC enjoy a constitutional guarantee that entitles them to participate in its activities. It protects the exercise of the right not only against external interference but also against interference arising from within the party.’²²¹

The Court then continued saying that the way party member's can participate in the activities of a political parties is not regulated by the Constitution as this regards ‘internal matters of each political party.’²²² Political parties are ‘best placed to determine how members would participate in internal activities.’²²³ In the same breath, however, the Court stressed that constitutions of political parties may not be ‘inconsistent with section 19.’²²⁴ The court therefore implied that, on the one hand, political parties should be given sufficient room to regulate their internal affairs, but, on the other hand, the Constitution requires at least a minimum of participation. The tension between these interests is characteristic for the issue of internal party democracy since political parties, as explained elsewhere in this paper, are creatures who somehow act on the border between the public and private sphere. Unfortunately, the Court did not tell us more about the content of section 19(1)(b) as the ‘validity of the ANC's Constitution was not under attack.’²²⁵ But, as Pierre de Vos has pointed out, although the Court never expressly defined the content of section 19(1)(b) of the Constitution in *Ramakatsa*, the judgment slightly indicates what may, *inter alia*, compromise the right to participate in the activities of a political party as the Court discussed some provisions of the ANC's constitution in this regard.²²⁶ Among those provisions were: the power of the members ‘to determine and formulate the party's policies’; accountability of the leadership;

²¹⁹ Ibid para 64.

²²⁰ Ibid paras 65ff.

²²¹ Ibid para 71.

²²² Ibid para 73.

²²³ Ibid.

²²⁴ Ibid para 74.

²²⁵ Ibid.

²²⁶ Pierre de Vos (note 29 above) at 21.

‘freedom of speech’; ‘circulation of ideas and information’; ‘active participation in the discussion, formulation and implementation’ of policies and taking ‘part in the elections’ and getting ‘elected or appointed’.²²⁷ I will discuss some of these quoted provisions of the ANC constitution in more detail in the next subchapter. However, it can already be said that these provisions point to a fairly decent degree of active participation and are obviously characterised by basic democratic values.²²⁸

Besides these indicators, the court emphasised in *Ramakatsa* the strong link between the right to vote and section 19(1)(b) of the Constitution²²⁹ by saying that section 19 needs to be interpreted in the light of the right to vote. From a perspective of participatory democracy, this link also indicates that member’s participation in the activities of a political party may not be neglected. In order to accentuate this point Moseneke DCJ and Jafta J quoted *August and Another v Electoral Commission and Others*²³⁰ in which Sachs J *inter alia* stated:

‘Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement’²³¹

As already mentioned, the Constitutional Court did not at any time in *Ramakatsa* expressly define the content of section 19(1)(b) of the Constitution. However, one could argue that the Court used many indicator to emphasis the importance of section 19(1)(b) which in turn points to the necessary degree of participation that is required by this section. To sum up, the Court in particular stressed the historical context of section 19, the pivotal role of political parties for the South African democracy and finally the right to vote. In my view, all these indicators suggest that the right to

²²⁷ *Ramakatsa* (see note 184 above) paras 74 and 75.

²²⁸ Pierre de Vos (note 29 above) at 22.

²²⁹ *Ramakatsa* (see note 184 above) para 69; Pierre de Vos (note 29 above) at 15f.

²³⁰ *August and Another v Electoral Commission and Others* (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363.

²³¹ *Ibid* at para 17.

participate in the activities of a political party must be carried out in a democratic manner.²³² Or to put it differently, at least the core values of internal party democracy, which I have mentioned elsewhere in this paper, represent the minimum which is required by section 19(1)(b) of the Constitution.

(c) *The constitutions of the ANC and DA*

As mentioned in the introduction to this chapter, the lack of express (state) provisions which govern internal party democracy does not hinder political parties from organising democratically. This is all the more true since some scholars have suggested that forms of internal party democracy are desirable for political as they may foster party unity and prevent the fragmentation of political parties.²³³ Therefore, I will now examine the constitutions of the ANC²³⁴ and DA.²³⁵ As in the previous chapters, I will mainly focus on the basic requirements of internal party democracy.

– *The ANC* –

As the ANC's total membership is approximately 1.2 million,²³⁶ the organisational structure of the ANC seems to be crucial to guarantee democratic participation of all members. Given the very high number of members of the ANC, it is not surprising that the ANC, first, divided its structure into different levels²³⁷ and, secondly, applies a delegates system.²³⁸ The organisational structure of the ANC is therefore pretty much the same as the structure of German political parties. On each level – branch, regional, provincial and national²³⁹ – regular meetings of the members must take place.²⁴⁰ These meetings, which are called general meetings at branch level and

²³² See also Pierre de Vos (note 29 above) at 23.

²³³ See, eg, Josh Maiyo (note 41 above) at 2.

²³⁴ African National Congress Constitution, as amended and adopted at the 53rd National Conference, Mangaung, 2012, available at <http://www.anc.org.za/show.php?id=10177>, accessed on 21 January 2015.

²³⁵ DA Federal Constitution 2010, available at <http://www.da.org.za/docs/542/DEMOCRATIC%20ALLIANCE%20FEDERAL%20CONSTITUTION%202010.pdf>, accessed on 21 January 2015.

²³⁶ Mail & Guardian 'Audits reveal ANC membership numbers soar' 17 December 2012, available at <http://mg.co.za/article/2012-12-17-anc-membership-numbers-soar>, accessed on 21 January 2015.

²³⁷ See rules 9 (Provinces), 21 (Regions) and 23 (Branches) of the ANC constitution.

²³⁸ Rules 10.1.1, 17.2.2.1(i) and 24.4(i) of the ANC constitution.

²³⁹ The branch level is the lowest level whereas the national level is the highest.

²⁴⁰ See rules 10.5, 17.2.1, 21.3 and 23.2.3 of the ANC constitution.

conferences at the other levels,²⁴¹ are supposed to be the main decision-making bodies through which *inter alia* delegates of the branches are elected to the conferences at the higher levels.²⁴² Therefore, like in the CDU and the SPD, the members of the ANC exercise their right to participate mainly at the lowest level, the branch level. The constitution of the ANC recognises this by stating that ‘the branch shall be the place where members exercise their basic democratic rights to discuss and formulate policy and be the basic unit of activity for members.’²⁴³ On each level there is also an Executive Committee which gets elected by the respective conference at regular intervals.²⁴⁴ But how exactly gets the leadership elected? How does the ANC produce its candidate list for the national elections? Which role do the members play in policy development? On the next paragraphs I will tackle these issues.²⁴⁵ I will mainly focus on the national level of the ANC in this respect.

The vast majority of the members of the National Executive Committee (NEC), which is the most important body of the ANC between National Conferences²⁴⁶ and comprises all important persons of the ANC such as the President or the National Chairperson, gets elected by the National Conference through secret ballot every five years.²⁴⁷ Candidates for an office in the NEC are generally proposed by the provinces. Yet, delegates of the National Conference may also make proposals.²⁴⁸ From an internal party democracy point of view, a problem that arises in this respect is, however, the composition of the National Conference. According to rule 10.1.1 of the ANC Constitution, ‘at least 90% of the delegates shall be from branches, from properly constituted branch general meetings’. These delegates need to get elected democratically.²⁴⁹ However, what about the remaining 10 per cent? These seats are issued to ex-officio members and to persons from the ‘Leagues’ which get selected by the NEC.²⁵⁰ This procedure must be considered democratically problematic. As

²⁴¹ Rules 7.1.1 to 7.1.4. of the ANC constitution.

²⁴² Rules 10.1.1, 17.2.2.1(i) and 24.4(i) of the ANC constitution.

²⁴³ Rules 23.2.3 and 23.2.4 of the ANC constitution.

²⁴⁴ Rules 7.1.1 to 7.1.4 of the ANC constitution.

²⁴⁵ For a detailed analysis, see, eg, Tom Lodge and Ursula Scheidegger *Political Parties and Democratic Governance in South Africa* (2006) 15ff and Susan Booyson and Grant Masterson ‘South Africa’ in Denis Kadima and Susan Booyson (eds) *Compendium of Elections in Southern Africa 1989-2009* (2009) 409ff.

²⁴⁶ Rule 12.1 of the ANC constitution.

²⁴⁷ Rule 12.3. of the ANC constitution.

²⁴⁸ See rule 12.7. of the ANC constitution.

²⁴⁹ *Ramakatsa* (see note 184 above) para 87.

²⁵⁰ Rule 10.1.1.4 of the ANC constitution.

already mentioned in the chapter about Germany, ex-officio members are simply not democratically authorised by the members of the political party to hold the concerned office. The same applies to the persons from the ‘Leagues’ who get appointed by the NEC. Interestingly, however, the German PPA, as described elsewhere in this paper, allows the delegates’ assemblies to compromise even 20 per cent ex-officio members. In this context a further problem is that not all members of the NEC, even though the vast majority, are elected by the National Conference. Indeed, according to the constitution of the ANC, around 20 per cent of the NEC’s members are ex-officio members.²⁵¹

The process of nominating candidates in order to produce a candidate list for the national elections is of paramount importance given the South African electoral system of pure proportional representation. The ANC’s constitution is, however, fairly silent on the nomination process. Rule 12.2.11 of the constitution only states that the NEC ‘appoints annually a National List Committee of not fewer than 5 (five) and not more than 9 (nine) persons for the selection and adoption of candidates for Parliament. (The NEC shall draw up regulations for the procedures to be followed in such a selection. The National List Committee shall report to the NEC prior to the implementation of its recommendations.’ Yet, a look at the ‘List Process Guidelines 2013 as adopted by the NEC’²⁵² reveals that the nomination process is fairly complex and takes a long time because all branches of the ANC participate in it. It is beyond the scope of this paper to explain the entire process in detail. However, from an internal party democracy perspective, the role of the NEC in the nomination procedures must be considered problematic. This is because the nomination process as such could be considered in line with democratic standards if the NEC had not the authority to significantly change the list of candidates according to the ‘List Process Guidelines’. For instance, rule 19 of the Guidelines states that ‘[t]he NEC shall have the power to allocate up to 20 seats in order to ensure that there is requisite skills and expertise deployed to the national legislature.’ More importantly, however, rule 20

²⁵¹ See rules 12.3.3 to 12.3.6. 12.3.3 of the ANC constitution which state that ex-officio members of the NEC are ‘the Chairperson and the Secretary of each elected ANC Provincial Executive Committee ...; the President and Secretary General of the ANC Women’s League ...; the President and Secretary General of the ANC Youth League ...; the President and Secretary General of the ANC Veterans’ League ...’

²⁵² List Process Guidelines 2013 – ANC List Process Guidelines as Adopted by the National Executive Committee, available at http://www.sadtu.org.za/docs/pe/2013/anc_list.pdf, accessed on 21 January 2015.

gives the NEC actually unlimited power to modify the list. It *inter alia* reads: ‘All powers and final discussions about lists, quotas and ordering lies with the NEC’. It is therefore not surprising that the Guidelines itself admit that the applied process ‘combines democratic and political intervention’ which ‘might mean that a few people who were selected in terms of the democratic process might not be included on the final lists.’²⁵³

The constitution of the ANC safeguards the right of the members to participate in policy formulation in various rules.²⁵⁴ For instance, under the heading ‘the character of the ANC’ rule 3.2 of the constitution says that ‘policies are determined by the membership’, and rule 3.7 of the constitution guarantees ‘freedom of speech’ which is essential in particular with regard to policy development. Furthermore, according to the constitution of the ANC, the branches are supposed to be the place where the members discuss and formulate policies.²⁵⁵ But, who has the final say about the policies of the ANC? It is *basically* the delegates’ assembly at the highest level, the National Conference.²⁵⁶ However, as the National Conference does of course not meet every day, it seems to be a practical necessity that NEC has also the authority to specify policies in certain cases. Rule 12.2.9 of the ANC’s constitution therefore states that the NEC has the power ‘to issue ... policy directive as when it deems fit.’ Yet, it should go without saying that the NEC should not make use of this power in key issues and should, moreover, not adopt entirely new policies without the approval of the National Conference.

– *The DA* –

Although the DA has neither as many members as the ANC²⁵⁷ nor the same history,²⁵⁸ on paper its basic organisational structure is comparable to the ANC’s. The DA’s structures are also divided into different levels – namely: federal, provincial, regional, constituency and local (branch) level²⁵⁹ –, and the DA uses a

²⁵³ Rule 51 of the List Process Guidelines 2013.

²⁵⁴ See rules 3.2, 5.1.1, 5.1.2, 5.1.3 and 23.2.3 of the ANC constitution.

²⁵⁵ Rule 23.2.3 of the ANC constitution.

²⁵⁶ Rule 11.1 of the ANC constitution which states that ‘[t]he National Conference shall [d]ecide and determine the policy, programme and Constitution of the ANC.’

²⁵⁷ The DA does not disclose the number of its members. However, it is beyond doubt that the ANC is by far the biggest political party in South Africa.

²⁵⁸ See, eg, Tom Lodge and Ursula Scheidegger (note 245 above) at 10ff.

²⁵⁹ Rule 2.1.2 of the DA constitution; a regional level will only be established if necessary, see rule 5.3 of the DA constitution.

delegates system at the higher levels.²⁶⁰ The branches are therefore also the place where the DA's members mainly exercise their right to participate.²⁶¹ At every level there is also a type of a members' or delegates' assembly²⁶² and an Executive Committee.²⁶³ The delegates' assembly at the highest level is called the Federal Congress which is supposed to be the main decision-making body of the DA²⁶⁴ and meets 'at least every two years.'²⁶⁵ Like regarding the ANC, I will now have a brief look at the implementation of the core values of internal party democracy within the DA. I will mainly focus on the highest organisational level of the DA which is called the federal level.

Concerning the election of the DA's leadership (the Federal Council) by the Federal Congress,²⁶⁶ the same problems arise as within the ANC. First, the Federal Congress does compromise ex-officio members.²⁶⁷ Unlike the constitution of the ANC (90 per cent to 10 per cent), the DA constitution does, however, not expressly state the ratio between delegates, who need to be elected at the regional and sub-regional level to the Federal Congress, and ex-officio members. The ratio must rather be calculated anew every time the Federal Congress meets because it is calculated *inter alia* on the basis of the current number of DA members.²⁶⁸ Unfortunately, the DA does not disclose its membership figures²⁶⁹ which is why the exact ratio between elected delegates and ex-officio members can not be calculated at this point. Secondly, not all members of the DA's leadership get elected by the Federal Congress.²⁷⁰ Rather, the Federal Council does also compromise a fairly high number of ex-officio members (more than 50 per cent).²⁷¹ Finally, the DA's constitution, unlike the constitution of the ANC, does not contain any provision which states for how long the leadership is elected. Therefore, the degree of internal party democracy within the DA regarding the election of the leadership must be considered limited.

²⁶⁰ See, eg, rules 2.14, 3.11, 3.9.1, 5.4.2, 5.1.2 and 5.5.2 of the DA constitution.

²⁶¹ Rules 2.1.4. and 3.8 of the DA constitution.

²⁶² Rules 3.14, 5.1.1.1 and 6.1 of the DA constitution.

²⁶³ Rules 3.1.5, 6.2, 5.1.1.5, and 6.2 of the DA constitution.

²⁶⁴ Rule 6.1.1 of the DA constitution.

²⁶⁵ Rule 6.1.2 of the DA constitution.

²⁶⁶ Rule 6.1.4 of the DA constitution; according to rule 2.3.2 of the DA constitution 'decisions at all meetings are taken by a majority of members present and voting ...'

²⁶⁷ See rule 6.1.3. of the DA constitution.

²⁶⁸ Rule 6.1.3.15. of the DA constitution.

²⁶⁹ Tom Lodge and Ursula Scheidegger (note 245 above) at 24.

²⁷⁰ Actually, it is only the Leader, the Federal Chairperson and the Deputy Federal Chairpersons, see rule 6.1.4 of the DA constitution.

²⁷¹ Rule 6.2.3 of the DA constitution.

Like the ANC's constitution, the constitution of the DA does not regulate the selection process of candidates for the National Assembly in detail. Yet, the DA's constitution obliges the Federal Council to adopt regulation in this respect.²⁷² Similar to the above described Guidelines of the ANC, these regulations²⁷³ set out the various steps which must be taken in order to produce the final candidate list. Similar to the selection process of the ANC, the DA's selection procedure must also be considered inconsistent with democratic standards due to the influence of the Executive Committees at the various levels. For instance, the regulations provide that 'colleges' and 'panels' need to be established in order to pre-select potential candidates.²⁷⁴ Actually, there would be nothing wrong with such 'panels', if they only compromised delegates who have been elected to the 'panels' by the members. However, the composition of these 'panels' is heavily shaped by the Executive of the respective organisational level of the DA rather than by the DA's members,²⁷⁵ which makes the outcome undemocratic. Moreover, it is the Federal Executive that is given the authority to strongly influence the candidate list.²⁷⁶ The DA's selection process is therefore, like the one of the ANC, substantially shaped by political interventions.

According to the rule 3.8.2 of the DA's constitution, the branches 'serve as the vehicle for the articulation of the interest of members of the Party.' Like within the ANC, the branches are therefore suppose to be the place where policies are freely formulated and debated by the members. The final decision-making authority rest, however, with the Federal Congress which is the 'supreme policy-making body' of the DA.²⁷⁷ Similar to the ANC, the Federal Council has, however, the power – provided that the Congress is not in session – to 'formulate policies in matters where no policy has been stated or where the policy is not clear or needs to be specifically applied, expressed amended or expanded.'²⁷⁸ As indicated above, if that power is

²⁷² Rule 2.2.1 of the DA constitution.

²⁷³ 'Regulations for the nomination of municipal candidates', as approved by the Federal Council on 23 November 2012, available at <http://www.da.org.za/get-involved/become-a-candidate/>, accessed on 21 January 2015.

²⁷⁴ See rules 5 and 8 of the DA regulations.

²⁷⁵ For instance, rule 8.1.3 of the regulations *inter alia* states that '[m]embers of selection panels must be nominated by provincial executives ...'

²⁷⁶ See rule 9.3 of the DA regulations which *inter alia* reads: 'Premiership and mayoral candidates for strategic municipalities and provinces must be approved by the Federal Executive ...'

²⁷⁷ Rule 2.4.1 of the DA constitution.

²⁷⁸ Rule 2.4.2 of the DA constitution.

exercised extensively by the Federal Council to circumvent the Congress in key issues, the process of democratic policy development is at stake.

In summary, it can be said the constitutions of the ANC and the DA – even though there is no explicit state regulation in place – recognise forms of internal party democracy as they grant their members the right to participate in various ways. In the same breath, it must, however, be noted that the degree of internal party democracy within the ANC and DA is limited. This applies especially to the selection of candidates for the National Assembly.

(d) *A party law for South Africa?*

As explained elsewhere in this dissertation, I would argue that section 19(1)(b) of the South African Constitution requires political parties to apply the core values of internal party democracy within their structures. As Pierre de Vos has pointed out, the Constitution does, however, not expressly specify the process of democratic participation within political parties which is why the legislature has the obligation to pass appropriate legislation to ensure and safeguard this process.²⁷⁹ This notion can mainly be based on the Constitutional Court's judgment of *Glenister v President of the Republic of South Africa and Others*.²⁸⁰ In this case the Constitutional Court had to decide whether the legislation which established a new anti-corruption unit passes constitutional muster. The majority of the Court *inter alia* held that although the Constitution does not expressly require the state establishing an independent anti-corruption unit, the Constitution itself nevertheless imposes a duty on the state to adopt national legislation in order to create an independent and effective anti-corruption unit.²⁸¹ Concerning internal party democracy and section 19(1)(b) of the Constitution, it is of interest how the Court reached that conclusion. It *inter alia* stated:

‘[T]he starting point is section 7(2), which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court has held that in some circumstances this provision imposes a positive obligation on the state and its organs “to provide appropriate protection to everyone through laws and structures designed to afford such protection.”

²⁷⁹ Pierre de Vos (note 29 above) at 23.

²⁸⁰ *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC); see also Pierre de Vos (note 29 above) at 19.

²⁸¹ *Glenister* (note 280 above) paras 109 and 189.

Implicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective.²⁸²

Furthermore, the Court invoked section 8(1) of the Constitution. It held:

‘And since in terms of section 8(1), the Bill of Rights “binds the legislature, the executive, the judiciary and all organs of state it follows that the executive, when exercising the powers granted to it under the Constitution, including the power to prepare and initiate legislation, and in some circumstances Parliament, when enacting legislation, must give effect to the obligations section 7(2) imposes on the state.’²⁸³

It could therefore be argued that sections 7(2) and 8(1) of the Constitution read with section 19(1)(b) of Constitution (which must be interpreted in the light of the above-mentioned historical context of section 19, the pivotal role of political parties for the South African democracy and the right to vote) imposes a duty on the legislature to pass ‘reasonable and effective’ legislation which ensures democratic participation of the party members in the activities of the respective political party.²⁸⁴ Concerning the precise content of a (possible) party law that regulates internal party democracy, the legislation must, however, be given enough room to manoeuvre as, according to *Glenister*, ‘there are many ways in which the state can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights.’²⁸⁵ Yet, these measures need to be reasonable.²⁸⁶ I would, as already outlined above, therefore argue that these measures at least have to give effect to the basic requirements of internal party democracy.

²⁸² Ibid para 189.

²⁸³ Ibid para 190.

²⁸⁴ Pierre de Vos (note 29 above) at 23.

²⁸⁵ *Glenister* (note 280 above) at para 191.

²⁸⁶ Ibid.

V CONCLUSION

In this paper I sought to deepen the understanding of the legal regulation of internal party democracy by examining relevant legal instruments of two countries that handle internal party democracy differently. First of all, it has become evident that it is still a challenging task to exactly determine what compromises internal party democracy. This is, however, not surprising as one can hardly find a commonly accepted definition of ‘democracy’ itself. Furthermore, the debate about the necessity to regulate the internal functioning of political parties is not yet finished. In my view, the cases of both Germany and South Africa have, however, shown that political parties play such a crucial role for a democracy that justifies imposing the legal duty to organise democratically on them.

The case study of Germany has further revealed that the existing legal framework governing internal party democracy in Germany does basically cover the basic requirements of internal party democracy which include freedom of speech, compliance with the principles of majority rule and periodic elections as well as participation of the party members in: the selection process of the candidates for local and general elections, the election of the leadership and policy making. All in all, the regulatory framework in Germany does not give political parties much room for manoeuvres in terms of the core values of internal party democracy. This is why the constitutions of political parties in Germany basically have the same content in this regard. However, the case study has also revealed loopholes in the law. The PPA expressly allows up to 20 per cent ex-officio members in both the delegates’ assemblies and the Executive Committees of political parties. This must be considered democratically problematic even though the SPD and CDU have not fully exploited this loophole according to their constitutions. Another loophole in the relevant legislation concerns the selection of the candidate for Chancellor. There are no provisions in place governing this selection process. In my view, this loophole has been exploited largely by the SPD and CDU as the selection of the respective candidate for Chancellor is highly dominated by the party’s leadership.

South Africa is lacking a comprehensive legal framework governing internal party democracy. The Electoral Commissions Act and the Electoral Act are especially

concerned with the registration of political parties, but they do not impact on the internal functioning of political parties. The same applies to the PAJA which, in my view, is not of great use when it comes to the protection and enforcement of the basic principles of internal party democracy. However, in my opinion, the examination of the South African Constitution and the Constitutional Court's judgment of *Ramakatsa* suggest that section 19(1)(b) of the Constitution requires the right to participate in the activities of a political party to be carried out in a democratic manner. In other words, at least the protection of the core values of internal party democracy is covered by section 19(1)(b) of the Constitution. Moreover, the *Glenister* judgment of the Constitutional Court may allow the conclusion that the state has the obligation to pass national legislation in order to 'protect, promote and fulfil' the 'right to participate in the activities of a political party.' The actual need for such a party law is apparent from a look at the constitutions of the ANC and DA. Although it can not be said that the ANC and the DA are organised entirely in an undemocratic manner as they grant their members the right to participate in various ways, the study has revealed that in particular the process governing the selection of candidates for the general elections is, at the end of the day, determined by the Executive Committees rather than by the party's members. Furthermore, like in Germany, ex-officio members play a not insignificant role in both the delegates' assemblies and the Executive Committees of the ANC and DA. In my view, the existence of ex-officio members in both German and South African political parties indicates that political parties apparently are afraid of completely subjecting themselves to democratic minimum standards, even though they claim quite the opposite.

All in all, the study has shown that it is premature to conclude that a legal framework governing internal party democracy necessarily means that political parties are entirely organised in a democratic manner. In the same vein, the lack of a legal framework does not necessarily mean that they are completely undemocratic. Moreover, the absence of provisions that expressly regulate internal party democracy, like in South Africa, does not mean that one can not find other legal instruments which can be used to foster and promote internal party democracy. However, it needs to be emphasised that this study has been conducted from a formal perspective. The inner life of political parties, both in Germany and South Africa, is

certainly not only determined by rules set out in party laws or the constitutions of political parties but also by informal power relations and patronage networks. In my view, a party law can therefore guarantee internal party democracy only to a certain extent. The actual challenge seems to be to establish a political culture which actually gives priority to democratic standards instead of perseverance of power.

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