

## **Economic migrants, expatriate citizens and the right to vote within the Southern African Development Community (SADC)**

*Wessel le Roux*

### **Abstract**

This chapter seeks to explore the impact of migration on post-apartheid conceptions of citizenship within the Southern African Development Community (SADC). In particular, it investigates the extension of voting rights to economic migrants as an example of the disaggregation of citizenship rights (Benhabib). Three important recent developments in the region provide the background to the discussion: (i) On 16 August 2005 a Protocol on the Facilitation of Movement of Persons was adopted by SADC. The Protocol recognises a right to migrate but is silent about the political status of economic migrants; (ii) As if in direct defiance of the SADC protocol, a wave of xenophobic violence that claimed more than 50 lives broke out in South Africa on 11 May 2008. The violence marked a breakdown in participatory democracy at local government level; (iii) During the 2009 national elections in South Africa, the issue of migrant voting rights served before the South African Constitutional Court for the first time. The Court was asked in the *Richter* and *AParty* cases to rule on the constitutionality of permanent residence as a prerequisite for voting rights. The Court relied on the idea of global citizenship or diasporic nationalism to rule against a residence based electoral system. The judgment contrasts sharply with the position in other SADC countries, most notably Zimbabwe, where non-resident citizens do not have a right to vote outside the country. The chapter explores the seemingly progressive reasoning and impact of the judgments. It asks, in particular, whether the notion of diasporic nationalism has any useful role to play in the political integration of economic migrants within the SADC. In arguing that it does not, it also explores the regional relevance of the alternative models of political integration recently identified by Benhabib (the carnival of the multitude, postnational urban politics, and cosmopolitan federalism).

**Key Words:** Economic migration, citizenship, voting rights, street democracy.

\*\*\*\*\*

### 1. Introduction

The local integration of migrants, especially so in the case of refugees, is often described as a triangular process with legal, economic and social dimensions.<sup>1</sup> As a legal process, local integration means that migrants are granted a progressively wider range of civil, social and political rights and entitlements by the host state. According to Jeff Crisp, the test for successful legal integration is therefore whether migrants have acquired permanent residence status and ultimately, through naturalisation, full citizenship in their host country. However, Seyla Benhabib reminds us that the process of legal integration should not be reduced to the gradual acquisition of traditional nation state citizenship.<sup>2</sup> The ideal is best theorised as a disruptive and critical notion, involving the gradual “disaggregation of citizenship”, as the cluster of rights that was traditionally associated with citizens is broken apart and then distributed right by right to non-citizen migrants as well.<sup>3</sup> The “disaggregation of citizenship” reveals its critical potential precisely where claims are made for an extension of the process beyond civil and social rights, to political rights as well.<sup>4</sup> The legal integration of migrants then not only influences the way in which we see migrants, but also how we understand citizenship as a form of membership. This is the case as we contemplate both the voting rights of non citizen residents (immigrants), and the voting rights of citizen non-residents (emigrants or expats).

This chapter seeks to explore the impact of migration on post-apartheid conceptions of citizenship within the Southern African Development Community (SADC) from this vantage point. Three important recent developments in the region provide the background to the discussion. Firstly, on 16 August 2005 a Protocol on the Facilitation of Movement of Persons was finally adopted by the SADC member states.<sup>5</sup> The Protocol explicitly recognises the right to migrate and to economically establish oneself throughout the region. However, the Protocol does not link these migrant rights to any post-national notion of community citizenship, and is completely silent about the political status and rights of economic migrants (both in their host and departure countries). Secondly, as if in direct defiance of the SADC protocol, a wave of xenophobic violence broke out in South Africa on 11 May 2008 and eventually claimed more than 50 lives. The violence marked a breakdown in participatory democracy at local government level, and underscored the urgent need to explore ways to legally and politically integrate migrants into an inclusive notion of shared local citizenship. Lastly, the fourth democratic elections took place in South Africa on 22 April 2009. In the run-up to the election, the issue of migrant voting rights served before the South African Constitutional Court for the first time. The Court was asked in the *Richter* and *AParty* cases to rule on the

---

constitutionality of permanent residence as a prerequisite for voting rights, i.e. whether emigrant (or expatriate) citizens constitutionally retained the right to vote after permanently settling in their new host countries.<sup>6</sup> Although the Court technically failed to answer the question, it fully inscribed post-apartheid citizenship into a model of global citizenship or diasporic nationalism that raises serious concerns for the future of disaggregated citizenship and democracy within the SADC region. As I wish to show below, the approach by the Court contrasts unfavourably with all the alternative models of cosmopolitan politics recently identified by Benhabib - the carnival of the multitude, cosmopolitan federalism, and most importantly, postnational urban politics (or what I have elsewhere called *street democracy*).<sup>7</sup>

## **2 Willem Richter: the migrant, the citizen and the voter**

Willem Richter is a 27 year old South African citizen who grew up in Pretoria, studied teaching at the University of the North-West, served in the Democratic Republic of the Congo as a member of a South African peace-keeping force, and currently lives and work in England as a teacher. In January 2009 Mr Richter approached the South African Electoral Commission to find out whether and how he could vote in the (then) upcoming 2009 general elections. He was informed that the only way for him to vote was to return to South Africa, and to vote in the voting district where he was registered as a voter. This was so because section 33(1)(e) of the Electoral Act 73 of 1998 restricted absentee voting to holiday makers, businessmen, students and sportsmen, who were temporary outside the country.<sup>8</sup> Mr Richter's absence from the Republic due to his (temporary) employment in England thus fell outside the limited scope of the section.

Having been informed about the state of the South African election law, Mr Richter launched an urgent application for an order declaring section 33(1)(e) of the Electoral Act unconstitutional. The High Court granted (and the Constitutional Court confirmed) an order to that effect. The Constitutional Court eventually ruled that the constitutional right to vote meant that all expatriate citizens, who were registered as voters before they emigrated, retained the right to vote in South African national elections. By so-doing, the Court explicitly declined to base the voting rights of (e)migrants on residence. Voting rights are thus presented as a formal incidence of nationality or formal citizenship (combined with the fact of voter registration).

The expatriate voting rights lobby has celebrated the *Richter* judgement as a "triumph of generosity over mean-spiritedness".<sup>9</sup> In this regard it has focussed in particular on one passage of the judgment. In the

---

relevant passage O'Regan J powerfully countered the dominant construction of emigration as a betrayal of sorts. She wrote as follows:

I am influenced by the fact that, as several of the parties noted, we now live in a global economy which provides opportunities to South African citizens and citizens from other countries to study and work in countries other than their own. The experience that they gain will enrich our society when they return, and will no doubt enrich, too, a sense of a shared global citizenship. The evidence before us, too, shows that many South African citizens abroad make remittances to family members in South Africa while they are abroad, or save money to buy a house. To the extent that citizens engaged in such pursuits want to take the trouble to participate in elections while abroad, it is an expression both of their continued commitment to our country and their civic-mindedness from which our democracy will benefit<sup>10</sup>.

Leaving aside the fact that this passage was clearly written with resident citizens in mind, the expatriate lobby has claimed that the real importance of the passage lies in the “message it conveys to South Africans permanently living abroad”.<sup>11</sup> That message is that their continued commitment to the country would not go unrewarded. As such the message reveals a desire on the part of the Court to “foster a continued sense of belonging, and help keep alive the desire to return”. Pierre de Vos explicitly describes the case as a welcome exception in a political context where nobody (read: “in the black majority”) “cares about the personhood and dignity of [read: “white”] South Africans who live abroad”.<sup>12</sup> A similar sentiment is expressed by Ian Macdonald, who argues that expatriates have been forced into exile by crime and the affirmative action policies of the ANC government, but that many remained South African at heart.<sup>13</sup> According to Macdonald, granting expatriates the right to vote will “make our scatterlings feel like they are still part of the country and part of its future. Denying them the right risks alienating them and causing them to lose interest in their native land and be lost forever”.

The *Richter* judgment indeed contrasts sharply with the position in other SADC countries, most notably Zimbabwe, where even resident citizens do not have a right to cast absentee votes during elections. However, it is not clear how the seemingly progressive celebration of diasporic nationalism will impact on or whether it has any useful role to play in the political integration of economic (im)migrants within the SADC.

### **3        *Richter* and the nature of street democratic citizenship**

---

Note, as these spokespersons present the case for expatriate voting rights, it is a campaign about the meaning of national patriotism, not one that is concerned with the nature and quality of political participation or the value of democratic accountability. Whether their remarks get the point that O'Regan J was trying to make or not, they completely miss an important point about democratic citizenship. The right to remain engaged in the political life of a country cannot be acquired as a reward for continued national patriotism, it can, democratically speaking, only derive as a precondition of being subject to the permanent jurisdiction of that state, its courts and its laws. A fundamental virtue of democratic citizenship is precisely that it places limits on the way in which economic power, mobility or agency translate into political power. Opponents of expatriate voting rights, like Ruth Rubin-Marín, therefore warn that we should be wary not to express the economic activities of expatriates as a form of economic citizenship and then use that concept as the basis for the allocation of political rights.<sup>14</sup> The link that O'Regan J (according to the expatriate lobby) establishes between being economically productive on the international stage and being a good global and local citizen, threatens to completely reduce political action to market interaction. It thus all but totally instrumentalises the right to vote, at the cost of a wide range of more deliberative or republican understandings of political participation (including the model of participatory democracy that the Constitutional Court itself has been at pains to develop in its recent jurisprudence).<sup>15</sup> Rubin-Marín suggests, far more convincingly, that while economic and developmental considerations are indeed central to any political response to migration and the demand for expatriate voting rights, it is irrelevant as a consideration of constitutional right:

[Emigrants] do not have a right to determine the political destiny of the community they left behind through absentee voting and other forms of political participation. Absentee voting is an option that, under certain circumstances sending countries may legitimately embrace; it is not a right that diasporic national communities can simply assert, especially not on the grounds of their economic contributions to the national economies through remittances or other forms of capital inflow. This holds true even if that contribution is one of the main reasons for the use of nationalist diasporic rhetoric by sending countries themselves<sup>16</sup>.

Claudia López-Guerra has pointed out that the argument for voting rights based on the ongoing economic contribution of the expatriate community to their country of nationality, is but one of several arguments for expatriate voting rights grounded on the idea of desert (other familiar desert

---

based arguments rests on patriotism or forced exile).<sup>17</sup> She rejects the idea that citizens can acquire voting rights on any desert based consideration other than being directly subject to the territorial jurisdiction of the law (including being indirectly affected by the law).<sup>18</sup> She therefore insists that even if a decision about the inclusion of others cannot be taken in a democratic manner, there is a universal and robust principle of democratic inclusion that all self-professing democratic republics should adopt: everyone who is directly subject to the laws of a democratic polity should be included in the citizen body of that polity.<sup>19</sup>

The calls by Rubin-Marín and López-Guerra for a more demanding principle of democratic inclusion and membership of political communities were made and must be understood in the context of the struggle for expatriate voting rights in Mexico. Kim Barry has recently written that the Mexican case indeed provides a paradigmatic example of the fact that the extra-territorial relationship between nation-states and their emigrants are being reconstructed under the pressure of globalisation.<sup>20</sup> States are increasingly willing to tolerate and even encourage migrant identities with multiple allegiances and loyalties. Gone is the romantic association of nationality with an exclusive patriotism to the state and nation. Mexico's new self-conception as an emigration state thus includes a celebration of the fact that the Mexican nation extends beyond the territory of the Mexican state and its jurisdiction. On the basis of this diasporic self-conception of the Mexican nation, greater economic and cultural ties between emigrant communities and Mexico are actively pursued. However, the point that Barry seeks to underscore is that although the economic and cultural engagement of emigrant communities are increasingly welcomed, "their direct participation in the national political community generally is not".<sup>21</sup> Even in a country where the popular and official view of expatriates has shifted from traitors to heroes, that reorientation has not translated into the recognition of expatriate voting rights.

As the comments by Rubin-Marín and López-Guerra also point out, the opposite might even have been the case. This reorientation has resulted in a far clearer distinction between the legal ties that a person might have with a state, the economic and cultural ties she might have with a nation, and the political ties she might have with a democratic or political legal community. To accommodate these distinctions, Barry suggests that we restrict the term *citizenship* to this last-mentioned category and distinguish more demandingly than is generally the case between *nationality* (or formal legal citizenship) and *citizenship* (or active participatory citizenship).<sup>22</sup>

The crucial question to ask is thus not whether expatriate citizens remain patriotic or economically productive South Africans, as O'Regan J seems to suggest in the *Richter* case, but how expatriate citizens who are no longer subject to the jurisdiction of the law can rightfully claim a democratic

---

right to have a say in the making of the law? The interpretation that Myburg, De Vos and the rest of the South African expatriate lobby attributes to the *Richter* judgment reduces the political life of the country to an extension of the cultural, or even worse, economic life of the country. There is no doubt that Myburg and De Vos have a liberal nationalism in mind, but the fundamental difference between their national patriotism and the constitutional patriotism defended by Benhabib, López-Guerra and Habermas is sharply drawn. Even if the value of democratic accountability is rather more strenuous than Habermas is willing to concede, his insistence that there is only a historically contingent and not a conceptual connection between republicanism and national memory or patriotism, serves as a useful starting point for an approach to voting rights fully grounded in the idea of participatory democracy itself.<sup>23</sup>

Habermas suggested during the early 1990s that the task of the next generation of critical theorists was to employ a discourse theory of societal rationalisation in order to free democratic republicanism from the domination of both the administrative power of the state and the mythology of the nation. In contrast to the instrumentalist and ethical understandings of citizenship, Habermas favoured a discourse theoretical understanding in which a citizen's legal status was constituted by a network of egalitarian relations of mutual recognition that were called into being by the discursive medium of law itself. In this regard he felt encouraged at the time by the remark of the German Constitutional Court, in an important voting rights case of the late 1980's, to the effect that

the idea of democracy, and especially the idea of liberty contained in it, implies that a congruence should be established between the possessors of democratic political rights and those who are permanently subject to a specific government. This is the proper starting point<sup>24</sup>.

The South African liberal expatriate lobby, by contrast, continues into the 21<sup>st</sup> century to work within an instrumentalist conception of politics and democracy in which affected interest is the starting point of the relationship between the subject and the law. Voting rights are simply another means of promoting a citizen's individual or collective interests. As Edwin Baker states, if citizens were at root mere interest maximizers, then only being obliged, and not obligation, would be relevant.<sup>25</sup> Where obligation is relevant, the starting point of the relationship between the subject and law lies in the accountability citizens owe each other. The liberal expatriate lobby presents us with a theory of the law, democratic politics and voting rights in which this insight is almost completely forgotten. The basic idea underlying expatriate voting rights is that the subject can insulate and remove herself

from the jurisdiction and violence of law, without affecting her relationship with the community of those who are wounded by every attempt to posit and decipher the law. The expatriate subject seeks to hold others democratically accountable for the content of the law without herself assuming accountability for the violence and force of the law. Whatever this demand for democratic accountability might finally mean, the fact remains that expatriate citizens do not bear the cost and implications of their vote to the same degree as resident citizens who are directly subject to the jurisdiction of the South African courts. The right of expatriates to vote therefore means the right to impose obligations on resident South Africans without having to assume those obligations. Whether or not this right is implied by collective membership in a nation, it is not implied by collective membership in a democratic community where the Kantian idea of dignity is the defining feature.

The relationship between voting rights and the value of democracy accountability is closely related to the relationship between voting rights and permanent residence. Seyla Benhabib has recently identified the rise of new forms of postnational citizenship as a significant reaction to the twilight of nation state sovereignty. Postnational citizenship refers to the rise of political activism on the part of non and postnationals living together in multi-cultural and ethnic inner-city neighbourhoods, who come together around issues like women's rights, secondary language education, environmental concerns, representation on school boards and migrant employment.<sup>26</sup> The new forms of "urban activism" described by Benhabib radically undermines the old distinction between national citizens and non-citizens, and relocates democratic citizenship in local residence and active every-day life on the streets of the world's great migration cities:

Today we are caught not only in the reconfiguration of sovereignty but also in the reconstitution of citizenship. We are moving away from citizenship understood as national membership increasingly towards a citizenship of residence which strengthens the multiple ties to locality, to the region and to transnational institutions. [...] This new modality decouples citizenship from national belonging and being rooted in a particular cultural community<sup>27</sup>.

#### 4 Conclusion

The *Richter* judgment of the South African Constitutional Court seems completely out of zinc with this post nationalist urban politics or street democracy. In fact, by confirming citizenship as the formal basis for the allocation of voting rights, it might even be antithetical to this ideal. If the *Richter* case indeed implies that *non-resident citizens* acquire (and retain) the

---

right to vote as a formal incidence of their abstract citizenship or nationality alone then it has pointed the ongoing debate about the future of democratic citizenship in South and Southern Africa in the wrong direction. Democratic political participation requires a decoupling of voting rights (or active republican citizenship in the narrow sense) from nationality (or formal liberal citizenship in the broad sense). The value of democratic accountability requires, as a starting point, that democratic citizenship be tied to the locality of ordinary residence. If any legislative reform is needed after the *Richter* judgment, it is not as the South African expatriate lobby has claimed to allow all *non-resident citizens* (emigrants) to register and vote in the next election, but to allow *non-citizens residents* (immigrants) to register and vote in the next municipal elections in the cities where they are ordinary resident.

### Notes

<sup>1</sup> Jeff Crisp “The local integration and local settlement of refugees: a conceptual and historical analysis” New Issues in Refugee Research, Working Paper No. 102 (April 2004).

<sup>2</sup> Seyla Benhabib “Twilight of sovereignty or the emergence of cosmopolitan norms? Rethinking citizenship in volatile times” in Thomas Faist and Peter Kivitsso (eds) *Dual citizenship in global perspective* (2007) 247; see also Seyla Benhabib *Another Cosmopolitanism* (2006).

<sup>3</sup> The disaggregation of citizenship (or the legal integration of migrants) is reflected in the South African Bill of Rights in the distinction between rights that attach to “every person” and rights that attach only to “citizens”. This distinction has given rise to a number of Constitutional Court cases. Most fundamentally, in *Lawyers for Human Rights and Other v Minister of Home Affairs and other* the Court rejected the claim by the government that arriving migrants, who were physically but not legally in the country, could not be beneficiaries of the rights in the constitution ([2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC)). In *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* the court held that the Constitution vests the right to social security in “everyone” and that permanent residents are thus bearers of this right ([2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC)). Finally, in *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* a minority of the Court held that the restriction of work as a security guard to citizens and permanent residents violated the constitutional rights of refugees ([2006] ZACC 23; 2007 (4) BCLR 339 (CC)).

<sup>4</sup> Benhabib 35 goes as far as claiming that critical theory finds its contemporary expression in the drive for the extension of voting rights as part of a new “politics of cosmopolitan membership”. This politics concentrates on rights litigation that burdens courts with the task of “negotiating the complex relationship between rights of full membership, democratic voice and territorial residence”.

<sup>5</sup> SADC Protocol on the Facilitation of Movement of Persons. Available at [www.sadc.int](http://www.sadc.int) (accessed 4 September 2009).

<sup>6</sup> *Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* [2009] ZACC 3; 2009 (5) BCLR 448 (CC); and *AParty and Another v The Minister for Home Affairs and Others; Moloko and Others v The Minister for Home Affairs and Another* [2009] ZACC 4; 2009 (6) BCLR 611 (CC).

<sup>7</sup> Wessel le Roux “From acropolis to metropolis: the new Constitutional Court building and South African street democracy” (2001) 16 *South African Public Law* 139; and Wessel le Roux “Planning law, crime control and the spatial dynamics of post-apartheid street democracy” (2006) 21 *South African Public Law* 25.

<sup>8</sup> The section reads as follows: “The Commission must allow a person to apply for a special vote if that person cannot vote at a voting station in the voting district in which the person is registered as a voter, due to that person’s *temporary absence* from the Republic for purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit or participation in an international sports event, if the person notifies the Commission within 15 days after the proclamation of the date of the election, of his or her intended absence from the Republic, his or her intention to vote, and the place where he or she will cast his or her vote”.

<sup>9</sup> James Myburg “A triumph of generosity over mean-spiritedness” available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=120816&sn=Marketingweb%20detail> (accessed 5 May 2009).

<sup>10</sup> *Richter* para 69.

<sup>11</sup> James Myburg “A triumph of generosity over mean-spiritedness” available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=120816&sn=Marketingweb%20detail> (accessed 5 May 2009).

<sup>12</sup> Pierre de Vos “Limited victory for voters abroad” available at <http://constitutionallyspeaking.co.za/?cat=15> (accessed 20 May 2009).

<sup>13</sup> Ian Macdonald “The right to vote” available at [http://www.sagoodnews.co.za/newsletter\\_archive/the\\_right\\_to\\_vote.html](http://www.sagoodnews.co.za/newsletter_archive/the_right_to_vote.html) (accessed on 18 May 2009).

<sup>14</sup> Ruth Rubio-Marín “Transnational politics and the democratic nation-state: normative challenges of expatriate voting and nationality retention of emigrants” (2006) 81 *New York University Law Review* 117 133.

<sup>15</sup> See further Frank Michelman “Conceptions of democracy in American constitutional argument: voting rights” (1989) 41 *Florida Law Review* 443. Michelman distinguishes between two conceptions of democratic politics that are implicit in US American voting rights cases. He calls these deliberative politics and strategic politics (447). He also distinguishes between two reasons why people might value enfranchisement. He calls these instrumental reasons and constitutive reasons. In terms of the former, people use the right to vote as an instrument to further their interests. In terms of the latter, people make use of the right to vote to constitute and constantly transform their individual and communal identities in a dialogical fashion (451). Ostensibly to ensure the dialogical or deliberative nature of politics, republicans have traditionally supported the introduction of a range of voter qualifications (including literacy tests). Michelman takes up the challenge to rid republicanism of this tainted voting rights tradition, without giving up on the value of dialogical, as opposed to instrumental, politics. In this context, Michelman discusses and justifies the fact that bona fide residence is a constitutionally permissible franchise prerequisite in US American law (469-480). Bona fide residence can withstand close constitutional scrutiny

because it is necessary to preserve the (dialogical) ideal of political community, i.e the value of democracy. However, any residence requirement must serve the high purpose for which it is constitutionally permitted. This might require a further distinction between those who are directly subject to democratic decisions and those whose interests are affected by the indirect impact of those decisions (477).

<sup>16</sup> Rubio-Marín 145.

<sup>17</sup> Claudio Lopés-Guerra "Should expatriates vote" (2005) 13 *Journal of Political Philosophy* 216 227.

<sup>18</sup> Expressed in Habermasian language, one could also say that Lopés-Guerra reinterprets the ethical or constitutive dimension of political participation in a universal or post-nationalist direction. Like Michelman, she locates the value of political participation and the right to vote in a critical hermeneutics of self-transformation through the dialogical confrontation with otherness that breaks with the hermeneutics of self-understanding and the "the moral stasis and self-satisfaction of sameness" (Michelman 485).

<sup>19</sup> Lopés-Guerra 218-221. López-Guerra would thus fundamentally disagree as a matter of democratic principle with the claim by Niki de Haviland, one of the leading champions of expatriate voting rights, that the restrictions on expatriate voting rights "fails to recognize that the right is an adjunct of citizenship and has nothing to do with residence".

<sup>20</sup> Kim Barry "Home and away: the construction of citizenship in an emigration context" (2006) 81 *New York University Law Review* 11 12.

<sup>21</sup> Barry 51.

<sup>22</sup> Barry 20-25.

<sup>23</sup> Jürgen Habermas *Between facts and norms: contributions to a discourse theory of law and democracy* (1996) 499.

<sup>24</sup> Habermas 509.

<sup>25</sup> Edwin Baker "Republican liberalism: liberal rights and republican politics" (1989) 41 *Florida Law Review* 491 515.

<sup>26</sup> This new activism and politics need not be centred on voting rights and representative law-making institutions. However, Benhabib favours the institutional recognition of postnational citizenship through voting rights, as has already taken place at the local government level in the European Union. There are obvious limits to any focus on voting rights as an entry into transformative post-nationalist and post-national politics. The focus on voting rights tends to collapse political action to voting, and thus immediately folds the potentially radical idea of democratic civil society back into the representative law-making and law-applying institutions of the state. Politics is then reduced to law-making and the contested interpretation and application of laws (litigation). This is the point that Bonnie Honig raises against Seyla Benhabib's law centred approach to transformative politics as democratic iteration (see Bonnie Honig "Another cosmopolitanism? Law and politics in the new Europe" in Benhabib *Another Cosmopolitanism* (2006) 102).

<sup>27</sup> Benhabib 262.

## Bibliography

Baker, E "Republican liberalism: liberal rights and republican politics". (1989) 41 *Florida Law Review* 491

Barry, K "Home and away: the construction of citizenship in an emigration context" (2006) 81 *New York University Law Review* 11 12.

Benhabib, S "Twilight of sovereignty or the emergence of cosmopolitan norms? Rethinking citizenship in volatile times" in Thomas Faist and Peter Kivitso (eds) *Dual citizenship in global perspective* (2007) 247;

Benhabib, S *Another Cosmopolitanism* (2006).

Crisp, J "The local integration and local settlement of refugees: a conceptual and historical analysis" New Issues in Refugee Research, Working Paper No. 102 (April 2004).

Habermas, J *Between facts and norms: contributions to a discourse theory of law and democracy* (1996) 499

Honig, B "Another cosmopolitanism? Law and politics in the new Europe" in Benhabib *Another Cosmopolitanism* (2006) 102).

le Roux, W "From acropolis to metropolis: the new Constitutional Court building and South African street democracy" (2001) 16 *South African Public Law* 139;

le Roux, W "Planning law, crime control and the spatial dynamics of post-apartheid street democracy" (2006) 21 *South African Public Law* 25

Lopés-Guerra, C “Should expatriates vote” (2005) 13 *Journal of Political Philosophy* 216 227.

Michelman, F “Conceptions of democracy in American constitutional argument: voting rights” (1989) 41 *Florida Law Review* 443

Rubio-Marín, R “Transnational politics and the democratic nation-state: normative challenges of expatriate voting and nationality retention of emigrants” (2006) 81 *New York University Law Review* 117 133.

**Wessel le Roux** is Professor in Public Law at the University of South Africa. His research focuses on the nature and constitutional preconditions of sustainable democracy in the post-apartheid context.