Conceptualising Political Candidacy as a Human Right

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In Loving Memory of My Dear Father

Patrick Lloyd Johns

ABSTRACT

This thesis examines the justificatory basis of the right to candidacy, otherwise referred to as the right to stand for election, and assesses the implications of characterising political candidacy as a human right. It examines the extent of the right's legal recognition in international, regional and domestic human rights law with specific focus on the jurisprudence of the United States, Canada and the ECtHR.

This dissertation then offers a theoretical justification for the existence of a moral right to candidacy in all liberal democracies. This justificatory account highlights how the following values and interests underlie the right to candidacy: dignity (as social recognition of one's equal moral status), autonomy, self-expression and self-development. It further examines the derivative justifications for the right to candidacy by outlining the extent to which it is necessary for the effective exercise of the right to vote, freedom of association and the maintenance of a common liberal culture.

The correlative duties to which the right gives rise are also examined. It is argued that the right entails duties to respect, protect and fulfil. The duty to respect imposes a negative obligation on the State to refrain from imposing unjustifiable disqualifications or eligibility requirements for elective office. The duty to protect entails an obligation to safeguard against infringements of the right by political parties in their candidate selection processes. Thirdly, the duty to fulfil involves a positive obligation to organise and administer free and fair elections with a reasonably level playing field in which candidates may compete.

This thesis subsequently explores the institutional implementation of these duties and how the values and interests underlying the right should help inform the scope and content of such duties in the jurisdictions specified above.

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ACHR	American Convention on Human Rights
CEDAW	Convention on the Elimination on all forms of Discrimination Against Women
CIHRL	Customary International Human Rights Law
CIL	Customary International Law
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FPTP	First-past-the-post
ICCPR	International Covenant on Civil and Political Rights
IPU	Inter-Parliamentary Union
ONCA	Ontario Court of Appeal
OSCE	Organization for Security and Co-operation in Europe
SCC	Supreme Court of Canada
SMP	Single Member Plurality
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee

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INTRODUCTION

The right to stand for election, otherwise referred to as the right to candidacy, is included in a number of regional and international human rights treaties, often expressed alongside the closely related right to vote.[1] While both electoral rights enjoy widespread international recognition, a starkly different picture emerges on the domestic plane. Most domestic bills of rights do not include an express right to stand for office, even though the right to vote is explicitly included in the majority of these instruments.[2] This imbalance is also revealed when one surveys academic literature on electoral rights, most of which focuses on the right to vote and on whether the franchise ought reasonably to be withheld from particular groups.[3] However, regarding the right to candidacy, scholarly attention has been much more limited, with disagreement lingering in some academic quarters on whether candidacy should even be properly considered a fundamental right.[4] Despite the central importance of this electoral right to the functioning of modern democracies, to date, there has been no reasoned analysis of its scope and content or on the more general implications of its designation as a human right. It is this gaping analytical and conceptual void which this thesis aims to begin filling.

[1] International Covenant on Civil and Political Rights (1966), art 25; American Convention on Human Rights (1969), art 23; African Charter on Human and Peoples' Rights (1981), art 13.

[2] See Chapter 2; Richard J Wilson, 'The Right to Universal, Equal, and Nondiscriminatory Suffrage as a Norm of Customary International Law: Protecting the Prisoner's Right to Vote' in Alec Ewald and Brandon Rottinghaus (eds), *Criminal Disenfranchisement in an International Perspective* (Cambridge University Press 2009) 121.

[3] Ludvig Beckman, 'Citizenship and Voting Rights: Should Resident Aliens Vote?' (2006) 10(2) Citizenship Studies 153; Susan Easton, 'Electing the Electorate: The Problem of Prisoner Disenfranchisement' (2006) 69(3) MLR 443; Alec Ewald and Brandon Rottinghaus (eds), *Criminal Disenfranchisement in an International Perspective* (Cambridge University Press 2009).

[4] Laurence Tribe, *American Constitutional Law* (2nd edn, West Academic Publishing 1988) 1098; Charles Beitz, *Political Equality* (Princeton University Press 1989) 174.

Among the most central claims it seeks to establish is that of the existence and fundamentality of political candidacy as a moral right in all liberal democracies, deserving of express legal recognition and robust protection. It will also be argued that the content of this right to candidacy embodies the correlative duties to respect, protect and fulfil the right. The duty to respect entails a negative obligation on the state to refrain from imposing unjustifiable eligibility requirements for elective office. In this way, the right to candidacy is not only a right of those legally qualified, but it is also a more basic right *to be qualified*, such that, it operates as a standard against which existing qualifications ought to be tested. The duty to protect imposes an obligation on the state to safeguard against third party infringements of the right; it will be argued that, in this context, the state's duty particularly includes protection against violation by political parties in their candidate selection processes, given that they are the main conduits through which the right is generally exercised. Thirdly, the duty to fulfil embodies a positive obligation to provide an environment of free and fair elections with a reasonably level playing field in which candidates may compete. This thesis aims to provide a full account of the values and interests underlying these central duties and will also defend the feasibility of their institutional implementation in modern liberal democracies.

It is worth highlighting the methodology which will be employed in achieving these ends. This thesis is divided into three main parts. Part I (Chapters 2 – 3) looks at the current recognition of the legal right to candidacy with particular focus on jurisprudence of the United States, Canada, and ECtHR. These jurisdictions have been chosen partly for the extent to which they have generated sufficient case law on the right to candidacy such that, they provide a meaningful basis for deeper examination. While the right to candidacy is not included in the US Constitution, US courts have sought to protect candidates' interests through the right to vote, and have grappled with the issue of whether candidacy ought to be recognised as a free-

standing fundamental right.[5] On the other hand, the Canadian Charter of Rights *does* include an express right to candidacy and the jurisprudence of Canadian courts has shed light on the purpose and scope of the right to candidacy, as it operates within that context.[6] Lastly, ECtHR jurisprudence offers an expansive body of case law on the right's operation at the regional level. Of particular importance is the Strasbourg Court's recognition of the procedural and substantive dimensions of the right to candidacy as well as the positive duties it imposes upon the State.[7]

The examination of this case law in Part I of the thesis serves two main purposes. First, it offers a descriptive analysis of the current recognition and interpretation of the right; such analysis stands as a necessary precursor to subsequent normative analysis of the right's content, given that the latter seeks to build on these former, existing accounts. Secondly, the jurisprudence also reveals judicial inconsistencies and uncertainties regarding the right's scope and underlying foundation. In that regard, the case law also operates to highlight the need for a more detailed theoretical analysis of the right, which is then provided in Part II of the thesis.

Part II (Chapters 4 – 5) offers a theoretical justification of the existence of the moral right to candidacy by outlining the values and interests underlying the right, and the extent to which they underpin the above duties to respect, protect and fulfil. Part III (Chapters 6 – 8) then examines the more detailed institutional implementation of these duties within the context of the three jurisdictions outlined above. The normative principles established in Part II are therefore employed as the lens through which the relevant jurisprudence is assessed and critiqued in Part III.

[5] *Bullock v Carter*, 405 US 134 (1972); *Lubin v Panish*, 415 US 709 (1974). See full discussion in Chapter 3.

[6] Canadian Charter of Rights and Freedoms, sec 3; *Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876.

[7] See Chapter 2.

Regarding the approach taken to comparative methodology, this thesis emphasizes what Jackson terms a 'contextual' approach to comparative analysis.[8] This approach seeks to highlight the application of the right as informed by the broader institutional and political context of each jurisdiction and is less concerned with advancing ideas for transplantation of approaches across systems.[9] While the theoretical analysis in Part II – regarding the right's underlying values – is taken to apply generally to all jurisdictions, Part III is concerned with how these values will come to be expressed in each jurisdiction, acknowledging that implementation will vary depending on the wider electoral and political context. Further, as will be highlighted in subsequent Chapters, the United States and Canada possess sufficient similarities regarding their electoral system and institutional framework for rights protection, such that, some analysis on implementation will prove equally applicable to both states.[10]

On a terminological point, it is important to define what exactly is meant by the terms 'political candidacy' and 'human right' as employed in this thesis. Regarding 'political candidacy', the arguments for the moral right to candidacy advanced in Part II conceivably apply, without distinction, to any elective governmental office. However, it should be noted that the right to candidacy as embodied in the ECHR and the Canadian Charter is limited only to legislative office.[11] It has therefore been held that the right does not apply to mayoral office in Canada,[12] or to presidential or local government elections in ECHR Contracting Parties.[13]

[8] Vicki Jackson, 'Comparative Constitutional Law: Methodologies' in Michel Rosenfeld and Andras Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 66.

[9] Jackson (n 8) 66 – 67.

[10] See Chapters 3, 6 and 8.

[11] See Canadian Charter (n 6) sec 3; ECHR Protocol 1, art 3.

[12] *Nunziata v Toronto (City) (Clerk)* (2000) 189 DLR (4th) 632 (ONSC).

[13] *Cherepkov v Russia* App no 51501/99 (ECHR, 25 January 2000); *Habsburg-Lothringen v Austria* App no 15344/89 (ECHR, 14 December 1989).

The analysis in Part III regarding institutional implementation is therefore largely related to legislative office, given that jurisprudence on the express right to candidacy has been limited to such office in both the ECtHR and Canada. However, where relevant, analysis of jurisprudence concerning other elective offices, primarily in the United States, is also considered.

Regarding the meaning ascribed to the term 'human right', expounding on this issue is the task embarked upon in Chapter 1 of this thesis. Chapter 1 sets out the theoretical understanding of the term 'human right' as adopted herein. It outlines the position taken on the nature, existence and function of human rights in order to give the reader a clear idea of the meaning and purpose behind seeking to frame political candidacy as one such right. It rebuts two theoretical accounts of human rights which do not accommodate a right to candidacy and subsequently puts forward an interest-based account, demonstrating how that account broadly accommodates the notion of political candidacy as a 'human right'.

Chapter 2 then offers an overview of the recognition of the right to candidacy in regional and international human rights law. At the regional level, focus is placed on the ECHR with an examination of its drafting history and its jurisprudence on the right to stand for election. This Chapter also outlines the more general recognition of the right to candidacy in international human rights law by examining whether the right may be considered to have achieved customary international law status.

Chapter 3 examines the recognition of the right in Canada and the United States, given that these two polities provide the main contextual frameworks within which further discussions on the right to candidacy at the domestic level will be situated. The Chapter therefore provides an overview of the extent of the right's recognition in these jurisdictions and demonstrates how both courts' jurisprudence point to the need for a clear theoretical account of the values and interests underlying the right to candidacy.

This theoretical account is then offered in Part II, which comprises Chapters 4 and 5. Chapter 4 first offers an overview of the pluralistic justificatory framework adopted in the thesis. It then outlines a 'primary', interest-based justification by demonstrating how the following values and interests underlie the right to candidacy: dignity, autonomy, self-expression and self-development. Lastly, it provides a 'derivative' justification of the right by establishing its instrumentality for: (i) the full realisation of the right to vote (ii) the preservation of all other rights and (iii) the maintenance of a common liberal culture.

Chapter 5 next delineates the proposed duties to which these values and interests give rise: duties to respect, protect and fulfil the right. It examines the content of these duties and shows how this content is informed by the underlying interests outlined in Chapter 4. It thereafter applies Tasioulas' threshold test for the formation of human rights duties by offering a defence of the general feasibility and reasonableness of the duties proposed. Part III then offers a more detailed analysis of the institutional implementation of these duties.

Chapter 6 examines the duty to respect. As noted above, this entails a negative duty to refrain from imposing unjustifiable eligibility requirements and disqualifications from office. It will assess the role and legitimacy of courts in reviewing such disqualifications within the context of case law from the ECtHR, Canada and the United States. It will also assess an important issue raised in the Canadian context of whether parliament's privilege to regulate its membership should, in some instances, act as a bar to the judicial review of statutory disqualifications.

Chapter 7 then assesses the nature of the state's duty to protect. This chapter will look at the enforcement of the right as against political parties and the duties this right may impose on the State regarding the regulation of the internal affairs of parties in their candidate selection processes. It examines this duty through the lens of a conflict of rights between the political

party's associational freedom and the individual's right to candidacy and puts forward general principles regarding the resolution of this rights' conflict.

The nature of the state's duty to fulfil is then highlighted in Chapter 8 of this thesis. This involves a positive duty to ensure that the electoral process provides a reasonably level playing field in which candidates may fairly compete. It will be argued that in order for the right to be effective, it cannot merely speak to eligibility requirements without looking at whether any practical impediments block the eligible candidate from meaningfully pursuing his/her right. It therefore examines aspects of electoral organisation which implicate the right to candidacy such as administrative requirements for admission to the ballot and campaign finance rules, within the context of the jurisprudence of the abovementioned jurisdictions. This Chapter offers a defence of the legitimacy of judicial oversight in this area and thereafter outlines general principles which should guide the court in its adjudication on these issues of electoral organisation.

Before embarking on these important issues regarding the right's scope and content, it is first necessary to outline the conceptual understanding of the term 'human right' as adopted herein. This is the issue to which this thesis now turns in its preliminary examination of the conceptual foundations beneath framing political candidacy as a 'human right'.

CHAPTER 1 –

FRAMING POLITICAL CANDIDACY AS A HUMAN RIGHT: CONCEPTUAL FOUNDATIONS

A. INTRODUCTION

As the title of this thesis reveals, its aim is to offer a conceptual analysis of political candidacy as a human right. Broadly speaking, the primary goals are to investigate the extent to which standing for election has been recognised as a human right, exploring the right's normative content, and the implications of such recognition (or lack thereof) in specified jurisdictions. Before undertaking these tasks, it is first necessary to delineate one's theoretical understanding of the term 'human right' in order to clarify the precise meaning which this thesis ascribes to what has fast become one of the most commonplace, yet no less contested,[1] concepts of the 20th and 21st Centuries.

The extent to which we can embrace political candidacy as a human right largely depends on our perspective of the nature, existence, purpose, and universality of human rights: aspects of human rights theory which continue to yield conflicting viewpoints.[2] This Chapter aims to put forward the theoretical understanding of human rights adopted in this thesis and to demonstrate how that understanding (i) accords with contemporary human rights practice and (ii) accommodates the notion of political candidacy as one such right. The precise content of the right to candidacy and the duties to which it gives rise remain the subject of later Chapters.

[1] Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013) 21; Chris Brown, 'Universal Human Rights: A Critique' in T Dunne and NJ Wheeler (eds), *Human Rights in Global Politics* (Cambridge University Press 1999) 103.

[2] James Nickel, 'Human Rights', *The Stanford Encyclopedia of Philosophy* (Spring edn, 2014) http://plato.stanford.edu/archives/spr2014/entries/rights-human/ accessed 11 December 2014.

This Chapter merely seeks to clarify the meaning and purpose behind framing political candidacy as a human right and to broadly defend the suitability of that designation. The Chapter is divided into three sections, each dealing briefly with the position adopted on the following aspects of human rights theory: (i) the existence of human rights (ii) the basis and universality of human rights and (iii) the purpose and function of human rights.

B. THE EXISTENCE OF HUMAN RIGHTS: MORAL AND LEGAL DIMENSIONS

Of foundational importance in justifying the existence of a human right, is to first clarify the way(s) in which one is claiming that the right 'exists'. Most contemporary theorists view human rights as possessing two levels of existence: 'legal' and 'moral'.[3] Human rights exist as positive legal rights through their enactment in both international and domestic laws. Conversely, moral rights, as defined by Feinburg, are those rights which are 'held to exist prior to, or independently of, any legal or institutional rules.'[4] In line with this, Neuman aptly coins the term 'suprapositive' to refer to that aspect of human rights which are 'reflections of non-legal principles that have normative force independent of their embodiment in law, or even superior to the positive legal system'.[5] This he distinguishes from the 'consensual' aspect of human rights: the extent to which they are embodied as enactments of positive law.[6]

It will be argued that the right to candidacy exists as both a legal and moral right. This is, of course, contrary to the classic positivist account as put forward by Bentham that the idea

[3] Nickel (n 2); Maurice Cranston, *What are Human Rights?* (The Bodley Head 1973) 6 - 7; Joel Feinburg, *Social Philosophy* (Prentice-Hall 1973) 84; James Griffin, *On Human Rights* (OUP 2003) 2.

[4] Feinburg (n 3) 84.

[5] Gerard Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55(5) Stanford L Rev 1863, 1868.

[6] ibid 1866.

of rights existing independent of legal enactment is 'nonsense upon stilts'.[7] However, most would agree that what Bentham categorized as 'nonsense' now greatly accords with contemporary human rights theory and practice,[8] such that any comprehensive defence of human rights as moral rights is largely rendered unnecessary.[9]

I. THE LEGAL RIGHT TO CANDIDACY

Chapters 2 and 3 of this thesis outline the extent to which candidacy has been recognised as a legal right at the international and domestic levels, respectively. In looking at the right's existence on the international plane, both treaty law and customary international law are taken into account. The right to stand for elective office, like the right to vote, is included in most major regional and international human rights conventions.[10] All such treaties identify the rightholders as *citizens* of a given country as opposed to all persons within its borders. One example is article 25 of the ICCPR which guarantees to 'every citizen' the right and opportunity 'to vote and to be elected at genuine periodic elections'.

One may question the necessity of defending the 'existence' of the right to candidacy given its inclusion in well-established international conventions. However, as Nickel notes, a right's inclusion in an international document hardly settles the question of its status as a human

[7] Jeremy Bentham, 'Anarchical Fallacies' in J Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen 1987) 46 – 76.

[8] See on this point: Nickel (n 2); Alasdair Cochrane, 'In Defence of Traditional Theories of Human Rights' Centre for Political Theory and Global Justice Working Paper Series, 5 <http://www.sheffield.ac.uk/polopoly_fs/1.277288!/file/CochraneInDefenceofTraditionalTheoriesofHumanRights.pdf> accessed 11 December 2014; Charles Beitz, 'Human Rights as a Common Concern' (2001) 95(2) American Political Science Review 269, 276 – 8.

[9] John Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65(1) Current Legal Problems 1, 10.

[10] International Covenant on Civil and Political Rights, art 25; American Convention on Human Rights, art 23; African Charter on Human and People's Rights, art 13; ECHR Protocol 1, art 3.

right or the weight to be accorded to it when balancing it against competing norms.[11] Further, even though ratification of these treaties is widespread, it is by no means universal and even ratifying states may opt to make reservations to electoral rights provisions. With this in mind, Chapter 2 also examines the extent to which the right to stand for election may be regarded as a norm of customary international law, binding on states even in the absence of an applicable treaty.

The existence of a legal right to candidacy at the domestic level is then evaluated in Chapter 3 by looking at the jurisdictions of Canada and the United States. These two jurisdictions provide an interesting juxtaposition of how the interpretation and enforcement of the right differ between a polity with an express constitutional right to candidacy (in the case of Canada), and one without an express right (the United States).

II. THE MORAL RIGHT TO CANDIDACY

The right to candidacy may also be characterized as what Feinburg terms an 'ideal moral right'. An ideal right is a moral right which 'ought to be a positive (institutional or conventional) right' and the rightholders of which 'have a claim against political legislators to convert their "moral right" into a positive legal one'.[12] This thesis will be arguing that the right to candidacy exists as an ideal moral right in all liberal democracies in which the right has yet to attain positive recognition. In liberal democracies which already recognise the right, candidacy exists as both a legal and moral right, with its moral existence being independent of and separate from its enactment as positive law.

[11] Nickel (n 2).

[12] Feinburg (n 3) 84 – 5.

What then is the justificatory basis of this moral right and what is its content? As Cranston notes, the difficulty with moral rights is that they cannot be strictly proven in the same way that one proves the existence of a legal right.[13] Rather, moral rights have to be justified. Chapter 4 of this thesis outlines the justificatory basis of a human right to candidacy based on principles of democratic theory, as well as the underlying values of dignity and autonomy. In Chapter 5, normative claims are then made concerning how this justificatory foundation should inform the moral or 'suprapositive' content of the right. The right's content is identified as including the tripartite duties to respect, protect and fulfil the right. Chapters 6 to 8 then assess the extent to which these duties have been fulfilled in the jurisdictions specified, while also making normative claims for more robust protection of the right where necessary.

The moral or suprapositive content of the right is therefore used not only to state what should obtain in the absence of a positive right, but also as a benchmark to assess the efficacy and legitimacy of existing legal arrangements. It is acknowledged that the enforcement and protection of the right will necessarily vary among jurisdictions given the presence of divergent institutional and socio-political factors. This thesis is not, therefore, seeking to put forward a uniform account of the right's protection which is directly applicable in all polities. On the contrary, a key distinction is made between the suprapositive content of the right versus the details of its institutional implementation.[14] The right's moral or suprapositive content, with its grounding in equality, autonomy and participatory democracy, may be said to somewhat transcend jurisdictional and institutional nuances. It is acknowledged that this moral content is by no means strictly universal given that there is no shortage of differing viewpoints on the meaning of the underlying values identified. Notwithstanding, the moral content outlined may be considered broadly applicable to states espousing liberal democratic governance, even if not

[13] Cranston (n 3) 6.

[14] On the institutional aspect of rights see Neuman (n 5) 1869.

strictly applicable to all such states in the same way. However, it remains important to have some conception of what the ideal moral content should be so that one can then assess how this may best be implemented within a given institutional framework.

Discussions on the moral content of the right have largely been kept separate from questions of its justiciability and enforcement. This separation is important given that when the suprapositive and institutional aspects are conflated, one risks narrowing the moral content of the right because of reservations about what is institutionally possible.[15] In particular, reservations about what is justiciable. However, as Fredman and others have noted, a right's enforcement and implementation are by no means limited to the purview of the court.[16] This thesis therefore employs a very broad view of implementation which includes, but is not limited to, judicial protection. Further, the right's moral existence is not taken to be contingent on its effective implementation. As Sen aptly points out, the current unrealizability of enforcing a human right does not by itself convert that claim into a non-right.[17]

C. THE BASIS OF HUMAN RIGHTS AND THE QUESTION OF UNIVERSALITY

One of the most contested issues in human rights theory is the origin or foundation of human rights. What is the source of these rights, which are considered independent of positive law, and to what aspect of our humanity do we owe their endowment? Closely connected to this question of origins is the issue of universality: the extent to which human rights may be

[15] As Donnelly notes, '[It] seems odd to suggest that something is a real human right only if it is relatively easy to implement. Ease of implementation is certainly irrelevant to determining moral paramountcy': see Donnelly (n 1) 41. Further, Neuman highlights how commonly these two aspects are conflated in legal discourse and cautions against it: see Neuman (n 5) 1873.

[16] Donnelly (n 1) 36; Sandra Fredman, *Human Rights Transformed* (OUP 2008) 150.

[17] Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32(4) Philosophy & Public Affairs 315, 320.

considered as equally applicable to all human beings regardless of temporal, geographical or cultural differences. These questions remain of great significance and are capable of exploration in somewhat inexhaustible depth. This section does not, of course, aim to offer a comprehensive discussion of these issues. Rather, it will primarily address, and rebut, two accounts on the foundation and universality of human rights which prove problematic in establishing candidacy as one such right. The theoretical perspective on these issues that has been adopted in this thesis will then be outlined.

I. THE ORTHODOX NATURAL RIGHTS ACCOUNT

In seeking to explain the basis of contemporary human rights, many have made linkages with the natural rights tradition, and its Lockean foundations dating back to the 17th and 18th Centuries.[18] Under this account human rights, like natural rights, are 'the rights of all people at all times and in all situations';[19] they are rights owed to men simply by virtue of their common humanity and does not include 'special' rights arising from membership in a particular group.[20] Cranston offers one such account wherein he distinguishes between the 'liberties and privileges of citizenship' versus human rights which are universal moral rights applicable to all.[21] As Beitz points out, this orthodox account draws heavily from Hart's account of natural rights as

[18] See for example John Simmons, 'Human Rights and World Citizenship' in *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge University Press 2001) 185; John Finnis, *Natural Law and Natural Rights* (Clarendon 1980) 198; Cranston (n 3).

[19] Cranston (n 3) 21; See also Simmons (n 18) 185.

[20] ibid 7, 24.

[21] ibid 20 – 21.

'general rights' open to all, as opposed to 'special rights', which are contingent on some special relationship such as 'membership in a political society'.[22]

This account is problematic for the right to candidacy given that this right generally comes on account of citizenship, not by virtue of mere humanity. As noted above, international conventions have framed the right as one owing to 'citizens' and in arguing for a moral right to candidacy, this thesis will be focusing on a country's adult citizens as the putative rightholders. Further, candidacy, like the right to vote, is reasonably limited to adult citizens capable of a basic level of reasoning and rationality. There is therefore some degree of tension between a 'natural rights' conception of human rights, owed to all simply by virtue of mere humanity, and the designation of the citizen's right to candidacy as one such right.

In assessing the natural rights school of thought, it becomes clear that it offers an untenably broad conception of universality, with human rights applying to all persons at all times irrespective of temporal, geographical or situational differences. The difficulties with this conception of universality have been recognised by many.[23] For example, Waldron notes that it would be nonsensical to consider primeval man as endowed with the same human rights of the present day, given that the latter are framed largely in relation to institutions which are not transhistorical.[24]

Conceiving of human rights as accruing 'solely by virtue of one's humanity' is too broad a basis on which to rest human rights' theoretical foundation. This is because of the

[22] Charles Beitz, 'Human Rights and the Law of Peoples' in Deen Chatterjee (ed), *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge University Press 2004) 199; HLA Hart, 'Are There Any Natural Rights?' (1955) 64(2) Philosophical Review 175 – 191.

[23] Jeremy Waldron, 'Human Rights: A Critique of the Raz/Rawls Approach' (2013) Public Law & Legal Theory Research Paper No 13-32, 1 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272745 accessed 11 December 2014; Beitz (n 22) 196 – 200; James Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell 2007) 37 – 38; John Tasioulas, 'Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps' (2002) 10(1) European Journal of Philosophy 79, 87.

[24] Waldron (n 23) 1.

numerous and varied ways in which we experience 'humanity' based on social, developmental, and cultural differences. These differences mandate some 'specialisation' in the account of human rights, as opposed to the strict generality offered by some within the natural rights school. As Beitz notes, limiting human rights to general rights and excluding any reference to special relationships or membership, unduly circumscribes the list of human rights.[25] It would take out of the purview of human rights law important safeguards made necessary precisely by virtue of the vulnerability which some special relationships create, for example, the right to a healthy and safe work environment.

II. THE RAWLSIAN ACCOUNT OF HUMAN RIGHTS IN *THE LAW OF PEOPLES*

A second account of human rights which proves particularly problematic for the right to candidacy is that offered by John Rawls in *The Law of Peoples*. There, Rawls presents his theory of international justice which includes a principle that countries should 'honour human rights'.[26] Such human rights are defined as 'urgent rights', the violation of which warrant coercive international intervention by 'diplomatic and economic sanctions or military force'.[27] Therefore, the main role of international human rights, in the Rawlsian conception, is to define the limits of permissible coercive intervention by other states.[28] In this regard, Rawls views human rights as 'distinct from constitutional rights, or from the rights of liberal democratic citizenship'; he posits that many of the rights in the UDHR, (including democratic rights of political participation), are not 'human rights proper' but rather 'liberal aspirations'. 'Human

[25] Beitz (n 22) 200.

[26] John Rawls, *The Law of Peoples* (Harvard University Press 1999) 37.

[27] ibid 79 – 80.

[28] ibid 80.

rights proper' are taken to include the right to life, liberty and security of the person as well as freedom from slavery and torture.[29] On this account, the right to candidacy would be relegated to a 'liberal aspiration' as opposed to a genuine 'human right'.

In analysing Rawls' theory, it is important to first note that Rawls does not aim to put forward a comprehensive theory on the origin or basis of human rights. Rather, his account may best be described as a political or practical conception on the nature and role of human rights within his broader theory of international justice. Notwithstanding, the Rawlsian account must still be confronted given that, in espousing its philosophy of international justice, his theory necessarily makes claims about the basis and universality of democratic rights.

Many human rights theorists have levelled strong criticisms against Rawls' approach,[30] and those critics seem to far outnumber the few who defend his truncated list.[31] Nickel rightly categorizes Rawls' account as 'ultraminimalist',[32] given that the contemporary purpose of human rights law is much broader than that of justifying coercive intervention.[33] International human rights serve as moral standards by which the performance of governments may be critically assessed and non-coercively persuaded.[34] Further, as Waldron notes, the focus on coercive intervention undermines the individualism of human rights, considering that an

[29] ibid.

[30] John Tasioulas, 'From Utopia to Kazanistan: John Rawls and the Law of Peoples' (2002) 22(2) Oxford Journal of Legal Studies 367; Nickel (n 23) 98 – 103; Beitz (n 22) 202 – 5; Beitz (n 8) 276; Griffin (n 3) 25; Waldron (n 23) 7 – 21.

[31] In defence of Rawls' list of human rights see: David Reidy, 'Political Authority and Human Rights' in Rex Martin and David Reidy (eds), *Rawls's Law of Peoples: A Realistic Utopia?* (Malden 2006) and Samuel Freeman, 'The Law of Peoples, Social Cooperation, Human Rights and Distributive Justice' (2006) 23(1) Social Philosophy and Policy 29.

[32] Nickel (n 23) 98.

[33] Beitz (n 8) 276 – 277; Waldron (n 23) 15; Nickel (n 23) 101; Cochrane (n 8) 7.

[34] ibid.

intervention would likely only take place on account of mass violations as opposed to a mere few.[35]

In looking more closely at Rawls' exclusion of electoral rights (the rights to vote and stand for election), it is important to note that this turns heavily on his notion of liberal democracies having a duty to tolerate 'decent', non-liberal states which do not espouse democratic ideals.[36] Therefore, Rawls' exclusion should not be taken as undercutting the importance of these rights *within* liberal democracies.[37] On the contrary, his writings strongly suggest that Rawls would include a right to stand for election in the list of rights necessary for a liberal democratic state. For example, in outlining the importance of fair political processes in international relations between states, he likens this to the domestic importance of 'fairness of elections and of political opportunities to run for public office'.[38] Further, in *A Theory of Justice*, Rawls identifies the 'right to vote and to hold public office' as 'basic liberties' to which all persons have an equal right.[39]

Rawls' denial of democratic rights as 'human rights proper' is therefore less reflective of his views on the importance of such rights, and perhaps more attributable to his philosophy on the broader role of human rights in relations between liberal and non-liberal states. Notwithstanding, his view of human rights which brings him to this conclusion is largely

[35] Waldron (n 23) 11.

[36] Rawls defines 'decent' peoples as 'nonliberal societies whose basic institutions meet certain specified conditions of political right and justice (including the right of citizens to play a substantial role, say through groups and associations, in making political decisions) and lead their citizens to honor a reasonably just law for the Society of Peoples': Rawls (n 26) 3.

[37] As Lindstad posits, Rawls' position is best construed as conferring on decent, non-democratic states 'recognitional legitimacy' only, as opposed to full 'internal political legitimacy'. Democratic rights would therefore still be necessary for 'internal legitimacy': See Sigurd Lindstad, 'Rawls's Law of Peoples: Human Rights, Recognitional Legitimacy and Positive Duties Across Borders' (Master's Thesis, University of Oslo 2012) 38.

[38] Rawls (n 26) 114 – 115.

[39] John Rawls, *A Theory of Justice* (Revised edn, Harvard University Press 1999) 53; See also Charles Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton University Press 1989) 174.

flawed and based on two misconceived notions. The first is that human rights violations necessarily warrant coercive intervention, such that, the toleration of decent, non-democratic states dictates that democratic rights cannot be seen as 'human rights' because if so classified they would legitimise external intervention on the sole basis of non-adherence with democratic principles. However, as noted above, human rights enforcement and implementation is much broader than Rawls' coercive intervention paradigm. As Nickel and Beitz point out, liberal democracies can non-coercively encourage and persuade the formation of democratic institutions (and the respect of democratic rights), while still 'tolerating' and respecting the sovereignty of decent, non-liberal states.[40]

The second misconstrued aspect of human rights practice involves Rawls' strict dichotomy between 'constitutional rights' and '(international) human rights': presented as two wholly separate entities.[41] In the Rawlsian account, the right to candidacy would be considered as a 'constitutional right' of liberal democratic citizenship as opposed to an international human right. However, as Waldron notes, human rights law reveals a great deal of continuity between domestic constitutional rights and international human rights.[42] The drafting history of many international conventions reveal that the scope of their rights was heavily informed by examining the content of domestic bills of rights.[43] International human rights law, in turn, continues to play a central role in domestic human rights adjudication and reform.[44] Reference

[40] Nickel (n 23) 102; Beitz (n 8) 279.

[41] Rawls (n 26) 78 – 79.

[42] Waldron (n 23) 14, 19.

[43] Neuman (n 5); Stephen Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19(4) European Journal of International Law 749.

[44] Neuman ibid; Christopher McCrudden, 'A Common Law of Human Rights: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499; See also Antenor Hallo de Wolf and Donalnd Wallace, 'The Overseas Exchange of Human Rights Jurisprudence: The US Supreme Court in the European Court of Human Rights' (2009) 19(3) International Criminal Justice Review 287.

to the term 'human rights' in this thesis is therefore taken to be applicable to both international human rights and domestic constitutional rights: both regarded as 'complementary positivizations' of the same ideals.[45] Further, in relation to electoral rights more specifically, any examination of international human rights law will clearly reveal that they are no longer regarded as matters of sole domestic concern. This increased emphasis placed on electoral rights in the international sphere will be outlined in greater detail in Chapter 2.

III. THE INTEREST-BASED ACCOUNT AND CONTEXTUAL UNIVERSALITY

Thus far we have explored two accounts of human rights which fail to accommodate the adult citizen's right to candidacy. This section seeks to put forward a theoretical account of the basis and universality of human rights which not only reasonably accommodates candidacy as a right, but is also firmly grounded in contemporary human rights theory and practice.

[a] The Human Interest Approach

As discussed above, the natural rights approach, of grounding human rights simply on the basis of one's status as a human being, failed to account for the differences in how one's experience of that status is coloured by variations in mental development, age and temporal context. Other status-based approaches have sought to increase specificity by outlining key aspects of our humanity which endow us with these rights, such as agency and 'normative autonomy'.[46] However, this hardly solves the problem, given that such accounts do not adequately accommodate humans incapable of rational, autonomous thought and action.[47] In response to

[45] Waldron (n 23) 14.

[46] See Griffin (n 3) 45.

[47] John Tasioulas, 'Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps' (2002) 10(1) European Journal of Philosophy 79, 93; Joseph Raz, 'Human Rights Without Foundations' (2007) Oxford

these issues, some theorists, such as Tasioulas, have argued for a move away from status-based justifications toward interest-based accounts which view human rights as grounded in safeguarding a plurality of basic and fundamental human interests.[48] Central to the account are threshold tests to determine which interests ought to be considered of sufficient importance to generate binding duties and to therefore constitute a human right.[49] There are, of course, diverging opinions within this approach about which interests meet that qualification.[50] This section does not aim to resolve these debates or to offer a comprehensive examination of different accounts within the interest-based school of thought. Rather, the aim is to demonstrate that the broad foundational basis of this school of thought is one which comfortably accommodates candidacy as a human right.[51]

Interest-based accounts provide for a greater degree of flexibility in accommodating the possibility that different human beings enjoy different rights on account of varied basic interests.[52] The strict universality of status-based approaches is therefore eschewed in favour of what may be termed contextual or 'relative' universality: the right as universally applicable to all persons within a specified group, as opposed to all human beings generally.[53] This

Legal Studies Research Paper 14/2007, 6 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999874> accessed 11 December 2014.

[48] Tasioulas ibid 93; Tasioulas (n 9) 7 - 14; Cochrane (n 8) 11; Nickel (n 23) 3. Griffin does somewhat offer an interest-based account to the extent that he sees human rights as grounded in our 'interest' in 'normative agency'. However, Tasioulas builds on this approach by arguing for a plurality of human interests as the basis for human rights as opposed to the quasi-status-based interest of 'agency': Tasioulas (n 47) 93; Defending the plurality of interests approach see also William Talbott, 'Review of James Griffin 'On Human Rights' (2008) Notre Dame Philosophical Reviews <http://ndpr.nd.edu/news/23832/?id=14645> accessed 11 December 2014.

[49] Tasioulas (n 9) 15; Cochrane (n 8) 17.

[50] ibid.

[51] The justificatory account put forward in Chapter 4 of this thesis provides greater detail on the interest based account which has been adopted and on the specific human interests taken to underlie the right to candidacy.

[52] Cochrane (n 8) 18.

[53] See also Donnelly (n 1) 93 on this point. He notes the importance of viewing the universality of human rights within a particular domain of application as opposed to with complete generality.

acknowledgement of varied human interests is reflected in contemporary practice by the increased specialisation of human rights instruments and bodies dealing separately with the rights of the child,[54] women,[55] and persons with disabilities.[56]

This tempered approach to universality facilitates the adult citizen's right to candidacy given that it is not considered problematic for only a sub-set of a population to possess a 'human right'. As Tasioulas notes, on the interest-based account, those in a persistent vegetative state would not possess the right to political participation given that they lack the relevant interests and also because the threshold conditions for the generation of a duty would not be satisfied.[57] Yet, its inapplicability to this sub-group does not make it any less of human right, given that it is otherwise rooted in the value of human dignity as well as a plurality of fundamental human interests.[58]

It is acknowledged that interest-based accounts do not answer the deeper metaphysical question of where these interests come from or why human well-being ought to be considered worthwhile. Instead, it begins on the premise that safeguarding human interests is morally desirable. However, as many theorists in the field have noted, agreement on the ontological foundation of human rights is unnecessary in light of the broad 'overlapping consensus' on the importance of protecting human well-being.[59] Therefore, a theory's failure to set out a

[54] Convention on the Rights of the Child (CRC).

[55] Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

[56] Convention on the Rights of Persons with Disabilities.

[57]John Tasioulas, 'Human Dignity and the Foundations of Human Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (British Academy 2013) 311 – 312.

[58] Ibid.

[59] Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29(2) Human Rights Quarterly 281, 292 – 3; Cochrane (n 8) 17.

'comprehensive doctrine' on human rights' origins does not by itself undermine its legitimacy or cogency.[60]

[b] On Universality and Limitations based on Citizenship

As noted above, there is some degree of internal tension in the idea of electoral rights, such as candidacy, being characterised as *human* rights even though it is largely accepted that they may be limited to only the citizens of a given state.[61] However, this apparent tension may be resolved when one considers the extent to which citizenship may itself be regarded as a universal human status which all individuals ought to be equally entitled to possess. The citizen's right to candidacy may therefore be considered universal in the sense that it is based on the ideal premise that all human beings possess citizenship in some state, albeit not the same state, and are therefore all equally entitled to these political rights in their state of citizenship. For example, Hannah Arendt insightfully highlights the vast extent to which international human rights are collectively premised on one's membership in a political community given that the stateless individual is effectively without human rights protection, in that, there is no government to which his claim may be directed.[62] It is on this basis that Arendt noted that the most important right is the 'right to have rights' i.e. the right to be a member of a political community where one's claim of rights may be petitioned.[63]

Similarly, article 15 of the UDHR states that everyone has the 'right to a nationality'. It is accepted that citizenship and nationality are not wholly synonymous, with some writers

[60] Donnelly ibid.

[61] Heather Lardy, 'Translating Human Rights into Moral Demands on Governments' (2003) 9 International Legal Theory 123, 133; Heather Lardy, 'Is there a Right not to Vote?' (2004) 24(2) OJLS 303, 309 – 10.

[62] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt 1973) 268.

[63] ibid.

distinguishing between the subjective cultural and ethnic bonds which characterize nationality versus the formal legal status which is citizenship.[64] However, others have categorized both terms as legal statuses, distinguishing instead between citizenship as the legal relationship which creates rights and duties *within the state*, versus nationality as the state-membership status which operates on the *international* plane.[65] It is this latter conception of nationality as legal status which seems to be embodied in article 15 of the UDHR. The article appears to be referring to some measure of formal legal membership within a state given that it also guarantees that no one shall be 'arbitrarily deprived' of their nationality, or disallowed from changing it.[66] These guarantees connote the existence of some formal legal status, more closely related to the concept of citizenship. It may therefore be argued that given that all humans themselves possess a right to nationality (understood as formal legal membership within a polity), a political right owing to 'citizens' is itself universally applicable on the basis that all humans have the foundational right to be a citizen.

This resonates with the Kantian ideal of citizenship as a status enjoyed by all human beings: 'Certainly no human being can be without any dignity, since he at least has the dignity of a citizen.'[67] Similarly, Waldron notes that given the importance of citizenship in the provision and security of human rights, 'the dignity of the citizen represents one possible realisation of human dignity. Everyone's having a state that is responsible for her and a particular political community to which she belongs is *a way* of realising human dignity.'[68]

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[64] Jurgen Habermas, *Between Fact and Norms* (MIT Press 1996) 491; Heather Lardy, 'Citizenship and the Right to Vote' (1997) 17(1) OJLS 75, 76.

[65] Ruth Donner, *The Regulation of Nationality in International Law* (2nd edn, Transnational Publishers 1994); B Turner and E Isin, *Handbook of Citizenship Studies* (SAGE 2003) 278.

[66] Universal Declaration of Human Rights, article 15(2).

[67] Immanuel Kant, 'The Metaphysics of Morals' in Kant, *Practical Philosophy* (CUP 1996) 471.

[68] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (British Academy 2013) 336, 338 (emphasis in original).

Therefore, the apparent tension between the universality of human rights and the exclusivity of rights limited to citizens, is somewhat reduced by understanding that the status of citizenship itself possesses some degree of normative universality, in that, all persons are theoretically considered equally entitled to possess it, albeit not within the same state.

Notwithstanding, the key problem arises in the face of increased transnational migration, where many persons are not living within their state of citizenship. This thrusts to the fore the issue of what rights should be extended to the 'others' (resident non-citizens) within the state.[69] In light of this, many have considered the extent to which resident aliens should also be granted electoral rights.[70] While this remains an important question, it lies outside the scope of the present thesis, given that the focus herein will be on adult citizens of liberal democracies and the duties necessarily owed to them on account of this right. This focus on citizens is on the basis that the question of whether aliens should gain electoral rights necessarily hinges on one's conception of democratic inclusion and membership: the question of who belongs. This thesis is less concerned with the question of 'who belongs' and more focused on the issue of what is owed to those who are deemed 'belongers'. To avoid tangential discussions on the former question, focus is therefore placed on the incontrovertible belongers: citizens. It is not ruled out that the right to candidacy may also be owed to some alien permanent residents. However, given that the extent to which a country's own citizens are owed a right to candidacy is a question which itself remains unsettled, this thesis seeks to deal with this more basic question. After the existence and content of this right has been firmly established, one

[69] Seyla Benhabib, *The Right of Others: Aliens, Residents and Citizens* (CUP 2004).

[70] Admittedly these discussions have focused on the right to vote: Heather Lardy, 'Citizenship and the Right to Vote' (1997) 17(1) OJLS 75, 98; Gerlad Rosberg, 'Aliens and Equal Protection: Why not the Right to Vote?' (1977) 75(5) Michigan Law Review 1092; Rainer Bauböck, 'Expansive Citizenship—Voting beyond Territory and Membership' (2005) 4 Political Science & Politics 683; Ludvig Beckman, 'Citizenship and Voting Rights: Should Resident Aliens Vote?' (2006) 10(2) Citizenship Studies 153. Very little attention has been paid to the question of extending *candidacy* to resident aliens.

may then consider the secondary question of which alien residents within the community are owed this electoral right. However, given spatial limitations, this secondary question remains outside the scope of the current thesis.

[c] On the Question of Moral Universality

As noted above, this thesis puts forward the claim that the right to candidacy exists as a moral right in all liberal democracies and ought to be recognised as positive law in all such states. Adherents to a view of strict moral universality, (that human rights ought to apply everywhere, irrespective of geo-political or cultural differences), would demand that I also need to establish that candidacy is a moral right in all countries: democratic or not. However, the question of whether a non-democratic state ought to recognise a right to candidacy is perhaps better framed as a question of whether that state ought to establish democratic governance, given that one cannot meaningfully talk about a right to stand for election where no electoral framework exists. The question of whether the right to candidacy is morally universal therefore turns on the question of whether there is a morally universal right to democracy. This latter question has been the subject of much debate and, of course, there exists no consensus on this point.[71] Notwithstanding the importance of this question, the broader issue of democracy's universality lies outside the scope of the current thesis, which seeks to offer a more detailed specification of the duties generated by the right to candidacy within a democratic polity.[72]

[71] Joshua Cohen, 'Is there a Human Right to Democracy' in Christine Sypnowich (ed), *The Egalitarian Conscience: Essays in Honour of GA Cohen* (OUP 2006) 226; Seyla Benhabib, 'Is There a Human Right to Democracy? Beyond Interventionism and Indifference' in Claudio Corradetti (ed), *Philosophical Dimensions of Human Rights* (Springer 2012); Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86(1) American Journal of Intl Law 46; Bhikhu Parekh, 'The Cultural Peculiarity of Liberal Democracy' (1992) XL Political Studies 160.

[72] It is accepted that arguments supporting the existence of a universal right to democracy would in turn support the right to candidacy as also constituting a universal *moral* right. However, given that such arguments regarding the universality of democracy will not be explored herein, the scope of this thesis will be limited to a justification of the moral right to candidacy within liberal democracies. Reasons for the choice of liberal democracies as the justificatory context are examined in greater detail in Chapter 4 of this thesis.

However, it should be noted that a lack of consensus about whether democracy is morally universal does not prevent us from assessing the scope and content of the right to candidacy in countries which do espouse a shared set of liberal democratic ideals. Further, a general demand that the right be established as morally universal in all polities, ignores the extent to which moral universality varies depending on the level of abstraction of the right. This goes back to the importance of contextualising universality. As Donnelly notes, rights may be considered most universal at the 'conceptual level' where there is an 'abstract, general statement of an orienting value' e.g. everyone has the right to work.[73] At the 'interpretation level', concerning questions on the scope and precise meaning of the right, there is considerably less universality.[74] Finally, at the 'implementation level', the least degree of universality is required: variations are considered morally legitimate 'so long as they fall within the range of variation consistent with the overarching concept'.[75]

This thesis largely zones in on the right to candidacy at the levels of 'interpretation' and 'implementation', where strict universality is not required. Further, regarding the requirement of moral universality at the conceptual or abstract level, it may be argued that there is a more generally universal right to political participation in government.[76] The right to candidacy may therefore be seen as one component extracted at the interpretation level of analysis from that broader conceptual right.

[73] Donnelly (n 1) 99.

[74] Donnelly ibid 101.

[75] ibid 102.

[76] See Henry Steiner, 'Political Participation as a Human Right' (1988) 1 Harvard Human Rights YB 77; UDHR art 21; Griffin (n 3) 250; Fabienne Peter, 'The Human Right to Political Participation' (2013) 7(2) Journal of Ethics and Social Philosophy 1, 11.

D. THE PURPOSE AND FUNCTION OF HUMAN RIGHTS

I. THE ROLE OF INTERNATIONAL HUMAN RIGHTS

As Rawls' account of human rights demonstrates, one's conception of the purpose of human rights will largely colour one's idea of what legitimately qualifies as 'human rights proper'. In narrowly viewing the role of international human rights as providing limits for coercive intervention, Rawls consequently drew up a very short list of 'urgent rights'. However, as noted above, the role of international human rights is much broader and includes, the provision of a consensus on moral standards used to critically assess the performance of national governments.[77] They also serve to establish a binding obligation on states to safeguard specified rights and thereby provide an added level of governmental accountability, as well as a model for local human rights reform. Within this conception of purpose, the right to candidacy may reasonably be conceived of as an international human right, given the increasing primacy placed on participatory democracy and electoral fairness at the international level.[78] Chapter 2 of this thesis explores the extent to which the right to candidacy, as recognised in international and regional human rights law, may be regarded as fulfilling these crucial roles.

II. THE FUNCTION OF HUMAN RIGHTS AT THE INDIVIDUAL LEVEL

The role of human rights may also be assessed at the micro level in looking at what a norm's status as a human right achieves or guarantees for the individual rightholder. This concerns the level of protection human rights guarantee as high priority norms. It is important to set out

[77] See n 33.

[78] See Chapter 2 of this thesis.

one's conception of this function when arguing for recognition of a particular right, in this case candidacy, as a positive legal right at the domestic level. As Nickel notes, when making such a claim one must establish that classification as a human right is necessary for the protection of the interest in question; it must be shown that recognition as a lower order principle would not suffice.[79] Before defending the necessity of human rights protection, one must first clarify what that protection affords.

The most common classification of a right's function at the individual level is Dworkin's well-known conception of rights as 'trumps'.[80] He notes that rights serve as trumps in overriding utilitarian justifications which conflict with the principles of equal concern and respect.[81] A norm's classification as a right therefore limits the kinds of reasons which a government may present for withholding the interest in question.[82] While there is a great deal of debate on the suitability of the 'trump' metaphor[83] and on Dworkin's theory of rights more generally,[84] there is overwhelming agreement on the idea of rights as high priority norms which can function to override collective interests.[85] However, the 'trump' metaphor is not taken here to suggest that rights operate as taking absolute priority over collective interests in all cases, as

[79] Nickel (n 23) 75.

[80] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) xi.

[81] ibid 277.

[82] ibid.

[83] Karen Zivi, *Making Rights Claims: A Practice of Democratic Citizenship* (Oxford University Press 2012) 24; Richard Pildes, 'Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism' (1998) 27 Journal of Legal Studies 725.

[84] Joseph Raz, 'Professor Dworkin's Theory of Human Rights' (1978) 26 Political Studies 123; Paul Yowell, 'A Critical Examination of Dworkin's Theory of Rights' (2007) 52 American Journal of Jurisprudence 93; Jeremy Waldron, 'Pildes on Dworkin's Theory of Rights' (200) 29 Journal of Legal Studies 301.

[85] Leif Wenar, 'Rights', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2011) <http://plato.stanford.edu/archives/fall2011/entries/rights/> accessed 11 December 2014.

some have utilized it.[86] As Waldron notes, such a conception manifests a misunderstanding of Dworkin's theory.[87] What a right does guarantee its holder is a valid claim meriting consideration[88] and which demands that justifiable reasons be offered for any denial of the interest in question. The extent to which political candidacy necessitates this level of protection will be discussed in Chapters 4 and 5 of this thesis, which address the justificatory basis of the moral right to candidacy in liberal democracies.

E. CONCLUSION

This Chapter has sought to briefly outline the meaning and purpose behind seeking to conceptualise political candidacy as a 'human right'. The author's conception of the existence, universality and function of human rights has been offered as a necessary precursor to arguments in favour of characterising candidacy as one such right. The remainder of this thesis is largely concerned with the more detailed justificatory underpinnings of the right, as well as the implications of its recognition in light of the duties it places on the state. However, before examining the theoretical justification and content of the right, it is first necessary to broadly map the extent of current legal recognition and to examine how this right has been heretofore interpreted in practice. On this basis, Part I next seeks to outline the extent of the legal recognition of the right to candidacy at the international and domestic levels.

[86] See Waldron (n 84) 306.

[87] Waldron (n 84) 302.

[88] Joel Feinburg, 'The Nature and Value of Rights' (1970) 4 The Journal of Value Inquiry 243, 257.

PART I:

THE RECOGNITION AND STATUS OF THE LEGAL RIGHT TO CANDIDACY

CHAPTER 2 –

THE RIGHT TO CANDIDACY IN REGIONAL AND INTERNATIONAL HUMAN RIGHTS LAW

A. INTRODUCTION

Chapter 1 sought to expound on the general meaning ascribed to the term 'human right' as employed in this thesis and to defend the basis on which political candidacy may be categorised as one such right. Contrary to those who suggest that electoral rights may best be conceived of as 'constitutional rights', operational at the domestic level, as opposed to 'human rights',[1] the right to candidacy is, in fact, widely recognised and protected in regional and international human rights law. This Chapter seeks to expand on the recognition and application of the right to candidacy within these regional and international bodies of law.

At the regional level, focus will be placed on the jurisprudence of the European Court of Human Rights (ECtHR). This is in light of the fact that ECtHR jurisprudence forms one of the three main contexts in which later discussions on the right's implementation will be situated. It is therefore necessary to gain an understanding of the general nature and scope of the right as interpreted by the Strasbourg Court before making more detailed, normative evaluations of its rulings.

This Chapter will then subsequently access the recognition and status of the right to candidacy within the broader corpus of international human rights law. To this end, the various instances of the recognition of the right to candidacy in international law will be organised and

[1] John Rawls, *The Law of Peoples* (Harvard University Press 1999) 79 - 80; Allison Young, 'Prisoner Voting: Human or Constitutional Right?' UK Constitutional Law Blog (27th September 2013) <http://ukconstitutionallaw.org/2013/09/27/alison-l-young-prisoner-voting-human-or-constitutional-right/> accessed 30 November 2014.

analysed through the doctrinal lens of customary international law (CIL). The second section of this Chapter therefore seeks to assess whether the current extent of recognition may be considered sufficient to establish the right to candidacy as a norm of CIL. This approach has been taken for two reasons. First, as outlined in further detail below, uncovering the content of customary international human rights law (CIHRL) remains an important yet oft-neglected area, given the limitations of treaty enforcement on both the domestic and international planes.[2] Secondly, as an established source of international law, CIL offers a meaningful doctrinal lens through which the current status of the right and its level of consensus may be assessed. This Chapter therefore examines how the following instances of recognition may itself inform whether the right has attained customary status: inclusion in international human rights treaties, General Assembly Resolutions, national constitutions and reports of international election observation missions. As noted in further detail below, the central aim is less about making a definitive finding regarding customary status and more about examining how the right is trending along the continuum between a non-binding ideal and fully crystallised custom. It will be shown that there has been growing consensus on the existence and primacy of candidacy as a human right: beginning from reticence regarding its express inclusion in earlier instruments, towards a subsequent embrace of the right's fundamentality in later conventions and jurisprudence.

B. REGIONAL RECOGNITION: EUROPEAN CONVENTION ON HUMAN RIGHTS

As noted above, the examination of recognition at the regional level will focus primarily on the jurisprudence of the ECtHR, given that this, in part, forms the basis of subsequent discussions

[2] Richard Lillich, 'The Growing Importance of Customary International Human Rights Law' (1996) 25 Ga Journal of Intl & Comp Law 1, 7; B Simma and P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogen and General Principles' (1988) 12 Aust YBIL 82.

on the right's implementation in Part III of this thesis. The extent to which other regional instruments recognise a right to candidacy is discussed briefly in the second section of this Chapter when examining whether the right has attained customary status.

The main text of the European Convention on Human Rights contains no reference to electoral rights. However, the First Protocol includes a belated obligation on states to 'hold free elections', even though it also lacks an express articulation of the rights to vote and be elected. Article 3 of the First Protocol reads:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.[3]

It is from this obligation that the ECtHR has extracted the individual rights to vote and stand for election.[4] Before examining the Court's jurisprudence on this point, it is first necessary to gain an understanding of the historical context in which this instrument was drafted, in order to appreciate why an express guarantee of the right may have been excluded. In light of this, the drafting history of the ECHR and its First Protocol will be briefly examined. Prior to this, the relevant drafting history of the Universal Declaration of Human Rights will also be examined, given the extent to which the drafting of both documents were largely contemporaneous and given that the *travaux preparatoires* of the UDHR provides interesting insights on attitudes towards the right to candidacy which prevailed at that time.

[3] European Convention on Human Rights Protocol 1, art 3.

[4] *Mathieu-Mohin v Belgium* (1988) 10 EHRR 1.

I. THE DRAFTING HISTORY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948)

In undergoing any historical analysis of international human rights law, the 1948 Universal Declaration of Human Rights (UDHR) remains the first port of call, in light of the fact that this non-binding declaration formed the basis upon which many subsequent human rights conventions were drafted.[5] The UDHR is also significant for the extent to which it influenced the content of many domestic Bills of Rights.[6] Article 21 of the UDHR provides:

> (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
>
> (2) Everyone has the right of equal access to public service in his country.
>
> (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

While no express reference is made to a right to stand for election, this article represents the first expression in international human rights law of the concept of direct participation in government as a human right. In explaining the existence of the provision, many writers have pointed to the somewhat global ideological shift during and after World War II from absolute sovereignty to notions of popular sovereignty and self-determination.[7] This is reflected in the draft articles submitted by States to the Drafting Committee. Many States included in their submissions the desirability of an express right to be elected or to hold public office.[8] Yet, this

[5] Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995 – 96) 25 Ga J of Intl & Comp Law 287.

[6] *Ministry of Home Affairs v Fisher* [1980] AC 319, 328; Hannum (n 5) 292.

[7] Allan Rosas, 'Article 21' in Alfredsson and Eide (eds), *The Universal Declaration of Human Rights: A common standard of achievement* (Martinus Nijhoff 1999); Greg Fox 'The Right to Political Participation in International Law' [1992] YJIL 539; Atlantic Charter (August 14, 1941).

[8] Ecuador (UN doc E/CN.4/32); Mexico (UN doc E/CN.4/82/ADD.1); USA, India (UN Doc E/CN.4/AC.1/3/Add.1); Statement of Essential Human Rights presented by the delegation of Panama, UN Doc E/HR/3 (April 26, 1946).

express right was not ultimately included in the final document. A deeper examination of the drafting history reveals that, while the right to candidacy was, at that point, gaining traction as a human right, it was yet to receive the broad, universal consensus of States.

One of the preliminary drafts of the Declaration included an express right to hold public office in addition to the right to take part in government.[9] However, this formulation was ultimately not adopted in the face of objections raised by a number of states, including South Africa and Sweden. The South African government argued that it was 'difficult to see how equal opportunity… to hold public office can be regarded as a fundamental human right' given that in some countries members of organizations with subversive objectives are rightly barred from holding public office.[10] However, this objection merely speaks to the fact that the right should not be absolute; it provides no principled basis on which to deny its very existence. The Swedish government registered concerns about the extent to which the principle of equal opportunity to hold public office may be incompatible with Swedish law in light of the fact that its Constitution mandated that only members of the Swedish State Church could be cabinet ministers or holders of other named public offices.[11]

A survey of national constitutions conducted by the Drafting Committee in June 1947 further revealed the extent to which the rights to candidacy and to hold office were not recognized by a majority of States. Of the 50 national constitutions examined, only 4 contained an express right to be elected.[12] 13 contained more general participatory clauses, including the

[9] UN doc E/600, p 20

[10] UN doc E/CN.4/82/ADD.4.

[11] UN doc E/CN.4/82/ADD.11.

[12] China, Ecuador, USSR and Yugoslavia (See UN doc E/CN.4/AC.1/3/Add.1 256 – 265).

right to vote and/or eligibility requirements for elective office.[13] The remaining 33 constitutions did not contain any specific reference to electoral rights.[14]

Reference to an express right to hold public office was subsequently deleted from the draft and the version which came before the General Assembly for discussion merely referred to the right to take part in the government of one's country directly, or through freely chosen representatives. In the General Assembly, the USSR delegation proposed the re-inclusion of an express right to be elected. The delegation noted:

> [I]t was not enough merely to refer to the right of everyone to take part in the government of his country. It was necessary to state that he also had the right to elect persons and be elected to all organs of authority… It was essential to state explicitly, that every citizen of any State must have the right, equally with other citizens, of access to any State or public office in his country.[15]

However, this proposal for an express right to be elected was rejected by 36 votes to 9 with 11 abstentions.[16] This broad rejection of the USSR's proposal indicates the reluctance of States, as at that point, to unreservedly embrace the recognition of candidacy rights at the international level. This reluctance was further manifested during the drafting of the European Convention on Human Rights (ECHR), discussed in further detail below.

II. THE DRAFTING HISTORY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, FIRST PROTOCOL (1952)

Due to a lack of consensus among European States as to the substance of political rights to be included in the Convention, the 1950 Convention was adopted without any reference to

[13] Argentina, Belgium, Bolivia, Cuba, Czechoslovakia, Denmark, France, Guatemala, Liberia, Netherlands, Norway, Panama, USA. (See UN doc E/CN.4/AC.1/3/Add.1 256 – 265).

[14] UN doc E/CN.4/AC.1/3/Add.1 256 – 265.

[15] ibid.

[16] See UN doc A/PV.183.

electoral rights.[17] After further discussions, States agreed on what is now embodied in Article 3 of Protocol 1 (P1/A3), adopted in 1952. As noted above, this includes a general undertaking to 'hold free elections', with no individual rights expressly granted to citizens. Initial drafts included an undertaking by States Parties to 'respect the political liberty of their nationals'.[18] That version of the article was unanimously endorsed by the Consultative Assembly (one of the bodies involved in the drafting process) who strongly urged for 'the inclusion in the Convention of a provision safeguarding the political rights of the individual without which the significance of the Convention would be greatly diminished'.[19]

However, reference to the 'political liberty' of individuals was eventually omitted on the basis that the majority of States felt that it was too wide and imprecise.[20] It was further felt that the reference to 'political liberty' would add nothing in as far as it related to the freedoms of opinion, assembly and association, since these were already provided for in the Convention.[21] The final version therefore included no direct mention of individual electoral rights given the continued lack of consensus among states. Notwithstanding, the ECtHR held in its 1987 decision of *Mathieu-Mohin v Belgium*[22] that article 3 does include the individual rights to vote and stand for election, noting further that the *travaux preparatoires* supports this conclusion.[23] However, given the aforementioned resistance of states to embrace express

[17] Council of Europe, *Preparatory Work on Article 3 of Protocol 1 to the European Convention on Human Rights* (Strasbourg 5 September 1986) 36 <http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-P1-3-Cour(86)36-BIL1221606.pdf> accessed 30 November 2014.

[18] ibid 30.

[19] ibid 33.

[20] ibid 74.

[21] ibid.

[22] *Mathieu-Mohin* (n 4).

[23] Ibid para 49 – 51.

electoral rights, the Court's finding in *Mathieu-Mohin* seems more reflective of the growing acceptance of the centrality of these democratic rights and less grounded in the actual collective intention of States as at the time of drafting.[24]

III. THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Regardless of the questionable textual grounding beneath the Court's holding that article 3 confers individual rights, it is now undisputed that the rights to vote and to stand for election embody central aspects of the Court's jurisprudence given that they underpin effective democracy, which the Court has regarded as a fundamental element of the 'European public order'.[25] This section aims to give a brief overview of the Court's jurisprudence on the right to candidacy, with a more detailed examination taking place in Part III of this thesis.

The Court has held that the rights to vote and candidacy are not absolute but are subject to implied limitations.[26] In *Mathieu-Mohin* the Court sought to outline the nature of permissible limitations by noting that restrictions on the rights to vote and to stand for election must fulfill the following criteria: (i) imposed in pursuit of a legitimate aim (ii) embody proportionate means (iii) not curtail the rights in question to such an extent as to impair their very essence and (iv) the conditions should not thwart 'the free expression of the opinion of the people in the choice of the legislature'.[27] Further, in accordance with the plain reading of the text, the

[24] Earlier Commission decisions held that article 3 did not confer individual rights. See *X v Germany* No 530/59, 3 YB 184 (1960); Heather Green, 'Article 3, First Protocol: The Right to Free Elections' in Harris, O'Boyle & Warbick (eds), *Law of the European Convention on Human Rights* (3rd end, OUP 2014) 920.

[25] *Zdanoka v Latvia* (2007) 45 EHRR 17, para 98; *Hirst v UK (No 2)* (2005) 42 EHRR 849, para 58.

[26] *Zdanoka* ibid, para 103.

[27] *Mathieu-Mohin* (n 4), para 52.

Court has noted that article 3 applies only to elections for legislative office and excludes municipal or presidential elections.[28]

It should also be noted that states possess a wide margin of appreciation in this area: the Court has been careful to point out that the right does not include an entitlement to any specific electoral system.[29] Therefore, while the article necessarily implies equality of treatment of all citizens in the exercise of their electoral rights, it does not guarantee that all votes must have equal weight or that all candidates must have equal chances of victory.[30]

Regarding the right to candidacy, the Court has held that the right encompasses both procedural and substantive dimensions. In its substantive element, the right requires that restrictions on eligibility for legislative office must be proportionate and should not impair the very essence of the right.[31] In light of this, the Court has previously ruled the following limitations incompatible with article 3: a disqualification of individuals possessing dual or multiple nationality,[32] and a permanent disqualification of citizens previously impeached.[33] However, the Court has stressed that the historical and political evolution of a given State must be taken into account when assessing proportionality, such that eligibility requirements permissible in one state may be unacceptable in another.[34] The Court's jurisprudence on eligibility requirements will be examined in greater detail in Chapter 6 of this thesis when assessing the state's duty to respect.

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[28] *Mathieu-Mohin* ibid, para 53; *Cherepkov v Russia* App no 51501/99 (ECHR, 25 January 2000); *Habsburg-Lothringen v Austria* App no 15344/89 (ECHR, 14 December 1989).

[29] *Mathieu-Mohin* (n 4), para 54.

[30] ibid.

[31] *Zdanoka* (n 25), para 115; *Tanase v Moldova* (2012) 55 EHRR 17, para 161.

[32] *Tanase* (n 31).

[33] *Paksas v Lithuania* App no 34932/04 (ECHR, 6 January 2011).

[34] *Podkolzina v Latvia* App no 46726/99 (ECHR, 9 April 2002), para 33.

In relation to the procedural element, the Court has noted that procedures for determining eligibility for candidacy must contain sufficient safeguards to prevent arbitrary decisions.[35] Therefore, any domestic mechanism for determining eligibility must meet the requirements of legal certainty and procedural fairness.[36] The Court has further highlighted the extent to which many aspects of electoral organization can conceivably implicate the right to candidacy. Election deposits must therefore be proportionate and not excessive so as to constitute an 'impenetrable administrative or financial barrier'.[37] Further, the right has been held to require non-arbitrary and transparent mechanisms for the counting of votes,[38] as well as the presence of fair and impartial complaints procedures in the event of alleged electoral misconduct.[39] These aspects will be explored in greater detail when examining the state's positive duty to fulfil in Chapter 8.

C. RECOGNITION OF THE RIGHT TO CANDIDACY IN INTERNATIONAL HUMAN RIGHTS LAW

Having examined the interpretation of the right to candidacy at the regional level, with a focus on the ECHR, this section now seeks to more broadly assess the recognition and status of the right to candidacy in the wider remit of international human rights law. As noted above, this will be done through the lens of customary international law. This section therefore seeks to

[35] *Podkolzina* (n 34), para 35.

[36] ibid, para 36; *Melnychenko v Ukraine* (2006) 42 EHRR 39, para 59.

[37] *Sukhovetskyy v Ukraine* (2006) 44 EHRR 1185.

[38] *Hajili v Azerbaijan* App no 6984/06 (ECHR, 10 April 2012); *Kerimli and Alibeyli v Azerbaijan* App nos 18475/06 and 22444/06 (ECHR, 04 June 2012); *Kermiova v Azerbaijan* App no 20799/06 (ECHR, 30 December 2010).

[39] *Grosaru v Romania* App no 78039/01 (ECHR, 02 June 2010); *Petkov and Others v Bulgaria* App nos 77568/01, 178/02 and 505/02 (ECHR, 11 September 2009).

assess whether composite instances of the current recognition of the right are sufficient for it to be taken to embody a rule of customary international law.

A great deal has been said about whether it remains useful to classify human rights as rules of customary international law.[40] An equally great deal has been said about the continued usefulness of customary international law as a source of international law in and of itself.[41] While a detailed examination of those arguments lies outside the scope of this thesis, I will seek to briefly defend the basis upon which the question of the right's status as customary international law remains a pertinent one.

I. THE CONTINUED RELEVANCE OF CUSTOMARY INTERNATIONAL HUMAN RIGHTS LAW

With the ever increasing body of treaty law pertaining to human rights, one may question the extent to which classifying human rights norms as customary law remains a necessary, or useful, exercise. A number of widely ratified regional and international treaties espouse both socio-economic and civil and political rights.[42] Further, there are many 'specialised' conventions focusing on the rights of women,[43] children,[44] persons with disabilities[45] and racial

[40] Simma and Alston (n 2); Arthur Weisburd, 'The Effect of Treaties and other Formal Acts on the Customary Law of Human Rights' (1995 – 96) 25 Ga J Intl & Comp Law 99.

[41] NCH Dunbar, 'The Myth of Customary International Law' (1983) Aust YBIL 1; J Patrick Kelly, 'The Twilight of Customary International Law' (2000) 40 VA J Intl Law 449.

[42] International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); American Convention on Human Rights (1969); African Charter on Human and Peoples' Rights (1981).

[43] Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW).

[44] Convention of the Rights of the Child 1989 (CRC).

[45] Convention on the Rights of Persons with Disabilities 2006 (CRPD).

minorities.[46] Notwithstanding the existence of this growing corpus of human rights treaty law, identifying the content of customary international human rights law (CIHRL) remains significant for a number of reasons.

First, while many of these treaties are widely ratified, such ratification is by no means universal. For example, although the ICCPR remains one of the most widely acceded with 167 States Parties, the 26 UN Member States who are not party to the Covenant collectively account for over 20 per cent of the world's population.[47] Similarly, the ICESCR has even less ratifications with a total of 160 States Parties. Customary international human rights law (CIHRL) creates a basis of obligation outside of human rights treaties, the latter only binding those who are party to the instrument in question. On the other hand, customary international law binds all States, except those who are identified as having persistently objected to the rule's formation.[48]

Secondly, CIHRL also affects the legal obligations of States Parties to human rights treaties to the extent that parties cannot make reservations to norms which have attained the status of customary law, given that these remain binding even outside of the convention in question. In its General Comment 24, the UN Human Rights Committee outlined the provisions of the ICCPR which it understood as representing CIL, noting that such provisions may not be

[46] Convention on the Elimination of All Forms of Racial Discrimination 1965 (CERD).

[47] Antigua and Barbuda, Bhutan, Brunei, Burma, China, Comoros, Cuba, the Federated States of Micronesia, Fiji, Kiribati, Malaysia, Marshall Islands, Nauru, Oman, Palau, Qatar, Saint Kitts and Nevis, Saint Lucia, São Tomé and Principe, Saudi Arabia, Singapore, Solomon Islands, South Sudan, Tonga, Tuvalu and the United Arab Emirates. See: Article 19, 'ICCPR Anniversary: Opportunity for Protection of Freedom of Speech' (*Article 19*, 23 March 2012) <http://www.article19.org/resources.php/resource/3001/en/iccpr-anniversary:-opportunity-for-protection-of-freedom-of-speech#sthash.Sn9CZxcF.dpuf> accessed 29 November 2014.

[48] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 28.

the subject of reservations.[49] The rights listed include, inter alia, freedom from slavery, torture and arbitrary arrest, and the right to freedom of religion and conscience.[50]

Thirdly, as some writers have pointed out, the continued relevance of customary human rights norms is perhaps best highlighted when one considers their potential applicability at the domestic level.[51] A number of constitutions directly incorporate CIL as a part of domestic law and confer upon it a status superior to that of domestic legislation;[52] this is in contrast to the position held by treaties which, in many of these jurisdictions, must be expressly incorporated in order to be applicable on the domestic plane and even then, do not hold a status superior to that of municipal statutes.[53]

Further, in some jurisdictions, even where customary international law lacks direct constitutional incorporation, it is still applicable on the domestic plane to the extent that it is held to be a part of the common law.[54] In the UK, customary international law has traditionally been held to be incorporated into the common law and automatically applicable on the domestic plane, subject to the existence of conflicting statutory or judicial authority.[55] This is in contrast to treaty law, which would require incorporation by statute in order to have domestic effect.[56]

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[49] UNHRC General Comment 24, para 8.

[50] Ibid.

[51] Simma and Alston (n 2) 85.

[52] Ibid; Constitution of Austria 1920, arts 9 and 44; Basic Law of Germany 1949, art 25; Constitution of Italy 1947, art 10; Antonio Cassese, *International Law* (2nd edn, OUP 2005) 225, 229 – 230. See also the Constitution of South Africa 1996, ss 231 – 232.

[53] Ibid.

[54] *R v Jones* [2006] UKHL 16, para 11 – 23; *R v Hape* [2007] 2 SCR 292, para 39 (Supreme Court of Canada); *PUCL v Union of India* [1997] 1 SCC 301 (Supreme Court of India).

[55] Brownlie (n 48) 67; *Triquet v Bath* (1764) 3 Burr 6 BILC; *Trendex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 273; *Chung Chi Cheung v The King* [1939] AC 160, 167 – 8.

[56] Given the dualist tradition in the UK, treaties must be incorporated by an Act of Parliament in order to have domestic effect. See Brownlie (n 48) 62 – 67.

Similarly, in the United States, customary international law has traditionally been held to form a part of the federal common law,[57] even though the precise extent of CIL's domestic applicability in the US remains a contentious issue.[58]

The importance of domestic enforceability is underscored when one looks at the limits of enforcement on the international plane. Of the 167 States Parties to the ICCPR, only 114 have ratified the First Optional Protocol which grants the Committee competence to consider individual complaints of alleged violations.

Given the important and unique status which CIL occupies on both the international and domestic plane, it is imperative that legal scholarship in the field be dedicated to unearthing the content of customary international human rights norms, as this growing body of law continues to evolve. This is particularly so in light of the fact that writings of highly qualified publicists are accepted as a subsidiary means for determining the rules of international law.[59] It is also no secret that there is a great deal of judicial reliance on such writings at both the domestic and international levels. Yet, academics in the field have largely neglected to carry out meaningful and methodical ongoing examinations as to whether particular human rights now amount to CIL.[60] This section therefore attempts to address this forsaken, yet no doubt important, issue of customary human rights law as it pertains to the right to candidacy.

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[57] *Filartiga v. Peña-Irala*, 630 F.2d 876, 885–86 (2d Cir. 1980); *Restatement (Third) of the Foreign Relations Law of the United States*; Jordan Paust, 'Customary International Law and Human Rights Treaties are Law of the United States' (1998 – 9) 20 Michigan Journal of International Law 301.

[58] Curtis Bradley and Jack Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110 Harv L Rev 816; Carlos Vazquez, 'Alien Tort Claims and the Status of Customary International Law' (2012) 106 AJIL 531.

[59] Statute of the ICJ, art 38(1)(d).

[60] Elizabeth Stubbins-Bates, 'From Assertion to Solid Methodology in Customary International Human Rights Law' (2009) 103 ASIL Proceedings 492, 493; Lillich (n 2) 7.

II. EXISTING APPROACHES TO CUSTOMARY INTERNATIONAL HUMAN RIGHTS LAW

Article 38 of the Statute of the ICJ lists as one of the sources of international law, 'international custom, as evidence of a general practice accepted as law'.[61] Customary international law is therefore generally considered as having two components: (i) state practice and (ii) opinio juris (the belief that such practice amounts to a binding legal obligation).[62] Competing approaches to CIL view these requirements in different ways. The 'traditional' approach to custom emphasizes the requirement of state practice and views such practice as primarily limited to physical, inter-state conduct as opposed to statements and declarations, which are viewed exclusively as *opinio juris*.[63] Legal rules are therefore generated from an inductive process which has material practice at its base.[64] In contrast, the 'modern' approach to custom emphasizes *opinio juris* by taking into account treaties, statements and resolutions as the basis from which rules of custom may subsequently be deduced; such 'paper practice' is taken as a sufficient basis for the formation of customary norms.[65]

Customary human rights norms have generally been understood as emerging from more modern approaches to custom given the difficulties associated with giving primacy to material state practice in the field of human rights.[66] Evidence of state practice and opinio juris have been taken to include ratification of human rights treaties, UNGA resolutions, state legislation

[61] Statute of the ICJ, art 38(1)(b).

[62] Brownlie (n 48) 23 – 25; *Restatement* (n 57); *North Sea Continental Shelf Cases* ICJ Reports (1969) 3.

[63] Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757, 759.

[64] Roberts (n 63) 758; Simma and Alston (n 2) 88.

[65] Ibid.

[66] Isabelle Gunning, 'Modernising Customary International Law: The Challenge of Human Rights' (1991) 31 VJIL 212, 213; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (OUP 1991) 113.

and judicial decisions.[67] However, this approach has been criticized for idealistically prioritising substantive normativity at the expense of descriptive accuracy,[68] to the extent that the conferral of customary law status often does not accord with the actual practice of states, where human rights violations with impunity remain present.[69] For this reason it has been feared that the modern approach, particularly in its application to human rights, risks jeopardizing the legitimacy of not only international human rights law, but also of CIL as a source of law.[70]

There exists no clear consensus among human rights scholars on the current content of CIHRL, or on the methodology for ascertaining what that content is. Some writers, such as Waldock, have taken the view that the UDHR in its entirety, now embodies CIL.[71] Others have made the case for the formation of 'instant custom' by virtue of international consensus on particular human rights conventions and resolutions.[72] Yet, these approaches appear to stretch the notion of custom beyond the boundaries of even the most elastic conceptions of the term. Many are in agreement that a more methodical approach, employing extensive empirical investigation, and which examines the status of individual rights, admits of greater accuracy and is to be preferred.[73] More contentious is the question of the type of state practice which

[67] Roberts (n 63) 759; Hannum (n 5); See also Brian Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2010).

[68] Roberts (n 63); Weisburd (n 40).

[69] Roberts (n 63).

[70] Meron (n 66) 81.

[71] Humphrey Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention* (1965) 15.

[72] Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 Am U Law Rev 1, 17.

[73] Meron (n 66) 94; Stubbins-Bates (n 60) 493; Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers 1991) 335 – 42; Lepard (n 67) 319.

should form the basis of such empirical examination, and the relative weight to be accorded to it.[74]

The 1987 Restatement on US Foreign Relations Law, published by the American Law Institute, stands as one of the most persuasive statements within the United States on the content of CIHRL. In explaining its methodology, the authors of the Restatement list as evidence of custom formation: the preparation and adoption by States of regional and international human rights instruments, adherence to such instruments including the incorporation of human rights norms in national constitutions and laws, the support of UN resolutions espousing human rights, and the condemnation, or other adverse reaction, to those States which violate the given norm.[75] Meron endorses the Restatement's list as 'extremely useful', noting further that international human rights instruments cannot be assessed in isolation, but must be understood in the context of the surrounding practice on both the international and domestic planes.[76] A similar approach was adopted by the International Law Association (ILA) in its 1994 study on the customary status of rights contained in the UDHR, wherein evidence of states' beliefs were drawn from domestic legislation and judicial decisions as well as submissions to international tribunals and organisations.[77]

[74] Meron (n 66) 132.

[75] *Restatement* (n 57), section 702 (volume 2).

[76] Meron (n 66) 131.

[77] International Law Association, 'Final Report on the Status of the UDHR in National and International Law' (1994) 66 ILA Report Conference 525.

III. APPROACH EMPLOYED IN ASSESSING THE CUSTOMARY STATUS OF THE RIGHT TO CANDIDACY

More recent enquiries into the content of CIHRL have all favoured the latter approach of detailed empirical examinations which include mapping recognition at both the national and international level.[78] This is the approach that will be adopted in the present case, subject to two qualifications.

First, as noted above, the empirical approach to CIHRL rightly emphasizes the investigation of a wide cross-section of relevant sources in order to assess *opinio juris* and state practice. Given the obvious constraints of time and space, this examination has been limited to the sources listed below; the extent to which they provide relevant evidence of state practice and *opinio juris* will be assessed:

(i) International and Regional Treaties;

(ii) UNGA Resolutions;

(iii) Recognition of the right in national constitutions; and

(iv) State Responses to International Election Observation Missions.

Secondly, this assessment differs from previous approaches to the extent that the aforementioned studies sought only to answer the question of whether or not a given norm possessed customary status; no attention was given to an intermediate position. Yet, when one considers that the maturation of norms into custom remains a gradual process, it is important to map the progress of particular rights in this process as opposed to focusing merely on whether this maturation has been completed. This examination will seek to assess the position of the right to candidacy on the continuum between non-binding ideals and crystallised custom,

[78] Stubbins-Bates (n 60); Lepard (n 67).

as well as the direction in which the right may be moving on that continuum, if it has not yet fully crystallized. It is submitted that this 'progress mapping' approach can assist in strengthening the legitimacy of CIHRL, given that an eventual finding of crystallisation into custom possesses greater credibility when backed by a series of interim examinations which highlight how recognition and implementation of the right in question has to come increase over time. In this vein, this examination will also seek to highlight whether recognition of the right to candidacy has been trending upwards or downwards in recent times.

[a] International and Regional Treaties

The extent to which multilateral treaties may be taken as evidence of customary international law, has been the subject of much debate.[79] It is generally accepted that there are two primary ways in which a treaty may reflect customary law. First, a treaty may be taken to represent a codification of customary international law as it existed at the time of the treaty's drafting.[80] The second instance is where a treaty norm, which did not originally represent custom, later crystallizes into such.[81] In both instances, both the treaty law and customary norm continue to exist alongside each other, each possessing its own separate identity.[82] The extent to which each of these methods may be said to apply to the treaty provisions espousing a right to candidacy will be assessed in turn.

[79] Weisburd (n 40); Anthony D'Amato, 'Custom and Treaty: A Response to Professor Weisburd' (1988) 21 Vand J Transnational Law 459; Anthony D'Amato, 'Treaties as a Source of General Rules of International Law' (1962) 3 Harv Intl LJ 1; Richard Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965-66) 41 BYIL 275.

[80] Baxter (n 79).

[81] Baxter (n 79); See also Vienna Convention of the Law of Treaties, art 38: 'Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as customary rule of international law, recognised as such.'

[82] Brownlie (n 48) 33.

The right to stand for election and/or the right to participate directly in the government of one's country finds expression in the following human rights instruments:

(i) Universal Declaration of Human Rights (1948): Article 21 notes that 'Everyone has the right to take part in the government of his country, directly or through freely chosen representatives';

(ii) International Covenant on Civil and Political Rights (1966): Article 25 guarantees the rights 'to vote and be elected at genuine periodic elections';

(iii) American Convention on Human Rights (1969): Article 23 also espouses the rights 'to vote and be elected' in genuine periodic elections; and

(iv) African Charter on Human and Peoples' Rights (1981): Article 13 guarantees that every citizen shall have the right to participate directly in the government of his country.

None of these instruments expressly declare to be codifications of customary international law. As Baxter notes, in such an instance one must have resort to the *travaux preparatoires* in order to see if States were of the belief, at the time of drafting, that the provision in question embodied an existing principle of international law *dehors* the treaty.[83] Regarding the UDHR, as noted above, the drafting history reveals that the right to participate in government was not widely recognised by States as at the time of drafting. Of the 50 constitutions examined by the Drafting Committee in a 1947 survey, only 4 contained an express right to be elected.[84] The eventual rejection of the express rights to be elected and to hold public office, which were put forward by the USSR,[85] also signals that States were generally not of the belief that there was, at that point, an existing customary right to directly participate in government or to stand for election.

[83] Baxter (n 79) 287.

[84] China, Ecuador, USSR and Yugoslavia. See UN doc E/CN.4/AC.1/3/Add.1 256 – 265.

[85] See UN Doc E/CN.4/AC.1/3/Add.1 256 - 265.

The drafting history of the ICCPR reveals similar tensions which would make one hesitant to accept that the right's inclusion was borne out of an intention to codify an existing customary norm, or indeed that such a norm existed at the time.[86]

The second, and more plausible, alternative is that the norm may be said to have crystallized into custom over time. In the *North Sea Continental Shelf Cases*,[87] the ICJ noted that there is 'no doubt' that such a process 'constitutes one of the recognized methods by which new rules of customary international law may be formed'.[88] Yet the court cautioned that 'this result is not lightly to be regarded as having been attained',[89] before going on to outline some of the criteria for this process. Focus will be placed on the extent to which the right to candidacy, specifically as it is embodied in article 25 of the ICCPR, may be said to have fulfilled these criteria and matured into custom.

Article 25(b) of the ICCPR states: 'Every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions… to be elected at genuine periodic elections…'[90] The court in *North Sea Continental* went on to note that the first hurdle to be surmounted is that the provision must be 'of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of

[86] See UN Doc A/C.3/SR.291; UN Doc E/CN.4/353, Add.2 p 8; UN Doc E/CN.4/SR.364 p 14 for objections raised by Uruguay, United Kingdom and Belgium on the inclusion of electoral rights.

[87] *North Sea Continental* (n 62).

[88] ibid para 71.

[89] ibid.

[90] The distinctions listed in article 2 include freedom from discrimination on the basis of: race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status.

law'.[91] To this end, the ICJ noted that 'unresolved controversies' regarding the 'exact meaning and scope' of a principle may compromise its norm-creating character.[92]

Article 25(2) of the ICCPR may be said to be fundamentally norm-creating in that it lays down a general rule in obligatory terms, noting that every citizen 'shall have the right'. However, some may argue that the right to candidacy remains too indeterminate in scope to embody a general rule of custom given the 'unresolved controversies' as to its meaning and scope. Indeed, given that this thesis, in its entirety, is dedicated to uncovering the 'content' of the right, how then can one be seeking to establish the right's status without having first ascertained what that content is? In response, it is useful to point out Meron's distinction between 'the definition of the core norm claiming customary law status' and the 'contours of the norm'.[93] While there may not yet be consensus on the contours of the norm, it is still useful to carry out an initial inquiry into whether the core definition of the norm is widely accepted. In this vein, the question is whether the opportunity to stand for election is regarded as a human right, guaranteed to all citizens subject only to reasonable restrictions. The fact that there is a lack of universal consensus on which restrictions are reasonable, does not preclude a finding that the general principle of candidacy as a protectable human right has passed into the corpus of customary law. Similarly, the 1994 ILA report noted that many viewed the right to a fair trial as representing custom on a general level, without specifying which components of the right were necessarily included.[94] It may therefore be fair to conclude that the right to candidacy embodied in article 25(b) of the ICCPR is of a fundamentally norm-creating character and lays down a general rule of law.

[91] *North Sea Continental* (n 62) para 72.

[92] ibid.

[93] Meron (n 66) 93.

[94] ILA Report (n 77) 547.

Of the additional criteria for a conventional rule to be passed into custom, the court noted the importance of 'a very widespread and representative participation in the convention'.[95] As Lepard notes, the wideness of a treaty's ratification is a factor to be taken into account when looking at its weightiness as evidence of state practice and/or *opinio juris*.[96] Baxter outlines that 'the weight that the treaty will carry is roughly proportionate to the number of parties to the treaty'.[97] In the case of the ICCPR, there are 167 States Parties, only 4 of which have made a reservation to the full application of the right to stand for election.[98] 163 states therefore fully recognise the right as laid down in the ICCPR. This factor, taken in isolation, is of course not sufficient to establish the creation of a customary norm. As Meron notes, one must look at 'the degree to which a statement of a particular right in one human rights instrument, especially a human rights treaty, has been repeated in other human rights instruments'. To this end, it is noted that the guarantee in the ICCPR is also included in the American Convention on Human Rights (23 States Parties), the African Charter on Human Rights (53 States Parties) and the International Convention on the Elimination of All Forms of Racial Discrimination (175 States Parties).[99] The right to candidacy has also been included in the following regional and international declarations: (i) Declaration of Principles for International Election Observation (2005) (ii) African Union Declaration on the Principles governing Democratic Elections in Africa (2002) (iii) Code of Good Practice in Electoral

[95] *North Sea Continental* (n 62), para 73.

[96] Lepard (n 67) 194.

[97] Baxter (n 79) 277.

[98] Kuwait, Mexico, Monaco and Pakistan. See United Nations Treaty Collection <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> accessed 30 November 2014.

[99] Article 5(c).

Matters (Venice Commission, 2002) and (iv) Declaration on Criteria for Free and Fair Elections (Inter-Parliamentary Union, 1994).

Some may challenge whether this repeated conventional recognition, even when taken cumulatively, should be regarded as state practice towards the development of a customary norm given that, in each instance, states are propounding the rule within the context of a particular treaty-based obligation and not as a general rule of international law.[100] However, as Lepard notes, treaties reflect the views of ratifying states about whether a particular norm should be legally implemented.[101] Repeated inclusions of the norm in a number of different instruments signal a general commitment of States to the norm in question and a growing acceptance of it as a rule to which they should be bound. The inclusion of the rule during drafting and subsequent ratifications no doubt represent relevant 'state practice'.[102]

While such practice remains relevant, it may not in and of itself be sufficient to point to the creation of a customary norm. It is also important to look at the incorporation of the rule in national constitutions as well as the impact of any relevant UNGA resolutions. These will be addressed in turn. Special attention will also be placed on the actions of States which are not party to any of the aforementioned conventions and to the actions of States before they became parties. This is on the basis of the concern raised by some writers that the actions of State parties to a particular treaty remain problematic indicators of whether that treaty has crystallised into custom, given that the State in question may likely be acting pursuant to the treaty obligation and would therefore lack the requisite opinio juris.[103] Many are in agreement that this concern is somewhat exaggerated and that the actions of State Parties should be

[100] Weisburd (n 40); W Hall, *International Law* (8th edn, Higgins 1924) 7 – 8.

[101] Lepard (n 67) 191.

[102] D'Amato (n 79); Brownlie (n 48).

[103] Baxter (n 79); D'Amato, 'Treaties as a Source of General Rules' (n 79) 5.

included as relevant state practice.[104] While I agree with the latter approach, the action of non-parties will still be highlighted in order to strengthen the case for the development of a customary rule *dehors* the applicable treaty law.

[b] UN General Assembly Resolutions

Although General Assembly resolutions are not binding, the ICJ has held that opinio juris may be deduced from the attitude of States towards such resolutions, noting that consenting votes 'may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves'.[105] The Court went further in the *Nuclear Weapons Advisory Opinion*[106] to outline the following factors which should be examined when assessing the evidentiary weight of GA resolutions in establishing *opinio juris*: (i) the content of the resolution (the extent to which it lays down rules of general application or calls for follow-up or implementation)[107] (ii) conditions of its adoption (degree of support or consensus by which it was adopted)[108] and (iii) the number of resolutions adopted on the matter (greater evidentiary weight being accorded if multiple resolutions espouse the norm).[109]

Several General Assembly resolutions have been passed explicitly in the furtherance of promoting and consolidating democracy. These include the 2005 UNGA resolution 59/201 on enhancing the role of regional organisations in promoting democracy (approved by 172 states

[104] Lepard (n 67) 197; Theodor Meron, 'Revival of Customary Humanitarian Law' (2005) 99 AJIL 817, 833.

[105] *Nicaragua Case* [1986] ICJ Rep 14, para 188.

[106] [1996] ICJ Rep 226.

[107] *Nuclear Weapons* ibid para 70; See also Lepard (n 67) 212; Schachter (n 73) 89.

[108] *Nuclear Weapons* ibid; Lepard (n 67) 213; Blaine Sloan, 'General Assembly Resolutions Revisited' (1987) 58 BYIL 39, 130 – 131.

[109] *Nuclear Weapons* ibid.

with no rejections and only 15 abstentions)[110] and the 2001 UNGA resolution 55/96 on 'promoting and consolidating democracy' (approved by 150 states with no rejections and only 16 abstentions).[111] Each of these documents lists the right to stand for election as an 'essential element of democracy'.[112] The large number of affirmative votes for both resolutions, along with the absence of votes against, signal a strong level of consensus on the norms contained therein. Further, this support included that of a number of States which do not have an international treaty obligation to guarantee a right to candidacy.[113]

Regarding the text of the resolutions, UNGA Res 59/201 calls for specific follow-up and implementation actions which States and regional organisations are requested to make.[114] Writers have noted that the existence of such implementation measures signal that the resolution should be considered as possessing particularly persuasive authority as evidence of *opinio juris*.[115]

[c] National Constitutions

The extent to which a given right has been incorporated by States at the national level is also a relevant indicator of whether it has attained customary law status. As Lepard notes, constitutions enjoy 'significant evidentiary weight' given the extent to which 'they constitute a supreme legal

[110] *UNGA, Enhancing the role of regional, sub-regional and other organisations and arrangements in promoting and consolidating democracy,* UN Doc A/RES/59/201 (23 March 2005).

[111] UNGA, *Promoting and consolidating democracy*, UN Doc A/RES/55/96 (4 December 2000).

[112] See UN Res 59/201, para 1; UN Res 55/96, para 1(d).

[113] In the case of UN Res 59/201, the following States without treaty obligations voted in favour: Antigua and Barbuda; Fiji; Malaysia; Marshall Islands; Micronesia; Nauru; Palau; Solomon Islands, Tuvalu, St Lucia, South Korea. See Annex XVI at http://www.un.org/News/Press/docs/2004/ga10321.doc.htm (accessed 30 November 2014); In the case of UN Res 55/96, the following States were among those which voted in favour: Antigua, Fiji, Micronesia, Malaysia, Nauru, Palau, Marshall Islands, South Korea, St Kitts, St Lucia, Solomon Islands. See Annex VI at http://www.un.org/News/Press/docs/2000/20001204.ga9842.doc.html (accessed 30 November 2014).

[114] UN Res 59/201, paras 8, 11 – 12, 15.

[115] Lepard (n 67) 213; Sloan (n 108) 130 – 131.

authority in domestic legal systems and purport to manifest the highest values of those systems'.[116] Given limitations of time and space, it was therefore chosen to limit the enquiry to States' constitutions and domestic bills of rights. To the extent that such rights were outlined in extra-constitutional Charters, Declarations or Basic Laws, these were also examined. However, ordinary legislation and domestic judicial decisions were not assessed.

The constitutions of 155 States were examined in order to assess the extent to which the opportunity to stand for elective office was granted any measure of recognition as a human right. The sample of States selected include 116 States characterized as 'electoral democracies' according to the latest survey conducted by Freedom House.[117] This annual survey seeks to measure the extent of enjoyment of political rights and civil liberties worldwide through the assessment of indicators including the fairness of the State's electoral framework, enjoyment of freedom of association and the extent of governmental openness and transparency.[118] An additional 39 States were selected which, though failing to attain the categorization of 'electoral democracy', possessed fairly satisfactory 'freedom' ratings and may be said to espouse the formal tenets of democracy, even if its full manifestation in substance remains wanting.[119]

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[116] Lepard (n 67) 175.

[117] See Freedom House, 'Freedom in the World 2014: Democratic Breakthroughs in the Balance' <https://freedomhouse.org/sites/default/files/Freedom%20in%20the%20World%202014%20Booklet.pdf> accessed 30 November 2014. Albania, Andorra, Antigua and Barbuda, Argentina, Australia, Austria, The Bahamas, Bangladesh, Barbados, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Canada, Cape Verde, Chile, Colombia, Comoros, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, East Timor, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guyana, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kiribati, Latvia, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malawi, Malta, Marshall Islands, Mauritius, Mexico, Micronesia, Moldova, Monaco, Mongolia, Montenegro, Namibia, Nauru, Netherlands, New Zealand, Niger, Norway, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, St Kitts and St Lucia, St Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, South Korea, Spain, Suriname, Sweden, Switzerland, Taiwan, Tanzania, Thailand, Tonga, Trinidad and Tobago, Tunisia, Turkey, Tuvalu, Ukraine, United States, Uruguay, Vanuatu, Zambia.

[118] Freedom House ibid.

[119] Algeria, Angola, Armenia, Azerbaijan, Bhutan, Burkina Faso, Burundi, Cambodia, Cameroon, Central African Republic, Congo (Brazzaville), Congo (Kinshasa), Cote d'Ivoire, Djibouti, Fiji, Gabon, Gambia, Guinea, Guinea-

States with at least some measure of commitment to democratic governance were chosen on the basis that such States provide the most fitting context in which to examine the recognition of electoral rights.[120]

The claim is not being made that the 155 states chosen are the only states which espouse democratic ideals. Rather, to the extent that the limitations of time necessitated a sample size less than the approximately 195 states currently in existence, the list was circumscribed based on other factors such as the existence, or lack thereof, of a written constitution or domestic bill of rights and the availability of such instruments.

Extent of Domestic Recognition

For the purposes of this examination, the right was taken to be recognised, not only in constitutions which contain an express right to candidacy, but also in those which include a more general right to direct participation in government or a right to hold public office, which may reasonably be said to subsume the more specific right to stand for election. To this end, three categories of recognition were identified:

[i] Express Right to Candidacy:

Approximately 27% of total constitutions examined (42 of the 155) contained an express right to stand for election.[121] Examples of this include the guarantee found in section 23 of the Hungarian Constitution:

Bissau, Haiti, Honduras, Kenya, Lebanon, Malaysia, Maldives, Mauritania, Morocco, Mozambique, Nicaragua, Nigeria, Pakistan, , Rwanda, Singapore, Solomon Islands, South Sudan, Togo, Uganda, Venezuela.

[120] A similar approach was adopted by the Democracy Coalition Project in a 2003 publication on the International Status of the Right to Vote. The sample States selected were the then 119 electoral democracies as recognised by Freedom House. See Alexander Krishner, 'International Status of the Right to Vote' (Democracy Coalition Project 2003).

[121] Albania, Algeria, Angola, Azerbaijan, Cambodia, Canada, Colombia, East Timor, Ecuador, Gambia, Ghana, Guatemala, Honduras, Hungary, Israel, Kenya, Lesotho, Lithuania, Malawi, Maldives, Marshall Islands, Mexico,

> Every adult Hungarian citizen shall have the right to be a voter as well as a candidate in the elections of Members of Parliament, local representatives and mayors, and of members of the European Parliament.

Another formulation of the express right to candidacy can be found in section 19(3)(b) of the Constitution of South Africa:

> Every adult citizen has the right to stand for public office and, if elected, to hold office.

[ii] Right to Hold Public Office:

Approximately 12% of constitutions examined (20 of 155) contained a right of access to public office on general terms of equality.[122] For example, section 12 of the Constitution of Lebanon states:

> Lebanese shall have the right to hold public office, no preference being made except on the basis of merit and competence, according to the conditions established by Law.

Similarly, section 21(4) of the Czech Republic Constitution provides:

> Citizens shall have access to any elective and other public office under equal conditions.

[iii] Right to Direct Participation in Government:

8.3% of constitutions examined (14 of 155) contained a more general right to participate directly in the administration of public affairs,[123] similar to the formulation contained in article 21 of the UDHR. Article 45(3) of the Constitution of Rwanda provides:

> All citizens have the right to participate in the government of the country, whether directly or through freely chosen representatives in accordance with the law.

Moldova, Mongolia, Montenegro, Namibia, Netherlands, New Zealand, Nicaragua, Papua New Guinea, Peru, Romania, Russia, San Marino, Serbia, Seychelles, Slovenia, South Africa, South Sudan, Tanzania, Turkey, Ukraine.

[122]Andorra, Argentina, Czech Republic, El Salvador, Georgia, Germany, Italy, Lebanon, Macedonia, Mauritania, Morocco, Paraguay, Portugal, Sao Tome and Principe, Slovakia, South Korea, Spain, Taiwan, Uganda, Venezuela.

[123] Armenia, Bolivia, Brazil, Burundi, Cape Verde, Croatia, Czech Republic, Paraguay, Portugal, Rwanda, Sao Tome and Principe, Slovakia, Spain, Venezuela.

7 of the constitutions examined contained both a right to direct participation and a right of access to public office.[124]

On the whole, taking all three categories combined, a total of 69 countries (of the 155 examined) recognise, in some way, standing for elective office as a constitutionally protected right. This is approximately 44% of constitutions examined. Not surprisingly, there was much greater recognition of the right to vote: 78% of constitutions examined recognised an express right to vote (121 of 155).

The pie chart below illustrates the percentage breakdown of each of the subcategories discussed above, as reflected in the 44% of States which recognise the right to candidacy. All percentages displayed represent percentages of the whole sample: 155 States.

[124] Czech Republic, Paraguay, Portugal, Sao Tome and Principe, Slovakia, Spain, Venezuela.

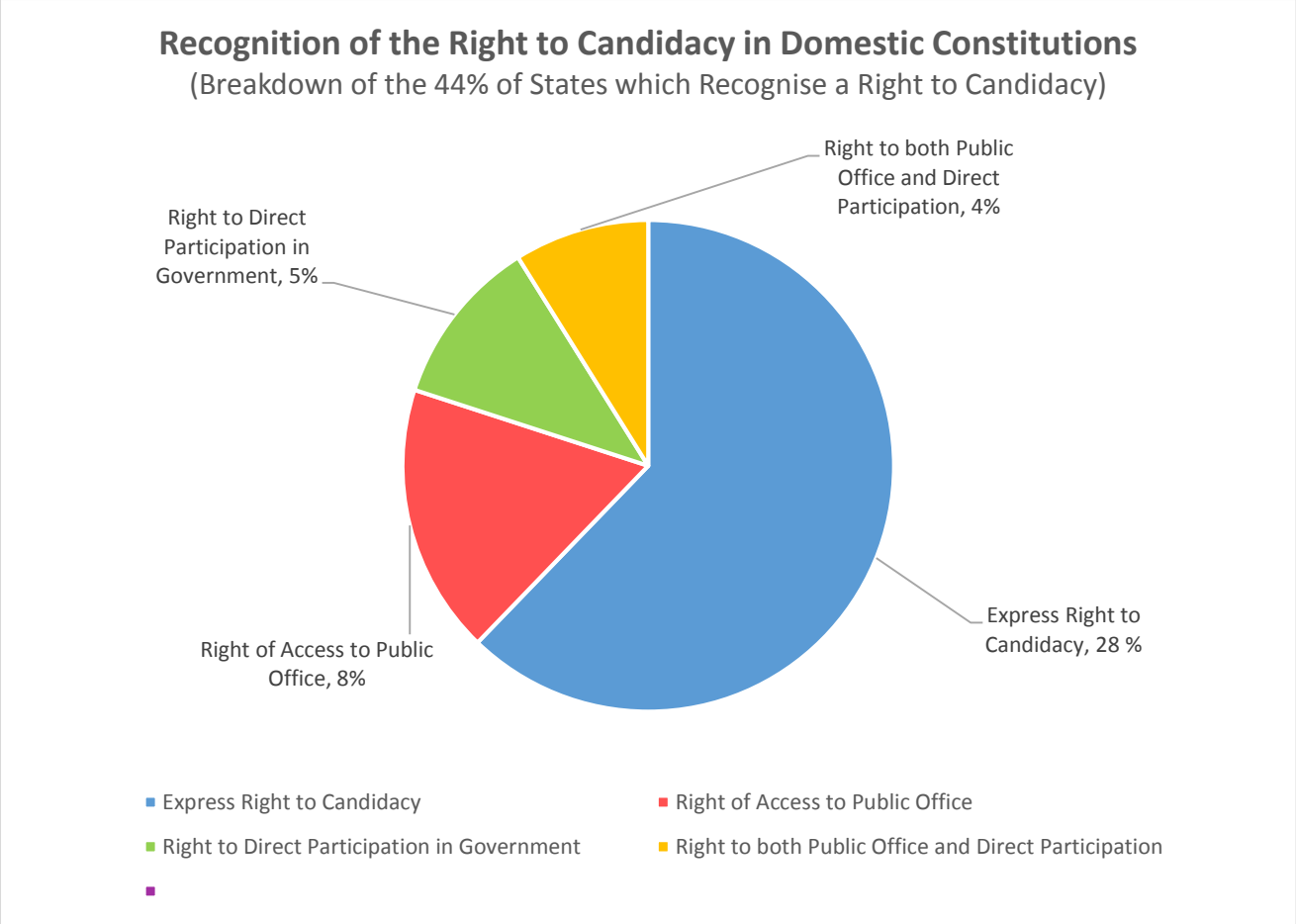

Figure 1: Recognition of the Right to Candidacy in Domestic Constitutions

It is generally accepted that uniformity or universality of practice is not required for the formation of a customary rule.[125] What is necessary is consistency and generality of practice. Domestic recognition of the right in 44% of States examined, therefore points encouragingly toward the right's growing recognition, (even if not full crystallisation as custom), particularly when one bears in mind that this figure only represents 'constitutional' recognition and may therefore be higher if other forms of domestic recognition were examined. Further, of the 86 States which did not recognise the right at the constitutional level, 71 of these states recognise the right in one or more treaties at the international level.

[125] Brownlie (n 48), 24 – 25.

For reasons noted above, special regard was also had to the practice of States which did not have an international treaty obligation to recognise the right. Of the 17 countries which currently lack a treaty obligation to guarantee the right,[126] 4 of these countries recognise the right at the constitutional level.[127] It is also noteworthy that 19 countries gave constitutional recognition to the right before their ratification of, or accession to, the human rights treaty instruments to which they are currently party.[128] Thus, of the 69 countries which constitutionally recognise the right, 33% (23 of 69) may be said to have done so outside of an obligation imposed by an international treaty.

Mapping Progress and Trends in Recognition

In keeping with the 'progress mapping' approach to custom outlined above, an attempt was made to ascertain whether there were any identifiable trends in the recognition of the right, and whether it may be posited that this recognition was increasing steadily over time. For this purpose, the date of enactment or adoption of the relevant domestic instrument was used in order to make comparisons across decades. It is noted that assessing the date of enactment does not provide a comprehensive representation of such trends given that the right may have been introduced in subsequent amendments after the instrument was adopted. Further, it may be that these rights were previously recognized in an earlier version of the constitution, now repealed. Notwithstanding, the patterns revealed by looking at the date of enactment still provide a fairly

[126] Antigua and Barbuda, Bhutan, Fiji, Kiribati, Malaysia, Marshall Islands, Micronesia, Nauru (signed ICCPR but haven't ratified it), Palau (signed ICCPR but haven't ratified it), Solomon Islands, South Korea, South Sudan, St. Kitts, St. Lucia, Taiwan, Tonga, Tuvalu.

[127] Marshall Islands, South Korea, South Sudan, Taiwan.

[128] Algeria (1976), Andorra (1993), Austria (1929), Azerbaijan (1978), Brazil (1988), Croatia (1990), East Timor (2002), Germany (1949), Israel (1958), Italy (1947), Lebanon (1927), Macedonia (1991), Mexico (1917), Monaco (1962), Namibia (1990), Papua New Guinea (1995), Portugal (1976), San Marino (1974), Slovenia (1991).

accurate picture of the general direction in which levels of recognition may be moving. Comparisons were made between the percentage of constitutions adopted in each decade, which recognised a right to candidacy and/or a right to vote. It was revealed that these electoral rights have been gaining more recognition over time and appear much more widely in instruments dated after 1990. Figures 2 and 3 demonstrate these findings.

Time Period	Total No. of Constitutions Examined	Total with Right to Vote	Total with Right to Candidacy	Percentage of Constitutions with Right to Vote	Percentage of Constitutions with Right to Candidacy
2001 – 2011	24	22	15	91.6%	62.5%
1990 – 2000	58	54	34	93.1%	58%
1980 – 1989	18	15	7	83.3%	38%
1970 – 1979	19	13	7	68.4%	36%
Pre 1970	36	18	9	50%	25%

Figure 2: Recognition of the Right to Candidacy and Right to Vote

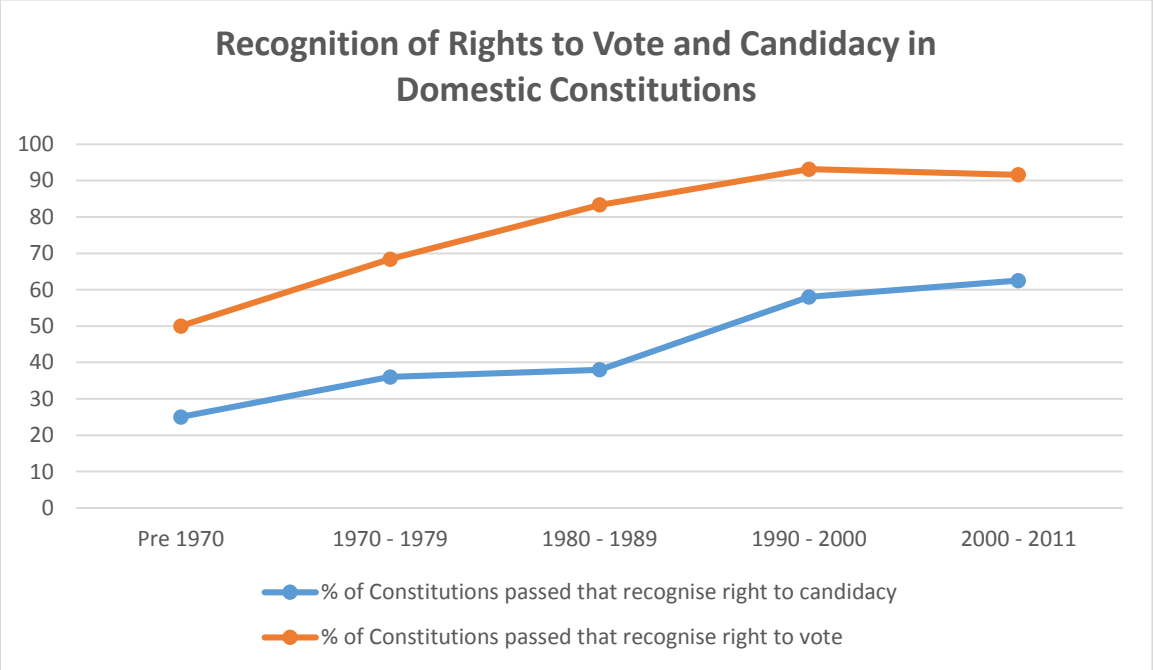

Figure 3: Temporal Recognition of Rights to Vote and Candidacy in Domestic Constitutions

[d] International Election Observation

Election observation missions have increased exponentially in the past few decades with some 80% of elections in non-established democracies now being monitored by international observers.[129] Organisations engaging in election monitoring include many influential regional intergovernmental bodies such as the Organisation of American States (OAS), the African Union (AU), the Commonwealth Secretariat, the Organisation for Security and Co-operation in Europe (OSCE) and the European Commission. As one author notes, election monitoring has fast become an 'international norm',[130] with many States inviting observers in an attempt to gain greater local and international faith in the legitimacy of their democratic processes.[131] The last three decades have witnessed a dramatic shift in the international landscape whereby domestic elections are no longer viewed to be within the exclusive purview of States; instead, there is an increased regional and international interest in such processes and a reciprocal willingness of States to have these processes open to review and critique.[132] This change in landscape has undoubtedly increased the recognition of the right to candidacy at the international and regional levels.

In 2005, the UN published a 'Declaration of Principles for International Election Observation' which was endorsed by over 20 NGOs and intergovernmental organisations involved in election monitoring, including all of the regional organisations mentioned above. This Declaration repeatedly refers to the right to stand for election as an 'internationally

[129] Judith Kelley, 'The Good, The Bad and The Ugly: Rethinking Election Monitoring' (International IDEA 2012) <http://www.idea.int/democracydialog/upload/the-good-the-bad-and-the-ugly-rethinking-election-monitoring.pdf> accessed 30 November 2014.

[130] Susan Hyde, *The Pseudo-Democrat's Dilemma: Why Election Observation has become an International Norm* (Cornell University Press 2011) 1.

[131] Ibid.

[132] Judith Kelley, 'Election Monitoring: Power, Limits and Risks' (Council of Foreign Relations 2012) <www.cfr.org/elections/election-monitoring-power-limits-risks/p27772> accessed 30 November 2014.

recognized human right'.[133] Paragraph 2 of the Declaration states that the endorsing organisations have joined to declare that:

> … everyone has the right and must be provided with the opportunity to participate in the government and public affairs of his or her country, without any discrimination prohibited by international human rights principles and without any unreasonable restrictions. This right can be exercised directly, by participating in referenda, standing for elected office and by other means, or can be exercised through freely chosen representatives.[134]

The right is also expressly recognised in the handbooks and manuals on election observation published by various monitoring organisations,[135] the protection of which being understood as one indicia of a free and fair election. Disproportionate restrictions on the right have been the subject of censure and critique in a number of observation reports,[136] signalling intolerance for the violation of the right among the international community.

One key question to be addressed is the relevance and weight of such pronouncements and declarations by international and intergovernmental organisations in the process of custom formation. The traditional view is that only state interactions can directly produce custom, to the extent that state interaction with non-state actors do not count as 'state practice'.[137] However, a more moderate approach has emerged regarding actions of regional and intergovernmental organisations as a relevant source of state practice, namely that they embody

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[133] Declaration of Principles for International Election Observation, p 1 – 2.

[134] Ibid.

[135] General Secretariat of the OAS, 'A Manual for OAS Electoral Observation Missions' (OAS October 2007) p 8 <http://www.oas.org/sap/docs/deco/361247_oas%20manual%20ingles.pdf> accessed 30 November 2014; OSCE/ODIHR, 'Election Observation Handbook' (6th edn, OSCE/ODIHR 2010) p 18 <http://www.osce.org/odihr/elections/68439?download=true> accessed 30 November 2014.

[136] OSCE/ODIHR, 'Principality of Monaco: Election Expert Team Final Report on Parliamentary Elections of 10 February 2013' 7 < http://www.osce.org/odihr/elections/101353> accessed 30 November 2014; OSCE/ODIHR, 'Armenia: Election Observation Mission Final Report on Presidential Elections of 18 February 2013' 5 <http://www.osce.org/odihr/elections/101314> accessed 30 November 2014.

[137] Anthony Arend, *Legal Rules and International Society* (OUP 1999) 176; Michael Byers, *Custom, Power and the Power of Rules* (CUP 1999) 78 – 79.

'collective state action',[138] though not having the power to vitiate the weight of conflicting practice by individual states.[139] Gunning rationalizes the latter approach by noting that individual state sovereignty is not compromised given that States have, by their own motion – in the creation of and continued membership in these organisations – effectively 'ceded some of their exclusive ability to generate rules of customary international law'.[140]

The statements and practices of these regional organisations therefore possess some weight as relevant state practice and *opinio juris*. While these statements may not be taken as conclusive evidence of the individual views of each member state in the organisation, their continued membership does count as state practice in affirmation of the right's recognition and enforcement. Further, States' implementation of recommendations made by election observers would also count as relevant state practice. It is unclear what this implementation record has been with regard to recommendations concerning the right to candidacy. However, more generally, research reveals that a fair number of States have made positive changes pursuant to observers' recommendations,[141] signalling that election monitoring, in at least some instances, has the potential to impact the practice and policy of States.

[e] <u>On the Requirement of *Opinio Juris*</u>

While the examples above may prima facie be taken as relevant 'state practice' towards the formation of a customary norm, the requirement of *opinio juris* must also be clearly established. *Opinio juris* is generally understood as a belief that the norm or practice in question is a binding rule of law; practice should therefore be borne out of a sense of legal obligation as

[138] Gunning (n 66).

[139] Gunning (n 66) 222; Lepard (n 67) 280.

[140] Gunning (n 66) 225.

[141] Judith Kelley (n 132).

opposed to mere comity. However, this formulation naturally gives rise to what many writers term the 'paradox of opinio juris'. The authors of the *US Restatement* outlined this paradox in following way:

> Most troublesome conceptually has been the circularity in the suggestion that law is built by practice based on a sense of legal obligation: how, it is asked, can there be a sense of legal obligation before the law from which the legal obligation derives has matured?[142]

Building on the work of Finnis, Lepard suggests that this paradox is best resolved by viewing *opinio juris* not only as a belief by States that the norm *currently* embodies an authoritative rule, but more importantly, a belief that such a rule is *desirable* now or in the near future.[143] This resolves the circularity inherent in the traditional definition and is more consistent with the 'progress mapping' approach outlined above, given that it more accurately reflects a process of gradual maturation. If one applies Lepard's definition of opinio juris, the state practice above evidences a strong desirability of States that the right to candidacy be taken as an authoritative legal norm now, or in the near future. This is evidenced in the wide ratification of multilateral treaties which espouse the right, as well as the wide level of consensus on General Assembly Resolutions as well as declarations on election monitoring which all call for greater protection and recognition of the right in democratic states.

[f] Conclusions Regarding Customary Status

As noted above, the main aim of this examination was not to definitively establish that the right to candidacy has fully crystallised into a norm of customary international law. Such a finding is not an essential pillar on which further arguments rest. Rather, this section sought to highlight the growing measure of recognition at the international level using principles related to custom

[142] *Restatement* (n 57) section 102.

[143] Lepard (n 67) 112; John Finnis, *Authority* (NYU Press 1990) 181.

formation as an analytical tool by which relevant data could be meaningfully organised and examined. However, this section has also sought to contribute to an important but neglected area of human rights law regarding the content of CIHRL. To this end, it is also important to highlight how the right to candidacy has been trending along the continuum towards or away from the end point of crystallised custom.

As noted above, there has been growing recognition of the right at the international level as well as constitutional recognition in 44% of states examined. It is well established that uniformity and universality of practice are not required for the formation of custom, rather only 'generality and consistency of practice'.[144] On this basis, there is a strong case to be made that the right to candidacy is steadily moving towards full crystallisation, particularly when one considers the large number of states which have affirmed the right's existence through treaty ratification and also in General Assembly resolutions. There has also been growing acceptance of the right at the domestic level, with a larger percentage of more recent constitutions including an express right to stand for election. While it may be too soon to argue that full crystallisation has taken place, it is hoped that these findings will form part of further investigations which will continue to map progress in this area.

There is also a strong case which may be made for the right embodying 'regional custom' in the EU. Domestic constitutional recognition among EU Member States remains the highest when compared to all other regions. Further, the robust enforcement of the right through the machinery of the ECtHR underscores that the norm is of a binding legal nature;[145] the Court has highlighted that democracy is a 'fundamental feature of the European Public

[144] North Sea Continental (n 62).

[145] *Mathieu-Mohin v Belgium* (n 4).

Order'[146] and the only system of government compatible with the ECHR.[147] The duty of States to recognise the right is further reiterated in a number of regional documents regarding electoral democracy in the EU.[148]

D. CONCLUSION

The right to candidacy is certainly not merely a matter of domestic constitutional law, as portrayed in the Rawlsian account of human rights in the Law of Peoples.[149] Rather, as this Chapter has established, the right to stand for election is widely recognised in both regional and international human rights law where it has operated as an additional check on governments to ensure that the citizen's right to candidacy is adequately protected within the course of local elections. The growing practice and acceptance of international election observation reveals this important role of accountability and oversight which international human rights law fulfils in this area. This is in stark contrast to the coercive intervention paradigm presented by Rawls in his conception of the purpose of international human rights.[150]

Further, ECtHR jurisprudence provides a meaningful example of binding judicial enforcement of the right at the regional level. The Court has very insightfully recognised that the right possesses both substantive and procedural aspects. Therefore, quite apart from adjudging the proportionality of restrictions on eligibility for office, the court has looked deeper in order to assess whether any procedural or administrative barriers have unjustly or arbitrarily

[146] *United Communist Party of Turkey v Turkey* (1988) 26 EHRR 121, para 45.

[147] Ibid.

[148] Venice Commission, 'The Code of Good Practice in Electoral Matters' adopted by the Commission at its 52nd Session (18 October 2002).

[149] See Chapter 1; Rawls (n 1) 79 - 80.

[150] Ibid.

deprived the applicant of his right to candidacy. This approach resonates deeply with the framework adopted in this thesis, which seeks to holistically assess the nature of the state's duties to respect, protect and fulfil the right to stand. ECtHR jurisprudence will therefore be examined in further detail in Part III of this thesis as one seeks to delineate the nature of the right's institutional implementation.

Having established the recognition and status of the legal right at the regional and international levels, the following Chapter will next provide an overview of the right's recognition at the domestic level in the jurisdictions of Canada and the United States.

CHAPTER 3 –

RECOGNITION OF THE RIGHT TO CANDIDACY IN THE UNITED STATES AND CANADA

A. INTRODUCTION

Chapter Two of this thesis mapped the current recognition of the right to candidacy in international and regional human rights law. The extent of recognition in domestic law was also broadly assessed by looking at a range of national constitutions. Chapter Three now seeks to focus more squarely on the operation of the right at the domestic level by looking specifically at the jurisdictions of the United States and Canada. These two polities will provide the main contextual framework within which further discussions on the right to candidacy, at the domestic level, will be situated. For this reason, it is first necessary to gain an understanding of the extent of the right's recognition in these jurisdictions before making any normative claims about the content of the right, or the desirable scope of its protection. This Chapter also provides a general overview of the electoral framework and political landscape of each jurisdiction, an appreciation of which remains indispensable for an adequate understanding of jurisprudence on the right to candidacy.

The jurisprudence examined in this Chapter also serves to illustrate the need for a more robust conceptual understanding of candidacy as a free-standing right. For example, the United States Constitution does not possess an express right to candidacy; yet the courts have, to some extent, recognised the existence of a justiciable right to stand for election. As demonstrated below, the US courts' equivocal jurisprudence on candidacy highlights the need for a more coherent theory given the problems associated with the current theoretical void. On the other hand, while Canada does guarantee an express constitutional right to candidacy, an analysis of

its jurisprudence also reveals underlying disagreements regarding the purpose and content of the right. This Chapter aims to highlight the nature of these conceptual and practical issues regarding the application of the right at the domestic level, and how these issues point to the usefulness of a clear justificatory account of the values and interests underlying the right (such an account is then offered in Chapter 4 of this thesis).

The first section of this Chapter will address the position in the United States while the second section addresses the approach taken in Canada.

B. THE UNITED STATES

I. OVERVIEW OF ELECTORAL FRAMEWORK AND POLITICAL LANDSCAPE

The United States employs a single member plurality system (SMP) for the election of federal and state legislators, often referred to as a First Past the Post system (FPTP) wherein the candidate receiving more votes than any other wins the seat in question, even if he does not receive an absolute majority of votes.[1] The election of president and vice president similarly takes place on a 'winner takes all' basis where the candidate who receives the plurality of a state's popular vote is awarded all of the Electoral College votes allocated to that state; the candidate with the majority of Electoral College votes is then deemed the winner of the presidential election.[2] As with many other plurality voting systems, the United Stats' electoral framework has given rise to a strong two-party system wherein the Democratic Party and the

[1] Michael Gallagher and Paul Mitchell, *The Politics of Electoral Systems* (OUP 2005) 185.

[2] Ibid 193.

Republican Party collectively win the overwhelming majority of seats in both state and federal elections.[3]

Regarding the administration of elections, the United States is unique given that, unlike most other established democracies, there is no central organisation charged with the responsibility of conducting elections and of ensuring the fairness thereof.[4] Instead, the process is highly decentralised: each state enacts and administers its own laws regarding the more detailed mechanics of the voting process.[5] One such aspect of electoral organisation left to the discretion of individual states is the process governing the admission of candidates and parties to the ballot, generally referred to as 'ballot access rules'.[6] States generally employ a two-tiered system where major parties, such as the Republicans and Democrats, receive automatic access to the ballot, while smaller parties and independent candidates must show some level of public support via signature petitions before their names can be printed on the ballot.[7] This disparity has given rise to much litigation regarding the fairness of states' ballot access rules, which has in turn forced courts to assess the extent to which there exists a constitutional right to candidacy. This jurisprudence will be explored in greater detail below.

More generally, the high degree of litigation on matters of electoral procedure constitute another unique feature of the American system: in the absence of a centralised, nonpartisan electoral commission, courts have more recently assumed a relatively active role in determining

[3] ibid 192.

[4] ibid 188.

[5] Ibid 185; Thad Hall, 'Primer on the US Electoral System' (IFES 2012) <http://www.ifes.org/~/media/Files/Publications/Books/2012/English%20Primer.pdf> accessed 02 December 2014.

[6] Alexander Bott, *Handbook of United States Election Laws and Practices: Political Rights* (Greenwood 1990) 96.

[7] Bott (n 6) 147; Gallagher and Mitchell (n 1) 188.

whether various laws enacted by individual states meet federal constitutional standards.[8] However, the Federal Constitution itself contains very limited recognition of electoral rights.

II. LIMITED CONSTITUTIONAL RECOGNITION OF ELECTORAL RIGHTS

The original United States Constitution, adopted in 1787, contained no express enumeration of individual rights. Such rights were not given constitutional recognition until the ratification of the first ten amendments to the Constitution in 1791, known collectively as the US Bill of Rights. These amendments guaranteed key civil rights, such as the freedoms of religion and expression, but made no mention of the electoral rights to vote or stand for office. This is not surprising when one considers the era in which these amendments were drafted: a time in which suffrage and office-holding remained the exclusive domain of white, male, property owners and were in no way considered fundamental rights guaranteed to all.[9]

However, a series of subsequent amendments (passed between 1870 and 1971) eventually guaranteed the right to vote without discrimination on account of race,[10] gender,[11] or age (for persons over 18 years)[12]. Yet, to date, the US Constitution still lacks an affirmative right to vote. Even though voting discrimination on specified grounds is prohibited, there is no provision which explicitly guarantees to citizens the right to vote. It is therefore no surprise that there is also no affirmative right to candidacy. Further, unlike the right to vote, there are

[8] Gallagher and Mitchell ibid 202.

[9] See Alfred Avins, 'The Right to Hold Public Office and the Fourteenth and Fifteenth Amendments: The Original Intent' (1967) 18 Mercer L Rev 367, 372; (1867) 39(2) Congressional Globe 309; (1864) 38(1) Congressional Globe 840.

[10] Constitution of the United States, Fifteenth Amendment (1870).

[11] Constitution of the United States, Nineteenth Amendment (1920).

[12] Constitution of the United States, Twenty-Sixth Amendment (1971).

no provisions which guarantee that the right to candidacy should be free from certain prohibited grounds of discrimination.[13] There is, therefore, no textual recognition of the right to candidacy in the United States Constitution. However, through the course of its adjudication on the electoral process, courts have explored the extent to which there may exist a free-standing constitutional right to candidacy.

III. JUDICIAL RECOGNITION OF THE RIGHT TO CANDIDACY

The journey toward federal judicial protection of electoral rights has been a long and arduous one. In understanding the court's current treatment of the right to candidacy, it is first necessary to trace how judicial reasoning has evolved regarding protection of the right to vote. The courts have treated both rights as intricately connected, noting that 'the rights of voters and the rights of candidates do not lend themselves to neat separation'.[14] Further, the court has generally predicated its protection of candidates' rights on the broader need to safeguard the voter's right to select a candidate of his choice.[15] The court's treatment of the right to vote therefore bears direct relevance to its treatment of the right to candidacy. This section maps the evolution in judicial reasoning regarding the protection of both rights and highlights the uncertainty and inadequacy of the court's current approach to the right to candidacy.

[13] Interestingly, during the drafting of the Fifteenth Amendment, earlier versions also prohibited discrimination in office holding on account of race. However, due to a lack of consensus on this point, the final wording which was adopted spoke only to voting rights and excluded reference to the right to hold office: See William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* (Johns Hopkins Press 1965); Nicole Gordon, 'The Constitutional Right to Candidacy' (1976) 91 Political Science Quarterly 471, 474; Avins (n 9).

[14] *Bullock v Carter*, 405 US 134, 143 (1972).

[15] ibid.

[a] <u>Traditional Restrictive Approach to Electoral Rights</u>

In the 1874 Supreme Court decision of *Minor v Happersett*,[16] the court held unanimously that the 'Constitution of United States does not confer the right of suffrage upon any one'.[17] In upholding the validity of the Missouri constitution, which denied females the right to vote, the court held that voting was not one of the 'privilege or immunities' of US citizenship, as guaranteed by the Fourteenth Amendment.[18] Further, the Court placed great emphasis on the freedom given to states to direct the conditions and qualifications for voting as they saw fit,[19] provided only that there was no discrimination as to race, expressly prohibited by the Fifteenth Amendment. Similarly, in the 1904 decision of *Pope v Williams*[20], the court noted that 'whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one'.[21]

This high degree of deference to state electoral rules was the hallmark of the traditional restrictive approach. Challenges were made only to those regulations which discriminated on the basis of race (grounded in the Fifteenth Amendment), or on the basis of gender (following the passage of the Nineteenth Amendment). The court maintained that these amendments conferred no generalised right to vote, but were instead circumscribed prohibitions against discrimination, only in the particular respects mentioned.[22]

[16] 88 US 162 (1875).

[17] ibid 178.

[18] ibid 175.

[19] ibid 171.

[20] 193 US 601 (1904).

[21] ibid 633.

[22] *United States v Reese*, 92 US 214, 217 (1876).

The court's non-interventionist approach also extended to the rights of candidates. In *Snowden v Hughes,*[23] the Supreme Court's first major decision on candidacy rights, the court held that 'the right to become a candidate for state office, like the right to vote for the election of state officers, is a right or privilege of state citizenship, not of national citizenship'.[24] The court cited *Minor* and *Pope* in support of this holding and emphasized the importance of state autonomy in the creation and regulation of public office at the state level.[25]

As noted above, states also possess a great degree of autonomy regarding the regulation of elections for federal office. Article I, section 4 of the US Constitution (the 'Elections Clause') grants States the power to regulate the election of Senators and members of the House of Representatives (both federal offices):

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

In assessing the permissible scope of state power under the Elections Clause, the Supreme Court has held that it 'gives States authority to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved'.[26] States are therefore the primary guardians of electoral fairness regarding elections to these offices, with the Elections Clause conferring upon them the task of 'ensuring that elections are fair and honest'.[27] The Court's initial reticence to intervene in this area must therefore be understood within the context of the decentralised nature of electoral regulation, which gives states a great measure of autonomy.

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[23] 321 US 1 (1944).

[24] ibid 7.

[25] ibid.

[26] *Smiley v Holm,* 285 US 355, 366 (1932); *US Term Limits, Inc. v Thornton*, 514 US 779 (1995).

[27] *Cook v Gralike*, 531 US 510, 524 (2001).

The traditional restrictive approach is perhaps best encapsulated by Justice Frankfurter's statement in *Colegrove v Green*.[28] In ruling that electoral districting was not a matter for judicial scrutiny he cautioned that, 'Courts ought not to enter this political thicket.'[29]

[b] *Baker v Carr* Line of Cases: The Court's Entry into the 'Political Thicket'

The 1962 Supreme Court decision of *Baker v Carr*[30] signalled the court's official foray into the previously forbidden 'political thicket'. The plaintiffs contended that apportionment of seats in Tennessee's General Assembly was not proportionate to the current distribution of the state's population, with the effect that residents in more populous districts suffered a 'debasement of their votes' and were thereby denied the Fourteenth Amendment's guarantee of equal protection of the laws. In a historic 6-2 decision, the Supreme Court held that the malapportionment of seats did in fact raise a justiciable cause of action under the equal protection clause. *Baker* was a hugely impactful decision for voting rights because of the extent to which it opened the door for courts to consider and protect the 'quality' of one's vote, as opposed to merely being concerned with the fact of its existence free from prohibited discrimination. It is no wonder then, that of all the seminal decisions of the Warren court, Justice Warren categorized *Baker v Carr* as the most influential case of his tenure.[31]

In subsequent apportionment decisions, the Court then put forward its 'one man, one vote' principle, noting that 'An individual's right to vote… is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of [other] citizens'.[32]

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[28] 328 US 549 (1946).

[29] ibid 556.

[30] 369 US 186 (1962).

[31] William Brennan, 'State Constitutions and the Protection of Individual Rights' [1977] Harvard L Rev 489, 492.

[32] *Reynolds v Sims*, 377 US 533, 568 (1964).

This expansive view of the right to vote, as also including the strength and quality of one's vote, paved the way for judicial protection of the voter's right to an 'effective vote' (for a candidate of one's choice) and, by extension, protection of the candidate's right to run for office.

[c] <u>The Right to Candidacy in Supreme Court Ballot Access Cases</u>

In the court's traditional, restrictive approach to electoral rights, ballot access regulations were seldom made the object of judicial scrutiny and in the event that they were, the court displayed a great amount of deference to the State.[33] All this changed in 1968 when the Supreme Court handed down its ruling in *Williams v Rhodes*.[34] There, the court subjected Ohio's ballot access restrictions to strict scrutiny because of the extent to which the restrictions affected 'both the right to vote and the right to associate'.[35]

Following on from *Williams*, the Court went on to decide on the constitutionality of a number of other ballot access rules imposed by various states. However, quite unfortunately, many agree that the Supreme Court's jurisprudence in this regard has been marked by inconsistency and obscurity.[36] As one author put it,

> 'At various times during its investigations of ballot access regulations, the Court has applied rational basis scrutiny, intermediate scrutiny, and heightened scrutiny, before finally (seemingly) settling upon a multifactor balancing test. At every step in the road, including the balancing test, the Court has suffered severe criticism from all sides.'[37]

[33] *MacDougall v Green*, 335 US 281, 283 – 4 (1948).

[34] 393 US 23 (1968).

[35] ibid 31.

[36] Laurence H Tribe, *American Constitutional Law* (2nd edn, West Academic Publishing 1988) 1102; Gordon (n 13) 472; Kevin Cofsky, 'Pruning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restrictions' (1996) 145 UPenn L Rev 353, 357.

[37] Todd Zywicki, 'Federal Judicial Review of State Ballot Access Regulations: Escape from the Political Thicket' (1994) 20 T Marshall L Rev 87, 108.

These criticisms have been documented by numerous academic writers[38] and lower court judges.[39] This section of the thesis does not attempt to offer a comprehensive discussion of the various viewpoints raised by all these sources. Rather, this section will seek to focus more specifically on one aspect of the Court's ballot access jurisprudence: the extent to which candidacy has been recognised by the Court as a federal constitutional right. Secondly, this section will point out the inadequacy of the Court's current approach in its failure to put forward a coherent exposition of the nature and scope of the right to candidacy and its resultant failure to effectively safeguard the right.

Williams v Rhodes: Court links candidacy with freedom of association and the right to vote

In *Williams v Rhodes*, the Supreme Court struck down Ohio's restrictive ballot access rules which made it 'virtually impossible' for third parties and independents to gain access to the ballot of presidential electors.[40] Third parties, which include all parties other than the Republicans and Democrats, were required to obtain petitions signed by 15% of the number of persons who voted in the last gubernational election. Further, no provision was made for independent candidates. Two of the minor parties affected challenged the validity of Ohio's rules on the ground that they denied the parties, and their potential voters, equal protection of the laws.

[38] See n 36.

[39] *Rainbow Coalition v Oklahoma State Election Board*, 844 F.2d 740, 742 – 43 (10th Cir 1988); *Paul v State of Indiana Election Board*, 743 F Supp 616, 621 (SD Ind 1990); *Dixon v Maryland State Admin Board of Election Laws*, 878 F.2d 776, 779 (4th Cir 1989).

[40] *Williams* (n 34) 23.

In assessing whether Ohio's laws denied equal protection, the Court held that the strict scrutiny standard of review should apply because of the extent to which the laws affect both the right to vote and the right to political association:

> [T]he state laws place burdens on two different, although overlapping, kinds of rights: the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.
>
> … The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.[41]

For the first time the Court conceptualised the right to vote, as being somewhat inclusive of a right to cast an 'effective vote' for the candidate of one's choice. In commenting on the ground-breaking nature of the Court's ruling, Tribe notes 'the right to vote invoked here differs radically from the right to vote that underlay the apportionment cases',[42] the latter being concerned with the weight of one's vote as opposed to the *Williams* decision which 'dealt with the right of voters to cast their ballots for particular candidates'.[43] The Court also made a crucial link between candidacy and the First Amendment right to political association, acknowledging that the latter would be somewhat empty without a real opportunity to stand for election and 'win votes'.

Because the impugned restriction was seen to affect such fundamental rights (voting and association), the court applied strict scrutiny review in its equal protection analysis, thereby requiring the State to establish that the law in question was 'narrowly tailored' to meet a 'compelling state interest'.[44] The Court held that the State failed to fulfil this burden, noting

[41] ibid 30 – 31.

[42] Tribe (n 36) 1103.

[43] ibid.

[44] *Williams* (n 34) 31.

that Ohio's laws taken as a whole, amounted to invidious discrimination against the minor parties.

Some lower courts have read *Williams* as authority for the view that candidacy stands as a fundamental right protected by the First Amendment.[45] However, most would agree that the *Williams* decision provides only a tenuous basis on which to build such a claim.[46] This is bearing in mind that the Court's decision was grounded in an Equal Protection claim, with only ancillary mention of the First Amendment right to associate. Further, the Court made no direct mention of candidacy as a free-standing right.

But even though the Court stopped short of explicitly recognising the right to candidacy, the *Williams* decision remains significant because of the extent to which it paved the way for the right's recognition by acknowledging the close link between candidacy and the rights to vote and associate. The Court also recognised the expressive value in candidacy, noting the importance of giving new parties the opportunity to participate in the 'competition of ideas and governmental policies at the core of our electoral process'.[47]

Based on the seeds sown in *Williams*, it is not surprising that in *Jenness v Fortson*,[48] (the Court's second major ballot access decision), the petitioners challenged Georgia's laws on First Amendment grounds, arguing that the restrictions abridged the candidates' freedoms of speech and association and secondly, that they violated the Fourteenth Amendment equal protection clause. The Court in *Jenness* acknowledged that these arguments were 'primarily

[45] *Mancuso v Taft* 476 F.2d 187 (1st Cir 1973); *Thomas v Mims* 317 F Supp 179, 181 (SD Ala 1970).

[46] Paul R Wassenaar, 'The Emerging Right to Candidacy in State and Local Elections: Constitutional Protection of the Voter, the Candidate, and the Political Group' (1971) 17 Wayne L Rev 1543, 1545; Gordon (n 13) 476; James S Jardine, 'Ballot Access Rights: The Constitutional Status of the Right to Run for Office' [1974] Utah L Rev 290, 296.

[47] *Williams* (n 34) 32. On this point, see also Justice Douglas' concurring opinion at 39.

[48] *Jenness v Fortson*, 403 US 431 (1971).

based upon this Court's decision in *Williams v Rhodes*'.[49] Here, the Court had an opportunity to build on the ground laid in *Williams* by explaining more fully the nature of the candidacy rights protected under the First Amendment. Unfortunately, this was an opportunity lost as the Court in *Jenness* introduced more uncertainty than it did clarity. The Court upheld Georgia's restrictions, without stating explicitly the standard of review it employed. An isolated reference was made to Georgia having an 'important state interest' at stake. However, this is in stark contrast to the position in *Williams* where a 'compelling state interest' was required under the strict scrutiny standard. In *Jenness*, the Court did not explicitly state a departure from *Williams*, rather it sought to distinguish the case on facts only. However, most have agreed that the *Jenness* holding signalled an attempt by the Court to retreat from the robust stance taken in *Williams*, regarding the need for strict scrutiny in assessing ballot access restrictions.[50] Given that the strict scrutiny standard is employed in cases concerning fundamental rights, *Jenness* signalled that the Court viewed candidacy as less than fundamental, and quite likely, not even as an independent right.

The dramatic divergence between *Williams* and *Jenness*, decided merely three years apart, is illustrative of the kind of doctrinal fluctuations found throughout the Court's ballot access jurisprudence. In some ways, the Court's decisions reveal a palpable tension between those on the bench who possess an expansive view of political rights, and those who do not. For example, the majority decision in *Jenness* was written by Justice Stewart, who incidentally offered the strongest dissent in *Williams*, arguing that First Amendment rights were not infringed and that States had absolute discretion in organising the selection of presidential electors, which need not even be by popular vote.[51] In Stewart's reasoning, the right to vote

[49] ibid 434.

[50] Tribe (n 36) 1106; Zywicki (n 37) 112 – 13; Cofsky (n 36) 371.

[51] *Williams* (n 34) 49.

was therefore not affected.[52] He argued that a rational relation standard of review would have sufficed, as opposed to strict scrutiny.[53] It is little wonder then that the *Jenness* opinion read as it did.

At the other end of the philosophical spectrum lies Justice Douglas. In his concurring opinion in *Williams*, Douglas J noted that while States do have the discretion to select the mode of appointment of presidential electors, the fact that Ohio chose to do so by popular suffrage necessarily meant that it was bound to fully respect the right to vote.[54] Douglas J argued that the First Amendment right of association, as well as the right to vote, lay at the root of the case, noting that citizens had the right 'to vote for whomsoever they please and to organize campaigns for any school of thought they may choose'.[55] Douglas J articulated his views on the right to candidacy more expressly in *Lippitt v Cipollone*,[56] a ballot access decision handed down one year after *Jenness*. In his dissent in *Lippitt*, Douglas J disagreed that the State had put forward a 'compelling state interest' and noted categorically that, '*The right to run for public office seems a fundamental one*.'[57]

The varying degrees of scrutiny applied in ballot access cases may therefore be somewhat symptomatic of the bench's widely divergent views on the nature and scope of political rights: in particular, the right to candidacy.

Though *Jenness* declined to go further in marking out the contours of the right to candidacy, in its failure to expressly depart from *Williams*, the Court left intact the crucial link

[52] ibid.

[53] ibid 51.

[54] ibid 38.

[55] ibid 39.

[56] *Lippitt v A Cipollone,* 404 US 1032 (1972).

[57] ibid 1033 (emphasis added).

between candidacy and the right to vote, which was forged in *Williams* and further developed in the Court's subsequent cases.

Bullock v Carter and *Lubin v Panish*: Strengthening the Voter-Candidacy Link

One year after the *Jenness* decision, the Court considered the case of *Bullock v Carter*,[58] a claim challenging the exorbitant filing fees required to become a candidate for local office in Texas. The petitioners, candidate hopefuls and their potential voters, argued that the filing fees violated the equal protection clause. In addressing the question of which standard of review should be applied, the Court held that strict scrutiny was not necessary given that candidacy did not possess fundamental right status:

> The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review…
>
> [T]he Texas system creates barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose… In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.[59]

The Court held that given the 'real and appreciable impact' on voting rights, the laws must be 'closely scrutinized and found reasonably necessary to the accomplishment of legitimate state objectives'.[60] The Court here presented a robust standard of review, higher than mere rational relation, but lower than the strict scrutiny and 'compelling state interest' demanded in

[58] *Bullock* (n 14).

[59] ibid 142 – 143 (citations omitted).

[60] ibid 144.

Williams.[61] A few points may be noted about the Court's approach in *Bullock*. First, the Court made it clear that candidacy had not yet come into its own as a fundamental right.[62] However, the Court left open the possibility that candidacy may have gained recognition as an independent right, albeit not a fundamental one. Secondly, the Court cements the link between candidates' and voters' rights, noting that the two do not lend themselves to 'neat separation'. However, the Court does little to clarify the relationship between the two or to state when the candidate's right may individually merit protection. Thirdly, the Court makes it clear that its main concern is that of protecting the rights of voters, noting that in assessing candidate restrictions, it is essential to consider the impact on voters. It therefore presented the protection of candidates' rights as merely incidental to main aim of safeguarding the exercise of the franchise.

Two years after its decision in *Bullock*, the Supreme Court ruled on another case regarding excessive filing fees in *Lubin v Panish*.[63] There, the Court's statements have been interpreted as being much more open to the concept of candidacy as an independent right.[64] Pertaining to the link between voters' and candidates' rights, the Court noted:

> The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. *The right of a party or an individual to a place on a ballot is entitled to protection* and is intertwined with the rights of voters.[65]

[61] Cofsky (n 36) 376.

[62] Gordon (n 13) 479.

[63] *Lubin v Panish*, 415 US 709 (1974).

[64] Michael A Bragg, 'Adams v. Askew: The Right to Vote and the Right to be a Candidate--Analogous or Incongruous Rights' (1976) 33 Wash & Lee L Rev 243, 251; Tribe (n 36) 1111: Speaking of the Court's decision in *Lubin* Tribe noted, 'Moreover, it spoke of the voting rights at stake in a way that seemed to emphasize the right of the candidate to run for office rather than the right of voters to cast their ballots for a candidate of their choice'.

[65] *Lubin* (n 63) 716 (emphasis added).

The Court employed the same standard of review as it did in *Bullock* – reasonably necessary for a legitimate state objective – and held that the California statute failed to meet this test. In striking down the high filing fees as unconstitutional, the Court noted that States may not 'unnecessarily burden… an individual candidate's equally important interest in the continued availability of political opportunity'.[66] In his concurring opinion, Justice Douglas once again put forward progressive statements regarding the right to candidacy, highlighting that, 'the right to vote would be empty if the State could arbitrarily deny the *right to stand for election*'.[67] One would have hoped that the foundation laid in *Lubin* regarding the right to candidacy would have gradually and coherently been built upon in later decisions. However, this was not to be the case. The Courts' subsequent ballot access jurisprudence revealed a plethora of doctrinal inconsistencies as well as a pervasive decline in emphasis on the importance of candidacy as a free-standing right.

Storer v Brown to *Norman v Reed:* Mixed Messages and Shifting Standards

On the same day that the Court gave judgment in *Lubin*, it handed down its decisions in two other ballot access cases: *Storer v Brown*[68] and *American Party of Texas v White*.[69] In *Storer*, the Court considered a challenge to a disaffiliation provision in the California Election Code. The Code provided that persons were barred from running as independent candidates if they had a registered affiliation with a political party within one year prior to the immediately preceding primary election. The Court upheld the provision as serving the 'sufficiently important state interest' of ensuring that independent candidacies were genuine and not put

[66] Ibid.

[67] Ibid 722 (emphasis added).

[68] 415 US 724 (1974).

[69] 415 US 767 (1974).

forward by parties in attempts to manipulate the electoral process.[70] The Court held that this state interest outweighed the candidate's interest in making a late rather than early decision to seek independent ballot status.[71] However, as the dissenting opinion makes clear, this ruling ignores the unavoidable vicissitudes of political life, which may often warrant spontaneous decisions:

> By requiring potential independent candidates to anticipate, and crystallize their political responses to these changes and events 17 months prior to the general election, clearly is out of step with 'the potential fluidity of American political life,' operating as it does to discourage independent candidacies and freeze the political status quo.[72]

The majority applied what many have agreed to be an 'intermediate' level of scrutiny, requiring only a 'sufficiently important' state interest and declining to require proof that the least restrictive means were employed.[73] The Court's approach in *American Party* also reveals a similar intermediate standard of review, even though the Court claimed to be employing the compelling interest test.[74] As one author summarizes regarding *Storer* and *American Party*, '[they] have certainly diluted the protection previously given to candidacy rights and failed to provide either analytical clarity or direction in the wake of *Bullock*'.[75]

In further compounding the confusion rife in this area, the Court applied the traditional strict scrutiny standard of review in its next major ballot access decision: *Illinois State Board of Elections v Socialist Workers Party*.[76] In that case the impugned Illinois Election Code had

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[70] *Storer* (n 68) 734 – 735.

[71] Ibid.

[72] *Storer* (n 68) 758 (citations omitted).

[73] Tribe (n 36) 1106 – 7; Zywicki (n 37) 29; Cofsky (n 36) 373-5.

[74] Ibid.

[75] Jardine (n 46) 302.

[76] *Illinois State Board of Elections v Socialist Workers Party*, 440 US 173 (1979).

the effect of demanding that independent and minor party candidates for public office in Chicago had to obtain more signatures than candidates for state-wide office. The Court held that given the vital individual interests at stake (namely voting and association), the State measure must be 'necessary to serve a compelling state interest'.[77] The decision is also notable for the extent to which it highlights the importance of candidacy as a medium for political expression:

> The States' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation… As the records of such parties demonstrate, *an election campaign is a means of disseminating ideas as well as attaining political office*. Overbroad restrictions on ballot access jeopardize this form of political expression.[78]

Here the Court reveals a broader understanding of the values and interests underlying the right to candidacy,[79] as opposed to merely viewing candidacy as a means to the end of obtaining office.

True to the vacillating nature of the Court's ballot access decisions, this return to strict scrutiny was only short-lived. In *Clements v Fashing*,[80] the court held:

> Far from recognizing candidacy as a 'fundamental right', we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny'.[81]

The Court noted that the standard of scrutiny under equal protection analysis depends on the nature and extent of the interests affected:

> We have concluded that the burden on appellees' *First Amendment interests in candidacy* are so insignificant that the classifications of § 19 and § 65 may be

[77] ibid 184.

[78] ibid 185 (citations omitted) (emphasis added).

[79] These values and interests underlying the right are discussed further in Chapter 4.

[80] *Clements v Fashing*, 457 US 957 (1982).

[81] ibid 965.

> upheld consistent with traditional equal protection principles. The State's interests in this regard are sufficient to warrant the *de* minimis interference with appellees' *interests in candidacy*.[82]

While *Clements* offers the disappointing blow of confirming that candidacy is not yet regarded as a 'fundamental right', the decision is still promising because of the extent to which it highlights and assesses the independent 'First Amendment interests in candidacy', separate and apart from the right to vote. It leaves open the possibility that had the 'interests in candidacy' been (in the Court's opinion) more deeply affected, strict scrutiny analysis could have been applied.

In *Anderson v Celebrezze*,[83] decided one year after *Clements*, the Court considered the constitutionality of an Ohio statute which imposed a particularly early filing deadline for independent Presidential candidates. The Court departed from its previous equal protection / tiered-scrutiny analysis and instead put forward a multi-factor balancing test, noting that 'we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis.'[84] This approach represented a major doctrinal shift given that previous decisions primarily assessed whether equal protection had been denied. The move towards direct First Amendment analysis could be taken as a positive step in recognising the State's more general obligation to protect the individual's electoral rights, even in the absence of unequal treatment, given that equality analysis is only triggered when the individual is treated worse-off than someone else.

[82] ibid 967 (emphasis added).

[83] *Anderson v Celebrezze*, 460 US 780 (1983).

[84] ibid footnote 7 of Majority Opinion.

However, *Anderson* takes a very regressive stance on candidacy rights by explicitly focusing on the rights and interests of voters as the Court's 'primary concern'.[85] At the end of his majority opinion Justice Stevens notes:

> We began our inquiry by noting that our primary concern is not the interest of candidate Anderson, but rather, the interests of the voters who chose to associate together to express their support for Anderson's candidacy and the views he espoused.[86]

In *Munro v Socialist Workers Party*,[87] the Court appeared to be following the approach in *Anderson* by directly analysing whether there was a First Amendment violation, and omitting to carry out equal protection review. However, the decision is somewhat ambiguous as it does not apply the balancing test laid down in *Anderson*, nor does it state directly what standard of review is being used to assess the impugned Washington statute.[88]

One of the last major Supreme Court ballot access decisions was that of *Norman v Reed*.[89] *Norman* introduces a great deal of doctrinal uncertainty, which makes it very difficult to predict what the future approach of the Court will be in this area. The Court noted expressly that it follows the approach in *Anderson* by directly assessing whether First Amendment rights have been infringed and avoids equal protection analysis.[90] However, the Court does not apply the *Anderson* balancing test. On the contrary, it applies the test of 'narrowly tailored to advance a compelling state interest' and cites *Illinois State Board of Elections* in support of this (even though the latter case was one of equal protection review). While this apparent return to strict

[85] ibid 786, 806A.

[86] ibid 806A.

[87] *Munro v Socialist Workers Party*, 479 US 189 (1986).

[88] See *Munro* ibid 200 (Dissenting Opinion); Cofsky (n 36) 382 – 3. This decision is discussed in further detail in Chapter 8 of this thesis.

[89] *Norman v Reed*, 502 US 279 (1992).

[90] ibid footnote 8.

scrutiny may be promising for candidacy rights, the court did not expressly mention candidacy as an independent right and focused more squarely on voting and association.[91]

[d] Treatment of the Right to Candidacy in Lower Court Decisions

An examination of lower court decisions evidences a similar level of inconsistency, symptomatic of the incoherent and ambiguous Supreme Court jurisprudence on the right. Some lower courts have boldly declared candidacy as a fundamental right,[92] while others have maintained that the right has yet to attain fundamental status.[93] One of the most notable decisions which recognised candidacy as a fundamental right was that of *Mancuso v Taft*.[94] In applying strict scrutiny review to an eligibility requirement for public office, the First Circuit noted:

> A view today, that running for public office is not an interest protected by the First Amendment, seems to us an outlook stemming from an earlier era when public office was the preserve of the professional and the wealthy. Consequently we hold that candidacy is both a protected First Amendment right and a fundamental interest. Hence any legislative classification that significantly burdens that interest must be subjected to strict equal protection review.[95]

Notably, *Mancuso* was decided in 1973, before the wave of Supreme Court decisions which emphasized the primacy of voting rights,[96] and which directly stated that the right to candidacy

[91] *Norman v Reed* (n 89) 288.

[92] *Mancuso v Taft* (n 45); *Duncantell v City of Houston* 333 F Supp 973 (SD Tex 1971); *Socialist Workers Party v Rockefeller* 314 F Supp 984 (SDNY 1970); *Thomas v Mims* (n 45).

[93] *Chimento v Stark* 353 F Supp 1211, 1214 (DNH 1973); *Antonio v Kirkpatrick* 579 F.2d 1147, 1149 (8th Cir 1978); *City of Akron v Bell* 660 F.2d 166 (6th Cir 1981).

[94] *Mancuso v Taft* (n 45).

[95] ibid 196.

[96] *Anderson* (n 83) decided in 1983; *Norman* (n 91) decided in 1992.

is not fundamental.[97] More recent lower court decisions seem to have settled on recognising candidacy as an independent constitutional right, while maintaining that it is not necessarily a fundamental one.[98] In the 2010 Eleventh Circuit decision of *Randall v Scott*,[99] the Court highlighted the ambiguous nature of the Supreme Court's stance on the right to candidacy: 'Precedent in the area of constitutional protection for candidacy can be best described as a legal morass.'[100] Upon reviewing the Court's decision in *Bullock v Carter*, the Eleventh Circuit then noted:

> The Court thus reaffirmed that the right to candidacy is linked to voters' rights. While there is no 'fundamental status to candidacy' requiring the 'rigorous standard of review' that is applied in voters' rights cases, there is at least some constitutional right to candidacy.[101]

Similarly, regarding the declaration in *Clements v Fashing* that there exists no fundamental right to candidacy, the Court in *Randall* stated:

> Even though *Clements* does not make clear the degree of constitutional scrutiny required for candidacy restrictions, the Court does suggest that political candidacy is entitled to at least a modicum of constitutional protection.[102]

However, this recognition of a constitutional right to candidacy is in no way universal among lower courts. There are many recent ballot access decisions which fail to mention a free-standing right to candidacy and which focus wholly on the voting and associational rights at stake.[103]

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[97] *Clements* (n 80) decided in 1982.

[98] *Davies v Grossmont Union* 930 F.2d 1390, 1397 (9th Cir 1991); *Nader v Keith* 385 F.3d 729, 737 (7th Cir 2004); *Randall v Scott* 610 F.3d 701, 711 (11th Cir 2010).

[99] *Randall* (n 98).

[100] ibid 710.

[101] ibid 711.

[102] ibid 712.

[103] *Rosen v Brown* 970 F.2d 169 (6th Cir 1992); *Wood v Meadows* 207 F.3d 708 (4th Cir 2000); *Cromer v State of South Carolina* 917 F.2d 819 (4th Cir 1990). Citing *Anderson v Celebrezze* the Court noted in *Rosen* at 175: 'The

IV. ACADEMIC LITERATURE ON THE RIGHT TO CANDIDACY IN THE UNITED STATES

Given the disparate nature of judicial decisions on this point, it is no wonder that academic analysis of the right to candidacy reveals equally divergent views. In the wake of the Supreme Court's entry into ballot access adjudication, via its 1968 decision of *Williams v Rhodes*, some constitutional scholars mooted that there was an 'emerging' right to political candidacy.[104] Writing in 1975, Le Clercq noted that there existed a general, emerging right to political participation, of which a 'limited, federally secured right of political candidacy' formed a part.[105] In hopeful anticipation of the future, he noted: 'As this right [to candidacy] is more clearly delineated over the years, it promises a sure, if not swift, passage toward a more democratic society for the United States'.[106]

Unfortunately, over 30 years on, that clear delineation has yet to take place. For this reason, other academics have taken a more cautious approach by highlighting the ambiguous nature of the Court's position, while making normative claims that the right should be unequivocally recognised and given fundamental status.[107] Illustrative of this approach, Ahrens and Hauserman noted in a 1980 article, 'It is too early to say that the right to be a candidate has become so commonplace, but we can find no good reasons in the facts of these cases to say it

primary concern in any ballot access case is not the interests of the candidate but of the voters who support the candidate and the views espoused by the candidate.'

[104] Wassenaar (n 46); Frederic S Le Clercq, 'The Emerging Federally Secured Right of Political Participation' (1974) 8 Ind L Rev 607, 625.

[105] Le Clercq (n 104) 625.

[106] ibid.

[107] Gordon (n 13) 487; Gary Ahrens and Nancy Hauserman, 'Fundamental Election Rights: Association, Voting, and Candidacy' (1980) 14 Valparaiso U L Rev 463; Bragg (n 64) 252.

should not be considered an integral part of the electoral process [and should be treated no differently than the rights of association and voting].'[108]

Other writers have taken a much bolder stance in noting that candidacy may be regarded as a 'quasi' or 'de facto' fundamental right because of the extent to which strict levels of scrutiny have been exercised in a number of ballot access cases.[109] It is argued that, 'the Court has effectively equated the right to candidacy with the rights to vote and associate' by virtue of their recognition of the inseparability of those rights.[110] However, a more careful reading of the Court's jurisprudence reveals that this conclusion misses the mark as courts have generally not tended to place those rights on equal footing. In pointing out the inseparability of candidates' and voters' interests, the Court has often stressed the primacy of voters' rights above that of the candidates', the implication being that, in the eyes of the Court, the protection of candidacy is more incidental than it is imperative.[111]

Interestingly, one of the most recent academic contributions in this area questions whether there is even an independent constitutional right to candidacy, let alone a fundamental one. In a 2011 article critiquing *Randall v Scott*, the author notes that the Eleventh Circuit's finding of a free-standing right to candidacy under the First Amendment is 'only tenuously grounded in Supreme Court precedent'.[112] While this may be true, one could argue that the weight of jurisprudence from lower courts, coupled with the Supreme Court's ambivalent

[108] Ahrens and Hauserman (n 107) 485.

[109] Dennis W Arrow, 'The Dimensions of the Newly Emergent, Quasi-Fundamental Right to Political Candidacy' (1981) 6 Okla City UL Rev 1; Sarah A Biety, 'Constitutional Law - Ballot-Access Restrictions and the First Amendment: Status of the Right to Candidacy' (1983) 17 Creighton L Rev 187, 192.

[110] Biety ibid 192.

[111] See *Bullock* (n 14); *Anderson* (n 83).

[112] Kevin C Quigley, 'Wading Through The "Morass": The Eleventh Circuit Recognizes A Right To Candidacy In Randall v. Scott' (2011) 52 BCL Rev 185, 189.

candidacy holdings, establishes some measure of an independent right to candidacy, even though the specific contours of it have yet to be mapped out.

On the whole, there is an emerging consensus among the academic community that there exists a need for a clearer and more robust status being given to the right to candidacy by virtue of its importance in safeguarding meaningful political participation in the democratic process.[113] However, this view is by no means shared by all. For example, Laurence Tribe, in sympathising with the Court's holding in *Clements* that candidacy is not a fundamental right, notes:

> The holding nonetheless seems entirely defensible… Moreover, there is something more than faintly odd, even in a country boasting that anyone can become President, about a society's describing as a 'fundamental right' an activity bound to be unthinkable for a vast majority of its members. Thus the efforts to cull a right to candidacy from loose language in Turner v Fouche should probably be rejected.[114]

Tribe's sentiments reveal the need for a systematic assessment of the theoretical justifications for a right to candidacy, which has not heretofore been carried out. The proceeding chapter will seek to provide one such justificatory account by outlining the theoretical values underpinning the right to candidacy and how those values should inform our understanding of the nature and scope of the right.

V. CONCLUDING OBSERVATIONS

The foregoing examination of the evolution of the right to candidacy in United States' jurisprudence reveals a general shift towards more inclusive notions of political participation, similar to that evidenced in the domestic constitutions surveyed in Chapter Two. The

[113] See n 107 and n 109.

[114] Tribe (n 36) 1098.

Nineteenth Century constitutional debates revealed strongly held views of candidacy as a cloistered privilege reserved for a worthy few.[115] However, with the increasing emphasis placed on political equality over the years, the Courts have in turn responded to this change by treating electoral laws with less and less deference. The Court in *Lubin* chronicles this ideological shift:

> In sharp contrast to this fear of an unduly lengthy ballot is an increasing pressure for broader access to the ballot. Thus, while progressive thought in the first half of the century was concerned with restricting the ballot to achieve voting rationality, recent decades brought an enlarged demand for an expansion of political opportunity. The Twenty-fifth Amendment, the Twenty-sixth Amendment, and the Voting Rights Act of 1965 reflect this shift in emphasis.[116]

However, an analysis of the Court's jurisprudence reveals that while they have acknowledged a need to protect and further 'the expansion of political opportunity', there is a lack of consensus about their specific role in this area and how it should be achieved. The Courts have therefore frequently engaged in analysis specifically designed to achieve a particular end, like applying strict scrutiny in 'easy' cases,[117] as opposed to laying down a consistent approach to the right to candidacy.

Given the disparate nature of the court's rulings, it is unclear which standard will be applied in future cases. Most contemporary ballot access decisions in lower courts have tended to apply the *Anderson* balancing test coupled with the 'flexible standard' taken in *Burdick v Takushi*,[118] which provides that the strictness of review in electoral law cases depends on the

[115] See n 9.

[116] Lubin (n 63) 713.

[117] Tribe (n 36) 1102 – 3.

[118] 504 US 428 (1992).

severity of the burden placed on the rights in question.[119] The application of this flexible standard has generally led to less stringent standards of review being applied in ballot access cases because a great deal turns on the court's initial assessment of the extent of injury to the right.[120] However, without a coherent appreciation of the nature and scope of the right to candidacy, it is difficult for courts to accurately assess the severity of harm done to the right.

The United States jurisprudence therefore demonstrates the inevitable confusion which persists in the absence of a reasoned consensus on the values and interests underpinning the right to candidacy. Such consensus at the federal level remains challenging given the absence of an express textual right and further, given the decentralised administration of elections which gives states a great degree of autonomy in regulating ballot access.

C. CANADA

The second half of this Chapter will now address the recognition of the right to candidacy in the jurisdiction of Canada. Unlike the position in the US, the Canadian Charter of Rights contains an express right to stand for election. Courts have therefore been able to delve more pointedly into questions of the right's purpose, scope and content. However, before examining Canadian jurisprudence in this area, it is first necessary to gain an understanding of the overarching electoral framework and political landscape in which these electoral rights are being exercised.

[119] *Duke v Smith* 13 F.3d 388 (11th Cir 1994); *Hagelin for President Committee v Graves* 25 F.3d 956 (10th Cir 1994); *Libertarian Party of Illinois v. Rednour* 108 F.3d 768 (7th Cir 1997); *Lawrence v Blackwell* 430 F.3d 368 (6th Cir 2005); *Torres-Torres v Puerto Rico* 353 F.3d 79 (1st Cir 2003).

[120] ibid.

I. OVERVIEW OF ELECTORAL FRAMEWORK AND POLITICAL LANDSCAPE

Canada employs a single-member plurality electoral system in its elections for both national and provincial legislators.[121] Unlike the static two-party system operational in the United States, the Canadian party system has been much more dynamic. There are now five political parties represented in the House of Commons: the Conservative Party (ruling),[122] the New Democratic Party (NDP) (official opposition), the Liberal Party, Bloc Quebecois and the Green Party. While the Liberal and the Conservative Parties have largely been the two most dominant in Canadian history, the NDP has steadily gained traction over the years, and in the 2011 general elections it won the second-most seats and gained the title of official opposition for the first time.

However, the 'winner-takes-all' plurality voting system does make it harder for smaller parties to be elected. Though there are currently 15 registered political parties, no more than 5 parties have been represented in the House of Commons at any given time.[123] Further, the Green Party only recently gained representation after winning its first seat ever in the 2011 general elections, despite its over 30 years in existence.

The administration of federal elections are conducted by a central, non-partisan body called Elections Canada. This organisation also manages the registration of political parties as well as the disbursement of state funding to qualified parties. Unlike the position which obtains in the US, there is therefore one uniform set of rules regarding candidate access to the ballot.

[121] Gallagher and Mitchell (n 1) 99.

[122] The current Conservative Party of Canada formed via a merger in 2003 between the Canadian Alliance Party and the Progressive Conservative Party. See: Gallagher and Mitchell (n 1) 101.

[123] Gallagher and Mitchell (n 1) 105.

Notwithstanding, controversies have still arisen regarding the fairness of these rules and their effect on the viability of smaller parties and independent candidates.[124]

II. CONSTITUTIONAL RECOGNITION OF THE RIGHT TO CANDIDACY

Section 3 of the Canadian Charter of Rights and Freedoms ('the Charter') provides for the rights to vote and to stand for election in the following terms:

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

The Charter, enacted in 1982, forms part of the Canadian Constitution, with the effect that any legislation in violation of a Charter right risks being struck down if it cannot be justified under the general limitation clause provided in section 1:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The 1982 Charter represents Canada's first express embodiment of human rights at the constitutional level. During the course of legislative debates on the Charter, there was general consensus regarding the inclusion of the rights to vote and candidacy,[125] with no express objections levelled against the right to stand for election.[126] James Robertson notes that this is arguably because democratic electoral rights were already agreed as being part of the law of Canada, such that the Charter was seen as merely declaratory on this point.[127] In an explanatory

[124] See discussion below.

[125] Anne Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History* (Volume II, McGraw-Hill 1989) 581, 594, 604, 661.

[126] Ibid.

[127] James Robertson, 'Electoral Rights: Charter of Rights and Freedoms' (Parliamentary Information and Research Service 2008) <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0850-e.pdf> accessed 2 December 2014.

note accompanying a 1980 draft of the Charter, it was noted that section 3 guarantees 'rights that are fundamental to the continued existence of a free and democratic society'.[128]

The primacy placed on section 3 rights is further highlighted by the fact that the scope of the right became progressively broader over the course of the drafting process. Earlier versions of the section protected the rights to vote and candidacy only against 'discrimination based on race, national or ethnic origin, language, color, religion or sex'.[129] This was an extremely narrow formulation, which would have offered little more than that already guaranteed by the Charter's general equality provision.[130] The section was later amended to provide more broadly for the rights to vote and candidacy 'without unreasonable distinction or limitation'.[131] Even further, in the final stages of drafting, the clause regarding 'unreasonable distinction or limitation' was omitted, with the effect that the only current limitation on section 3 rights is that provided for in section 1. Therefore, a violation of the right to candidacy will only be upheld if it is considered a 'reasonable limit prescribed by law' and 'demonstrably justified in a free and democratic society'.[132]

III. JUDICIAL INTERPRETATION

Even though the Charter came into force over 30 years ago, to date, there exists no large body of case law interpreting the right to candidacy embodied in section 3. Notwithstanding, there

[128] Bayefsky (n 125) 747.

[129] Bayefsky (n 125) 569.

[130] Section 15 of the Charter provides, inter alia: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

[131] Bayefsky (n 125) 569, 588, 599.

[132] Canadian Charter of Rights and Freedoms, sec 1.

are still important principles which can be gleaned from the existing case law on the scope and content of the right. First, in line with the plain reading of the text, the right has been held to apply only to elections to the House of Commons and elections to provincial and territorial legislative assemblies.[133] A challenge to the requirements for candidacy in the Toronto mayoral elections was therefore dismissed as being outside the scope of section 3.[134] This leaves candidacy for municipal office largely unprotected, given that all provincial human rights instruments (with the exception of Quebec) fail to provide for a right to candidacy in provincial or municipal elections.[135]

Secondly, the right to be 'qualified for membership' has been interpreted broadly to necessarily include 'the right to be a candidate and to sit as a member of Parliament or legislative assembly' if elected.[136] Further, the Supreme Court of Canada has noted that the right to stand for election is 'one of the most fundamental in the *Charter*, going as it does to the very heart of a free and democratic society'.[137] This importance rests in large part on the informational component of the right to candidacy: it has been held to include a right to effectively communicate one's ideas to the electorate.[138] This is in turn linked to the voters' right to hear such ideas in the process of making an informed choice.[139] Canadian jurisprudence

[133] *Nunziata v Toronto (City) (Clerk)* (2000) 189 DLR (4th) 632 (ONSC).

[134] ibid.

[135] Section 22 of the Quebec Charter of Rights (1975) provides: 'Every person legally capable and qualified has the right to be a candidate and to vote at an election'.

[136] *Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876, para 28.

[137] ibid, para 44.

[138] *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912, para 29; *Barrette v Canada* (1994) 113 DLR (4th) 623 (QCCA).

[139] ibid.

also displays a more general appreciation of the strong interdependence between candidacy and the right to vote, as evidenced in United States case law.[140]

However, the courts have made it clear that there is no positive duty on the State to provide candidates with the means to effect their communication[141] or to pass legislation which enhances their communicative capacity.[142] However, legislation which bestows benefits on one candidate, should not be to the detriment of another candidate's ability to meaningfully participate in the electoral process.[143]

A more detailed examination of the courts' jurisprudence reveals two different approaches to alleged violations of section 3, depending on the nature of the infringement in question. The court makes a distinction between express limitations on the right to candidacy (in the form of statutory disqualifications from running for office) versus legislation which more generally regulates the electoral process and only indirectly affects the exercise of the citizen's right to stand for election.[144] The courts' approach in these two respects will be examined below.

[a] Direct Restrictions on the Right to Stand for Election

Any legislation which imposes a direct disqualification from running for legislative office is treated as automatically in violation of section 3 and must be justified under section 1 in order

[140] For example in *Figueroa v Canada (Attorney General)* (2000) 189 DLR (4th) 577 (ONCA), the court noted that the right to vote and the right to candidacy were 'two sides of the same coin', noting that similar reasoning should be applied to both.

[141] *Figueroa* (SCC) (n 138), para 48; *Barrette* (n 138).

[142] *Figueroa* (SCC) ibid.

[143] ibid.

[144] ibid, para 33.

to withstand constitutional challenge.[145] In *Harvey v New Brunswick*,[146] the Supreme Court of Canada considered the constitutionality of a statute which imposed a five year candidacy disqualification on any person convicted of an illegal electoral practice. The appellant in question was convicted of knowingly inducing a minor to vote. The government sought to argue that this disqualification (given its importance in preserving the integrity of the electoral process) was within the scope of 'inherent' limitations on the right to candidacy and therefore need not be justified under section 1. The Supreme Court rejected this interpretation and emphasized the all-inclusive nature of the section 3 guarantee:

> Admittedly in the English version the words "right to be qualified" are somewhat ambiguous. The use of the word "qualified" suggests that certain criteria must be met before a citizen can run for office. However, since there exists a right to be qualified, it would appear that qualification is automatic regardless of any criteria set out by statute… A more precise statement of the right appears in the equally authoritative French text…The word "*éligible*" translates as "eligible" in English and is defined … as one who has met the relevant conditions so that they can be chosen. This suggests that the English version of s. 3 should be read as "[e]very citizen . . . is qualified for membership therein".[147]

The Court went on to clarify that disqualifications enumerated in the Constitution would remain undisturbed by section 3, given that one part of the Constitution cannot be used to invalidate another.[148] The constitutional disqualification of senators and judges from legislative office is therefore not subject to challenge on the basis of incompatibility with the right to be qualified.[149] However, it appears that all express *statutory* limitations on section 3 rights are

[145] *Harvey* (n 136).

[146] ibid.

[147] *Harvey* (n 136), para 28.

[148] *Harvey* (n 136), para 31.

[149] ibid.

subject to a Charter challenge: this includes 'standard' eligibility requirements such as age and residency.[150]

The Court's general approach to express disqualifications therefore provides for very robust protection of the right, given the general consensus that all such restrictions must be justified under the section 1 proportionality test. However, there does remain an unresolved question of the extent to which statutory disqualifications may be unreviewable by the court on the basis that they fall within Parliament's privilege to regulate its membership and internal affairs. In *Harvey*, the joint dissenting opinion of Justices L'Heureux-Dube and McLachlin provided a compelling case for the view that the impugned disqualification for electoral misconduct was within parliament's privilege to regulate its membership and therefore outside the scope of judicial review.[151] The majority opinion of La Forest J wholly declined to address the issue of parliamentary privilege on the basis that it was raised by an intervener and not by one of the parties to the action.[152] The majority held, instead, that the disqualification was constitutional on the basis that it was justified under section 1. The potential applicability of parliamentary privilege in this regard is therefore still open to question.[153]

[b] <u>Indirect Violations Resulting from the Administration of the Electoral Process</u>

The Canadian courts have taken a very broad and purposive approach in defining the content of the right to candidacy. The right is not fulfilled by merely making eligibility requirements

[150] *Fitzgerald v Alberta* 10 Alta LR (4th) 155 (ABQB).

[151] *Harvey* (n 136), paras 55 – 89.

[152] ibid, para 20.

[153] Chapter 6 of this thesis will normatively address this issue of the extent to which parliamentary privilege should act as a bar to the judicial review of statutory disqualifications.

for legislative office inclusive. On the contrary, as noted by Le Bel J in *Figueroa v Canada*,[154] 'section 3 imposes a positive obligation on the government to set up an electoral system, which, in turn, provides for democratic government in accordance with the choices of Canadian voters'.[155] The right to run for office has therefore been held to include the guarantee of a 'fair election' in which one may exercise that right.[156] The question of what precisely constitutes 'fairness' is less straightforward and has been the subject of much judicial debate.

Figueroa v Canada: The Test of Meaningful Participation

The key decision in this area is that of *Figueroa v Canada*, where the Supreme Court was asked to rule on whether the national system of political party registration infringed the section 3 rights to vote and stand for election. Michael Figueroa, leader of the Communist Party of Canada (CPC), brought an action challenging the constitutionality of a statute which provided that in order for a political party to obtain and retain 'registered party' status, it had to field candidates in at least 50 electoral districts. Benefits of registered party status included the right to list candidates' party affiliation on the ballot, as well as the right of candidates to issue tax receipts for donations made outside the election period and to transfer unspent election funds to the party. The CPC lost its registered party status after failing to meet the 50-candidate threshold in the 1993 federal elections. Figueroa challenged the party registration scheme on the basis that it infringed, inter alia, the right of candidates from smaller parties to stand for election.

At first instance, the trial judge Molloy J held that the 50-candidate threshold was unconstitutional on the basis that it provided an unfair advantage to larger parties, given that,

[154] *Figueroa* (SCC) (n 138).

[155] ibid, para 133.

[156] *Figueroa v Canada (Attorney General)* (1999) 170 DLR (4th) 647 (ONSC).

in her opinion, section 3 demanded that any benefit extended to one political party should be made equally available to all.[157] The provision also failed the section 1 proportionality test on the basis that there was no 'sufficiently pressing and substantial objective for this threshold to warrant overriding the constitutional right of electoral candidates to run for office in a fair election.'[158]

In large measure, Molloy J equated 'fairness' with 'equal treatment', such that the bestowal of unequal benefits to candidates from different political parties was held to necessarily violate section 3.[159] On appeal, the Ontario Court of Appeal staunchly disagreed with this conception of fairness, noting that any difference in treatment among candidates is only inconsistent with section 3 if it undermines the underlying purpose of the section.[160] In the Court of Appeal's view, the purpose behind section 3 was 'effective representation' more so than strict equality.[161] In support of this contention, the Court of Appeal relied on the Supreme Court decision of *Reference re Provincial Electoral Boundaries (Saskatchewan)*[162] (hereinafter '*Saskatchewan Reference*'). In that case, the Court had to consider whether electoral boundaries which gave rural voters more voting power than their urban counterparts, violated the right to vote. In upholding the electoral boundaries, the Supreme Court held that the purpose of the right to vote, as enshrined in section 3, was 'not equality of voting power per se, but the right to 'effective representation'.[163]

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[157] ibid.

[158] ibid.

[159] ibid.

[160] *Figueroa v Canada (Attorney General)* (2000) 189 DLR (4th) 577 (ONCA), para 58.

[161] ibid, para 66.

[162] [1991] 2 SCR 158.

[163] ibid 183.

In applying this reasoning to the right to stand for election, the Court of Appeal held that the main question which fell to be considered was whether the favourable treatment of larger political parties enhanced or undermined effective representation. The Court held that the special benefits given to larger parties, who fielded more candidates, was justifiable on the basis that these parties furthered effective representation by being able to constitute an entire government, thereby giving voters a genuine opportunity to choose who governs:

> A political party that runs only a handful of candidates cannot structure voter choice at the national level, nor can it offer citizens an opportunity to become involved in the process of choosing a government. Most significantly, political parties who run only a few candidates are not seeking to organize elected representation in Parliament… The purposes served by political parties in the electoral process which enhance effective representation, and thereby promote the goal underlying s. 3 of the Charter, become operative only where political parties assume a meaningful level of participation in the electoral process.[164]

The Court therefore held that the 50-candidate threshold was not in violation of section 3, except to the extent that it denied candidates from unregistered parties the right to print their party affiliation on the ballot.[165] This was held inconsistent with section 3 only on the basis that it violated the voter's right to make an informed choice.[166] It is interesting that, unlike Molloy J, the Court of Appeal made no ruling as to whether the party affiliation provision also infringed the candidate's right to stand. The Court of Appeal's judgment therefore seems to be characterised by a more general ideology that the meaningfulness of a candidate's participation, and the extent to which it deserves protection, is necessarily tied to the candidate's ability to form part of the ruling party. This thinking was squarely rejected by the Supreme Court, which overturned the Court of Appeal's decision and upheld Molloy J's ruling that the 50-candidate threshold was unconstitutional.

[164] *Figueroa* (ONCA) (n 160), para 77.

[165] ibid, paras 111 – 122.

[166] Ibid.

The Supreme Court held that the Court of Appeal took an unduly narrow view of 'effective representation' by equating it with the aggregation of preferences and the formation of a majority government.[167] By so doing, it lost sight of the importance of each individual citizen's right to play a meaningful role in the electoral process which, in the Supreme Court's view, was the central underlying purpose of section 3:

> Defining the purpose of s. 3 with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the composition of Parliament subsequent to an election, better ensures that the right of participation that s. 3 explicitly protects is not construed too narrowly.[168]

The Supreme Court further outlined the extent to which participation in the electoral process serves a much broader purpose than merely choosing one's government:

> It thus follows that participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections. To be certain, the electoral process is the means by which elected representatives are selected and governments formed, but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy. *The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option*; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses.[169]

Here the Court insightfully emphasized the intrinsic communicative value in electoral participation and thereby highlighted that the value of a candidate's contribution is independent of his or her ability to win (or to form part of a majority government).[170]

The Court went on to lay down the test for whether indirect limitations, which bestow unequal benefits to parties or candidates, violate section 3:

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[167] *Figueroa* (SCC), paras 22 - 23.

[168] ibid, para 26.

[169] ibid, para 29 (emphasis added).

[170] Ibid, paras 39, 41 and 44.

> [S]ection 3 imposes on Parliament an obligation not to enhance the capacity of one citizen to participate in the electoral process in a manner that compromises another citizen's parallel right to meaningful participation in the electoral process. Where legislation extends a benefit to some citizens, but not to others, it is necessary to consider carefully the impact of that legislation on the citizens who have not received the benefit. *If the legislation interferes with the right of certain citizens to play a meaningful role in the social discourse and dialogue that the electoral process engenders, it is inconsistent with s. 3 of the Charter*.[171]

Here, the Court's conception of meaningful participation is framed largely in terms of opportunities for 'social discourse and dialogue', once again highlighting the communicative aspect of the electoral process. The Court also noted that meaningful participation includes the right of voters to make an informed choice, which in turn hinges on candidates being able to effectively communicate their positions to the general public.[172] The Court also effectively eschewed Molloy J's conception of fairness as equal treatment by noting that:

> '…this requirement of fairness is not synonymous with formal equality… it is not enough to offend section 3 that the legislation differentiates between one citizen and another… It is also necessary that the differential treatment have an adverse impact upon the applicant's right to play a meaningful role in the electoral process.'[173]

In applying this test, the Court held that the 50-candidate threshold, and the accompanying unequal benefits, infringed section 3 by decreasing the capacity of smaller, unregistered parties to participate in the open political dialogue central to the electoral process.[174] The registration scheme was not saved under section 1 on the basis that, inter alia, the government could have employed less restrictive means to further their legislative objective.[175]

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[171] ibid, para 50 (emphasis added).

[172] ibid, para 54.

[173] Ibid, para 51.

[174] ibid, para 53.

[175] ibid, para 78.

‘Meaningful Participation’ and its Application to Political Parties

In the 2007 decision of *Jong v Ontario*,[176] the Ontario Superior Court had to consider whether the forfeiture of a $200 deposit for candidates who did not receive at least 10% of the votes in his or her electoral district, violated the candidates’ right to stand for election. In assessing whether this measure restricted the right to play a meaningful role in the electoral process, the Court noted that the provision affected the capacity of smaller parties to communicate their ideas to the public by requiring the diversion of substantial funds which could have aided in such communication.[177] While the effect on individual candidates was held to be less than significant, the cumulative effect for a party, having to forfeit numerous deposits for a large number of candidates, was held to be quite onerous.[178]

The Attorney-General sought to argue that any assessment of whether section 3 had been infringed, should only be limited to the effect on individual candidates given that the right to candidacy is framed as an individual right. On his view, it was therefore inappropriate to look at the effect of the measure on political parties as collective units.[179] The Court squarely rejected this assertion by emphasizing the extent to which a party’s capacity to communicate, in turn, affects the right of its candidates to play a meaningful role in the electoral process.[180] Here, the Court rightly recognised the extent to which the candidate’s right to stand is inevitably linked with the party’s more general right to freedom of association, a linkage which was also made evident in the United States jurisprudence, discussed above.

[176] (2007) 287 DLR (4th) 90 (ONSC).

[177] *Jong* (n 176), para 29.

[178] Ibid.

[179] Ibid, para 37.

[180] Ibid, para 50.

[c] <u>Doctrinal Divergences: Judicial Tension on the Scope and Content of the Right</u>

In analysing Canadian jurisprudence on the right to candidacy, it becomes clear that there exists a number of diverging opinions on the scope and content of electoral rights, as well as the underlying values which should inform such content. For example, in the Supreme Court decision in *Figueroa v Canada*, the Court was unanimous regarding the unconstitutionality of the 50-candidate threshold, but deeply divided regarding the methodology for arriving at that end. In a separate opinion handed down by Le Bel J, with which Justices Gonthier and Deschamps agreed, a fundamentally different conception of the right's content was put forward. Le Bel J agreed that section 3 guaranteed every citizen the right to meaningful participation, however he emphasized that such participation cannot be defined in purely individualistic terms.[181] Rather, the definition of meaningful participation, on his view, necessarily includes communitarian and group interests which must be taken into account in defining the very content of the right.[182] These collective interests include the aggregation of political preferences and the formation of majority governments which, he notes, are characteristic of the FPTP electoral system.[183] According to Le Bel J, section 3 must therefore be interpreted 'in harmony with our political traditions'.[184]

In taking these collective interests as embedded into the very content of the right, Le Bel J then argued that the question of whether section 3 has been infringed must incorporate a preliminary balancing of these collective values (such as majoritarian preference aggregation)

[181] ibid, para 100.

[182] ibid, para 101.

[183] Ibid, para 154.

[184] Ibid, para 102.

against the value of individual participation.[185] This balancing exercise would be prior to, and separate from, the proportionality analysis in section 1. If after first balancing these interests there is found to be a violation of section 3, only then would the court enquire as to whether that violation is saved under section 1.

The majority opinion roundly rejected Le Bel J's methodology. Writing for the majority, Iaccobucci J noted that any balancing of collective interests against the individual's right to meaningfully participate, must take place under section 1, where the government has the burden of justifying their infringement.[186] Further, the Court noted that Le Bel J's opinion sought to treat section 3 as a qualified right by attempting to incorporate a preliminary balancing exercise into the right's scope.[187] However as the Court noted in *Harvey*, based on the plain reading of the constitutional text, the only qualification on section 3 rights is the general limitation laid down in section 1.[188] The majority's view is certainly to be preferred based on the section's drafting history, as outlined above, which reveals a clear intention for an unqualified right. Further, section 1 remains the more appropriate framework within which to balance such individual and collective interests given section 1's clearly established proportionality structure which squarely places the burden on the government to justify its measures. The proposal for a loosely defined balancing exercise at the infringement stage, where the burden is largely on the applicant, was therefore rightly eschewed by the Court.

The majority also disagreed with Le Bel J's views on the extent to which the current electoral system and political tradition should inform the content of the right. The majority noted:

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[185] Ibid, paras 122 – 124.

[186] Ibid, para 31.

[187] Ibid, paras 35 – 36.

[188] ibid.

> Finally, although certain aspects of our current electoral system encourage the aggregation of political preferences, I do not believe that this aspect of the current electoral system is to be elevated to constitutional status. In his reasons, LeBel J. argues that first-past-the-post elections favour mainstream parties that have aggregated political preferences on a national basis. This might, indeed, be true. But the fact that our current electoral system reflects certain political values does not mean that those values are embedded in the *Charter*, or that it is appropriate to balance those values against the right of each citizen to play a meaningful role in the electoral process… the purpose of s. 3 is not to protect the values or objectives that might be embedded in our current electoral system, but, rather, to protect the right of each citizen to play a meaningful role in the electoral process, whatever that process might be.[189]

This difference in opinion regarding the extent to which majoritarian political values should inform the right's content is also reflected when comparing the majority's decision with that of the Ontario Court of Appeal. As discussed above, the Court of Appeal clearly placed more primacy on the collective interests of preference aggregation in defining 'effective representation' and, consequently, in determining the underlying purpose and content of the right to candidacy.

These various points of contention are important to note given that it is still early days in the court's jurisprudence on the right to candidacy. It will therefore be interesting to see how the court's thinking on these points will continue to develop. These disagreements also point to underlying divergences on the purpose and values which underpin the right. Therefore, the Canadian experience, much like that of the US, also highlights the usefulness of having an account of the underlying justificatory basis of the right to candidacy.

D. CONCLUSION

The United States provides an example of a prominent liberal democracy which has failed to unequivocally recognise an independent, justiciable right to candidacy. The consequences of

[189] Ibid, para 37.

this non-recognition have been explored by assessing the befuddling nature of the court's jurisprudence and its failure to fully safeguard the interests of electoral candidates. In stark contrast, Canada provides an example of a jurisdiction which expressly guarantees the right, and which seeks to progressively outline its scope and content. Notwithstanding this major difference between the two North American states, there are also striking similarities in the issues with which the courts in both jurisdictions have had to grapple.

First, both countries adopt an FPTP, single member district electoral system. As Le Bel J noted in his separate opinion, this system necessarily creates a bias in favour of larger parties which are able to represent the aggregated views of a wide cross-section of society.[190] It is automatically harder for smaller parties to obtain seats given the 'winner-takes-all' rule. This is, of course, as opposed to proportional representation electoral systems which are necessarily more conducive to small parties and independent candidates. However, states which have chosen the FPTP system have arguably done so largely because of the perceived benefits associated with majority governments, such as increased stability. This raises the question of the extent to which the court may undermine that legislative choice by reversing the natural consequences of that system in an attempt to further individual rights.[191]

The case law in both jurisdictions reveal this tension: these cases were largely challenges brought by minor parties and independent candidates who sought greater inclusion in the electoral process. Both courts have therefore had to deal with framing the contours of an *individual* right to candidacy, in a political landscape which favours large, major parties.

This common challenge faced in both jurisdictions begs an answer to the question of how a country's given electoral system should inform the content of the right to candidacy. In

[190] *Figueroa* (SCC) (n 138), para 154.

[191] Le Bel J raises this concern regarding statements made in the majority opinion which sought to question whether the formation of a majority government was in itself a legitimate state interest: see *Figueroa* (SCC) (n 138), para 182.

answering this question, resort may be had to the distinction between the 'institutional' and 'moral' aspects of a human right, outlined in Chapter 1 of this thesis. As noted in Chapter 1, this thesis adopts the view that there exists a basic, supra-positive (moral) content of the right which should be treated as largely independent of its institutional implementation.[192] As Neuman notes, there is a great deal of judicial uncertainty which often stems from a conflation of the 'supra-positive' and 'institutional' aspects of the right.[193] Le Bel J's attempt to define the very content of the right in reference to the aims of the FPTP electoral system may therefore be taken as one example of such judicial conflation of the moral and institutional aspects. It is first necessary to have an understanding of the core supra-positive (moral) content of the right before one can address the secondary question of how this content needs to be tailored in order to suit institutional demands. The proceeding Chapter therefore seeks to set out the theoretical justifications for the right to candidacy and how this informs its basic, supra-positive content. After which, the question of how this content should be shaped in order to fit the contours of specific electoral systems will be addressed in Chapters 6 to 8, when looking at the implementation of the duties to respect, protect and fulfil the right.

The second point of similarity in both jurisdictions is the extent to which the courts have identified the interdependence which exists between the right to candidacy, the right to vote and freedom of association. Further, both courts have also highlighted the crucial communicative value in standing for election: the fact that it serves a much broader purpose than merely vying for a seat. These important linkages with other fundamental rights, as well as the intrinsic interests in running for office, will be developed in greater detail in the following

[192] See chapter 1.

[193] Gerard Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55(5) Stanford L Rev 1863, 1873.

Chapter, which aims to provide a much-needed theoretical account of the central values and interests underlying the right to candidacy.

PART II:

THEORETICAL JUSTIFICATION OF THE MORAL RIGHT TO CANDIDACY IN LIBERAL DEMOCRACIES

CHAPTER 4 –

THE FUNDAMENTAL VALUES AND INTERESTS UNDERLYING THE RIGHT TO CANDIDACY

A. INTRODUCTION

Part I of this thesis examined the current legal recognition of the right to stand for election in international, regional and domestic human rights law, with specific focus on the jurisprudence of the ECtHR, the United States and Canada. Chapter 2 revealed that, despite widespread recognition in international and regional human rights treaties, the domestic constitutions of most electoral democracies do not include an express right to candidacy. The Constitution of the United States was among those found wanting and, as demonstrated in Chapter 3, US courts have been reticent to unequivocally recognise a free-standing right to candidacy. On the other hand, while Canada's constitution does include an express right, the court's jurisprudence reveal sharp disagreements about the purpose, nature and scope of the right to stand for elective office. Together, these factors point concertedly to the need for an analysis of the values and interests underlying the right to candidacy, with a view to providing a strong justificatory foundation for the right's existence and fundamentality. This justificatory foundation will be the subject matter of Part II of this thesis.

In as much as there exists no universal consensus on the nature and foundation of human rights, there is equally no unanimous agreement on the best approach to justify such rights' existence. As noted in Chapter 1, this thesis broadly adopts the pluralistic interest-based account of human rights, (as inspired by Raz and later developed by Tasioulas), and it is this account which will largely inform the approach taken to justification. Central to the interest-based account is the premise that a right is grounded in the existence of interests which are of

sufficient importance to generate binding duties on others to protect and promote those interests.[1] Raz consequently characterises rights as 'intermediate conclusions in arguments from ultimate values to duties'.[2] Therefore, based on this account, establishing the importance of a right's underlying values and interests is only one half of the justificatory exercise. After so doing, one has to further establish the extent to which these interests generate binding duties and to defend the feasibility and reasonableness of the duties imposed.[3] In light of this, the theoretical justification of the right to candidacy has been divided into two segments, dealt with in two separate chapters:

(i) This current Chapter, (Chapter 4), examines the fundamental values and interests underlying the right to candidacy, and

(ii) Chapter 5 outlines the proposed duties to which these interests give rise, while also broadly defending the legitimacy and suitability of enforcing such duties within the framework of a justiciable, constitutional right.

In establishing the primacy of the values and interests which underpin the right, this Chapter is in turn divided into three main segments. First, a more detailed exposition of the overarching justificatory framework will be offered. Secondly, an account of the underlying interests and values furthered by the right to candidacy will be provided, namely: dignity, autonomy, self-development and self-expression. This is termed the 'primary' justification of the right to

[1] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1988) 183; John Tasioulas, 'Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps' (2002) 10(1) European Journal of Philosophy 79, 92 – 95.

[2] Raz ibid 181.

[3] John Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65(1) Current Legal Problems 1, 15 – 16; James Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell 2007) 78 – 79.

candidacy given that it does not centrally hinge on the instrumentality of candidacy in furthering or supporting any other right. Lastly, a 'derivative' justification of the right will be offered by highlighting the extent to which its recognition is instrumental for the full realisation of other fundamental rights, including the right to vote.

B. UNPACKING THE SCOPE AND CONTENT OF THE JUSTIFICATORY FRAMEWORK

Before putting forward the substance of the justificatory account, it is perhaps necessary to explain more fully the form of the framework adopted, as well as the key assumptions which attend it. This section will seek to shed further light on the following aspects of the theoretical justification:

(i) The object being justified: the general scope of the moral right being asserted;

(ii) Where the justification is situated: the normative context within which it is positioned and the empirical context to which it is directed (the idea of the 'liberal democracy'); and thirdly,

(iii) How this justification will take place: the precise contours of the justificatory framework and a brief defence of its cogency.

I. THE GENERAL SCOPE OF THE MORAL RIGHT TO CANDIDACY

As noted above, in accordance with the interest-based account, the specific content of a right is derived from assessing the duties which have been generated in order to further the right's underlying interests. On that basis, seeking to expound on the content of a right *before* analysing the interests at stake is somewhat akin to placing the proverbial cart before the horse. Therefore, the current section does not aim to offer a detailed exposition on the precise content,

or duties, of the right; that remains the subject of the proceeding chapter. Instead, this section seeks to offer a general picture of the right which forms the object of this justification, as well as the level of protection being sought for it. It is important for the reader to have a clear understanding of the general idea being defended in order to accurately assess the strength and suitability of the defence offered.

As noted in Chapter 1, this thesis seeks to defend the claim that the right to stand for election exists as a moral right in all liberal democracies. In such polities where the right has yet to receive recognition as positive law, it will be argued that it exists as what Feinberg terms an 'ideal moral right': a right in which 'rightholders have a claim against political legislators to convert their 'moral right' into a positive legal one.'[4] The case will be made that this right deserves express recognition as a justiciable right at the constitutional level.

It may be argued that the citizen's right to stand for election is already a basic feature of most liberal democracies, given that, in establishing the composition of government, domestic constitutions generally outline those eligible to stand for major elective offices. This is normally included in what Dworkin terms the 'enabling' constitutional rules: those which construct majority government by stipulating the terms and conditions of elections.[5] Eligible citizens may therefore be said to possess a right to stand, even if this right is not expressly included as part of a constitutional bill of rights. So too with the right to vote: in the absence of express recognition, few would argue that eligible citizens in a liberal democracy lack the right to suffrage. These electoral rights are considered as part of the main constitutive elements

[4] Joel Feinberg, *Social Philosophy* (Prentice-Hall 1973) 85.

[5] Ronald Dworkin, 'Constitutionalism and Democracy' (1995) 3(1) European Journal of Philosophy 2, 3.

of modern democracies,[6] and, in this sense, their existence and necessity are largely uncontested.[7]

However, this thesis argues for a much more pointed and robust level of recognition and protection of the right to candidacy. It will argue for the right's inclusion as part of what Dworkin terms the 'disabling' constitutional rules: those which delineate individual rights that 'restrict the powers of the representative officials that the enabling rules have defined'.[8] Candidacy will be put forward as a basic right of virtually all adult citizens, such that, any limitation on the right, including all statutory eligibility requirements, must be specially justified by the state. Further, it will be argued that in order for the right to be meaningful, and not merely illusory, the state also possesses positive duties to ensure a fair electoral framework within which the right may be exercised. Thus, in Rawlsian terms, the state has a duty to ensure the 'fair value' of the right to candidacy: to guarantee not only the existence of the right, but also the equal 'worth' of the right to its holders.[9] This conception may be termed the 'robust' right to candidacy.

Couched in those terms, the right to candidacy is a much more contested norm than it first appears. Rawls includes the right 'to hold public office' as among the basic liberties which should be equally guaranteed to all under the first principle of justice.[10] One political theorist categorized Rawls inclusion as, 'one of the rare moments in the history of Western political thought … where a seminal thinker states unequivocally that eligibility for (public) office is a

[6] Marc Plattner, 'Liberalism and Democracy: Can't Have One Without the Other' (1998) 77(2) Foreign Affairs 171, 172.

[7] Plattner ibid; David Held, *Models of Democracy* (3rd edn, Polity 2006) 94.

[8] Dworkin, 'Constitutionalism and Democracy' (n 5) 3.

[9] John Rawls, *Political Liberalism* (Colombia University Press 1996) 327.

[10] John Rawls, *A Theory of Justice* (Revised edn, Harvard University Press 1999) 53.

basic right of citizenship that must be applied equally'.[11] On the other hand, Beitz roundly rejects Rawls categorization of the opportunity to run for office as a 'basic liberty'. He notes that it should be distinguished from the right to vote, which is feasibly exercised by everyone and hence truly 'basic'.[12] According to Beitz, while there is a 'right to have one's position represented' this is distinguishable from the 'right to represent one's own position' as the latter is 'more properly conceived as an opportunity for service and self-development, analogous perhaps, to the right to choose a career'.[13]

This lack of consensus on the right's status among key political theorists, points all the more to the need for a solid justificatory account which debunks such objections and which highlights the fundamentality of the interests underlying the robust conception of the right to candidacy outlined above.

II. DEFINING 'LIBERAL DEMOCRACY': THE JUSTIFICATORY CONTEXT

The context in which this robust moral right to candidacy is taken to exist, is that of the liberal democracy. Among empirical democratic theorists, the term 'liberal democracy' has come to be synonymous with a political regime which possesses the following characteristics: the protection of individual civil liberties (including freedoms of belief, speech, association and assembly), the rule of law, constitutionalism, an independent judiciary and the protection of ethnic and cultural minorities.[14] Diamond juxtaposes this regime with that of a thin 'electoral

[11] John Seery, *Too Young to Run: A Proposal for an Age Amendment to the US Constitution* (Penn State University Press 2011) 78.

[12] Charles Beitz, *Political Equality* (Princeton University Press 1989) 174.

[13] ibid 174 – 5.

[14] Larry Diamond, 'Can the Whole World Become Democratic?' (2003) CSD Working Papers, 8 – 9 <http://escholarship.org/uc/item/7bv4b2w1> accessed 02 December 2014; Larry Diamond, *Developing*

democracy', which possesses competitive, multiparty elections but which lack the crucial substantive elements listed above.[15]

The liberal democratic context has been chosen on the basis that its substantive features provide the minimum conditions necessary for the protection of the strong right to candidacy. More importantly, they are also central in justifying the right's very existence: the justificatory account espoused will include an examination of the instrumental value of the right to candidacy in securing the full realisation of the civil liberties listed above. The account therefore assumes that these liberties are indisputably accepted and that their full realisation is a good to be desired.

This is not to say that the right to candidacy, along with the full gamut of other civil and political rights, does not also exist as a moral right in thin 'electoral democracies'. Indeed, democratization studies are grounded, in large measure, on the premise that minimalist electoral democracies should be aspiring to become 'full' liberal ones.[16] However, the point being made is that for the purposes of the present justificatory account, the arguments have been situated in a context in which the desirability of protecting certain individual liberties is taken to be accepted and need not itself be justified.

It should also be noted that by situating the account in the *empirical* context of the liberal democratic state, I am in no way espousing the *theory* of liberal democracy as a normative ideal. Dufek and Holzer insightfully highlight a key distinction between empirical and normative democratic theorists in their treatment of 'liberal democracy': the former see liberal democracy as the ultimate ideal to be achieved, while the latter conceive of it as a

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Democracy: Towards Consolidation (Johns Hopkins 1999) 10 – 12; Marc Plattner, 'From Liberalism to Liberal Democracy' (1999) 10(3) Journal of Democracy 121, 121 – 2.

[15] Diamond, *Developing Democracy* (n 14) 10.

[16] Diamond ibid; Pavel Dufek and Jan Holzer, 'Democratisation of Democracy? On the Discontinuity between Empirical and Normative Theories of Democracy' (2013) 49(2) Representation 117, 118 - 119.

starting point from which they launch considerations for its 'reforms, transformations and alternatives'.[17] Chief among the normative theorists critical of the liberal model are those belonging to the deliberative democracy school of thought. Dryzek and others have noted that 'liberal minimalism' focuses too narrowly on the mere aggregation of fixed preferences and fails to place sufficient primacy on reflective preference formation through public debate.[18] This thesis generally agrees with that criticism and in arguing for a robust right to candidacy, justificatory arguments will largely be grounded in the modern theoretical movement toward more deliberative conceptions of democracy. The central tenets of liberal democracy are therefore taken to be necessary, but not sufficient, for the full realisation of the robust right to candidacy.

III. THE CONTOURS OF THE JUSTIFICATORY FRAMEWORK

Drawing from the work of James Nickel,[19] this Chapter puts forward a pluralistic justificatory account which includes a primary interest-based defence of the right to candidacy as well as derivative arguments which demonstrate the extent to which the right to candidacy is necessary for the effective implementation of other rights and interests. Nickel notes that pluralistic accounts should be favoured given that any single strand of justification is unlikely to provide a full picture of the right's importance or to successfully stand alone against objections.[20]

The primary justification offered is grounded in John Tasioulas' interest-based account of human rights. According to this account, human rights are grounded in a plurality of

[17] Dufek and Holzer ibid 123.

[18] Held (n 7) 246; John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (OUP 2002) 2 – 3.

[19] Nickel, *Making Sense of Human Rights* (n 3) 53 – 91.

[20] ibid 53.

normative values, these include: (i) human dignity, defined as equal, intrinsic moral value or status and (ii) a variety of universal human interests.[21] Tasioulas puts forward his account in opposition to 'status-based theorists' who view human rights as grounded solely in one's moral status; these theorists eschew interests as the basis on which rights may be grounded for fear that such an approach may give way to utilitarianism and consequentialism.[22] However, as Tasioulas notes, his interest-based account does not operate to the exclusion of the status-based foundations which make human rights resistant to utilitarian trade-offs.[23] To the contrary, prudential interests and moral status are in 'intimate union': 'the status of individuals [human dignity] is to be honoured primarily by respecting, protecting and advancing their interests'.[24]

Tasioulas' account is also distinguished on the basis that he employs a plurality of interests in grounding human rights. He notes that this is in contradistinction to James Griffin who views human dignity as founded largely in human agency or autonomy.[25] As such, in Griffin's account, autonomy and liberty are taken to be the only values which directly ground human rights.[26] On this basis, non-agent humans (infants or those in a vegetative state) are excluded from the account given the myopic focus on autonomy;[27] Griffin posits that while the murder or torture of a non-agent is morally reprehensible, it is not a 'human rights' violation.[28] Tasioulas notes that such an absurd conclusion may be avoided by utilising a plurality of

[21] Tasioulas, 'Towards a Philosophy of Human Rights' (n 3) 1.

[22] ibid 8; Thomas Nagel, *Concealment and Exposure and Other Essays* (OUP 2002) 39.

[23] Tasioulas, 'Towards a Philosophy of Human Rights' (n 3) 9.

[24] Ibid.

[25] James Griffin, *On Human Rights* (OUP 2003) 45.

[26] Ibid.

[27] Griffin (n 25) Chapter 4; John Tasioulas, 'Human Dignity and the Foundations of Human Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (British Academy 2013) 302 – 303.

[28] Ibid.

universal human interests, including the avoidance of pain, which would provide the non-agent with a protectable interest in the case of torture, while still making it logically consistent for that non-agent to lack the right to work or to political participation.[29] He posits that other universal interests which may ground human rights include achievement, enjoyment or knowledge.[30]

The following justificatory account will seek to establish the extent to which the right to candidacy furthers the democratic citizen's universal human interests of: autonomy, self-expression and self-development. It will further establish the extent to which the value of human dignity, defined largely as equal moral status, demands the existence and protection of the right to candidacy.

A derivative justification of the right is then offered: an exposition of its instrumentality for the fulfilment of other rights and interests. This section of the account has its theoretical roots grounded partially in Shue's exposition on basic rights: rights which are necessary for the effective enjoyment of all other rights,[31] with effective participation deemed by Shue as one such basic right.[32] More generally, this section is rooted in the widely acknowledged conception of the interdependence of human rights, such that supporting relationships between rights have been identified as providing important justificatory bases for individual rights.[33]

Many have noted that this interdependence necessarily presents a challenge in justifying specific rights in isolation, given that a holistic approach to justification is necessarily more

[29] Tasioulas, 'Human Dignity' (n 27) 311 - 312.

[30] ibid 302 – 303.

[31] Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton Univ Press 1996) 19.

[32] ibid 85.

[33] Nickel, *Making Sense of Human Rights* (n 3) 87.

natural.[34] In bearing this limitation in mind, it should not be a surprise that even the 'primary', interest-based account will rely on linkages regarding interests founded in the protection of other civil and political rights. This interdependence should not be taken to detract from the individual importance of candidacy as a free-standing right, rather, it will be argued that it serves to augment to importance of adequately safe-guarding the right to candidacy, given its centrality in the full realisation of other fundamental liberties.

C. THE PRIMARY INTEREST-BASED JUSTIFICATION OF THE RIGHT TO CANDIDACY

The interest-based justification of the right to candidacy will unfold in three stages. First, the importance of the democratic citizen's overarching interest in meaningful political participation will be outlined. Secondly, the extent to which candidacy for public office provides a uniquely valuable avenue for exercising this participation will be demonstrated. In so doing, an account will be offered of how the opportunity to stand for election furthers the following universal human interests: political expression, self-development and autonomy. Thirdly, it will be argued that the value of human dignity also centrally underlies the right to candidacy.

I. THE DEMOCRATIC CITIZEN'S INTEREST IN MEANINGFUL PARTICIPATION

The nature, scope and purpose of political participation in which the citizen should engage is invariably coloured by one's normative theory of democracy. If one adopts Schumpeter's elitist conception of democracy, the citizen's participation should be limited to choosing more

[34] Nickel ibid 61; Tasioulas, 'Towards a Philosophy of Human Rights' (n 3) 17; Rawls, *Political Liberalism* (n 9) 357.

experienced representatives who possess the expertise necessary for effective decision-making on public affairs.[35] However, if one surveys most other normative theories of democracy, it becomes clear that most envision the democratic citizen also engaging in more meaningful and direct modes of participation, beyond the mere casting of a vote for representatives. What distinguishes these other theories from each other is their conception of the nature and purpose of this meaningful participation.

Liberal theory focuses on the communication of preferences and needs to representatives with the main aim of ensuring that liberal rights and interests are adequately safeguarded.[36] Political participation is therefore viewed as a condition necessary to secure personal liberties rather than as a good in itself.[37] Classic republican conceptions,[38] and more modern participatory models,[39] focus on opportunities for engagement in direct decision-making largely for the purpose of the citizen's own self-development and self-realisation.[40] Deliberative democrats focus on the formation of refined and reflective preferences through a process of public deliberation aimed at strengthening discursive rationality.[41] The deliberative process is valuable for its own sake given that it is itself a source of democratic legitimacy.[42] Others such as Dahl and Beitz have highlighted the extent to which the democratic citizen

[35] See Joseph Schumpeter, *Capitalism, Socialism and Democracy* (3rd edn, Harper and Brothers 1950).

[36] Jan Teorrell, 'Political Participation and Three Theories of Democracy: A Research Inventory and Agenda' (2006) 45 European Journal of Political Research 787, 792.

[37] Dominique Leydet, 'Citizenship' *The Stanford Encyclopedia of Philosophy* (Fall edn, 2011) <http://plato.stanford.edu/archives/fall2011/entries/citizenship/> accessed 02 December 2014.

[38] See Held (n 7) 29 – 55.

[39] Arnold Kaufman, 'Human Nature and Participatory Democracy' in C Friedrich (ed), *Responsibility* (Liberal Arts Press 1960); Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press 1984)

[40] Teorrell (n 36) 794.

[41] Held (n 7) 233.

[42] Held ibid; Bernard Manin, 'On Legitimacy and Political Deliberation' (1987) 15 Political Theory 338, 351.

should have a part in controlling and shaping the political agenda as opposed to merely responding to it.[43]

Given that the present justificatory account is grounded in safeguarding a plurality of human interests, it becomes clear that it is not inextricably wedded to any single strand of democratic theory. For example, the right's derivative justification, which looks at candidacy's instrumental role in securing other liberties, resonates with the liberal theorists' interest in the protection of personal rights. Similarly, the proceeding section on how candidacy fosters self-development champions the aim of republican and participatory democrats. Additionally, Dahl's emphasis on control of the agenda will be used to highlight how candidacy furthers the value of individual autonomy. Lastly, the deliberative account will be most instructive in examining the intrinsic communicative value of candidacy as a means of political expression.

It is therefore important to note that the justificatory account does not wholly stand or fall on the acceptance or rejection of any single normative theory of democracy (provided, of course, that one is operating within the bounds of the main substantive tenets of a 'liberal democracy', as outlined above.) The proceeding section demonstrates the extent to which candidacy offers a unique and important avenue of meaningful participation as envisioned by a number of different democratic theories. It is to the deliberative model that we will first turn as we assess the extent to which candidacy furthers the underlying interest of political expression.

[43] Robert Dahl, *On Democracy* (Yale University Press 2000) 37, 95 – 96; Beitz (n 12) 164.

II. THE FUNDAMENTAL INTERESTS UNDERLYING THE RIGHT TO CANDIDACY

[a] Political Expression

Political expression is indisputably a central human interest, and is itself a recognised fundamental right, in most liberal democracies. Of course, the mere acknowledgement of this truism does not logically point us to a right to candidacy, given the myriad alternative avenues to engage in such expression. However, it will be argued that candidacy provides a uniquely significant opportunity to express one's views in a way which renders it worthy of independent recognition and protection in its own right.

This unique communicative value was recognised by the United States Court of Appeal in *Mancuso v Taft*[44] where, as noted in Chapter 3, the Court held that candidacy was a constitutional right protected by the First Amendment:

> Whether the right to run for office is looked at from the point of view of individual expression or associational effectiveness, wide opportunities exist for the individual who seeks public office. The fact of candidacy alone may open previously closed doors of the media. The candidate may be invited to discuss his views on radio talk shows... he may be invited to debate before various groups that had theretofore never heard of him or his views. In short, the fact of candidacy opens up a variety of communicative possibilities that are not available to even the most diligent of picketers or the most loyal of party followers.[45]

Building on the court's holding in *Mancuso*, it may therefore be argued that the fact of candidacy alone often elevates the relevance and potency of one's views in the eyes of others, given that the individual is now speaking in the capacity of a potential office-holder and not merely as the average lay citizen.

[44] *Mancuso v Taft* 476 F.2d 187 (1st Cir 1973).

[45] Ibid para 15.

The significance of this transition is highlighted by looking at Habermas' discursive theory of democracy wherein he highlights two tracks of deliberative communication.[46] The 'informal' track takes place in the general public sphere wherein citizens identify problems and possible solutions in an unregulated, decentralised space.[47] In contrast, the 'formal' political process includes deliberation by candidates, as well as the decision-making of elected legislators who respond to opinions and information generated from the informal sphere.[48] Habermas notes that the 'normative expectation of rational outcomes is grounded ultimately in the interplay between [the two spheres]', given that the formal track relies on the experiential knowledge of social issues and problems which emanates from the informal sphere.[49] On this basis, the importance of candidacy is underscored by the extent to which it facilitates that interplay by acting as a bridge between the formal and informal deliberative procedures, in granting the lay citizen a platform on which she may reflectively engage in the 'formal' communicative track.[50]

The deliberative conception of democracy is also instructive in assessing the intrinsic value of the candidate's expressive contribution during the electoral process. As noted above, the deliberative school of thought focuses on the formation and refinement of reflective preferences through a process of public deliberation.[51] In contrast to the liberal model, preferences are not taken as fixed elements which are merely in need of aggregation.[52] The

[46] Jürgen Habermas, *Between Facts and Norms* (MIT Press 1996) 304 – 308.

[47] Joshua Cohen, 'Reflections on Habermas on Democracy' (1999) 12:4 Ratio Juris 385, 399 – 400; Habermas (n 46) 300, 308, 485.

[48] Cohen (n 47) 399 – 400; Habermas (n 46) 307.

[49] Habermas ibid 485.

[50] Admittedly, this function of candidacy would not be operative in the case of an incumbent seeking re-election.

[51] Held (n 7) 246.

[52] ibid.

deliberative conception therefore appreciates the broader role of the electoral process: not only as a means of aggregating preferences and selecting representatives, but also as a discursive process in which preferences are themselves being refined.

The appreciation of this broader, communicative role of elections is central to an understanding of the expressive value of candidacy. This is demonstrated when one examines the approach taken in the Canadian Supreme Court decision of *Figueroa v Canada*.[53] As outlined in the previous chapter, the Ontario Court of Appeal narrowly defined the purpose of the electoral process as the formation of a majority government which has aggregated preferences at the national level.[54] As such, the Ontario Court had no qualms about upholding the constitutionality of a regulatory scheme which adversely affected the participatory capacity of smaller parties.[55] The Supreme Court of Canada roundly rejected the Court of Appeal's narrow approach and highlighted, instead, the broad expressive value of the right to candidacy:

> It thus follows that participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections… it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy. The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option…[56]

It should be noted that in highlighting the expressive value of candidacy, it is not intended that the importance of the actual decision-making aspect of the electoral process be discounted. Those championing similar 'expressivist' justifications of the right to vote have often been criticized for wrongly framing the substance and implications of the voter's decision as less

[53] *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912.

[54] ibid para 22; *Figueroa v Canada (Attorney General)* (2000) 189 DLR (4th) 577 (ONCA), para 77.

[55] *Figueroa* (ONCA) ibid.

[56] *Figueroa* (SCC) (n 53) para 29.

important than the individual benefit of moral self-expression;[57] in so doing, the self-indulgent right-holder is painted as having no moral obligation to vote responsibly.[58] Similarly, one may argue that the focus on the candidate's interest in individual expression downplays the importance of the collective public interests at stake in electoral politics. This resonates with Beitz's objection to candidacy as a basic liberty: he reduces it to a non-basic personal interest to 'represent one's own view' and notes that it should not serve to override the more important collective interest in the formation of a stable majority government.[59]

Notwithstanding the arguable legitimacy of such criticisms, it is submitted that the current expressive justification of the right to candidacy does not fall prey to any of them. First, the expressive value of the right to candidacy is *not* trumpeted to the exclusion of the decision-making role of elections. It is acknowledged that the 'government-selection' function of elections necessarily warrants a limitation on the number of persons given access to candidacy, in a bid to ensure that such selection remains feasible. It is not suggested that the expressive interest in candidacy should necessarily trump this competing consideration. To the contrary, it is merely emphasized that the expressive element must also be recognised in order to have a full picture of candidacy's participatory value. Secondly, it is precisely because of the gravity of the decisions at stake that the expressive function is deemed so important: as will be outlined below, voters possess a concomitant interest in hearing the views of a manageably broad range of candidates so that they may make informed decisions after reflectively considering their own preferences.

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[57] For an example of the expressivist justification of the right to vote see: Stanley Benn, 'The Problematic Rationality of Political Participation' in Benn and Wollheim (eds) *Political Participation* (Australian National University Press 1978) 19. For examples of criticisms see: Jeremy Waldron, 'Participation: The Right of Rights' (1998) 98 Proceedings of the Aristotelian Society 307, 317; Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* (CUP 1983).

[58] Waldron (n 57) 318.

[59] Beitz (n 12) 174 – 175.

[b] Self-Development

As noted above, the extent to which political participation fosters individual self-development has largely been the focus of republican and participatory conceptions of democracy. Within the classical republican tradition, one finds the Aristotelian notion of man as a 'political animal' who obtains true fulfilment only through direct participation in the political sphere.[60] Today, more moderate conceptions of participation's developmental role constitute prominent features of both republican and liberal accounts.[61] This section will focus on Rawls' developmental justification of political liberties and the extent to which candidacy offers a central and distinctive opportunity for such development.

Rawls first principle of justice provides that each person has an equal right to a fully adequate scheme of equal basic liberties; these include the political liberties 'to vote and to hold public office'.[62] The second principle of justice provides, in part, that 'social and economic inequalities are to be attached to offices and positions open to all under conditions of fair equality of opportunity'.[63] Under the first principle of justice, political liberties are treated in a special way, such that they are the only liberties which are to be guaranteed their 'fair value'.[64] This means that the worth or usefulness of political liberties must be the same for all regardless

[60] Aristotle, *Politics*, Book III.

[61] Held (n 7) 48, 92; Dominique Leydet, 'Citizenship' *The Stanford Encyclopedia of Philosophy* (Fall edn, 2011) <http://plato.stanford.edu/archives/fall2011/entries/citizenship/> accessed 02 December 2014.

[62] Rawls, *Political Liberalism* (n 9) 291; Rawls, *Theory of Justice* (n 10) 53.

[63] Rawls, *Political Liberalism* (n 9) 291.

[64] ibid 327.

of social or economic position.[65] As a corollary of this, Rawls notes that everyone should have 'fair opportunity to hold office public and to influence the outcome of political decisions'.[66]

In defending this special treatment accorded to political liberties, Rawls provides a compelling account of the intrinsic value of these liberties for the social and intellectual development of the citizen:

> Moreover, the effect of self-government where equal political rights have their fair value is to enhance the self-esteem and the sense of political competence of the average citizen… [Political participation] is an activity enjoyable in itself that leads to a larger conception of society and to the development of his intellectual and moral faculties… Having to explain and justify his views to others, he must appeal to principles that others can accept… [E]qual political liberty is not solely a means. These freedoms strengthen men's sense of their own worth, enlarge their intellectual and moral sensibilities, and lay the basis for a sense of duty and obligation upon which the stability of just institutions depends.[67]

Rawls further links political liberties to the development and exercise of the two moral powers which he deems necessary for all 'full participants in a fair system of social cooperation'.[68] He identifies these two moral powers as: (i) the capacity for a sense of justice – the ability to understand and apply the public conception of justice which characterises the terms of social cooperation and (ii) the capacity for a conception of the good – the ability to form, revise and pursue one's personal view of what is good or worthwhile.[69] Rawls notes that political liberties play a particularly important role in securing the 'full and effective exercise of citizens' sense of justice' (the first moral power).[70]

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[65] Ibid.

[66] Ibid.

[67] Rawls, *Theory of Justice* (n 10) 205 – 206.

[68] Rawls, *Political Liberalism* (n 9) 19, 308.

[69] ibid 19.

[70] ibid 334 – 335.

In building on Rawls' forceful developmental justifications, one can clearly see the distinctive and important role which candidacy plays in these aspects of moral and intellectual self-actualisation. The process of forming and presenting one's views on policy decisions gives one an important opportunity to apply moral reasoning to matters of public concern and to engage in deliberation on this reasoning with the electorate as well as one's opposing candidates. The social and intellectual rigor involved in seeking to persuade voters of one's position and to distinguish one's self from the opposition provides a unique developmental opportunity over and above that conferred by the right to vote.

Rawls further points to the specific developmental opportunity provided by office-holding in his explanation of the importance of fair access to offices and positions, which is demanded by the second principle. He notes that those unfairly excluded from holding office would be 'debarred from experiencing the realisation of self which comes from a skilful and devoted exercise of social duties. They would be deprived of one of the main forms of human good.'[71]

[c] <u>Autonomy</u>

The concept of autonomy, broadly defined, refers to one's capacity to choose one's own conception of the good life and to be self-reflective and self-determining, directed by considerations and desires which are not externally imposed.[72] As David Held notes, within a democratic society, the recognition of citizens' autonomy demands the creation of a system of collective and reflective decision-making which allows citizens to engage in deliberation about

[71] Rawls, *Theory of Justice* (n 10) 73.

[72] John Christman, 'Autonomy in Moral and Political Philosophy', *The Stanford Encyclopedia of Philosophy* (Spring edn, 2011) http://plato.stanford.edu/archives/spr2011/entries/autonomy-moral/ accessed 02 December 2014; Held (n 7) 263.

the political affairs which significantly affect the conditions of their own lives.[73] Held posits that this principle of autonomy lies at the centre of the modern democratic project, with various theoretical camps paying regard to the development of the citizen as 'free and equal'.[74] It will be argued that candidacy distinctively furthers this notion of democratic autonomy because of the extent to which it provides individuals with a significant opportunity to exercise control over the public agenda.

In outlining the criteria necessary for a fully democratic process, Dahl notes that the demos must share control of the agenda; that is, they should have an opportunity to make decisions about what matters should fall to be discussed and decided by the democratic process itself.[75] In liberal democracies, candidates for elective office play a significant role in forming the content of the public agenda, given that they constitute the platform from which a specified range of alternatives are presented for public consideration.[76] Beitz, among others, recognises this central role and highlights the extent to which rules regulating candidates' access to the ballot govern the very constitution of the political agenda itself.[77] In this regard, candidacy pivotally furthers the interest of autonomy by giving persons the opportunity to exercise their deliberative freedom not only in the discussion of a pre-determined set of issues, but also to the question of what issues are themselves worthy of discussion.

The principle of autonomy also underlies the right to candidacy in a more general, yet no less fundamental, way. The value of autonomy demands that persons should be free to choose their own conception of a worthwhile life; the closely related value of liberty requires

[73] Held (n 7) 271.

[74] Ibid 260, 262 – 263.

[75] Dahl (n 43) 38.

[76] Joseph Grcic, *Ethics and Political Theory* (University Press of America 2000) 185.

[77] Beitz (n 12) 164.

that they should have freedom to pursue that conception.[78] In this regard, autonomy and liberty underpin most civil and political liberties given that they operate to prevent the state from unjustly interfering with one's choice in matters of political association, speech or religious beliefs.[79] In like manner, it is submitted that autonomy demands that persons should generally possess the freedom to choose whether they wish to pursue elective office as a part of their own conception of the good life.

It is acknowledged that the value of autonomy which grounds human rights does not possess illimitable applicability to every aspect of decision-making regarding conceivable human pursuits.[80] As Tasioulas notes, the grounding value of autonomy operates 'within a broader web of prudential values' such that, it is the independent importance of religious matters to human life which makes it a violation of one's autonomy to infringe his freedom of conscience.[81] Similarly, it is in light of the distinctive importance of candidacy in furthering one's interests (in self-expression, self-development and control of the public agenda), which renders it a violation of one's autonomy to unduly restrict one's choice of whether to pursue elective public office.

Further, the mere fact that most persons may not choose to include political candidacy within their conception of the good life does not obviate the need to protect the freedom of choice for those who actually desire to pursue it. This debunks Laurence Tribe's objection to candidacy as a constitutional right: in his view it is 'more than faintly odd' for a society to describe as a fundamental right 'an activity bound to be unthinkable for a vast majority of its

[78] Griffin (n 25) 241 – 242.

[79] ibid 243.

[80] Griffin (n 25) 321; Tasioulas, 'Human Rights and the Values of Personhood' (n 1) 93.

[81] Tasioulas ibid 93.

members'.[82] However, as Shue notes, the fact that many persons may not wish to participate does not itself prevent participation from being acknowledged as a basic right: the test is one of 'quality of reasoning' as opposed to 'quantity of belief' regarding the right's importance.[83]

III. THE VALUE OF HUMAN DIGNITY

The usefulness of the concept of dignity, and its relation to human rights, remain highly contested:[84] while some trumpet its core fundamentality,[85] others lament its hopeless indeterminacy.[86] Critics of the contemporary use of human dignity in legal and political discourse have noted that the concept admits of a variety of different meanings and usages, with those invoking it seldom making clear the precise meaning attached.[87] Given that spatial limitations make it impossible to outline the many varying conceptions of human dignity, I will instead focus on outlining the specific meaning and role of dignity as adopted within the current justificatory account and attempt to also defend that conception.

[82] Laurence Tribe, *American Constitutional Law* (2nd edn, West Academic Publishing 1988) 1098.

[83] Shue (n 31) 72 – 73.

[84] Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in Christopher McCrudden (ed), *Understanding Human Dignity* (British Academy 2013) 43 – 47; Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655.

[85] Tasioulas, 'Human Dignity' (n 27); Gerald Neuman, 'Discourses of Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (British Academy 2013) 638 – 646.

[86] Michael Rosen, 'Dignity: The Case Against' in Christopher McCrudden (ed), *Understanding Human Dignity* (British Academy 2013) 143.

[87] Rosen ibid 154; Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous nor a Panacea' (2012) 32(1) Oxford Journal of Legal Studies 1, 14.

The Meaning and Role of Human Dignity in the Interest-Based Account

As noted above, Tasioulas' interest-based account grounds human rights not only in universal interests, but also in the value of human dignity. Tasioulas defines human dignity as 'an intrinsically valuable status that merits our respect, a status grounded in the fact of being a human being'.[88] He notes that human dignity consists in an 'equality of basic moral status among human beings'.[89] It is this concept of dignity as 'equal moral status' which will feature centrally in the current account. This idea of dignity as a fundamental claim of equal status finds support in many other conceptions of dignity.[90]

Tasioulas identifies the role of human dignity within the interest-based account as establishing the capacity of human beings to possess rights; this capacity stems from the fact that their well-being and existence are of intrinsic and ultimate value.[91] Human dignity may therefore be said to serve the role of establishing why human interests are themselves worthy of protection and fulfilment. Tasioulas further notes that the status-based concept of individual dignity helps to explain the resistance of human rights to trade-offs in the face of aggregative or utilitarian concerns.[92]

However, in looking specifically at the right to candidacy, there is a third role of dignity which will be of central focus in this account: the role of dignity as an expressive norm. Tarunabh Khaitan advances the position that human dignity's distinctive role lies centrally in

[88] Tasioulas, 'Human Dignity' (n 27) 305.

[89] Ibid 306.

[90] Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41:4 Metaphilosophy 464, 469; Catherine Dupree, 'Constructing the Meaning of Human Dignity: Four Questions' and Thomas Hill, 'In Defence of Human Dignity: Comments on Kant and Rosen' in Christopher McCrudden (ed), *Understanding Human Dignity* (British Academy 2013) 318; Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 335.

[91] Tasioulas, 'Human Dignity' (n 27) 307; Raz, *Morality of Freedom* (n 1) 176 – 180.

[92] Tasioulas, 'Human Dignity' (n 27) 307 – 308.

its function as an expressive norm: one which presupposes that meanings expressed by actions matter morally simply by virtue of such expression, irrespective of their consequences or other characteristics.[93] In support of this, he points to judicial interpretations of dignity as the recognition of individuals' equal moral worth, with the corresponding construal that a violation of dignity involves the lack of such recognition or the expression of unequal status.[94] As Denise Reaume notes, on this account, 'violating dignity involves conveying the message that some are of lesser worth than others.'[95] Thomas Hill labels this conception of dignity as 'respectful treatment': 'an expressed recognition, appropriate to the context, that the person has the fundamentally equal status and value of dignity'.[96]

This conception of dignity strongly resonates with Habermas' account of human dignity as centrally concerned with the social recognition of one's status as an equal member in an organised community.[97] Habermas traces the origins of the term dignity to its use in hierarchically ordered traditional societies where it was used to denote the status attached to a particular rank of nobility or office.[98] He notes that building from that historical origin, 'the universalised dignity that accrues to all persons equally preserves the connotation of a self-respect that depends on social recognition'.[99]

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[93] Khaitan (n 87) 19.

[94] Ibid 5 – 9.

[95] Denise Reaume, 'Discrimination and Dignity' (2003) 63 Louisiana L Rev 645, 676.

[96] Thomas Hill (n 90) 315, 318; Allen Buchanan, 'The Egalitarianism of Human Rights' (2010) 120(4) Ethics 679, 690.

[97] Habermas, 'The Concept of Human Dignity' (n 90) 472.

[98] Habermas ibid; Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (British Academy 2013) 327.

[99] Habermas ibid 472.

In considering the above meaning of dignity, joined with its role as an expressive norm, this account therefore focuses on the concept of dignity as social recognition of one's 'equal moral status'.

Human Dignity and the Right to Candidacy

As Dahl notes, political equality lies at the heart of democratic governance given that it assumes that all members are equally well-qualified to participate in decisions affecting the community.[100] Dahl further notes that this concept of political equality is itself grounded in the principle of the 'intrinsic equality' of all members of the community.[101]

Rawls' conception of political liberties is also grounded in the equality of members; he notes that the basis of this equality is one's capacity for moral personality or the capacity to possess the two moral powers.[102] He further highlights the widely inclusive nature of this criterion by highlighting that, 'there is no race or recognised group of human beings that lack this attribute… once a certain minimum is met, a person is entitled to equal liberty on par with everyone else.'[103]

Amy Gutmann notes that Rawls' treatment of basic liberties highlight the '*expressive purpose* of political freedoms' in that the status of persons as free and equal is publicly expressed through the recognition of equal political rights.[104] As Joshua Cohen similarly notes in his own analysis of Rawls, 'What is essential is not so much the good that flows to us from

[100] Dahl (n 43) 39.

[101] Dahl ibid 62.

[102] Rawls, *Theory of justice* (n 10) 443.

[103] Ibid.

[104] Amy Gutmann, 'Rawls on the Relationship between Liberalism and Democracy' in Samuel Freeman (ed), *The Cambridge Companion to Rawls* (CUP 2002) 179 (emphasis in original).

the exercise of the liberties as the affirmation of our equality that comes from acknowledging our right to the political liberties.'[105] Political liberties therefore play a central role in recognising one's 'equal moral status' and consequently, one's dignity.

In the same vein, Dworkin underscores the symbolic significance of a citizen's exclusion from the political process in his conception of political equality: 'The community confirms an individual person's membership, as a free and equal citizen, by according him or her a role in collective decision. In contrast, it identifies an individual who is excluded from the political process as someone not fully respected or not fully a member'.[106]

Exclusion from the right to candidacy, even if one is given the right to vote, still bears symbolic significance given that it potentially expresses the view, in violation of one's dignity, that those excluded do not possess equal membership and status as those who are given full access to the process.

D. DERIVATIVE JUSTIFICATION OF THE RIGHT TO CANDIDACY

In advancing a pluralistic approach to justification, it is important to also point out the derivative justifications of the right to candidacy, that is, the instrumental value of the right in supporting the fulfilment of other rights and collective interests.

I. THE RELATIONSHIP BETWEEN THE RIGHT TO CANDIDACY AND THE RIGHT TO VOTE

As Nickel notes, a right may also be justified by pointing to the extent to which its effective implementation is necessary for the full realisation of a second human right which is 'already

[105] Joshua Cohen, 'For a Democratic Society' in Samuel Freeman (ed), *The Cambridge Companion to Rawls* (CUP 2002) 111.

[106] Ronald Dworkin, 'What is Equality? Part 4: Political Equality' (1987 – 1988) 22 USF L Rev 1, 4.

accepted as justified'.[107] This section will seek to demonstrate how a robust right to candidacy is necessary for the effective guarantee of the indisputably fundamental right to vote. US courts and academics which have been reticent to recognise a free-standing right to candidacy all wholly embrace the importance of the right to vote. It will be argued that given the strong interdependence and 'bi-directional support'[108] between the rights to vote and candidacy, it strains the bounds of logic to accept one such right as fundamental to the exclusion of the other.

The relationship between the rights to vote and candidacy will be explored through the lens of Raz interest theory of rights, which insightfully considers how the interests of persons other than the rightholder may contribute to establishing the justification and weight of a particular right.[109] Raz notes that a right may be justified by the fact that 'by serving the interest of the right-holder it serves the interest of some others, and their interest contributes to determining the weight due to the right'.[110] He goes on to note that, 'the interests of others matter… only when they are served by serving the right-holders' interests.'[111]

The relationship between voting and candidacy may therefore be examined by looking at the extent to which furthering candidates' interests also serve to further the fundamental interests of voters. Two particular interests of the voter will be analysed: (a) the voter's interest in freely choosing his representative and (b) the voter's interest in making an informed choice.

[107] Nickel (n 3) 87.

[108] James Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights' (2008) 30 Human Rights Quarterly 984, 987.

[109] Raz, *Morality of Freedom* (n 1) 248 – 249; Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon 1995) 50 – 51.

[110] Raz, *Ethics in the Public Domain* (n 109) 50.

[111] ibid 51.

[a] <u>The Voter's Interest in Freely Choosing His Representative</u>

Restrictions on access to candidacy invariably affect the voter's interest in freely choosing his representative given that it limits the scope of choice available to the voter. As noted in Chapter 3, the US Supreme Court has highlighted this link on several occasions. In *Bullock v Carter*[112] the Court noted that, 'the rights of voters and the rights of candidates do not lend themselves to neat separation… the Texas system creates barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose.'[113] Similarly, in *Lubin v Panish*[114] it will be recalled that the Court noted:

> The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters.[115]

Admittedly, while the voter does have an interest in having a wide field of candidates from which to choose, the right to vote may not be taken to include an absolute guarantee that every voter should have the candidate of his choice represented on the ballot. This point was aptly highlighted by the European Court of Human Rights in *Russian Conservative Party v Russia*:[116]

> [T]he Court finds that the right to vote cannot be construed as laying down a general guarantee that every voter should be able to find on the ballot paper the candidate or the party he had intended to vote for. It reiterates, nevertheless, that the free expression of the opinion of the people is inconceivable without *the participation of a plurality of political parties representing the different shades of opinion* to be found within a country's population. Accordingly, it must have regard to the broader context in which the right to vote could be exercised.[117]

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[112] 405 US 134 (1972).

[113] ibid 142 – 143.

[114] 415 US 709 (1974).

[115] *Lubin* ibid 716 (emphasis added).

[116] *Russian Conservative Party of Entrepreneurs v Russia* (2008) 46 EHRR 39.

[117] Ibid para 79 (emphasis added).

The voter's interest may therefore be characterised as having access to a diverse field of candidates which represent wide and varied cross-sections of society. This interest is served through the robust right to candidacy given that such a right places a duty on the state to justify, at a high standard of scrutiny, any statutory eligibility requirements or disqualifications from office. Equally, the right demands that procedural electoral regulations do not unduly inhibit candidates' access to the ballot.

In rejecting the notion of the right to candidacy as a basic right, Beitz notes that the right to have one's view represented does not imply a correlative 'right to represent one's own views'.[118] However, as John Seery notes, this statement ignores the extent to which the candidate in question may be seeking to genuinely represent not only his own views but also the views of an identifiable group, with the result that denying him/her access to ballot in turn denies the group effective representation.[119] The Inter-American Court of Human Rights held that this was exactly the case when members from the YATAMA indigenous group were denied the right to stand for election on the basis that they did not form part of a registered political party:

> The Court finds it necessary to observe that the voters were affected as a result of the violation of the right to be elected of the YATAMA candidates. In the instant case, this exclusion meant that the candidates proposed by YATAMA were not included among the options available to the voters, which represented a direct limitation to the exercise of the vote and affected negatively the broadest and freest expression of the will of the electorate, which implies grave consequences for democracy.[120]

[b] <u>The Voter's Interest in Making an Informed Choice</u>

As noted above, one central interest underlying the right to candidacy is the individual's interest in freely expressing his views to the electorate; by so doing he deliberatively engages in a

[118] Beitz (n 12) 174.

[119] Seery (n 11) 90.

[120] *Yatama v Nicaragua* I/A Court, Judgment of 23 June 2005, para 226.

reflective process of preference formation and refinement. Furthering these expressive interests of the candidate in turn supports the voters' interest in being adequately exposed to a diverse array of viewpoints as they seek to form and refine their own preferences. The Supreme Court of Canada identified the importance of this linkage in *Figueroa v Canada*:[121]

> By derogating from the capacity of marginal or regional parties to present their ideas and opinions to the general public, it undermines the right of each citizen to information that might influence the manner in which she or he exercises the right to vote.[122]

This linkage resonates more generally with Scanlon's theory of freedom of expression which highlights that the right to free speech serves not only the speaker's interest but also separately concerns the interest of the audience in hearing what is being said.[123]

The strong interdependence of the rights to vote and candidacy therefore underscores the fundamentality of a robust right to candidacy given its instrumentality in the full realisation of the right to vote – the quintessential political right which has itself been regarded as 'preservative of all rights'.[124]

II. IMPORTANCE FOR THE PRESERVATION OF ALL OTHER HUMAN RIGHTS

As noted above, the right to vote (as well as democratic governance more generally) has often been regarded as essential for the preservation of all other human rights. Rawls notes that granting political liberties their fair value is essential for ensuring that the basic structure of society has a fair scheme of representation in which all citizens have a full and equally effective

[121] *Figueroa* (SCC) (n 53).

[122] ibid para 54.

[123] TM Scanlon, 'Freedom of Expression and Categories of Expression' (1978) 40 U Pitt L Rev 519, 521.

[124] *Yick Wo v Hopkins* 118 US 356, 370 (1886).

voice.[125] He notes that such a scheme is in turn 'fundamental' because 'the adequate protection of other basic rights depends on it'.[126] Thus, according to Rawls, even if one denies the intrinsic value of political liberties, they should still be accorded priority given the extent to which they are 'essential institutional means to secure the other basic liberties under the circumstances of the modern state.'[127]

Habermas similarly speaks to the preservative importance of democratic rights in his thesis on the co-originality of personal and political liberties. He notes that 'citizens arrive at a consensual regulation of their private autonomy only if they make adequate use of their political autonomy as enfranchised citizens'.[128]

In defending the fundamentality of democratic rights, William Talbott attempts to shed light on how this preservative role practically takes place.[129] He notes that democratic rights, particularly the right to vote, provide governments with 'reliable feedback' on how best to solve their citizens' problems. He notes further that, 'in addition to providing reliable feedback, democratic rights motivate the government to be appropriately responsive to that feedback, because its longevity depends on how well it promotes the well-being of its citizens.'[130] This resonates with Shue's justification of participation as a basic right, necessary for the realisation of all other rights. Shue notes that a right provides a justified demand that its substance be socially guaranteed.[131] Participation is therefore essential given that 'without channels through

[125] Rawls, *Political Liberalism* (n 9) 330 – 331, 361.

[126] ibid 361.

[127] ibid 299.

[128] Jürgen Habermas, 'On the Internal Relation between the Rule of Law and Democracy' (1995) 3:1 European Journal of Philosophy 12, 18.

[129] William Talbott, *Which Rights Should be Universal?* (OUP 2005) 158.

[130] ibid.

[131] Shue (n 31) 13, 75.

which the demand can be made known to those who ought to be guaranteeing its fulfilment, when it is in fact being ignored, one cannot exercise the right'.[132]

The right to candidacy is therefore preservative of all other rights because of the extent to which it is itself essential for the right to vote. It may also be taken to serve a particular preservative role in its own right given the full and distinctive opportunity for participation which it provides. It possesses distinctive value as a means of providing 'reliable feedback' to government and also as a channel through which citizens' demands may be made known.

III. CONTRIBUTION TO A COMMON LIBERAL CULTURE

Raz notes that the importance or weight attributed to many civil and political rights in liberal democracies is often much greater than the actual value of the right in the estimation of the individual right-holder.[133] He posits that this discrepancy is best explained by the fact that the justification and weight of many liberal rights lie, not only in their value to the right-holder, but also in their contribution to a 'common liberal culture' which serves the overall common good.[134] Raz provides the following example regarding freedom of expression:

> The right of free expression serves to protect the interest of those who have it and who may wish to use it to express their views. It also serves the interest of all those who have an interest in acquiring information from others. But here again the right serves the interests of those who are neither speakers nor listeners. Everyone who lives in a democracy is affected by the fact that this is a society enjoying a free exchange of information.[135]

[132] Ibid 75.

[133] Raz, *Ethics in the Public Domain* (n 109) 45, 54 – 55.

[134] ibid.

[135] ibid 54.

The same may be said of the right to candidacy: a similar discrepancy may be said to exist between its value to the average citizen versus its contribution to the common good. As Rawls notes, 'given the size of a modern state, the exercise of the political liberties is bound to have a lesser place in the conception of the good of most citizens than the exercise of the other basic liberties.'[136] Notwithstanding, its weight and fundamentality is still justified given its contribution to the common good of a liberal culture in which fair and competitive elections take place on a broad basis of equal and inclusive access to candidacy. This general interest goes beyond that of the individual candidate and their supporters.

E. CONCLUSION

The foregoing theoretical analysis outlined the fundamental values and interests underlying the right to candidacy. However, as noted above, this remains only one half of the justificatory exercise. It remains to be shown how these values and interests generate feasible and binding duties on the State to respect, protect and fulfil the right. This latter consideration will be the subject of the proceeding Chapter.

[136] Rawls, *Political Liberalism* (n 9) 330.

CHAPTER 5 –

THE CONTENT OF THE MORAL RIGHT TO CANDIDACY: DUTIES TO RESPECT, PROTECT AND FULFIL

A. INTRODUCTION

Chapter 4 of this thesis outlined the contours of this section's pluralistic, interest-based approach to justification. Central to the interest-based account is the understanding that outlining the importance of underlying values and interests does not by itself justify the existence of a human right. Of crucial importance is the extent to which these interests generate binding duties which are both feasible and justifiable.[1] This Chapter therefore seeks to outline the content of those duties, as they relate to the right to candidacy, and to broadly defend their feasibility and reasonableness within liberal democracies.

To that end, this Chapter is divided into three main segments. First, an examination of the general process of moving from interests to duties is undertaken, after which the approach adopted in the current Chapter is outlined. Secondly, the content of the duties to respect, protect and fulfil the right to candidacy are delineated. Thirdly, an application of the 'threshold test' as labelled by Tasioulas is then offered, that is, an examination of the extent to which the burdens which the duties impose are 'possible' and justifiable.[2]

[1] John Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65(1) Current Legal Problems 1, 15 – 16; James Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell 2007) 78 – 79.

[2] Tasioulas ibid.

B. THE PROCESS OF MOVING FROM INTERESTS TO DUTIES

It is widely accepted, even outside of the interest-based account, that the justification of a right must also outline and defend the duties to which it is said to give rise.[3] As Shue notes, 'one cannot fully justify a right without going into the duties it would entail and considering whether they are reasonable.'[4] Similarly, Feinberg posits that a full-fledged right includes a justified '*claim-to*' (which highlights the moral importance of a person having 'X') as well as a justified '*claim-against*' someone (which identifies the duties possessed by the right's addressees in order to make 'X' available).[5] Chapter 4 of this thesis may therefore be said to have contained the 'claim-to' aspect of the justificatory account, by outlining the fundamental values and interests which underpin the right to candidacy. The current Chapter now seeks to substantiate the 'claim-against' by outlining the core duties held by the State.

While there is general consensus on the need to clearly define the duties associated with a right, there is no single, accepted formula for achieving this end. As Nickel notes, the 'claim-against' aspect of rights justification has received much less attention from human rights theorists and advocates partly because 'general duties are more difficult to justify than claims about the moral value of something'.[6] However, Tasioulas posits that the lack of comprehensive criteria may best be understood as attributable to the nature of the subject matter itself. He notes that any search for a 'simple argumentative bridge… that enables us to cross

[3] Henry Shue, 'Mediating Duties' (1998) 98(4) Ethics 687, 700; Joel Feinburg, 'The Nature and Value of Rights' (1970) 4 The Journal of Value Inquiry 243, 256; James Nickel, 'How Human Rights Generate Duties to Protect and Provide' (1993) 15 Human Rights Quarterly 77, 78.

[4] Shue (n 3) 700.

[5] Joel Feinburg, *Social Philosophy* (Prentice-Hall 1973) 63 – 64; Feinberg (n 3) 256 – 7; Nickel (n 3) 78.

[6] Nickel (n 3) 79.

the Rubicon from interests to duties' would only be in vain.[7] This is on the basis that 'pure moral reasoning' alone cannot generate 'action-guiding standards' of sufficient specificity to ensure the effective realisation of a right.[8] He notes that such moral reasoning would have to be supplemented by social convention or positive law; what is required is therefore 'sound practical judgment attuned to the specificities of each case'.[9] Similarly, Shue notes that 'conceptual analysis alone' cannot adequately outline a right's attendant duties given that they 'depend as well on historical and empirical understanding of the relevant social, economic, political and legal factors'.[10]

However, moral reasoning still has a special place in the discovery of correlative duties; it is necessary but not sufficient for this end. Tasioulas acknowledges that the moral reasoning must itself provide the 'rough but objective parameters' within which the more detailed conventions should be constituted.[11] In outlining the duties associated with the right to candidacy, this Chapter therefore seeks to outline the broad parameters of those duties as informed by moral reasoning, specifically, the underlying values and interests outlined in the preceding Chapter. The proposed duties are also inevitably informed by an understanding of the general political and electoral landscape of modern liberal democracies, without which, no meaningful account of the right's normative protection can be made. Admittedly, the initial process of outlining general, objective parameters is not without difficulty, given the challenge of expressing standards which are both meaningful and sufficiently general in an area which

[7] John Tasioulas, 'Human Dignity and the Foundations of Human Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (British Academy 2013) 297.

[8] Tasioulas, 'Human Dignity' (n 7) 298; Tasioulas, 'Towards a Philosophy of Human Rights' (n 1) 17.

[9] ibid.

[10] Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton Univ Press 1996) 161.

[11] Tasioulas, 'Towards a Philosophy of Human Rights' (n 1) 17.

hinges so greatly on distinct socio-political and institutional nuances. The identified parameters are therefore intended to be taken as broadly applicable principles as opposed to strictly defined rules which require identical application in each case.[12]

As noted above, the broad content of correlative duties is often derived by examining how obligations may be framed in order to best serve the values and interests which underpin the right. For example, in outlining the content of key socio-economic rights, Fredman draws heavily on the underlying value of 'positive freedom' as agency in order to ground positive duties on the State to fulfil the rights to housing, education and welfare.[13] Similarly, Griffin explores the duties associated with the rights to life and health by looking at the conditions necessary in order to fulfil the underlying value of 'normative agency'.[14] This Chapter will therefore explore the obligations necessary in order to serve the values and interests outlined in the preceding Chapter: the value of human dignity as social recognition of equal moral status, as well as the interests of autonomy, self-development and political expression.

Of course, in outlining the duties correlative to a given right, their ability to serve the underlying interests is not the only consideration to be taken into account. Tasioulas insightfully identifies two thresholds which ought to be considered in progressing from universal interests to human rights. The first is one of 'possibility': 'whether in the case of all human beings, it is possible to serve the underlying values through a duty with the proposed content.'[15] The second asks whether the 'burden' the duty imposes unduly affects the duty-

[12] On this distinction between rules and principles see: Robert Alexy, *A Theory of Constitutional Rights* (OUP 2004) 45 - 57.

[13] Sandra Fredman, *Human Rights Transformed* (OUP 2008) Chapter 8.

[14] James Griffin, *On Human Rights* (OUP 2003) Chapter 5.

[15] Tasioulas, 'Towards a Philosophy of Human Rights' (n 1) 15; Tasioulas, 'Human Dignity' (n 7) 297.

bearer's 'capacity to realise other values, including other rights'.[16] These two threshold tests of 'possibility' and 'burden' resonate a great deal with two considerations similarly identified by Nickel in his framework for justifying 'claims-against'. These are: (i) the general feasibility of the right's implementation, that is, whether there are institutions or persons who could successfully bear the duties required and (ii) the justifiability of burdens imposed by the right.[17]

As Tasioulas notes, these two tests seek to fulfil the requirement of the widely held maxim that 'ought' implies 'can'.[18] These considerations therefore operate at two levels of the justificatory account. First, they operate as implicit factors to be taken into account in formulating the duties themselves and secondly, after the duties have been constructed, they operate as threshold tests against which the duties ought to be measured. In light of this, section B outlines the core content of the duties to respect, protect and fulfil the right to candidacy, after which, section C delineates the application of the two threshold tests by examining the feasibility and justifiability of the aforementioned duties.

C. DUTIES TO RESPECT, PROTECT AND FULFIL

I. BACKGROUND AND SCOPE OF THE 'RESPECT, PROTECT, FULFIL' TYPOLOGY

The tripartite typology of duties to respect, protect and fulfil human rights ('RPF'), is most notably associated with the work of the UN Committee on Economic, Social and Cultural Rights (the 'CESCR').[19] Generally speaking, the obligation to *respect* is a negative duty on the

[16] ibid.

[17] Nickel (n 3) 80 – 83; Nickel (n 1) 78.

[18] Tasioulas, 'Towards a Philosophy of Human Rights' (n 1) 15.

[19] See CESCR, 'General Comment 14: The Right to the Highest Attainable Standard of Health' (2000) UN doc E/C.12/2000/4; CESCR, 'General Comment 21: The Right of Everyone to take part in Cultural Life' (2009) UN doc E/C.12/GC/21; CESCR, 'General Comment 18: The Right to Work' (2005) UN doc E/C.12/GC/18.

state to refrain from interfering with the enjoyment of the right, the obligation to *protect* involves a duty to prevent third parties from violating the right and the obligation to *fulfil* imposes a positive duty on the state to 'take appropriate legislative, budgetary, judicial and other measures towards the full realisation of such rights'.[20]

The foundation of the typology rests more generally in Shue's work on the nature of the correlative duties associated with human rights. Shue notes that instead of conceiving of particular human rights as wholly 'positive' or 'negative', all rights are best understood as giving rise to a range of both positive and negative duties.[21] He identified these duties as obligations to: (i) *avoid* depriving (ii) *protect* from deprivation and (iii) to *aid* the deprived.[22] It is in this initial typology that the RPF terminology has its roots. The latter was first attributed to UN Special Rapporteur Asbjorn Eide in his 1987 report on the human right to adequate food.[23] Since then, it has been widely embraced by the CESCR and by advocates of socio-economic rights more generally.[24]

Conceptually, the tripartite duties were put forward as applicable to all human rights, in attempt to bridge the divide between socio-economic rights (largely viewed as 'positive') and civil and political rights (largely viewed as 'negative').[25] However, in practice, the typology has been utilised to a much lesser extent in relation to civil and political rights.[26] In

[20] Ida Elisabeth Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5(1) Human Rights Law Review 81, 82; see also CESCR General Comment 18 (n 19) para 22.

[21] Shue (n 10) 52.

[22] Ibid.

[23] Asbjorn Eide, 'The Right to Food as a Human Right' (1987) UN doc E/CN.4/Sub.2/1987/23.

[24] Koch (n 20) 82; Fredman (n 13).

[25] Koch (n 20) 87; Shue (n 10) 54 – 55.

[26] Koch (n 20) 87. For example, the UN Human Rights Committee, the CESCR's counterpart which deals with the enforcement of the ICCPR, has not incorporated the typology into its rulings or General Comments.

light of this, some have questioned whether the RPF tri-factor is a suitable fit in describing the duties associated with civil and political rights.[27] This section will therefore seek to briefly defend the use of this typology in relation to the political right to candidacy, while also outlining some of the limitations inherent in its application.

First, it is worth noting that given the complex nature of duties associated with human rights, no single classification is likely to perfectly reflect all of the obligations necessary for the full realisation of such rights.[28] As Shue notes, 'typologies are at best abstract instruments for temporarily fending off the complexities of concrete reality' and are not meant to be 'frozen abstractions'.[29] However, what they do provide is a general and systematic way of grouping the main duties associated with a given right in order to ensure that no core group is overlooked. Therefore, the standard for applicability is hardly set at the level of ultimate precision.

The RPF typology effectively provides for negative and positive duties (through the respect and fulfil elements respectively) as well as general duties of protection regarding violations by third parties. These three main elements have remained central in various classifications of duties which have been put forward by different theorists, the main difference being that the 'fulfil' category is often replaced by a more detailed list of distinct positive duties (inter alia, to ensure, promote, provide goods and service, create institutional machinery).[30] The RPF classification may therefore be said to provide the key skeletal structure in expressing the wide range of a right's correlative duties.

[27] Koch (n 20) 95 – 96.

[28] Shue (n 10) 156, 160; Jeremy Waldron, *Liberal Rights: Collected Papers, 1981 - 1991* (Cambridge University Press 1993) 25.

[29] Shue (n 10) 160.

[30] Koch (n 20) 86; van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views', in Alston and Tomasevski (eds), *The Right to Food* (Stichting Studie 1984) 106; Steiner and Alston, *International Human Rights in Context* (2nd edn, OUP 2000) 182.

Some have questioned the extent to which the obligation to 'fulfil' may be equally applicable to civil and political rights, given the extent to which this duty has centred on the provision and redistribution of material resources in the socio-economic rights' realm.[31] However, even within discussions on socio-economic rights, the duty to fulfil has been taken to broadly include the creation of legal and administrative norms necessary for the right's realisation, as opposed to the mere provision of particular resources.[32] It is this broader understanding of the duty to fulfil which will be employed in relation to the right to candidacy, akin to what Alexy terms as the positive duties of 'organisation and procedure'.[33] Further, it is generally accepted that electoral rights do require the expenditure of resources, given the time and money required for administering the electoral process.[34] As noted by the European Court of Human Rights regarding the rights to vote and candidacy, 'the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of civil and political rights, but one of adoption by the State of positive measures to 'hold' democratic elections'.[35]

Further, regarding one's choice of typology, having accepted the premise that all rights give rise to both negative and positive duties, the specific terminology applied in defining those duties may largely be considered as matters of semantic preference. The RPF typology has therefore been employed as but one method of organising the duties attached to candidacy, with the full realisation that this triad does not represent the only way of so doing. It is further acknowledged that even within this typology, the distinctions between duties are not airtight, such that, there may be obligations which could potentially be regarded as belonging to more

[31] Koch (n 20) 95.

[32] Fredman (n 13) 88.

[33] Alexy (n 12) 126, 324.

[34] Fredman (n 13) 70.

[35] *Mathieu-Mohin v Belgium* (1988) 10 EHRR 1, para 50.

than one group, depending on how they are framed.[36] However, this limitation in no way compromises the more general case for the right's existence, given that in assessing the feasibility and justifiability of correlative duties, their substantive content is of much greater relevance than their formal label.[37] The remainder of this section outlines the body of this substantive content.

II. DUTY TO RESPECT: OBLIGATION TO REFRAIN FROM IMPOSING UNJUSTIFIABLE ELIGIBILITY REQUIREMENTS

The duty to respect requires the state to refrain from interfering directly or indirectly with the enjoyment of the right.[38] It is a negative duty of non-interference grounded in the classical conception of freedom as absence from obstruction. As Berlin notes, one is free 'to the degree to which no man or body of men interferes with [his] activity'.[39] Regarding the right to candidacy, the greatest measure of potential obstruction to one's exercise of this right is the act of being deemed legally disqualified or ineligible. Unlike most other civil and political rights, the rights to vote and candidacy require the official recognition of an individual's legal eligibility before such rights can be exercised. An effective right to candidacy must therefore include a duty on the state to refrain from denying such eligibility without just cause.

The right to candidacy, as well as the correlative duty to respect it, are obviously not absolute. There are a number of justifiable requirements which a state may reasonably impose. However, through the grounding values of dignity and equality, what the right to candidacy does create is a presumption in favour of inclusiveness and eligibility, such that, restrictions on

[36] Koch (n 20) 91.

[37] Shue (n 10) 160.

[38] CESCR General Comment 18 (n 19) para 22; Fredman (n 13) 69.

[39] Isaiah Berlin, *Four Essays on Liberty* (Clarendon Press 1969) 121.

eligibility require justification from the state. As Dworkin notes, withholding a right requires that the state provide special justification which accords with the principles of equal concern and respect.[40] The 'generalizable core' of the duty to respect may therefore be framed as follows: an obligation on the State to refrain from imposing *unjustifiable* eligibility requirements or disqualifications from elective office.

Within this 'generalizable core', there are clear variations that will exist in the more detailed formulations of the right in positive law and in its institutional implementation. For example, there may be differences regarding the nature and strictness of the standard to be met in establishing a qualification's 'justifiability'. Under the ICCPR, eligibility requirements must be 'justifiable on objective and reasonable criteria',[41] while in Canada and under the ECHR, qualifications are scrutinized under proportionality tests of varying degrees of stringency.[42] Equally, there may be variations regarding the institution deemed most appropriate for determining whether a given qualification is 'justifiable'. For example, as noted in Chapter 3, some members of the Canadian judiciary are of the opinion that certain qualifications are outside the purview of judicial review on the basis that they fall under parliament's privilege to regulate its membership and internal affairs.[43] Further, qualifications laid down in a constitution, (as opposed to statute), cannot be made subject to judicial review and therefore also raise questions about the enforcement of the duty to respect outside of the courts.

[40] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 277.

[41] UN Human Rights Committee, 'General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service '(1996) UN doc CCPR/C/21/Rev.1/Add.7, para 15; ICCPR art 25.

[42] See *Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876; *Zdanoka v Latvia* (2007) 45 EHRR 17.

[43] *Harvey* (n 42) para 55.

Notwithstanding these variations, what remains central in most conceptions of the right is a duty on the State to refrain from imposing unjustifiable eligibility requirements,[44] even if differences remain regarding what constitutes justifiability and on who gets to decide. These questions regarding the right's institutional implementation are of grave importance and will be dealt with in greater detail in Chapter 6, which focuses on the application and enforcement of the duty to respect. On the other hand, this current section merely aims to outline the basic core of the duty to respect and to establish how this duty furthers the right's underlying values and interests.

As outlined in the previous Chapter, the value of human dignity, defined as social recognition of one's equal moral status, centrally underpins the right to candidacy. The denial of eligibility from such a central electoral right undermines one's political equality and signals that one does not possess the status of a fully equal citizen.[45] Therefore, at the heart of the right to candidacy is a right to be qualified or a right to be eligible,[46] given that legal eligibility signals one's recognition as a political equal. The duty to respect serves to further this presumption of equality and inclusiveness by requiring the state to refrain from imposing unjustifiable qualifications.

Without this core duty, the right to candidacy becomes merely a right of *those eligible*, as opposed to the broader right *to be eligible.* An example of the former may be found in the Quebec Charter of Rights, which provides a relatively weak formulation of the right: 'Every

[44] UN HRC, General Comment 25 (n 41) para 15; Patrick Merloe, 'Human Rights: The Basis for Inclusiveness, Transparency, Accountability and Public Confidence in Elections' in John Hardin Young (ed), *International Election Principles: Democracy and the Rule of Law* (American Bar Association 2010) 16.

[45] Ronald Dworkin, 'What is Equality? Part 4: Political Equality' (1987 – 1988) 22 USF L Rev 1, 4; Amy Gutmann, 'Rawls on the Relationship between Liberalism and Democracy' in Samuel Freeman (ed), *The Cambridge Companion to Rawls* (CUP 2002) 179.

[46] Section 3 of the Canadian Charter of Rights formulates the right in this way, as a right 'to be qualified for membership' in the legislature. See *Harvey* (n 42) para 28 for the Canadian Supreme Court's inclusive interpretation of the right to be qualified.

person legally capable and qualified has the right to be a candidate and to vote at an election.'[47] Similarly, article 50 of the Constitution of Algeria provides: 'Any citizen fulfilling the legal conditions can elect and be elected.'[48] These provisions guarantee the right only to those who are already qualified by law. There is therefore no scope to challenge the justifiability of existing qualifications given that those disqualified have no right on which to ground such a challenge. Such formulations limit the right's scope to protecting those eligible from undue interference in the course of pursuing candidacy. However, in order to fully further the values of autonomy and dignity, the right must also include protection from being unjustly denied the very eligibility necessary in order to embark on such pursuit. The duty to respect provides such protection by placing an obligation on the state to refrain from imposing unjustifiable qualifications.

III. DUTY TO PROTECT: OBLIGATION TO PREVENT THIRD PARTIES FROM VIOLATING THE RIGHT

The duty to protect places an obligation on the State to prevent third parties (private entities and individuals) from violating the right. As Shue notes, the duty to protect becomes necessary in order to enforce the universal duty of respect (non-interference) owed by all persons to the rightholder.[49] The duty is, of course, not one of strict prevention such that every violation by a private entity necessarily imputes culpability on the part of the state. To the contrary, the duty is one of taking reasonable preventative measures such as 'designing institutions that avoid the

[47] Quebec Charter of Rights and Freedoms, sec 22.

[48] Constitution of Algeria, art 50.

[49] Shue (n 10) 55; Ivar Kolstad, 'Human Rights and Assigned Duties: Implications for Corporations' (2009) 10 Human Rights Rev 569, 572.

creation of strong incentives to violate [the duty to respect]'.[50] Central to the duty to protect is therefore the creation of a legal and institutional framework which provides a disincentive against third party violation as well as a means of recourse for those whose rights have been violated by third parties.[51]

As Fredman notes, the duty to protect creates a complex three-way relationship between the rightholder, the third party and the state: in protecting the rightholder against the third party, the state also has a duty to respect the third party's rights by not unduly interfering with that party's freedom.[52] In awareness of this balance, it has been recognised that the duty to protect need not involve coercive measures on the part of the state which seek to direct the conduct of private individuals.[53] As Shue highlights, there are 'a number of intermediate steps between total prohibition and complete tolerance' such as regulation, monitoring and the creation of disincentives for non-compliance.[54] One example in this area is the duty to protect the right to candidacy against violations by private media who may unfairly limit the ability of candidates to promote their ideas by prohibitive pricing on an unequal basis or through biased and inaccurate coverage.[55] Given the competing right of press freedom, it has been suggested that the state's intervention should involve non-coercive measures such as the issuance of guidelines by election authorities on standards for impartial coverage as well as the

[50] Shue (n 10) 60.

[51] ibid.

[52] Fredman (n 13) 73.

[53] Shue (n 10) 59 – 60.

[54] ibid.

[55] Office for Democratic Institutions and Human Rights (ODIHR), 'Existing Commitments for Democratic Elections in OSCE Participating States' (2003) <http://www.osce.org/odihr/elections/13957?download=true> accessed 02 December 2014 pp 37, 69

encouragement of media entities to adopt self-regulatory measures which promote journalistic ethics.[56]

There are a number of other third parties which may conceivably infringe an individual's right to stand for election. Notwithstanding, this thesis will focus mainly on only one: the state's duty to protect against violations by *political parties*. This is on the basis of the increasingly prominent role played by political parties in the electoral processes of modern liberal democracies.[57] In recognition of this, the UN Human Rights Committee, in its General Comment on the right to stand for election, made the following observation:

> Political parties and membership in parties play a significant role in the conduct of public affairs and the election process. *States should ensure that, in their internal management, political parties respect the applicable provisions of article 25 in order to enable citizens to exercise their rights thereunder.*[58]

The Committee therefore acknowledged that states have an obligation to regulate the conduct of political parties in order to ensure that electoral rights are fully guaranteed.

Even outside the context of electoral rights analysis, many have called for the increased regulation of political parties as a measure necessary for fully free and fair elections.[59] However, there has been much debate on the permissible scope of this regulation and on whether it should extend to a party's internal processes such as the selection of candidates for election.[60] Such debates have largely turned on one's conception of the legal status of political

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[56] Ibid 69.

[57] Guy Goodwin-Gill, *Free and Fair Elections* (Inter-Parliamentary Union 2006) 59; Anika Gauja, *Political Parties and Elections: Legislating for Representative Democracy* (Ashgate 2010) 1 – 2; *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912, para 56.

[58] UN HRC, General Comment 25 (n 41) para 26 (emphasis added).

[59] Gauja (n 57) 2; T Somes, 'The Legal Status of Political Parties' in M Simms (ed), *The Paradox of Parties: Australian Political Parties in the 1990s* (Allen and Unwin 1996); William Cross, 'Candidate Nomination in Canada's Political Parties' in Jon Pammett and Christopher Dornan (eds), *The Canadian Federal Election of 2006* (Dundurn 2006) 171.

[60] Gauja (n 57) Chapter 5; Cross (n 59) 171.

parties: whether they are viewed as private, voluntary associations owed freedom from state interference, or as quasi-public institutions carrying out 'state actions' and therefore subject to high degrees of regulation and judicial review.[61] This debate on the public-private dichotomy is complicated by the fact that political parties are not unitary entities which neatly fit on either side of the divide. Some legal commentators have become increasingly aware of this and have acknowledged VO Key's insightful tripartite framework for understanding the different dimensions of political parties.[62] Key notes that parties include the 'party-in-the-government' (elected officials with the given party label), the 'party-organization' (professional party workers who form a part of its organisational structure) and the 'party-in-the-electorate' (voters who identify with the party and loyally support it through votes).[63] A two-tiered public-private distinction is therefore an inadequate basis on which to ground one's conception of the permissible level of state regulation.

In examining the content of the duty to protect, this thesis seeks to offer an alternative framework through which the regulation of political parties may be viewed. Previous analyses have focused on the legal status of political parties and the extent to which they are 'public institutions' subject to judicial review, such that, a finding that they are private entities is regarded as largely dispositive of the case.[64] However, in analysing the duty to protect, the focus will be on the *state* and on its obligation to safeguard against infringements of the right; this obligation is irrespective of whether political parties are private or quasi-public.

[61] Nathaniel Persily and Bruce Cain, 'The Legal Status of Political Parties: A Reassessment of Competing Paradigms' (2000) 100 Columbia L Rev 775, 777 – 8; Gauja (n 57) 2; Ingrid Van Biezen, 'State Intervention in Party Politics: The Public Funding and Regulation of Political Parties' (2008) 16(3) European Review 337, 338.

[62] Persily and Cain (n 61) 778; Nancy Rosenblum, 'Political Parties as Membership Groups' (2000) 100 Columbia L Rev 813, 818; Samuel Issacharoff, 'Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition' (2001) 101(2) Colombia L Rev 274, 279.

[63] VO Key, *Politics, Parties and Pressure Groups* (5th edn, Crowell 1964) 163 – 5.

[64] Van Biezen (n 61); Issacharoff (n 62).

Admittedly, the legal status of political parties still bears relevance in dictating the extent to which the state may seek to regulate in its fulfilment of the duty to protect. However, in examining the question from the vantage point of the state's duties, one acknowledges a much broader array of institutional rules and remedies which may be put in place outside the context of public law and judicial review. The designation of a party, or its actions, as 'private' is therefore not dispositive of the case; in that event, the state's duty may involve less coercive regulation as well as the provision and facilitation of effective private law remedies.[65] As noted above, what becomes necessary is a balance of competing rights at stake: the individual's right to candidacy as against the political party's right to freedom of association. Chapter 7 will explore the nature of this rights' conflict in more detail as well as possible frameworks for its resolution.

Quite naturally, focus will be placed on the aspect of a party's internal functioning which has the most bearing on an individual's right to stand for election: the process of selecting the party's electoral candidates. The extent to which anti-discrimination laws ought to be applicable to this process will also be explored. State practice in this area is vastly divergent: the United States heavily regulates candidate selection within parties through state-administered primaries, which are mandated by statute in many states.[66] Canada lies at the other end of the regulatory spectrum where candidate selection is regarded as a wholly private and internal process, held not to be subject to judicial review.[67] As will be explored further in Chapter 7, differences in this area are the result of historical and socio-political nuances particular to each jurisdiction, there is therefore no attempt to put forward a comprehensive

[65] CESCR, General Comment 18 (n 19), para 35; CESCR, 'General Comment 4: The Right to Adequate Housing' (1991) UN doc E/1992/23, para 17.

[66] See Issacharoff (n 62) 275 – 6.

[67] *Knox v Conservative Party of Canada* [2007] 286 DLR (4th) 129; Cross (n 59) 171; Gauja (n 57) 105.

rule of purported universal applicability in this sphere. However, it is submitted that the core of the duty to protect requires, at the very least, an obligation on the state to ensure that a suitable framework exists for the resolution of disputes regarding candidate selection and that such selection is in accordance with the political party's agreed constitutional instrument, even if there is no prescription by the state on the precise form which such selection should take. It will also be argued that anti-discrimination rules should generally apply to political parties in their candidate selection processes.

The duty to protect, as framed above, is centrally grounded in the interest of positive freedom as the 'agency' and 'capability' to feasibly pursue the ends which one desires.[68] A mere absence of direct interference by the state is therefore insufficient. Positive freedom necessitates the imposition of positive duties on the state to ensure that a framework exists which safeguards against impediments created by third parties. More specifically, the duty to ensure that candidate selection within parties accords with general principles of fairness and non-discrimination, furthers the underlying interests of dignity and equality. The importance of the social recognition of one's equal moral status is affirmed by requiring political parties to honour this principle in their candidate selection procedures. Chapter 7 will more fully defend the necessity and legitimacy of this duty, and will offer an analysis of its institutional implementation in selected jurisdictions.

IV. DUTY TO FULFIL: THE ORGANISATION OF FREE AND FAIR ELECTIONS WITH A REASONABLY 'LEVEL PLAYING FIELD' FOR CANDIDATES

As noted above, the duty to fulfil imposes a positive obligation on the state to take appropriate legislative, budgetary, judicial and other measures towards the full realisation of the right.[69]

[68] Fredman (n 13) 11; Amartya Sen, *Development as Freedom* (OUP 1999).

[69] Koch (n 20) 82; see also CESCR, General Comment 18 (n 19), para 22; CESCR, General Comment 14 (n 19), para 33.

Like the duty to protect, it is largely grounded in the positive conception of freedom as the 'capability' to exercise the rights with which one has been formally conferred.[70] The duty to fulfil has therefore been taken to encompass a duty to 'facilitate', by taking positive measures to enable and assist individuals in their enjoyment of the right.[71] The right to candidacy is largely rendered meaningless outside the enabling context of the free and fair elections in which it is to be exercised. In the most general terms, the duty to fulfil may therefore be taken to include a positive obligation on the state to organise and administer free and fair elections. It is further submitted that a key aspect of this duty, of particular relevance to the right to candidacy, is the creation and maintenance of a reasonably level playing field in which candidates may compete for electoral office.

The extent to which the right to candidacy is interdependent with, and indivisible from, free and fair elections has been recognised in the jurisprudence of Canadian courts and in that of the European Court of Human Rights. Canadian courts have recognised the right to candidacy as 'the constitutional right of electoral candidates to run for office *in a fair election*',[72] noting that it imposes a positive obligation on the government to set up an electoral system which genuinely gives expression to the will of voters.[73] Similarly, the European Court of Human Rights has held that the Contracting Parties' obligation to 'hold free elections', (in accordance with ECHR Protocol 1, Article 3), necessarily includes guaranteeing the rights to vote and stand for election, such rights being regarded as essential components of free and fair elections.[74]

[70] Fredman (n 13) 11; Sen (n 68).

[71] CESCR, 'General Comment 18' (n 19), para 27; CESCR, 'General Comment 14' (n 19), para 37.

[72] *Figueroa v Canada (Attorney General)* (1999) 170 DLR (4th) 647 (ONSC).

[73] Figueroa (n 57), para 133.

[74] *Mathieu-Mohin* (n 35), para 50.

As demonstrated in the jurisprudence discussed in Part I of this thesis, courts have not merely examined whether the formal right to candidacy exists, but have gone further to assess whether the conditions in which it is to be exercised pose any unjustifiable practical impediments on the candidate's ability to seek office on a generally fair and equal basis. The state's duty may therefore be said include what has widely become known as a central aspect of free and fair elections: the provision of a reasonably 'level playing field' in which potential candidates may access and compete.[75] In its General Comment on the right to stand for election, the UN Human Rights Committee also recognises the primacy of the broader organisational rules within which the right has to be exercised; it notes that conditions relating to nominations dates, fees and signature requirements should be reasonable and not act as a barrier to candidacy.[76] As Rawls notes, political liberties must be guaranteed their 'fair value' such that citizens' capacity to exercise them must be on an equal basis, with everyone possessing a 'fair opportunity to hold public office'.[77] He notes further that society 'must regulate the conduct of elections' to this end.[78]

As noted above, this duty to fulfil is largely grounded in the value of positive freedom. The positive obligation to administer free and fair elections ensures that practical impediments do not render void one's autonomy to exercise his formal right to stand for office. Further, the obligation to provide a level playing field among candidates is necessary in order to give full expression to the value of dignity as social recognition of one's equal moral status. Regulatory

[75] Goodwin-Gill (n 57) 77; Ronald Gould, Christine Jackson, and Loren Wells, *Strengthening Democracy: a Parliamentary Perspective* (Aldershot 1995) 90; Patrick Merloe, 'Lessons Learned and Challenges Facing International Election Monitoring' (1999) <https://www.ndi.org/files/3_elect_lessons99.html> accessed 02 December 2014.

[76] UN HRC, General Comment 25 (n 41) paras 16 – 17.

[77] John Rawls, *Political Liberalism* (Colombia University Press 1996) 327 – 8.

[78] ibid.

rules which discriminately favour certain parties or candidates above others, risk undermining one's recognition as a free and equal citizen. Similarly, the interests of self-development and self-expression demand that the right be exercised in an electoral framework which provides opportunities for meaningful participation and expression on a fair and equal basis.

One foreseeable challenge to this proposed duty to fulfil is its potential indeterminacy, given the wide range of meanings which may be attributed to the concept of 'free and fair elections' and the lack of consensus on what constitutes a 'level playing field'. As the Canadian jurisprudence has made plain, differences of opinion regarding the meaning of electoral 'fairness' have often led to radically different results.[79] It is further evident that one's conception of 'fairness' is largely coloured by one's own view of the objectives of the electoral process.[80]

How then does one discover the more detailed content of the duty to fulfil in a manner which renders it meaningfully determinate and enforceable? In addressing this challenge, resort may be had to Fredman's approach in combating claims of the purported indeterminacy of positive duties to fulfil socio-economic rights. In employing Alexy's framework on the differences between rules and principles, Fredman notes that positive duties may best be described as principles, which are 'optimisation requirements' to be realised to the greatest extent legally and factually possible, as opposed to binary rules which are either fulfilled or violated.[81] The extent to which principles may be realised in any given situation depends on the existence of competing principles to which they may need to give way. As less binary concepts, it is therefore impractical to require that positive duties be expressed in a pre-

[79] See Chapter 3.

[80] See *Reform Party of Canada v Canada* (Attorney General) [1995] 4 WWR 609, 635 (Alberta Court of Appeal): 'Fairness is achieved, not by equal treatment of political parties, but by fair treatment measured by popular support *with the objectives of the election process in mind.*' (Emphasis added).

[81] Fredman (n 13) 71; Alexy (n 12) 45 – 57.

determined list of steps required for their fulfilment.[82] This is particularly so regarding the organisation of free and fair elections, the details of which remain somewhat dependent on local historical and socio-political factors. Notwithstanding, there is also an ever increasing international consensus on the broad requirements and standards of free and fair elections as put forward by inter-governmental organisations, regional bodies and international election observation missions.[83] Thus, as Fredman notes, even if one lacks detailed prescriptions on how to perform the duty to fulfil, sufficient determinacy can still be achieved through the use of broad parameters deduced from the values underlying the duty.[84] On this basis, in Chapter 8, resort will be had to how the values and interests underlying the right help to inform decisions on the requirements of 'free and fair elections' and a 'level playing field' in the jurisdictions selected. As Chapter 8 will more fully bear out, the jurisprudence of the courts examined reveal that the duty to fulfil is sufficiently determinate in order to be enforceable.

V. SUMMARIZING THE 'GENERALIZABLE CORE' OF THE DUTIES TO RESPECT, PROTECT AND FULFIL

As outlined in section A of this Chapter, this section aimed to outline the 'generalizable core' of the duties to respect, protect and fulfil, noting that questions regarding their more detailed specification and implementation will be addressed in Part III of this thesis. It is therefore important to highlight the key aspects of this general core. Interestingly, the three main duties outlined directly correspond with what has been identified as the three main rules which may potentially affect an individual's right to candidacy. As highlighted by the Venice Commission in its Guidelines on the Regulation of Political Parties:

[82] Fredman (n 13) 77.

[83] See Goodwin-Gill (n 57) 4 – 5.

[84] Fredman (n 13) 77.

> The individual right to stand for elections may be affected by three sets of rules, those imposed by the state for registration as a candidate, those imposed internally by the party itself for selecting candidates, and admissible restrictions such as age, residency or citizenship requirements.[85]

The table below highlights the main content of the duties to respect, protect and fulfil, and how they correspond with the three rules outlined above.

	General Core	**Applicable Rules**
Duty to Respect	An obligation on the State to refrain from imposing unjustifiable disqualifications or eligibility requirements for elective office	Eligibility requirements for elective office as well as legal disqualifications (referred to above as restrictions such as age or residency).
Duty to Protect	An obligation to ensure that candidate selection within parties accords with general principles of fairness and non-discrimination	Candidate selection rules imposed internally by political parties
Duty to Fulfil	An obligation to organise and administer free and fair elections in which there is a reasonably 'level playing field' for candidates	Rules imposed for the registration of candidates, as well as the more general regulatory rules governing the electoral process

D. THRESHOLD TEST: THE FEASIBILITY AND JUSTIFIABILITY OF BURDENS IMPOSED

After identifying the core content of the right's correlative duties, Tasioulas identifies two thresholds which have to be crossed before it can be said that a human right has been generated. The first is one of 'possibility': 'whether in the case of all human beings, it is possible to serve

[85] Venice Commission, 'Guidelines on Political Party Regulation' (2010) Study no 595/2010 <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)024-e> accessed 02 December 2014, para 127.

the underlying values through a duty with the proposed content.'[86] The second asks whether the 'burden' the duty imposes unduly affects the duty-bearer's 'capacity to realise other values, including other rights'.[87] This section will apply these two threshold tests to the duties outlined above.

I. POSSIBILITY / FEASIBILITY TEST

One central component of Tasioulas' possibility test is the condition that proposed duties must be generally compossible, such that, their fulfilment in the case of any one human being must be compatible with their being simultaneously guaranteed to all others within the specified socio-historical context.[88] Similarly, in espousing the requirements of 'basic liberties', Pettit puts forward the condition of 'equal co-enjoyment' which dictates that a choice cannot constitute a basic liberty unless all members of society can enjoy the liberty at one and the same time.[89] As Beitz has hinted, this potentially poses a problem in conceiving of candidacy as a 'basic liberty' given that, unlike the right to vote, it cannot ideally be exercised by everyone simultaneously, owing to necessary constraints on the size of the ballot.[90] The action of standing for election, unlike voting, may therefore be classified as what Pettit, and Hart, term

[86] Tasioulas, 'Towards a Philosophy of Human Rights' (n 1) 15; Tasioulas, 'Human Dignity' (n 7) 297.

[87] ibid.

[88] John Tasioulas, 'On the Foundation of Human Rights' (2012) (Provisional Draft) <https://www.academia.edu/5569955/On_the_Foundations_of_Human_Rights> accessed 02 December 2014, p 14.

[89] Philip Pettit, 'The Basic Liberties' in Matthew Kramer and Claire Grant et al (eds), *The Legacy of HLA Hart: Legal, Political, and Moral Philosophy* (OUP 2008) 207.

[90] Charles Beitz, *Political Equality* (Princeton University Press 1989) 174 – 175; John Seery, *Too Young to Run: A Proposal for an Age Amendment to the US Constitution* (Penn State University Press 2011) 89.

a ‘competitive option’ where ‘owing to scarcity, one man’s satisfaction causes another’s frustration’.[91]

How then can the right to candidacy pass the threshold test of simultaneous, mutual possibility? First, it is important to note that the specific *duties* generated by the right are the focus of the threshold test. As Tasioulas notes, ‘all hinges on the content of the duties associated with the supposed rights, not the names we give to those rights’.[92] The duties outlined above do not include an obligation to ensure that every citizen may stand for election. Rather, they outline more general obligations which the state can simultaneously guarantee to all persons in a non-rivalrous way. The duty to respect, by refraining from imposing unjustifiable restrictions on eligibility, can naturally be co-extended to all at the same time. Similarly, the duties to protect and fulfil are largely related to legislative and regulatory measures which, by their very nature, are guaranteed to all simultaneously and do not raise any inherent challenges to the requirement of compossibility. Therefore, even if all may not be able to enjoy the *action* of running for candidacy simultaneously, all can equally co-enjoy the broader framework of free elections and fairness of access which the right demands on the part of the State.

Secondly, as Pettit notes, in the event that it is mutually competitive for all persons to exercise their liberty at the same time, this may be resolved by society introducing rules of coordination which dictate the conditions in which persons may exercise their liberties.[93] The liberties are then protected within the context of the rules on which their effective exercise relies.[94] He refers to these as ‘rule-dependent basic liberties’.[95] Hart offers the example of the

[91] HLA Hart, ‘Are There Any Natural Rights?’ (1955) 64(2) 175; Pettit (n 89) 213.

[92] Tasioulas, ‘Towards a Philosophy of Human Rights’ (n 1) 17.

[93] Pettit (n 89) 214.

[94] Ibid.

[95] Ibid.

liberty to speak in a public assembly: given that the simultaneous exercise of that liberty by all persons would greatly diminish its value, rules of order in debate are necessary in order for the liberty to remain meaningful.[96] The same may be said for the right to candidacy: the confusion resultant from everyone simultaneously exercising this right would equally diminish its value. In this case, rules of coordination generally take the form of threshold requirements which prevent unlimited access to the ballot. However, the necessity of these requirements does not negate the broad applicability of the right to candidacy to virtually all citizens. An individual prevented from being placed on the ballot because of failure to meet the threshold, may still be said to possess the right to candidacy. This right was simply limited by the competing interest to ensure a manageable ballot which does not confuse voters or lead to unending fragmentation. What the right guarantees, in the most general terms, is that these rules of coordination, and the manner in which they are applied, are non-discriminatory and proportionate. This guarantee may be enjoyed by all rightholders at one and the same time.

II. JUSTIFIABILITY OF THE BURDENS IMPOSED

The second threshold test asks whether the duties are justifiable in light of the burdens imposed on the putative duty-bearer as well as the impact of the burdens on the general capacity to realise other rights and interests.[97] One of the central questions at this stage is whether the duties impose 'excessive burdens' or infringements on the fulfilment of other rights.[98] In addressing this question, focus will be placed on the duty to protect, given its potential conflict with political parties' right to freedom of association.

[96] HLA Hart, 'Rawls on Liberty and its Priority' (1973) 40(3) University of Chicago L Rev 534, 542 – 3; Pettit (n 89) 218.

[97] Nickel (n 1) 78; Tasioulas, 'Human Dignity' (n 7) 297.

[98] Tasioulas, 'On the Foundations of Human Rights' (n 88) 16.

The proposed duty to protect imposes an obligation on the State to take reasonable measures to ensure that political parties' internal candidate selection processes are fair and non-discriminatory. However, it should be noted that the contours of the duty have been outlined in generally non-intrusive terms, through measures which aim to encourage and direct political parties to organise *their own* internal rules for candidate selection, to abide by those rules, and to provide agreed mechanisms for redress. Political parties therefore have a great deal of autonomy in this process; the only requirements are that such rules, and their application, accord with the principles of procedural fairness and non-discrimination. On this basis, there is hardly an 'excessive burden' on the right to freedom of association in a manner which compromises the very existence of the right to candidacy. As Tasioulas notes, when applying the burden test, one should be careful to distinguish between excessive burdens which undermine the very existence of the right, versus reasonable limitations which may be imposed on other rights in the process of protecting the putative right.[99] By way of example, the fact that the protection of the right to privacy poses potential conflicts with the exercise of freedom of expression is not a basis on which to negate the very existence of the former right. The burdensomeness test does not require that there be no potential conflicts with other rights; it imposes a much lower standard which asks whether the duties demand 'excessive sacrifices'[100] in the fulfilment of other rights. It is submitted that the duty to protect does not, in principle, impose 'excessive sacrifices' on political parties' enjoyment of free association given that parties are generally still free to choose the substantive details of their candidate selection method. The relevant question then becomes how to resolve the rights' conflict between association and candidacy in any given case. As noted above, this question will be explored in Chapter 7 of this thesis, given that it lies outside the scope of the current threshold test.

[99] Tasioulas, 'Human Dignity' (n 7) 297 – 298.

[100] Tasioulas, 'On the Foundation of Human Rights' (n 88) 16.

The burden threshold is also concerned with the extent to which the proposed duties require an expenditure of state resources to an extent which undermines the state's capacity to realise other rights and collective interests.[101] This relates mainly to the positive duties to protect and fulfil. These duties may potentially require additional expenditure in order to implement regulatory and organisational measures which meet the high demands set for electoral fairness and increased access. The precise measure of resources required depends a great deal on factors specific to each jurisdiction, including the current state of electoral administration and regulation. It may therefore vary a great deal from state to state. However, what the burden threshold asks is whether the formulation of the duty, by its very nature, necessarily imposes excessive resource burdens on the state which unduly detract from other interests. In applying this test, it is evident that the duties to protect and fulfil, as outlined above, do not, in principle, impose such excessive resource-intensive burdens in a manner which would undermine the very existence of the right. This is further borne out in Chapters 7 and 8 which assess the institutional implementation of these duties in selected jurisdictions.

E. CONCLUSION

Part II of this thesis, constituted of Chapters 4 and 5, has aimed to outline the main tenets of the theoretical justification of the right to candidacy. Chapter 4 sought to establish the moral importance of recognising candidacy as a human right by providing an account of the values and interests underlying the right. Chapter 5 then outlined the main duties to which the right gives rise and offered a brief defence of the feasibility and justifiability of those duties. Admittedly, the exercise of defending the justifiability of the correlative duties continues well beyond the present Chapter and invariably extends to Part III of this thesis, which examines

[101] ibid.

aspects of the more detailed institutional implementation of these duties in selected jurisdictions. In analysing the actual implementation of the duties to respect, protect and fulfil, Part III will serve to further establish the feasibility and reasonableness of the duties proposed. This will build upon the foundation laid in the current Chapter, which has established the broad parameters of these duties and the extent to which they meet the basic threshold requirements of being both possible and not excessively burdensome.

Part III:

The Institutional Implementation of the Right: Examining the Enforcement of the Duties to Respect, Protect and Fulfil

PART III - INTRODUCTION

The Institutional Implementation of the Right: Examining the Enforcement of the Duties to Respect, Protect and Fulfil

Part I of this thesis examined the current recognition of the right to candidacy in international and domestic human rights law, while Part II provided the justificatory basis for the moral right to candidacy and its correlative duties. Part III of this thesis now seeks to look more closely at the institutional implementation of the State's duties to respect, protect and fulfil the right within the context of jurisprudence from Canada, the United States and the European Court of Human Rights. It is noted that rights analysis which incorporates multiple jurisdictions must be embarked upon with caution, remaining ever cognizant of the challenges posed by the peculiar institutional and historical factors which inform each juridical context.[1] In light of this, the following analysis seeks to focus more squarely on how the relevant duties are best implemented within each jurisdiction within the context of its applicable legal and political framework; less emphasis is placed on proposing the transplantation of approaches across systems or on deriving principles of general application from instances of specific implementation. On the contrary, focus will be placed on how the more general principles regarding the right's underlying values and interests, as identified in Chapter 4, inform the more detailed application of states' obligations to respect, protect and fulfil the right.

As noted in Chapter 1, the extent of a right's universality varies depending on the level of abstraction with which it is expressed. As Donnelly notes, rights may be considered most universal at the 'conceptual' level, less universal at the 'interpretation' level, while possessing

[1] Michel Rosenfeld and Andras Sajo, *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 12; Christopher McCrudden, 'A Common Law of Human Rights: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499.

the least degree of universality at the 'implementation' stage.[2] At the level of implementation, variations are considered morally legitimate 'so long as they fall within the range of variation consistent with the overarching concept'.[3] In dealing with the right's implementation, Part III of this thesis is therefore relatively less focused on the identification of general principles which apply equally in all liberal democracies. Rather, this Part has three broadly stated aims. First, Part III seeks to further establish the feasibility and reasonableness of the duties outlined in Chapter 5 by examining the contours of their application and enforcement within the jurisdictional contexts specified. Secondly, this Part seeks to normatively assess whether implementation within those contexts adequately advance the values and interests underpinning the right, as identified in Chapter 4. Thirdly, Part III will examine whether there are any general principles to be derived regarding the institutional frameworks necessary for the effective implementation of the duties to respect, protect and fulfil the right to candidacy.

In examining the application of the right at the domestic level, the analysis is framed within the context of a constitutionally entrenched right, enforceable by judicial review. This is the position of the right in Canada and this is the position which this thesis argues should obtain in the United States. It is therefore necessary to defend the suitability of constitutional entrenchment as well as the legitimacy of judicial oversight which comes therewith. As Alexy notes, a constitutional right is designated as such not only because of its 'intrinsic importance' but also because of its importance relative to the competing principle of 'keeping the competence of the democratically legitimated legislature as wide as possible'.[4] Alexy therefore defines the 'formal concept' of constitutional rights as 'positions which from the perspective of constitutional law are so important that the decision to protect them cannot be left to simple

[2] Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013) 99, 101.

[3] ibid 102.

[4] Robert Alexy, *A Theory of Constitutional Rights* (OUP 2004) 298.

parliamentary majorities'.[5] In justifying a constitutional right it is therefore necessary to outline why exclusive legislative cognisance of the norm would not guarantee its requisite protection. This resonates with Nickel's framework for rights justification which includes the criterion that rights status be necessary for the protection of the norm in question, which cannot be adequately safeguarded by less authoritative means.[6] In discussing institutional implementation, Part III therefore seeks to also establish the necessity and suitability of judicial enforcement as well as the dangers of leaving decisions affecting the right to candidacy solely within the purview of the legislature. By so doing, it aims to supply the final piece of the justificatory puzzle which has heretofore been limited to what Alexy would term arguments for the right's 'intrinsic importance'.

However, it should also be noted that the analysis of institutional implementation aims to incorporate all organs of the state and is by no means limited to judicial enforcement. As many have noted, the fulfilment of states' human rights obligations also involves input from the legislature through the design of laws and policies necessary for safeguarding such rights.[7] Analysis of the right's implementation will therefore broadly involve all aspects of state action (and inaction) necessary for the full realisation of the duties to respect, protect and fulfil the right to candidacy.

Part III will also assess the enforcement of the right at the supranational level through the analysis of European Court of Human Rights jurisprudence. This offers an understanding of the right's application at a regional level where a margin of appreciation is operative and where courts are obliged to balance general principles against the national peculiarities of

[5] ibid 297.

[6] James Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell 2007) 74.

[7] Donnelly (n 2) 36; Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 Law and Philosophy 451, 454; Richard Fallon, 'The Core of an Uneasy Case for Judicial Review' (2008) Harvard L Rev 1693, 1695.

individual states. This jurisprudence is important in supporting the case for the feasibility of candidacy as an international human right which possesses a sufficiently determinable core, enforceable notwithstanding the great degree of variation which exists in domestic political and electoral frameworks.

Chapter 6 addresses the institutional implementation of the duty to respect, Chapter 7 addresses the duty to protect and Chapter 8 examines the duty to fulfil.

CHAPTER 6 – DUTY TO RESPECT:

THE OBLIGATION TO REFRAIN FROM UNJUSTIFIABLY DENYING ELIGIBILITY TO STAND

A. INTRODUCTION

Chapter 5 of this thesis outlined the broad contours of the duties to respect, protect and fulfil the right to candidacy. It will be recalled that the core of the duty to respect was identified as a negative obligation on the State to refrain from imposing unjustifiable eligibility requirements or disqualifications from elective office. This is on the basis that legal eligibility stands as a necessary prerequisite for exercising candidacy. It was therefore established that an effective right to candidacy must include safeguards against the denial of such eligibility without just cause. It was further highlighted that the grounding values of dignity and equality create a presumption in favour of eligibility and inclusion, such that, restrictions imposed require special justification on the part of the State. This Chapter seeks to look more closely at the institutional implementation of the duty to respect: the institutional frameworks utilised in determining a qualification's justifiability as well as the substantive bases on which such justifiability is assessed.

Chapter 6 is divided into three main sections. The first section of this Chapter addresses the issue of institutional competence; it offers a defence of the legitimacy of judicial enforcement of the duty to respect by outlining the suitability and necessity of the judicial review of qualifications for legislative office. The dangers of sole legislative oversight are also examined and the notion that some statutory disqualifications are unreviewable exercises of parliamentary privilege is squarely rebutted. The second section then offers an analysis of how the courts have approached this role by examining the judicial review of eligibility

requirements in Canada, the United States and the ECtHR. It assesses whether the courts' approaches adequately advance the values and interests underpinning the right to candidacy and also seeks to further substantiate the feasibility and reasonableness of the duty to respect by examining its actual enforcement in the contexts specified. The third and final section assesses how the duty to respect should inform the review and evaluation of constitutional qualifications which are not subject to the ordinary processes of judicial review.

B. INSTITUTIONAL LEGITIMACY: DEFENDING THE ROLE OF THE COURTS IN ENFORCING THE DUTY TO RESPECT

At the heart of the duty to respect lies an affirmation of the citizen's core right to be qualified for elective office. This generates a negative obligation on the part of the state to refrain from imposing unjustifiable qualifications, and disqualifications, for elective office. The question then arises regarding which institution should be legitimately tasked with assessing a qualification's justifiability. Within the framework of a constitutionally entrenched right to candidacy, the most natural answer is the courts. However, as will be revealed in the analysis below, even within the context of an express right to candidacy, thorny institutional conflicts arise over the competing competences of the legislature and the judiciary regarding the implementation and review of qualifications for elective office. This section seeks to look more closely at the nature of those conflicts and argues for their ultimate resolution in favour of the judicial branch.

I. DEBUNKING THE NOTION OF STATUTORY DISQUALIFICATIONS AS EXERCISES OF PARLIAMENTARY PRIVILEGE

In *Harvey v New Brunswick*,[1] the Canadian Supreme Court considered a challenge to the Elections Act which imposed a five year disqualification from standing for legislative office on anyone convicted of corrupt electoral practice. The majority ruled that the disqualification was proportionate and justified under section 1 as a 'reasonable limit' on the right to candidacy. However, in a separate opinion, Justices L'Heureux-Dube and McLachlin argued that the disqualification was a legitimate exercise of parliament's privilege to discipline and regulate its membership and therefore immune from judicial review. The majority declined to rule on this issue, on the basis that it was only raised by an intervener. The issue of whether some statutory disqualifications may be characterised as exercises of parliamentary privilege has therefore been left open in the absence of a definitive Supreme Court ruling on the point. However, the question remains an important one and has major implications for the protection of the right to be qualified. Characterising statutory disqualifications as potential exercises of parliamentary privilege places them outside the reach of judicial review where their compatibility with the Charter's right to be qualified may be assessed.

Even outside the Canadian context, many jurisdictions have grappled with the issue of reconciling traditional parliamentary privileges with emerging human rights norms which place an ever widening scope of issues within the purview of courts.[2] Examining the extent to which parliamentary privilege may affect the right to candidacy is therefore a question of more general significance given the many Commonwealth jurisdictions which maintain British influenced systems of legislative governance.[3] Further, similar issues regarding the scope of

[1] *Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876.

[2] *A v United Kingdom* (2003) 36 EHRR 51; *Speaker National Assembly v de Lille* [1999] ZASCA 50; *Toussaint v Saint Vincent and the Grenadines (AG)* [2007] UKPC 48; See also Colette Langlois, 'Parliamentary Privilege: A Relational Approach' (LLM thesis, University of Toronto 2009).

[3] Langlois ibid 19.

the legislature's power to expel and exclude members have also arisen in the United States, albeit not under the nomenclature of 'parliamentary privilege'.[4] This section therefore seeks to shed light on an issue of more general significance even though its main focus is on how this problem has manifested within the Canadian context.

As noted above, in *Harvey v New Brunswick*, the Supreme Court of Canada considered a statutory disqualification which provided that those convicted of corrupt electoral practice would be barred from standing for election to the New Brunswick Legislative Assembly for the next five years after the date of conviction. The Act further provided that if a sitting member of the Assembly were convicted, his seat would be immediately declared vacant. The appellant was elected to the New Brunswick Legislative Assembly in 1991. However, after his election he was convicted of inducing a minor to vote, knowing that she was ineligible to do so. He was consequently expelled from the legislature and disqualified from running for the next five years. McLachlin J posited that this disqualification was within the more general privilege of legislative assemblies to 'maintain the integrity of their processes by disciplining, purging and disqualifying those who abuse them'.[5]

McLachlin J's approach has major implications on the protection of the right to candidacy given that the Court would no longer be able to assess the proportionality of such disqualifications: once the court accepts that a claimed privilege exists, it cannot then examine the propriety of its exercise.[6] Given that McLachlin J's approach was neither addressed nor challenged by the majority, it remains of central importance to assess the extent to which disqualifications for legislative office may in fact amount to parliamentary privilege.

[4] *Powell v McCormack,* 395 US 486 (1969).

[5] *Harvey* (n 1) para 64.

[6] Ibid para 74.

McLachlin J's position may be assessed using the framework outlined in the subsequent Canadian Supreme Court decision of *Vaid v House of Commons*.[7] *Vaid* is the Court's latest decision on parliamentary privilege and its unanimous judgment is largely considered to represent the current position regarding the general scope and application of parliamentary privilege in Canada.[8] In *Vaid*, the Court noted that the first step when faced with a claim of privilege is to ascertain 'whether the existence and scope of the claimed privilege has been authoritatively established in relation to our own Parliament or to the House of Commons at Westminster'.[9] Second, if the privilege has not been historically recognised, the court must then 'test the claim against the doctrine of necessity'.[10] The remainder of this section will apply both tests in its examination of whether there exists a parliamentary privilege to disqualify potential members from standing for election to the legislature.

[a] – <u>Power to Disqualify Outside Scope of Historically Recognised Privileges</u>

Given that the Canadian doctrine of parliamentary privilege has largely been derived from the British Westminster model, the first test in *Vaid* asks whether the claimed privilege has been authoritatively established in either the UK House of Commons or the Canadian parliament.[11] McLachlin J sought to derive a privilege to disqualify as extensions of two well-established privileges: (i) the power to discipline members through expulsion and (ii) the privilege to determine matters relating to the election of members.[12] However, a closer examination of both

[7] (2005) 1 SCR 667.

[8] Evan Fox-Decent, 'Parliamentary Privilege, Rule of Law and the Charter after the Vaid Case' [2007] Canadian Parliamentary Review 27, 28; Warren Newman, 'Parliamentary Privilege, the Canadian Constitutions and the Courts' (2008) 39 Ottawa L Rev 573, 596.

[9] *Vaid* (n 7) para 39.

[10] ibid para 40.

[11] ibid para 39.

[12] *Harvey* (n 1) paras 81, 84.

these privileges reveal that the disqualification of potential members is not encompassed in either.

[i] *The Power to Discipline Members by Expulsion*

McLachlin J argued that the act of disqualification stood as a necessary extension of the well-established privilege to expel, in order to prevent those expelled from simply seeking re-election at the next available opportunity.[13] Academic support was cited for this position by relying on the work of Andrew Heard who has also argued that disqualifications for misconduct be considered as matters of parliamentary privilege:

> A legislature does not have conclusive authority to discipline its members if it expels someone simply to have that person returned [by subsequent election] to carry on where he or she left off. Disqualification would give finality to a disciplinary decision to expel a member.[14]

However, both British and Canadian authorities on parliamentary privilege are unanimous on the point that while parliament has the power to expel its members on account of misconduct, this expulsion does not disqualify an individual from seeking re-election. Erskine May's authoritative treatise on parliamentary privilege highlights this point: 'Expulsion, though it vacates the seat of a Member and a new writ is immediately issued, does not create any disability to serve again in the House of Commons if re-elected.'[15] Canadian authorities on the point are equally plain.[16] Bourinot's text on parliamentary practice and procedure in Canada describes the position as such:

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[13] Ibid para 81

[14] ibid; Andrew Heard, 'The Expulsion and Disqualification of Legislators: Parliamentary Privilege and the Charter of Rights' (1995) 18 Dalhousie LJ 380.

[15] Sir Malcolm Jack (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (24th edn, LexisNexis 2011) 199.

[16] Joseph Maingot, *Parliamentary Privilege in Canada* (2nd edn, House of Commons 1997) 183; A Fraser, WF Dawson and J Holtby, *Beauchesne's Rules & Forms of the House of Commons of Canada* (6th edn, Carswell

> No principle is more clearly laid down by all eminent authorities on the law of Parliament than this – 'That Parliament cannot create a disability unknown to the law, and that expulsion, though vacating the seat of a member, does not create a disability to serve again in Parliament.'[17]

On the basis of these authorities, the Supreme Court of Nova Scotia held that a statutory disqualification could not be regarded as an act of parliamentary privilege in the 1987 decision of *MacLean v Nova Scotia*:[18]

> In my opinion, no breach of section 3 occurs by the House expelling one of its members. The same cannot be said for the attempt by the House to impose restrictions on future members… Bourinot, Beauchesne and Erskine May all agree that… 'such expulsion does not affect the right of a Member to run again and be re-elected'.[19]

It is curious that McLachlin J declined to mention *MacLean v Nova Scotia* and its previous treatment of the issue, particularly in light of the authoritative sources on which it was grounded. There is further support for the *MacLean* position when one examines the historical case of UK House of Commons member, John Wilkes. As Erskine May's treatise highlights, Wilkes was expelled and subsequently re-elected three times. After his third expulsion, a resolution was passed in 1769 which provided that he was incapable of being elected a Member to serve in the present Parliament.[20] However, a motion was later passed (115 to 47) that the resolution barring his re-election should be expunged from the record on the basis that it was 'subversive of the rights of the whole body of electors'.[21] Here, the House revealed an

Company 1989) 16; John Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada* (5th edn, Irish University Press 1971) 152.

[17] Bourinot (n 16) 152.

[18] (1987) 76 NSR (2d) 296.

[19] Ibid 305 - 6.

[20] Erskine May (n 15) 199; 18 Cobbett's Parl Hist Eng (1775) 368.

[21] House of Commons Journal 2 May 1782, vol 38, 977.

appreciation of the extent to which disqualifications also curtail the right of voters to freely choose, a consideration wholly absent from McLachlin J's analysis. Further, the overwhelming dissatisfaction with the initial resolution, which sought to bar Wilkes' re-election, illustrates that Parliament quite likely did not view the disqualification of potential members as a matter within its privilege.

[ii] The Power to Determine Matters Relating to the Election of its Members

Heard and McLachlin also had resort to parliament's privilege of 'general control of its membership', which includes the historical privilege to determine matters relating to the election of its members. McLachlin, J argued that 'general control of its membership' must also include disqualification for corruption.[22] However, the authorities offer no support for this point.

Erksine May highlights that 'it is a privilege of the House of Commons to provide for its proper constitution as established by law'.[23] This included the power of the House to adjudicate over controverted elections in order to determine whether those elected were qualified to sit and vote.[24] However, historical precedent suggests that this power was understood as adjudging the member-elect's compatibility with standing requirements, as opposed to having the power to impose new qualifications as an act of unreviewable privilege. A thorough examination of such historical precedent is found in the US Supreme Court decision of *Powell v McCormack*.[25] There, the Supreme Court examined English historical precedent on this point (given the extent to which it would have informed 18th Century

[22] *Harvey* (n 1) para 83.

[23] Erskine May (n 15) 216.

[24] ibid 217; Maingot (n 16) 188; Fraser (n 16) 16.

[25] *Powell* (n 4).

Convention debates) in order to interpret the meaning of Congress' power under the Constitution to 'be the Judge of the Qualifications of its own Members'. The issue was whether this power limited Congress to judge based on standing requirements or whether it had a residual power to exclude members-elect for past misconduct, even if they had met all of the established qualifications. In reviewing English precedent on this point, the Supreme Court highlighted the case of John Wilkes, as noted above, where a resolution to disqualify him from re-election was eventually expunged from the parliamentary record.[26] Even more telling is the record of debates which document the arguments raised against the initial resolution which barred Wilkes from re-election (subsequently expunged by an overwhelming majority):

> [T]he law of the land had regulated qualifications of members to serve in parliament, and that the freeholders of every county had an indisputable right to return whom they thought proper, provided he was not disqualified by any of those known laws… Courts of judicature, and the houses of parliament acting as courts of judicature, have only the power of declaring [qualifications]: and in the use of that power are bound by the law as it stands at the time of making that declaration.[27]

[b] – <u>Application of the Doctrine of Necessity</u>

Given that the power to disqualify potential members has not been authoritatively established as a recognised privilege, the next question which needs to be answered is whether the claimed privilege may be established on the basis of the doctrine of necessity.[28] McLachlin J, and Heard, sought to apply this doctrine by asking 'whether the dignity, integrity and efficiency of the legislative body could be maintained if it were not permitted to carry out the type of action sought to be done'.[29] Both came to the conclusion that the right to disqualify potential members

[26] *Powell* (n 4) 527 – 530.

[27] 16 Cobbett's Parl Hist Eng (1769) 589 - 90.

[28] *Vaid* (n 7) para 40.

[29] Ibid para 72.

for corruption was necessary for the dignity and efficiency of parliament.[30] However, it is submitted that both proceeded on an erroneous conception of the doctrine of necessity. As the judgment in *Vaid* highlights, the necessity test is, at its core, a jurisdictional one, which asks whether it is necessary for the matter to be within the *exclusive* domain of parliament, not whether the matter is a necessary function in the abstract.[31] Most would agree with McLachlin J's conclusion that it is necessary for parliament to be able to disqualify potential members who are guilty of corrupt misconduct through the passing of statutory disqualifications. However, the central question is whether it is necessary, for the dignity and efficiency of the House, that such statutory disqualifications be within the exclusive domain of parliament and unreviewable by the courts. The Supreme Court encapsulated the necessity doctrine as follows in *Vaid*:

> [T]he sphere of activity for which privilege is claimed [must be] so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body… *that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency*.[32]

The jurisdictional nature of the test was again highlighted in a British Joint Committee Report on parliamentary privilege, cited extensively by the Court in *Vaid*: 'the privileged areas must be so closely and directly connected with proceedings in Parliament *that intervention by the courts would be inconsistent with Parliament's sovereignty as a legislative assembly*'.[33] The necessity test is therefore closely connected with the exigencies of Parliament in conducting its legislative function. On this basis, the expulsion of current members on account of misconduct constitutes a long established privilege, given that the House is exercising disciplinary powers

[30] *Harvey* (n 1) para 74, 82; Heard (n 14) 405.

[31] *Vaid* (n 7) para 46.

[32] *Vaid* (n 7) para 46 (emphasis added).

[33] Ibid para 44; UK Joint Committee on Parliamentary Privilege, *Report and Proceedings of the Committee* (1999) para 247.

over those participating in the legislative process. However, the same may not be said for the disqualification of potential members who have no current connection or bearing on parliamentary proceedings. As the Court noted in *Vaid*, it is a well-established principle that courts will look more closely at claims to privilege which 'have an impact on persons outside the legislative assembly than at those which involve matters entirely internal to the legislature'.[34] Even if a statutory disqualification has the effect of barring a recently expelled member, it also inevitably affects 'strangers' to the House and cannot therefore be viewed as a mere extension of parliament's disciplinary power to expel. This heightened scrutiny regarding non-members takes into account the extent to which their rights have been affected.[35] In the presence of an express constitutional right to be qualified, it is difficult to see how such a privilege would actually pass muster. While parliament retains the right to pass legislation disqualifying those guilty of grave misconduct, the right to candidacy demands that the court be given the opportunity to review the proportionality and reasonableness of such disqualifications. The power to disqualify individuals from seeking election is not so closely and directly connected to parliament's current legislative functioning as to warrant the ousting of such crucial judicial oversight.

Having established the legal and historical bases which militate against disqualifications being characterised as exercises of parliamentary privilege, the proceeding section seeks to outline the normative bases upon which judicial involvement ought to be considered necessary.

[34] *Vaid* (n 7) para 29; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319, 350.

[35] *Vaid* ibid para 39.

II. THE IMPORTANCE OF JUDICIAL INVOLVEMENT IN ASSESSING THE JUSTIFIABILITY OF QUALIFICATIONS FOR ELECTIVE OFFICE

No shortage of analysis has been carried out on the democratic legitimacy and competence of courts in reviewing, and overturning, the decisions of elected legislators. Formidable arguments have been made both for[36] and against[37] the suitability of judicial review as a mode of protecting constitutional rights. This section does not seek to rehearse those arguments or to ultimately resolve what has rightly been termed an 'unavoidable and permanent' tension.[38] Instead, this section seeks to more specifically highlight the extent to which institutional factors militate in favour of the necessity and democratic legitimacy of judicial oversight in this particular area.

Regarding qualifications for legislative office, there is a particular conflict of interest at play in the legislature laying down the very qualifications for its future competitors. As Ely notes, elected representatives 'have an obvious vested interest in the status quo' and their decisions affecting electoral rights therefore run the genuine risk of being self-interested.[39] This issue was considered by the US Supreme Court in *Powell v McCormack* where it was held that the qualifications for Congressional office were fixed by the constitution and could not be supplemented or changed by Congress.[40] In arriving at that conclusion, the Court considered the Convention Debates where influential framer James Madison firmly rejected a proposal that the legislature be vested with a general power to establish qualifications for each House, noting that it would confer 'an improper and dangerous power':

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[36] Ronald Dworkin, 'The Forum of Principle' (1981) 56 NYU L Rev 469; Fallon (n 7); Kavanagh (n 7).

[37] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale Law Journal 1346; Allan Hutchinson, 'A Hard Core Case against Judicial Review' (2008) 121 Harvard Law Review Forum 57; Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) Oxford Journal of Legal Studies 18.

[38] Alexy (n 4) 298.

[39] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 117.

[40] *Powell* (n 4).

> The qualifications of electors and elected were fundamental articles in a Republican Government and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution…Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partisans of [a weaker] faction.[41]

The position in the United States is therefore somewhat exceptional in this regard, with the Court holding that the legislature has no power to statutorily impose additional qualifications on federal legislative office. However, in most other jurisdictions, this conflict of interest warned against by Madison remains present, given that legislatures are generally seized of the opportunity to promulgate additional qualifications for legislative office. There is therefore a strong imperative in such cases that these qualifications be made subject to review by the courts. Ely's process theory is instructive on this point in as far as it highlights the extent to which courts are specially positioned outside of the political system to objectively assess malfunctions in that system which obstruct channels of political change.[42] More generally, Kavanagh, in her defence of judicial review, notes that the risk of self-interested decisions constitutes strong reason for some matters to be taken out of the hands of those most vested in their outcome and into the hands of an independent review body.[43] An example of such self-interested legislation was illustrated in the case of *Tanase v Moldova*,[44] before the European Court of Human Rights. In that case, the government imposed a dual citizenship disqualification shortly before the general election, the effects of which disproportionately burdened opposition parties.[45] The Court was able to objectively assess, and rectify, this

[41] *Powell* (n 4) 533 – 4.

[42] Ely (n 39) 103.

[43] Kavanagh (n 7) 472.

[44] (2012) 55 EHRR 17.

[45] ibid para 178.

potential obstruction in the channels of political change, a situation which Ely would characterise as the 'ins' choking off the avenues of change to ensure that the 'outs' stay out.[46]

It is acknowledged that the above argument regarding conflict of interest most directly applies to qualifications for legislative office, which are being made by legislative members themselves. The same may not be said about statutory qualifications for municipal and local government offices in which legislators would have less of a vested interest. Notwithstanding, the necessity and democratic legitimacy of judicial review in this area may be supported on similar bases. The court functions as an additional check to ensure that the democratic values of political equality and inclusion have been upheld given the real possibility of advertent or inadvertent violations of these principles, notwithstanding a reduced conflict of interest. As Kavanagh notes, the argument for judicial review does not hinge on a particular distrust of legislators, but rather on the acknowledgement of an inescapable risk of error which must be guarded against given the importance of the rights at stake.[47] Given the fundamentality of the right to candidacy, as outlined in Chapter 4, it is therefore imperative to 'err on the side of vigilance rather than complacency'[48] by providing for the judicial review of qualifications as an additional check in its protection.

On the issue of democratic legitimacy, Ely posits that judicial decisions regarding the electoral process are merely procedural in nature and do not involve the courts usurping legislative authority by adjudicating on substantive values.[49] However, as Tribe and Dworkin rightly note, matters pertaining to the democratic process are inherently substantive and value-

[46] Ely (n 39) 103.

[47] ibid 477.

[48] Ibid.

[49] Ely (n 39) 102 – 3.

laden, touching on issues of equality and inclusion.[50] On this basis, Ely's claim of judicial value-neutrality has rightly been subject to intense criticism.[51] How then may the courts' democratic legitimacy be asserted? As Fallon and Alexy note, general claims about the extent to which entrenched rights undermine democratic legitimacy ignore the extent to which some rights, such as electoral rights, are necessary for such legitimacy to exist.[52] It is therefore submitted that the right to candidacy, particularly regarding the duty to respect, furnishes courts with an ultimately democracy-enhancing function in ensuring that the values of dignity, equality and inclusion are upheld in statutory qualifications for elective office. In establishing this claim, resort may be had to Fallon's defence of judicial review offered in response to one of Waldron's critiques thereof.[53]

Fallon notes that the case for judicial review need not rest on the premise that judges will more likely arrive at the 'correct' answer in every case; rather, it may be grounded on the assumption that errors of 'under-enforcement' of rights are more morally troubling than errors of 'over-enforcement'.[54] On that basis, the additional protection which may occur in the presence of judicial review (where the court rules against the government and in favour of the rightholder) is considered to be less detrimental than the under-protection which may occur in the absence of judicial review.[55] While this assumption may not hold true in every case (as

[50] Laurence Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 Yale Law Journal 1063, 1071; Dworkin (n 36) 503 – 4.

[51] Ibid.

[52] Fallon (n 7) 1724; Alexy (n 4) 298.

[53] Fallon ibid.

[54] ibid 1700 – 1713.

[55] Ibid.

Fallon himself notes),[56] it does bear particular relevance regarding judicial enforcement of the citizen's right to be qualified for elective office.

Regarding the right to be qualified, it may be argued that while judicial review, at worst, risks 'over-protecting' the right to participate for those undeserving or unfit, the moral cost of that risk is arguably less than the cost of excluding those deserving of participation in the absence of judicial review. This is on the basis of the central democratic presumption of eligibility and inclusion which assumes that all citizens are equally deserving of the opportunity to govern.[57] This conclusion is further supported by the strong presumption of voters' sovereignty in their choice of candidate, the very foundation of democratic governance. In the event of the courts being too permissive of those deemed by the legislature as unfit to stand for office, the real 'risk' may therefore be characterised as leaving 'too much' within the hands of the electorate. Yet, voter choice in this area remains the bedrock of democratic rule. In striking down a particular qualification, the court is not usurping democratic legitimacy by choosing a particular candidate or group, it is rather upholding democracy by placing the decision of that candidate's worthiness into the hands of the electorate. Judicial review ensures that we err on the side of voter sovereignty by providing an additional check to ensure that these presumptions (of inclusiveness and popular sovereignty) are only displaced in the presence of most compelling reasons.

The proceeding section seeks to assess judicial involvement in this area and the extent to which courts have managed to fulfil a democracy-enhancing function by safeguarding the values and interests underlying the right.

[56] ibid 1712.

[57] Robert Dahl, *On Democracy* (Yale University Press 2000) 75.

C. JUDICIAL APPROACHES TO THE REVIEW OF QUALIFICATIONS FOR ELECTIVE OFFICE

I. CANADA: HONOURING THE PRESUMPTION OF ELIGIBILITY

As outlined in Chapter 3, the Canadian Charter of Rights expressly provides for the right to candidacy in the following terms:

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

By virtue of section 1 of the Charter, the right to be 'qualified for membership' is subject only to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The Supreme Court of Canada had occasion to interpret and apply this right to be qualified for the first and only time in *Harvey v New Brunswick*. As noted above, the impugned provision imposed a five year disqualification from seeking election on any person convicted of an illegal electoral practice. The challenge was brought by a former provincial legislator who was convicted of knowingly inducing an unqualified person to vote. The Court upheld the constitutionality of the disqualification on the basis that it was justified as a reasonable limit under section 1.[58]

Although the Court ultimately upheld the statutory disqualification, its decision in *Harvey* affirmed an expansive view of the right to candidacy as well as the state's duty to respect. The Court rejected the government's submission that the disqualification, given its importance in maintaining the integrity of the electoral process, was within the scope of 'inherent' limits on the right to candidacy and therefore exempt from justification under section 1. The Court held that there were no such 'inherent' limits on the right to be qualified and that all statutory disqualifications were equally subject to justification under the section 1

[58] *Harvey* (n 1) para 51.

proportionality test.[59] In advancing its expansive interpretation of the right to be qualified, the Court noted:

> Admittedly in the English version the words "right to be qualified" are somewhat ambiguous. The use of the word "qualified" suggests that certain criteria must be met before a citizen can run for office. However, since there exists a right to be qualified, it would appear that qualification is automatic regardless of any criteria set out by statute… the English version of s. 3 should be read as "[e]very citizen . . . is qualified for membership therein".[60]

The Court noted that its approach accorded with the Court's well established principle of reading Charter rights broadly and putting the burden of justifying limitations upon the state.[61] The Court's approach also forcefully advances the core value of political equality which lies at the heart of the duty to respect. As Dahl notes, the principle of political equality is grounded on the premise that among adults, no persons are so definitely better qualified than others to govern, such that, all citizens should be presumed to be sufficiently well qualified to participate in governing the state.[62] According to Dahl, this presumption should prevail 'except on a very strong showing to the contrary in rare circumstances, protected by law'.[63] The Canadian Supreme Court has affirmed this presumption of eligibility and inclusion by placing the onus on the state to justify all statutory restrictions on qualification, regardless of their nature or implicit purpose.

Lower courts have taken an equally expansive approach to the right to vote by noting that all statutory limitations on eligibility fall to be justified under section 1, regardless of

[59] ibid paras 26 - 29

[60] ibid para 28.

[61] ibid para 30.

[62] Dahl (n 57) 75.

[63] ibid.

whether they are expressed as qualifications or disqualifications. In *Fitzgerald v Alberta*,[64] two Canadian citizens, aged 16, challenged the constitutionality of the statutory age for voting eligibility, set at 18. Relying on a decision from the Manitoba Court of Queen's Bench,[65] the Crown sought to argue that section 3 contained certain 'internal limitations' on the right to vote, such as age and residency, which need not be justified under section 1.[66] The aim of section 3, it was argued, is the prohibition of 'selective disqualifications' as opposed to 'standard qualifications' such as age. The Court in *Fitzgerald* roundly rejected this argument, as well as the false distinction it sought to create:

> Barring minors from voting can be framed as either a standard qualification or a selective disqualification, depending on how you word it… As such, an age restriction cannot be justified without a s. 1 analysis simply because it is termed a standard qualification.[67]

It appears that the same analysis would apply to statutory restrictions on the right to candidacy. Standard age and residency requirements for candidacy are therefore subject to challenge under section 3. However, as was the case in *Fitzgerald*, it is highly likely that these restrictions would withstand section 1 scrutiny as 'reasonable limitations' on the right. The current minimum age for candidacy to the House of Commons is set at 18, with similarly permissive age requirements for most provincial and territorial legislatures. One may argue that it is somewhat pedantic for the court to argue that such 'routine qualifications' are in violation of section 3, when it is clear that they will withstand section 1 scrutiny and be ultimately upheld. This was the argument of Scollin J in *Badger v AG Manitoba*.[68] Regarding minimum age

[64] 10 Alta LR (4th) 155 (ABQB).

[65] *Badger v AG Manitoba* (1986) 30 DLR (4th) 108, 112 (Man QB).

[66] *Fitzgerald* (n 64), para 12.

[67] ibid para 18.

[68] *Badger* (n 65) 112.

requirements for the right to vote, he noted: 'It is pedantic to classify these as limits. They are simply rational dimensions of the right.'[69]

However, the courts' approach, of treating all statutory restrictions as prima facie violations of the right, may be defended on two grounds. First, this approach is in line not only with a literal reading of the section, but also its drafting history. As outlined in Chapter 3, the framers of the Charter omitted a clause in earlier drafts which guaranteed the right 'without unreasonable distinction or limitation'. Such a clause would have allowed for 'reasonable' limitations on the right to be held internally compatible with section 3. However, the subsequent omission of this caveat strongly suggests that the framers' intention was to have the section 1 proportionality test as the only permissible limitation on the rights to vote and candidacy.

Secondly, as noted above, the courts' approach affirms the democratic presumption of eligibility by placing the primary justificatory burden on the state. In the alternative approach, which provides for inherent limitations within the very scope of the right, the evidentiary burden is placed on the applicant to establish a prima facie case that the limitation in question is not 'inherent' or within the 'rational dimensions of the right'.[70] The Court has refrained from conducting any such preliminary balancing within section 3 and has maintained that the justifiability of qualifications falls to be decided only under section 1.[71] All qualifications are therefore assessed on the basis of the well-established *Oakes* test which imposes a fair, yet rigorous, justificatory burden on the state. Restrictions on eligibility must therefore be in pursuance of a pressing and substantial objective, possess a rational connection to that

[69] ibid 112.

[70] *R v Big M Drug Mart* [1985] 1 SCR 295 para 162: the burden to prove that the right has been infringed on rests on the applicant right holder.

[71] *Harvey* (n 1) para 30.

objective, be of only minimal impairment to the right and strike a proportionate balance between the effects on the right and the legislative objective.[72] This test is of sufficient stringency in order to render the state's duty to respect meaningful and to honour the primacy of the core values of equality and inclusion which underlie the right to candidacy.

II. UNITED STATES: PROTECTING THE VOTERS' RIGHT TO FREELY CHOOSE

As noted in Chapter 3, the United States Constitution does not contain an express right to candidacy, nor has there been unequivocal recognition of such a right by the courts.[73] Jurisprudence in this area has rightly been described as a 'legal morass',[74] with some lower courts affirming a fundamental right to candidacy even though the Supreme Court's recognition of it as an independent right remains only tenuous at best.[75] It should therefore come as no surprise that there is also no uniform approach to the review of qualifications for elective office. Instead, there exist sharp differences based on the nature of the office and on the individual court's categorisation of the right to candidacy. Notwithstanding, US jurisprudence offers valuable insights on the foundation of the state's duty to respect by highlighting the extent to which unjustifiable eligibility requirements or disqualifications also hinder the voters' right to freely choose. As noted in Chapter 4, the interests of voters, as served through the protection of the right to candidacy, remain one of the central derivative justifications for the existence and weight of the right to candidacy.[76] This section highlights

[72] *R v Oakes* [1986] 1 SCR 103.

[73] See Chapter 3.

[74] *Randall v Scott* 610 F.3d 701, 711 (11th Cir 2010).

[75] See full discussion in Chapter 3.

[76] See Chapter 4.

the extent to which US courts have recognised this derivative linkage in their review of qualifications for elective office and outlines the need for consensus on a strict standard of review to be applicable in all cases.

[a] – <u>Qualifications for Congressional Office</u>

Article 1 of the US Constitution sets out qualifications for membership in the US Congress, the bicameral legislature of the federal government which comprises both the House of Representatives and the Senate. Qualifications for the House of Representatives and the Senate are limited to a minimum age of 25 and 30 respectively, citizenship for a minimum of 7 and 9 years respectively, and residency in the State from which one is elected.[77] As noted in Section A of this Chapter, the Supreme Court has held that these qualifications are exhaustive and cannot be changed or supplemented by Congress[78] or by individual states.[79] In *US Term Limits v Thornton*,[80] the Supreme Court struck down a provision of the Arkansas State Constitution which served to disqualify from Congressional office candidates who had already served three terms in the House of Representatives or two terms in the Senate. In a 5-4 decision, the Court held that the state-imposed term limits were contrary to the 'fundamental principle of representative democracy' that 'the people should choose whom they please to govern them.'[81] In holding that states had absolutely no power to add qualifications, the majority relied heavily on its earlier decision in *Powell v McCormack* where it was established that the framers' intent

[77] US Constitution Art 1, ss 2 – 3.

[78] *Powell* (n 4).

[79] *US Term Limits v Thornton* 514 US 779 (1995).

[80] ibid.

[81] *Thornton* (n 79) 783.

was for the constitutional Qualifications Clause to be treated as exhaustive and unchangeable by the legislature.[82]

In *Thornton*, the majority very progressively noted that the principle of representative democracy includes 'the egalitarian concept that the opportunity to be elected was open to all'.[83] The Court outlined the extent to which this principle was emphasized and affirmed by the constitution's framers. James Madison, for example, noted the importance of keeping congressional qualifications at a minimum in The Federalist No 57:

> Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, birth, religious faith, or civil profession is permitted to fetter the judgment or disappoint the inclination of the people.[84]

Similarly, the Court cited Wilson Carey Nicholas who argued during Convention Debates on the importance of the right to legislative candidacy:

> It has ever been considered a great security to liberty, that very few should be excluded from the right of being chosen to the legislature. This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence.[85]

The Court further highlighted the principle of free voter choice, which was also affirmed during Convention Debates: 'The people are the best judges of who ought to represent them. To dictate and control them, to tell them whom they shall elect, is to abridge their natural rights.'[86] On the basis of these two principles – an egalitarian ideal of open access to office and the people's

[82] *Powell* (n 4).

[83] *Thornton* (n 79) 794.

[84] James Madison, *Federalist Papers (No. 57)* (New American Library 1961) 351; ibid 808.

[85] 3 Elliot's Debates 8; *Thornton* (n 79) 794; *Powell* (n 4) 541.

[86] 2 Elliot's Debates 292 – 293; *Thornton* (n 79) 794 – 5; *Powell* (n 4) 541.

sovereignty to vote for whom they wish – the Court ruled that States did not have the power to impose additional qualifications for Congressional office.[87]

It is important to note how expansively the Court's position safeguards the right to candidacy, even in the absence of an expressly recognised constitutional right. The Court very strictly enforced the duty to respect by holding that the federal or state legislature may not impose additional qualifications, with the effect that the only fetter on voter choice are the constitutional requirements of age, residency and citizenship. This goes even further than the position taken in Canada where the qualifications for the federal legislature may be supplemented by statute (with such statute being subject to judicial review for its compatibility with the Charter). The US Supreme Court has gone one step further in precluding the very enactment of additional congressional qualifications. The radical nature of the Court's stance is well noted in Justice Thomas' powerful dissent where he notes that the majority's ruling is out of step with the Court's decision in *Bullock* which denied the existence a fundamental right to candidacy.[88] The majority indeed offers robust support and protection for the right to *congressional* candidacy but stops short of explicitly recognising a more general constitutional right to candidacy. The absence of such recognition means that the right to stand for other elective offices remain in a much less protected position regarding the imposition of potentially unjustifiable qualifications. As the analysis below reveals, with regard to state and municipal offices, qualifications may be imposed by statute and there exists no consensus on the standard of review to be used in assessing impugned restrictions.

[87] *Thornton* (n 79) 820.

[88] ibid 879. Justice Thomas' dissent also highlights the extent to which the Amendment in question was not precisely the act of a state legislature, but was rather voted on directly by the electorate through initiative. This raises questions regarding the electorate's own power to limit the scope of persons from whom they wish to choose. Yet, the majority ignored this factor in its analysis. See: *Thornton* (n 79) 883; Heather Lardy, 'The Constitutional Limits of Democratic Choice: US Term Limits v Thornton' (1996) 25 Anglo-American L Rev 376.

[b] – <u>Qualifications for State Office</u>

Each state government comprises a number of key elective offices including governors, state legislators and senior judges. Qualifications for these offices are generally contained in state constitutions as well as statutes. In the absence of an express right to candidacy, these qualifications are often challenged under the equal protection clause of the Fourteenth Amendment on the basis that they deprive the disqualified citizen from 'equal protection of the laws'. Under the court's system of tiered scrutiny in equal protection cases, a challenge attracts 'strict scrutiny' if the law in question differentiates on a 'suspect' classification such as race or if a 'fundamental right' is implicated. Strict scrutiny requires the state to establish that the measure in question is narrowly tailored to meet a 'compelling state interest'.[89] In cases involving neither a suspect classification nor a fundamental right, the much less demanding 'rational basis' standard is applied which requires only that the means are rationally related to a legitimate state aim.[90] Courts have also employed intermediate levels of scrutiny for what they characterise as 'quasi-suspect' classifications such as gender.[91]

Many courts reviewing state office qualifications have employed the very permissive 'rational basis' test in light of the Supreme Court's holding in *Bullock* that candidacy is not a fundamental right.[92] In some cases, this undemanding standard has resulted in courts upholding lengthy durational residency requirements which mandate that candidates be resident in a particular state or county for a fixed period of time immediately prior to their candidacy.[93]

[89] Michael Dorf and Trevor Morrison, *The Oxford Introductions to US Law: Constitutional Law* (OUP 2010) 144.

[90] ibid 143.

[91] ibid 144.

[92] *Manson v Edwards* 482 F2d 1076 (6th Cir 1973); *Deibler v City of Rehoboth Beach* 790 F2d 328 (3d Cir 1986); *Hayes v Gill* 473 P2d 872, 52 Haw 251 (1970).

[93] *State ex rel. Gralike v. Walsh* 483 SW2d 70 (Mo 1972); *Walker v Yucht* 352 F Supp 85 (D Del 1972); *Hayes* ibid.

However, as LeClercq notes, many of these provisions unduly discriminate against bona fide residents on the basis of recent interstate travel in pursuance of educational or vocational opportunities.[94] Admittedly, states often advance the valid countervailing interest of desiring candidates with sufficient exposure and knowledge of the community. However, the rational basis test remains an inadequate standard on which to assess these qualifications given that it places on the applicant the inordinate burden of establishing that the restriction is 'totally unrelated' to the state aim[95] and that it is not imaginably rational in any state of facts.[96] Such a loose standard renders the duty to respect a virtual nullity.

It is perhaps for this reason that most other courts have sought to apply more robust standards of review in assessing these qualifications. In *Wellford v Battaglia*,[97] a district court, whose judgement was later affirmed by the Court of Appeals,[98] applied the compelling interest test to a qualification which required that candidates for the office of mayor must have been resident in the city for five years immediately preceding their election. The court noted that the qualification necessarily restricts voter choice and therefore compels close scrutiny.[99] In striking down the five year requirement as excessive the court noted that:

> Reliance must be placed on the cornerstone of representative government, the collective judgment of the electorate, rather than on a legislative solution which substantially restricts that electorate in its choice of leadership.[100]

[94] Frederic LeClercq, 'Durational Residency Requirements for Public Office' (1976) 27 South Carolina L Rev 847, 863 – 4.

[95] *Manson v Edwards* (n 92).

[96] Dorf (n 89) 143.

[97] 343 F Supp 143 (D Del 1972).

[98] *Wellford v Battaglia* 485 F2d 1151 (3d Cir 1973).

[99] *Wellford* (n 97) 146.

[100] ibid 150.

By characterising the 'collective judgment of the electorate' as the 'cornerstone of representative government', the court rightly operated under a presumption of voter sovereignty in the choice of one's representative. It therefore demanded a very compelling state interest, with narrowly tailored means, in order to displace this presumption. This strong presumption of voter sovereignty in candidate choice may be said to more generally underlie the duty to respect as well as the strict standard of review it requires. This was once again affirmed in *Gangemi v Rosengard*[101] by the New Jersey Supreme Court:

> Far from being unrestricted, the power to prescribe qualifications for elective office is sharply limited by the constitutional guaranty of a right to vote. A prescribed qualification for office must relate to… the special needs of the particular office involved, with the voters free to judge the personal or individual fitness of the candidates who have those basic qualifications. The line separating the basic needs of office from the individual fitness of a candidate, perhaps more easily felt than described, is vital, and the fundamental value involved is best served if the judiciary insists that the reason … be real, and clear, and compelling.[102]

Qualifications should therefore be narrowly tailored in responding to the strict necessities of the office in question, given that voters are rightly presumed to be the ultimate judges of a candidate's individual fitness.

In adding to the diversity in approaches, other lower courts in the US have applied strict scrutiny directly on the basis of their characterization of candidacy as a fundamental right.[103] In *Cowan v City of Aspen*,[104] the Colorado Supreme Court held that: 'There must be a present

[101] *Gangemi v Rosengard* 207 A2d 665, 44 NJ 166 (1965).

[102] ibid 171.

[103] *Zeilenga v Nelson* 4 Cal 3d 716 (1971) (Supreme Court of California); *Cowan v City of Aspen* 509 P2d 1269 (1973) (Supreme Court of Colorado); *Thompson v Mellon* 507 P2d 628 (1973) (Supreme Court of California).

[104] ibid.

and compelling governmental interest to justify a durational residency requirement because the right to hold public office is one of the valuable and fundamental rights of citizenship.'[105]

On the whole, US jurisprudence in this area reveals valiant attempts by the courts to safeguard the individual's right to be qualified even in absence of an express right to candidacy. The prevalence and potency of these attempts may be said to belie the Supreme Court's holdings in *Bullock* and *Clements* that the right to candidacy is less than fundamental. While many of these decisions sought to protect voters' freedom of choice, by so doing they highlighted the extent to which voter freedom hinges on respecting the candidate's right to be qualified. As noted in Chapter 4, the extent to which voters' basic interests are served through a robust right to candidacy remains one of the central derivative justifications of the right's fundamentality. As Raz notes, the interests of persons other than the rightholder may contribute to establishing the weight of a particular right if their interests are served by serving the rightholders' interests.[106] This level of interdependence is certainly present regarding the rights to vote and candidacy.

Quite apart from the primacy of the right to vote, the courts' jurisprudence also reveals an appreciation of the independent importance of the right to be qualified. Relying on progressive statements made by the constitution's framers, the Supreme Court in *Thornton* emphasized, 'the egalitarian concept that the opportunity to be elected be open to all'.[107] This concept lends itself to the recognition of a more general right to candidacy which applies equally to federal and state office. The Supreme Court's holding in *Thornton*, which treats congressional qualifications as unchangeable by statute, stands in stark opposition to the position regarding qualifications for state offices which may be subject only to rational basis

[105] ibid 1272.

[106] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon 1995) 50 – 51.

[107] *Thornton* (n 79) 794.

review. It is unclear why this egalitarian concept should be limited to congressional office. Given the power and autonomy which state governments possess within the federal system, one's opportunity to be elected to state office is equally deserving of constitutional protection. These considerations point toward the need for unequivocal recognition of candidacy as a fundamental right, such that strict levels of scrutiny are applied in reviewing all qualifications for state elective office. High standards of scrutiny remain necessary to give effect to the egalitarian principle which presumes open eligibility as well as the presumption of voter sovereignty in candidate choice.

III. EUROPEAN COURT OF HUMAN RIGHTS: HOLISTICALLY SAFEGUARDING THE VERY ESSENCE OF THE RIGHT TO STAND

Article 3 of Protocol 1 of the ECHR provides that Contracting Parties undertake 'to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'. As noted in Chapter 2, the ECtHR has held that this undertaking gives rise to the individual rights to vote and stand for election for legislative office.[108] The aim of the current section is to examine the Court's treatment of the state's duty to respect by looking at its interpretation of the state's negative obligation to refrain from unjustifiably disqualifying individuals from candidacy. It also seeks to highlight the feasibility of enforcing the duty to respect at the regional or supra national level where general principles have been established and applied, notwithstanding the diverse historical and political background of Contracting Parties.

The Court has laid down a general test for a restriction's compatibility with article 3, noting that limitations on the rights to vote and candidacy must fulfil the following criteria: (i) imposed in pursuit of a legitimate aim (ii) proportionate (iii) not impair the very essence of the

[108] *Mathieu-Mohin v Belgium* (1988) 10 EHRR 1.

right and (iv) not thwart 'the free expression of the opinion of the people in the choice of legislature'.[109]

[a] – <u>The Requirement of Procedural Fairness</u>

In assessing qualifications for legislative office, the Court has looked not only at the substantive justifiability of restrictions, but also on whether the *procedure* for determining eligibility has arbitrarily denied the applicant of his right to be qualified. In *Podkolzina v Latvia*,[110] the applicant sought to challenge a Latvian language proficiency requirement as well as the mechanism by which her proficiency was tested. The applicant was required to take a written exam, which other candidates were not obliged to take and was challenged on her political views during the assessment. The Court held that 'the procedure for ruling a candidate ineligible must be such as to guarantee a fair and objective decision and prevent any abuse of power on the part of the relevant authority'.[111] The procedure in question was held to be incompatible with the requirements of procedural fairness and legal certainty and hence in violation of article 3. Similarly, in *Melnychenko v Ukraine*,[112] the Court reiterated that 'while it is true that states have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires that the eligibility procedure contain sufficient safeguards to prevent arbitrary decisions'.[113]

The Court's stance on the importance of procedural fairness in determining eligibility is a crucial component of the state's duty to respect. A candidate's right to be qualified is

[109] *Mathieu-Mohin* (n 108) para 52.

[110] App no 46726/99 (ECHR, 9 April 2002).

[111] ibid para 35.

[112] (2006) 42 EHRR 39.

[113] *Melnychenko* ibid para 59.

undermined not only by the imposition of unjustifiable qualifications, but also by the arbitrary and unfair *application* of qualifications which are themselves substantively justifiable. This was clearly demonstrated in Azerbaijan's 2005 parliamentary elections where dozens of opposition candidates were disqualified on the basis of loosely substantiated allegations of bribery, vote buying and other electoral misconduct. In a series of cases decided between 2011 and 2012,[114] the Court held that these disqualifications were in violation of article 3 on the basis that they did not contain sufficient safeguards against arbitrariness:

> As the Convention guarantees the effective exercise of individual electoral rights, the Court considers that, in order to prevent arbitrary disqualification of candidates, the relevant domestic procedures should contain sufficient safeguards protecting the candidates from abusive and unsubstantiated allegations of electoral misconduct.[115]

[b] – <u>Protection of the Right to Sit if Elected</u>

In its application of the criterion that limitations should not impair the very essence of the right, the Court has also afforded protection against qualifications which prevent an elected candidate from taking his seat. In *Tanase v Moldova*,[116] the impugned restriction provided that dual nationals may run for legislative office but, if elected, in order for their mandate to be confirmed, they must provide proof that they have taken steps to renounce their other nationality. The Court noted that even though the dual national applicant was not prevented from standing for office, the knowledge that he would be required to renounce his other nationality would have affected his electoral campaign, given the uncertainty surrounding the

[114] *Abil v Azerbaijan* App no 16511/06 (ECHR, 21 February 2012); *Atakishi v Azerbaijan* App no 18469/06 (ECHR, 28 February 2012); *Khanhuseyn Aliyev v Azerbaijan* App no 19554/06 (ECHR, 21 February 2012); *Orujov v Azerbaijan* App no 4508/06 (ECHR, 26 July 2011).

[115] *Abil* (n 114) para 35.

[116] (2012) 55 EHRR 17.

actual confirmation of his mandate if elected.[117] The Court noted that the applicant had a 'right to take his seat following election' given that the right to stand would be rendered meaningless without the right to sit once elected.[118]

The Canadian Supreme Court has also broadly framed the right as 'the right to be a candidate and to sit as a Member of Parliament or legislative assembly'.[119] Construing the right as inclusive of a right to sit if elected serves not only the candidate's interest but also the derivative interest of voter freedom by ensuring that the electorate's choice is actualised. It therefore seems natural that the duty to respect should also include a negative obligation on the State to refrain from imposing unjustifiable prerequisites for elected candidates to take their seats. Strasbourg jurisprudence squarely affirms this in *Tanase* through its requirement that restrictions should not impair the very essence of the right or rid it of its effectiveness.

[c] – <u>The Court's Treatment of Substantive Qualifications</u>

In assessing substantive qualifications for legislative office, the Court has emphasized that states possess a wide margin of appreciation in this area.[120] It has stressed the need to assess electoral legislation 'in light of the political evolution of the country concerned, with the result that features unacceptable in the context of one system may be justified in the context of another'.[121] The Court relied on this principle in *Zdanoka v Latvia*[122] where it upheld a parliamentary disqualification of all persons who had 'actively participated' in the Communist

[117] ibid para 108.

[118] ibid para 176.

[119] *Harvey* (n 1) para 28.

[120] *Zdanoka v Latvia* (2007) 45 EHRR 17, para 115.

[121] ibid para 115; *Mathieu-Mohin* (n 108) para 54.

[122] *Zdanoka* (n 120).

Party of Latvia (CPL). CPL had launched an attempted coup against the Latvian government in 1991 and was subsequently declared unconstitutional. The Court took this political history into account and noted the importance of a State being able to protect the stability and effectiveness of its democratic system.[123] However, in upholding the disqualification the Court urged that 'the Latvian parliament must keep the statutory restriction under constant review, with a view to bringing it to an early end' given the greater political stability which Latvia now enjoys.[124]

Similarly, in *Adamsons v Latvia*,[125] the Court considered a disqualification of officers previously under the supervision of the KGB and noted its importance in light of Latvia's political history. However, the Court ruled that the disqualification was disproportionate given its general application to all former 'officers' without assessing past conduct on an individual basis.[126] The Court emphasized that with the passing of time, generalized restrictions of whole groups become more difficult to justify and will be treated with greater scrutiny.[127]

In analysing the Court's jurisprudence, as *Adamsons* and *Zdanoka* reveal, there appears the emergence of a robust approach to review where the Court takes a nation's political history into account, while not allowing this to eclipse a close consideration of the qualification's proportionality in light of current circumstances. This approach is further highlighted in *Sejdic and Finci v Bosnia and Herzegovina*[128] where the Court considered a challenge to Bosnia's constitution which provided that only 'constituent peoples', defined as Bosniacs, Croats and

[123] ibid para 100.

[124] ibid para 135.

[125] App no 3669/03 (ECHR, 24 June 2008).

[126] ibid.

[127] ibid.

[128] App no 27996/06 and 34836/06 (ECHR, 22 December 2009).

Serbs, were eligible to run for parliamentary office. The Court upheld the case of the applicants, who were of Roma and Jewish origin, ruling that the provision breached their article 14 right to non-discrimination taken in conjunction with their right to stand for election under article 3 of protocol 1. Bosnia sought to rely on the historical fact that the constitution was itself birthed out of a peace process between the 'constituent peoples' hence the special status expressly conferred to those groups.[129] The Court rejected this argument and noted that the provision did not withstand the test of 'objective and reasonable justification' which, the Court noted, was applied with heightened scrutiny in cases of ethnic discrimination.[130]

The Court has also generally taken a dim view of permanent, unreviewable disqualifications in assessing proportionality. In *Paksas v Lithuania*,[131] the impugned statute imposed an indefinite parliamentary disqualification on anyone who had been impeached as president. The applicant was impeached and removed as president owing to abuses of his public office and now sought to stand for election to parliament. The Court noted that while a disqualification limited in time may have been appropriate, a permanent ban strips voters of their opportunity to decide whether they wish to renew confidence in the individual concerned.[132] The Court considered Lithuania's argument that as a newer democracy it was necessary for it to adopt more stringent measures in order to safeguard its democratic ideals.[133] However, the Court ruled that ultimately this consideration was still not enough to justify such a permanent disqualification.[134]

[129] ibid para 34.

[130] ibid para 44, 50.

[131] *Paksas v Lithuania* App no 34932/04 (ECHR, 6 January 2011).

[132] ibid para 103, 104.

[133] ibid para 104.

[134] ibid.

The Court's jurisprudence reflects a commitment to the core values underlying the duty to respect. In *Paksas*, the Court sought to protect the derivative interest of voter freedom by noting that a permanent disqualification was ultimately a matter for the electorate.[135] Similarly, in *Tanase* the Court took into account the large number of dual nationals within the electorate who would have been denied representation by their fellow dual nationals if the disqualification remained in effect.[136] The Court has also sought to further the egalitarian presumption of eligibility by applying high levels of scrutiny to blanket disqualifications of whole groups[137] and those affecting ethnic minorities.[138] The Court's emphasis on qualifications being periodically reviewed in order to ensure their continued necessity and desirability is also of central importance in enforcing the duty to respect. This has prevented states from hiding beneath a cloak of historical necessity in the face of present conditions which render previously acceptable qualifications currently unjustifiable.

D. QUALIFICATIONS CONTAINED IN CONSTITUTIONS: PROTECTING THE RIGHT TO BE QUALIFIED IN THE ABSENCE OF JUDICIAL REVIEW

The eligibility requirements for service in a democracy's most central governmental offices are usually contained in its constitution. As noted in Chapter 4, Dworkin terms these provisions 'enabling' constitutional rules given that they construct majority government by stipulating qualifications to vote and to hold office, as well as the powers of those elected.[139] In arguing

[135] ibid.

[136] *Tanase* (n 116) para 174.

[137] *Tanase* ibid; *Adamsons* (n 125).

[138] *Sejdic* (n 128).

[139] Ronald Dworkin, 'Constitutionalism and Democracy' (1995) 3(1) European Journal of Philosophy 2, 3.

for the right to candidacy as a 'disabling' constitutional rule, (which limits majority government to the extent of its inconsistency with the rule),[140] a peculiar conflict arises where the 'enabling' rules (establishing qualifications) may potentially contravene this 'disabling' rule embodied in the right to stand. As noted by the Canadian Supreme Court in *Harvey*, such constitutional qualifications would not be subject to judicial review given that 'it is a well-accepted principle that one part of the Constitution cannot be used to invalidate a provision in another part'.[141] Yet, notwithstanding their relative permanence (as compared to legislative qualifications), they may equally be the subject of deep disagreement and perceived unjustifiability. How then is the duty to respect enforced and honoured in the face of objectionable qualifications contained in national constitutions?

At the regional level, it is important to note that recourse may be had to regional courts who exercise authority to review both statutory and constitutional provisions. The European Court of Human Rights has been increasingly bold in this area and stated its position quite explicitly in *United Communist Party v Turkey*:[142]

> The political and institutional organisation of the member States must accordingly respect the rights and principles enshrined in the Convention. It matters little in this context whether the provisions in issue are constitutional or merely legislative. From the moment that such provisions are the means by which the State concerned exercises its jurisdiction, they are subject to review under the Convention.[143]

It will be recalled that the provision in *Sejdic* which limited parliamentary office to 'Bosniacs, Croats and Serbs' was contained in Bosnia's constitution and this did not hinder the Court's

[140] ibid.

[141] *Harvey* (n 1) para 31.

[142] (1998) 26 EHRR 121.

[143] ibid para 30.

review thereof.[144] Further, in exceptional cases, constitutional rules may be made expressly subordinate to the human rights treaties to which a jurisdiction is party.[145] In these cases, constitutional qualifications may be reviewed for their compatibility with international and regional human rights norms. However, in the vast majority of instances, at the domestic level, there exists no possibility for the judicial review of eligibility requirements contained in the state's constitution.

In the absence of such review, it is submitted that the recognition of a right to candidacy may still be instructive by informing public discourse on the desirability of constitutional amendment and by providing substantive principles by which the constitution may be assessed in the court of public opinion. This view is predicated on a conception of constitutional rights which frames them as applicable far beyond the four corners of the court and exuding a much more general influence on what Raz terms the 'common liberal culture'.[146] Alexy's notion of constitutional rights having a 'radiating effect' on the entire legal system is instructive on this point. He cites the German Constitutional Court on its position in this regard:

> [C]onstitutional rights norms do not simply contain defensive rights of the individual against the state, but at the same time they embody an objective order of values, which applies to all areas of law as a basic constitutional decision, and which provides guidelines and impulses for the legislature, administration and judiciary.[147]

It is submitted that the radiating effect to 'all areas of law' ought to include the substantive and procedural bases which inform and shape constitutional revision and amendment. The

[144] However, it should also be noted that Bosnia's constitution explicitly provides that the ECHR applies directly in Bosnia and has priority over all other law. However, it is arguable that the Court may have likely reviewed the provision even in the absence of such direct incorporation given its position in *United Communist Party*.

[145] See *Sejdic* (n 128) para 14.

[146] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1988) 260, 262; On the point of the more general influence of constitutional provisions see also Tribe (n 50) 1079 – 80.

[147] Alexy (n 4) 352.

discourse surrounding the acceptability of constitutional qualifications should therefore be influenced by the 'objective order of values' which underlie the right to candidacy.

Strasbourg's emphasis on the importance of timely review of the continued necessity of dated qualifications bears equal relevance in the constitutional context. One notable example of this is the qualification contained in the US Constitution which mandates that the President of the United States must be a 'natural born' citizen thereof.[148] There have been numerous calls for its amendment, with many scholars decrying its 'striking unfairness and dangerous ambiguity'.[149] Its initial purpose is believed to have been the protection of the sovereignty of a state in its infancy amidst concerns that a foreign monarch might be invited to assume the presidency.[150] However, over 200 years on, it has been highlighted that these concerns no longer persist,[151] particularly in light of extensive vetting which would likely unearth any suspect foreign connections.[152] Further, the circumstances of one's birth is hardly a compelling test of the individual's loyalty and connection to a nationality community.[153] Prominent and dedicated elected officials who would have otherwise been plausible presidential candidates,

[148] US Constitution, art 2, s 1.

[149] Sarah Duggin and Mary Collins, 'Natural Born in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It' (2005) 85 Boston University L Rev 53; Robert Post, 'What is the Constitution's Worst Provision?' (1995) 12 Constit Comment 191; Lawrence Friedman, 'An Idea Whose Time has Come: The Curious History, Uncertain Effect and Need for Amendment of the Natural Born Citizen Requirement for the Presidency' (2007) 52 Saint Louis University Law Journal 137.

[150] Friedman (n 149) 142; Michael Medina, 'The Presidential Qualification Clause in this Bicentennical Year: The Need to Eliminate the Natural Born Citizen Requirement' (1987) 12 Oklahoma City Univ L Rev 253, 260.

[151] Medina ibid 277; Friedman (n 149).

[152] Peter Spiro, 'McCain's Citizenship and Constitutional Method' (2008) 29 Immigration & Nationality L Rev 615, 620; Duggin (n 149) 140.

[153] Spiro ibid; Duggin (n 149) 136; WW, 'Natural Born Nonsense: De-birtherising the Constitution' *The Economist* (Iowa, 27 April 2011).

but for the provision, include Franklin D Roosevelt Jr., Henry Kissinger and Madeleine Albright.[154]

The role of an expressly recognised right to candidacy in this sphere may therefore be said to add potency and force to the public debate on calls for amendment. Thus far, arguments in favour of amendment have been founded on more general principles of equality and popular sovereignty, given the ambiguous position which the right to candidacy possesses in US constitutional law.[155] However, the presence of a clearly recognised constitutional right would compel the provision's characterization as a direct violation of affected citizens' fundamental right to be qualified, permissible only in the face of most compelling reasons.

It is admitted that framing the debate in this way would not automatically increase the chances of amendment, particularly in light of the procedural and political difficulties which impede US constitutional amendment more generally.[156] However, it does add force and rigor to the debate and strengthens the call for amendment by establishing that the provision in question is a direct violation of the citizen's right to be qualified. Similarly, John Seery, who argues for an amendment to the age qualifications for Congressional office, acknowledges the extent to which framing candidacy as an individual right adds great force to his case for constitutional change.[157] In such circumstances, the right to candidacy may act as a tool for advocacy and in guiding potential reform, particularly when backed by relevant jurisprudence which elucidates the values and interests informing the right.

[154] Friedman (n 149) 138 – 9.

[155] Paul Clark, 'Limiting the Presidency to Natural Born Citizens Violates Due Process' (2006) 39 John Marshall L Rev 1343; Duggin (n 149); Medina (n 150); Friedman (n 149).

[156] Sanford Levinson, *Our Undemocratic Constitution* (OUP 2006) 159 – 166.

[157] John Seery, *Too Young to Run: A Proposal for an Age Amendment to the US Constitution* (Penn State University Press 2011) 107 – 108.

E. CONCLUSION

This Chapter has assessed issues surrounding the institutional implementation of the duty to respect by examining the particularities of jurisprudence in the United States, Canada and the ECtHR. While these jurisdictional approaches differ widely, a few principles of general application regarding institutional enforcement may still be gleaned. First, the importance of judicial review as a check on statutory qualifications remains a necessary safeguard, particularly in light of the potential conflict of interest faced by legislators in this area. Secondly, in order for the right to be effective, the standard of review must be robust, given the fundamentality of the right to be qualified. This review must seek to uphold the democratic presumptions of citizen eligibility and voter sovereignty by applying strict levels of scrutiny to impugned qualifications. Thirdly, as highlighted in ECtHR jurisprudence, it is also important to assess whether substantively permissible qualifications may have been arbitrarily imposed due to a lack of sufficient safeguards in the procedure for determining eligibility. Fourthly, as recognised by both Canadian courts and the ECtHR, the right to candidacy reasonably includes the right to take one's seat if elected. On this basis, qualifications which operate as prerequisites for an elected citizen to take his or her seat, should be subject to equally demanding levels of scrutiny.

Regarding the potential impact of parliamentary privilege, most authorities point to the conclusion that the imposition of statutory disqualifications from legislative office is not one such privilege. However, a more thorny issue may arise if one deems the right to candidacy as including the right to take one's seat if elected. Within the Canadian context, one author has noted that parliament possesses a residual privilege to refuse to seat 'a fully qualified and properly elected Member' and that this power 'has not been weakened by time or disuse'.[158]

[158] Marcel Pelletier, 'Privilege in the Canadian Parliament' (1973) 54 Parliamentarian 143, 149; *Harvey* (n 1) para 83.

While the US Supreme Court has made it clear that Congress does not have this power to exclude (refuse to seat) a duly elected member,[159] some authorities suggest that the position in the UK and Canada is less clear.[160] This dilemma has yet to be definitively tested. However, it seems clear that such cases ought reasonably to be resolved in favour of the right to candidacy so that the electorate's choice of representative may be ultimately honoured. Further, a basic application of the necessity doctrine would suggest that parliament's authority to discipline and exclude ought to be focused on its sitting members and should therefore commence once an individual has been seated, not before.

Challenges remain in many jurisdictions regarding the presence of objectionable and out-dated constitutional qualifications which are not subject to judicial review.[161] While the right to candidacy may act as a catalyst for reform, it is acknowledged that its effects in this area are relatively limited. Given the relative permanence of constitutional qualifications, it may therefore be argued that the right to candidacy is best protected when these qualifications are not extensive but rather limited to the most basic constitutive elements of governmental structure such as requirements disqualifying senators and judges from election to the lower House.[162] Admittedly, constitutional qualifications often also include personal characteristics related to one's citizenship, age and residency. While these are no doubt important, the right to candidacy may be said to demand a more general principle of timely re-evaluation of the continued desirability and necessity of such qualifications in the format in which they are

[159] *Powell* (n 4).

[160] Maingot (n 16) 189.

[161] See Alecia Johns, 'Dual Citizenship and the Right to Candidacy: An Analysis of Jamaica's Foreign Allegiance Parliamentary Disqualification' (MPhil Thesis, University of Oxford 2012); See also Section D above regarding the US Natural Born Clause.

[162] *Harvey* (n 1) para 31.

currently structured.[163] This principle is highlighted in the jurisprudence of the ECtHR.

Having examined the importance of open access to candidacy through the removal of unreasonable qualifications, this thesis next addresses the importance of removing practical barriers which may inhibit the qualified citizen's ability to meaningfully stand. Chapter 7 will assess the role of the state in protecting the candidate from infringement of the right by political parties, while Chapter 8 examines the state's positive duty to provide a context of free and fair elections – an environment indispensable for the effective exercise of the right to candidacy.

[163] Johns ibid.

CHAPTER 7 – DUTY TO PROTECT:

THE REGULATION OF POLITICAL PARTIES' CANDIDATE SELECTION PROCESSES

A. INTRODUCTION

The duty to protect imposes a positive obligation on the state to prevent third parties from violating the right to candidacy. As noted in Chapter 5, the duty is not one of strict prevention, but rather, one of taking reasonable preventative measures such as designing institutions which create disincentives against third party violation, as well as recourse for those whose rights have been violated by private entities.[1] Regarding the right to candidacy, the general core of the duty to protect was identified as 'an obligation to ensure that candidate selection within parties accords with general principles of fairness and non-discrimination'.[2] This is on the basis of the central role which political parties play as conduits to candidacy and public office via their internal pre-selection processes.[3] However, in protecting the candidate against the political party, the state also has a duty to ensure that it does not unduly infringe the political party's right to freedom of association. This reflects what Fredman identifies as the complex three-way relationship between the rightholder, the third party and the state which is created by the duty to protect.[4]

[1] Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton Univ Press 1996) 60.

[2] See Chapter 5.

[3] UN Human Rights Committee, 'General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service '(1996) UN doc CCPR/C/21/Rev.1/Add.7, para 26.

[4] Sandra Fredman, *Human Rights Transformed* (OUP 2008) 73.

This Chapter seeks to look more closely at state regulation of political parties' candidate selection processes and the conflict of rights which arises therefrom between candidacy and freedom of association. While there exists no precise formula for achieving an optimal balance between both rights, this Chapter aims to identify general factors which weigh both for and against each right and to assess how these factors may inform the state's fulfilment of its duty to protect.

This Chapter is divided into four main segments. The first section looks at the existing regulatory framework for candidate selection which exists in selected democracies. Consistent with the jurisdictional contexts heretofore explored in this thesis, the United States and Canada are examined and remain the main focus at the domestic level.[5] However, the section also briefly examines the extent of regulation in Australia, New Zealand and the United Kingdom, given that the experience in these polities shed particularly meaningful light on key aspects relevant to the state's duty to protect. These polities also represent a broader context in which the spectrum of state regulation in this area may be understood. They may be characterised as intermediary points on the regulatory continuum, located between the United States which adopts expansive regulation and Canada where there is virtually no formal regulation of the process. This exposition of existing regulatory contexts serves as a necessary precursor to normative arguments regarding how the right to candidacy should inform decisions on the appropriate level of state regulation. Such decisions are invariably informed by the peculiar legal and political landscape of each state. This Chapter does not, therefore, aim to put forward a single model of appropriate regulation which should obtain in all polities. Nor does it aim to put forward a prescription on the best method of candidate selection within parties. What it aims to highlight are general factors which should inform the level of regulation which a state

[5] Given the dearth of ECtHR case law in this area, this Chapter contains no separate analysis of Strasbourg jurisprudence.

pursues, bearing in mind that the precise contours of such regulation may vary according to the jurisdictional nuances of each state.

The second and third sections of this Chapter then offer guidance on how to resolve the resulting conflict between the right to candidacy and freedom of association which arises when the state engages in its duty to protect. This section outlines factors which militate in favour of each competing right and therefore identifies circumstances which warrant lesser or greater levels of state intervention, depending on which right possesses primacy in a given context.

The fourth and final section then summarizes the main principles governing the fulfilment of the state's duty to protect, as informed by the conflict of rights analysis.

B. REGULATION OF CANDIDATE SELECTION IN COMPARATIVE PERSPECTIVE

In recent years, there has been increasing recognition of the importance of political parties' candidate selection processes, not only for the party itself but also for the wider democratic process and quality of governance.[6] Political scientists and philosophers alike have noted the impact of parties' pre-selection on the general composition and representativeness of the legislature,[7] particularly in single member plurality systems where the presence of 'safe seats' easily renders a party's selection determinative of the final outcome in a given constituency.[8] Yet, in most liberal democracies, candidate selection is regarded as a private, intra-party affair

[6] Anika Gauja, *Political Parties and Elections: Legislating for Representative Democracy* (Ashgate 2010) 99; William Cross, 'Democratic Norms and Party Candidate Selection: Taking Contextual Factors into Account' (2008) 14(5) Party Politics 596, 597; Caroline Morris, 'Conceptualising Candidate Selection in the Courts: Where to After Watt v Ahsan?' [2008] Public Law 415, 416.

[7] Charles Beitz, *Political Equality* (Princeton University Press 1989) 165; Reuven Hazan and Gideon Rahat, *Democracy within Parties: Candidate Selection Methods and their Political Consequences* (OUP 2010) 7; Morris (n 6) 416; Cross (n 6) 597.

[8] Peter Riddell, 'Candidate Selection: The Report of the Commission on Candidate Selection' (Electoral Reform Society 2003) 8; Cross (n 6) 605.

with no obligation on parties to engage in transparent, democratic selection.[9] Consequently, there have been growing calls for increased regulation in Canada, Australia and the UK, where some parties' current selection methods have been deemed arbitrary and of questionable fairness and integrity.[10] This is in contrast to the position which obtains in the United States where a number of states mandate that a party's candidates be chosen via democratic 'primary' elections which are publicly administered by the state. However, even within the US context of mandatory democratic selection, disagreements have arisen regarding the extent to which a party may limit who may run and who may vote in its primary election.[11] In all these polities, academic discussion and judicial reasoning have cast the issue as one which primarily concerns a balance between the state's interest in ensuring a fair electoral process versus the party's interest in associational autonomy. Very little attention has been placed on the extent to which these processes may implicate the party member's right to stand for election.[12] This Chapter seeks to fill that conceptual gap by arguing for the right to candidacy as an additional justificatory basis for state regulation in this area and to shed light on how the ensuing conflict with parties' associational rights may be navigated. However, before doing so, it is necessary to first briefly outline the existing regulatory frameworks which exist in these jurisdictions as well as the judicial reasoning which has developed in this area.

[9] Hazan and Rahat (n 7) 4; Gauja (n 6) 100.

[10] William Cross, 'Candidate Nomination in Canada's Political Parties' in Jon Pammett and Christopher Dornan (eds), *The Canadian Federal Election of 2006* (Dundurn 2006) 171; Graeme Orr, 'Overseeing the Gatekeepers: Should the Preselection of Political Candidates be Regulated?' (2001) 12 Public Law Review 89; Riddell (n 8) 8.

[11] *Tashjian v Republican Party of Connecticut*, 479 US 208 (1986); *California Democratic Party v Jones*, 530 US 567 (2000); *Duke v Cleland* 954 F.2d 1526 (11th Cir 1992); *LaRouche v Fowler* 152 F.3d 974 (DC Cir 1998).

[12] One notable exception to this is Nathaniel Persily's thoughtful article, which casts the issue as a rights conflict implicating the right to candidacy: Nathaniel Persily, 'Candidates v Parties: The Constitutional Constraints on Primary Ballot Access Laws' (2001) 89 Georgetown Law Journal 2181, 2184.

I. UNITED STATES

As with most aspects of electoral regulation in the United States, the regulation of candidate selection varies from state to state, with a majority of states mandating primary elections for major political parties.[13] These primaries are generally funded and administered by the state in accordance with rules crafted by the party.[14] This renders the dividing line between state conduct and party action particularly nebulous in this sphere.[15] This was exemplified in the case of *Duke v Massey*[16] where members of a Republican Presidential Selection Committee in Georgia voted to remove the applicant's name from the list of candidates who would potentially appear on the presidential primary ballot for the Republican Party. Duke argued that the Committee's decision to exclude him deprived him of his rights to free speech, association and his right to run for office.[17] The Court held that while the Committee members were engaged in state action (as elected officials acting under statutory authority) they were also acting in their capacity as representatives of the Republican Party, and in that capacity they were not compelled to accept Duke's candidacy given the Party's associational freedom to choose with whom it wishes to identify.[18]

Even within the context of state mandated primaries, courts in the US have generally sought to uphold party autonomy regarding who may vote in a party's primary. In *California*

[13] Alexander Bott, *Handbook of United States Election Laws and Practices: Political Rights* (Greenwood Press 1990) 113.

[14] Persily (n 12) 2182, 2187.

[15] Ibid.

[16] 87 F.3d 1226 (11th Cir 1996).

[17] *Duke v Massey* (n 16) 1229.

[18] ibid 1231, 1234. Interestingly, even though Duke argued that his right to candidacy had been infringed, the Court did not engage in separate analysis of this claim and focused only on potential infringements of his rights to free speech and association: see *Duke* (n 16) 1232.

Democratic Party v Jones,[19] the Supreme Court struck down a law mandating blanket primaries, which gave all voters the right to vote in a party's primary, whether or not they were registered with that party. The Court held that processes by which political parties select their nominees were not wholly public affairs which the states may freely regulate, emphasizing that the law in question forced the party to affiliate with non-members in the important decision of selecting its standard bearer.[20] Similarly, in *Tashjian v Republican Party of Connecticut*,[21] the Republican Party wished to include independent voters in its primary whereas state law mandated that only those registered with the party may participate. The Supreme Court held that candidate selection was a 'crucial juncture' in the life of the party and the law in question unduly infringed on the party's right to associate with independent voters.[22]

On the whole, US Courts have placed great emphasis on the importance of candidate selection to a party's associational freedom and have sought to honour that freedom as far as is possible within the constraints of mandatory primary elections.[23]

II. CANADA

In Canada, there is no formal regulation of the processes by which political parties choose their candidates for election. There is therefore a significant degree of variation among parties, most of which privately conduct democratic contests in which only registered party members are

[19] 530 US 567 (2000).

[20] *California* (n 19) 572 – 575.

[21] 479 US 208 (1986).

[22] *Tashjian* (n 21) 225.

[23] See also *Democratic Party of United States v Wisconsin ex rel La Follette*, 450 US 107 (1981); *Eu v San Francisco County Democratic Central Committee*, 489 US 214 (1989); Richard Hasen, 'Do the Parties or the People Own the Electoral Process?' (2001) 149(3) UPenn Law Review 815; Gauja (n 6) 118.

allowed to vote.[24] However, in the absence of state oversight these contests often fall short of the democratic standards of openness, fairness and transparency.[25] Many nomination candidates have controversially recruited new members and covered the cost of their dues in exchange for those members' support in the internal contest.[26] The result is that many voting in these elections are not bona fide party members or persons qualified to vote in the general election (given that recruitment drives often focus on immigrant communities).[27] Concern has also been expressed about the fact that most parties confer on party leaders the discretion to directly appoint candidates for a particular constituency, in lieu of an actual nomination contest.[28] In light of this, only a few nominations are actually contested.[29]

Consistent with the lack of statutory regulation, Canadian courts have viewed candidate selections as private activities which are not amenable to judicial review. In *Knox v Conservative Party of Canada*,[30] the Court of Appeal of Alberta held that the party's nomination procedures were 'private activities' which were not subject to judicial review. The Court held that the disgruntled member's proper recourse was through arbitration proceedings provided for in the party's constitution.[31] However, the Court stated obiter that, in the absence of an agreed dispute resolution mechanism, 'the Court might be prepared to infer certain basic

[24] Cross (n 10) 182.

[25] ibid 171.

[26] ibid 182; Sefakor Ashiagbor, 'Selecting Candidates for Legislative Office' (National Democratic Institute 2008) 58.

[27] Ashiagbor (n 26) 58.

[28] Royce Koop and Amanda Bittner, 'Parachuted into Parliament: Candidate Nomination, Appointed Candidates, and Legislative Roles in Canada' (2011) 21(4) Journal of Elections, Public Opinion and Parties 413.

[29] Cross (n 10) 180.

[30] 2007 ABCA 295; 286 DLR (4th) 129.

[31] ibid, para 27.

procedural protections' and to use its 'general jurisdiction to provide the relief to which the parties are entitled'.[32] However, the court has yet to rule on whether a party's candidate selection procedures may be considered to infringe upon an individual member's right to candidacy under section 3 of the Canadian Charter.

III. AUSTRALIA, NEW ZEALAND AND THE UNITED KINGDOM

Australia also lacks overarching legislative regulation of candidate selection processes, however, courts have generally taken a more stringent approach in reviewing these processes. Unlike Canadian courts, they have deemed such processes to be of a quasi-public nature.[33] In the absence of statutory regulation, nomination contests have been subject to the unscrupulous practice of 'branch stacking', which involves enrolling members in the branch of a political party for the sole purpose of channelling their votes toward a particular candidate and, where necessary, falsifying signatures for branch meeting attendance where voting eligibility is conditional upon such attendance.[34] Given the pervasive nature of such practices in Queensland during the 1980s and 1990s, an inquiry was undertaken by the Criminal Justice Commission whose report led to the passage of legislation requiring that candidate selection contests in that state be conducted according to principles of free and democratic elections.[35] The legislation entrusts the Queensland Electoral Commission with oversight of these processes, and parties in breach are liable to deregistration and loss of public funding.[36]

[32] ibid, para 30.

[33] *Baldwin v Everingham* [1993] 1 QdR 10; *Clarke v Australian Labour Party (SA Branch)* (1999) 74 SASR 109; *Coleman v Liberal Party of Australia (New South Wales Division) (No 2)* [2007] 212 FLR 271.

[34] Gauja (n 6) 119.

[35] ibid.

[36] ibid.

Courts in Australia have also taken a robust approach regarding the justiciability of candidate selection disputes. In *Baldwin v Everingham,*[37] the Court noted that even though parties were voluntary associations, the fact that they fulfil a 'substantial public function' makes it indefensible that questions concerning the interpretation of their constitution should be beyond judicial resolution.[38] Similarly, in *Clarke v Australian Labour Party*,[39] a potential candidate sought to challenge an attempt at branch-stacking where 2,000 new memberships were introduced into the party contrary to the mechanism outlined in the party's constitution. The Court granted an injunction restraining the party from validating the memberships, noting that the candidate had an interest in 'ensuring observance of the Constitution and Rules of the [party]'.[40] There was, however, no mention of the party member possessing an independent interest or right to stand for election.

New Zealand possesses a more express regulatory framework wherein the Electoral Act mandates that parties' candidate selection should be via democratic procedures.[41] The Act provides that such selection may take place by members of the party directly or through delegates who have been elected by the general party membership.[42] However, to date, there has not been particularly stringent enforcement of this requirement and the court has emphasized that the provision flexibly contemplates a range of 'participatory' procedures.[43]

[37] [1993] 1 QdR 10.

[38] ibid 17 – 18.

[39] (1999) 74 SASR 109.

[40] *Clarke* (n 39) para 92.

[41] Gauja (n 6) 71.

[42] Electoral Act 1993 (New Zealand), s 71.

[43] *Payne v New Zealand National Party* [2008] 3 NZLR 233.

Lastly, the United Kingdom presents an interesting regulatory model given that political parties are not subject to legislative oversight regarding candidate selection, however, these processes have been held to be subject to anti-discrimination legislation. This legislation has been applied on the basis of such selection being deemed discrimination in employment,[44] and also, as unlawful discrimination within a voluntary association.[45] This aspect of UK jurisprudence will be considered in further detail below regarding the question of whether discrimination on certain invidious bases should be considered as a factor warranting increased state protection of the right to candidacy.

C. CANDIDATE SELECTION THROUGH CONFLICT OF RIGHTS LENS

As outlined above, judicial intervention in this area, as well as calls for reform, have largely taken place without reference to party members' right to candidacy as one of the bases justifying state regulation in this sphere. This section seeks to outline the extent to which such selection implicates the right to candidacy and further explains the conflict of rights framework employed in this Chapter.

I. THE EXTENT TO WHICH POLITICAL PARTIES' CANDIDATE SELECTION IMPLICATES THE RIGHT TO CANDIDACY

It should be noted that the right to candidacy does not include a direct guarantee to run for the party of one's choice. Therefore, not every refusal of a party's endorsement constitutes a violation of the right to stand. In *Payne v New Zealand National Party*[46] the New Zealand High

[44] *Jepson and Dyas-Elliot v The Labour Party* [1996] IRLR 116; *Sawyer v Ahsan* [2000] ICR 1.

[45] *Watt v Ahsan* [2007] UKHL 51.

[46] [2008] 3 NZLR 233.

Court noted that while section 12 of the New Zealand Bill of Rights Act guaranteed the right to be elected, what was at stake was not that electoral right, but rather 'whether a political party will allow a particular person to represent it at an election.'[47] Similarly, US courts have emphasized the extent to which there exists no absolute right to run as a candidate for a particular party given that dissatisfied members may run as independent candidates or as candidates of a third party.[48] For example, in *Duke v Massey*[49] the court noted that while Duke has a First Amendment right to express his political beliefs, he has no First Amendment right to do so as a presidential candidate for the Republican Party.[50]

Therefore, on the basis that standing for a particular party is not the only means by which an individual may run for office, courts have not treated the issue of party endorsement as central to one's right to candidacy. Rather, they have emphasized the extent to which party members have the option of 'exit' in the event of dissatisfaction. This resonates with Hirschman's theory of 'exit' and 'voice' as the two options available for influencing change in an organisation or firm.[51] Many academic writers have employed the exit-voice paradigm in examining power dynamics within political parties.[52] This paradigm will also be utilised herein to explain the extent to which political parties' pre-selections implicate the right to candidacy.

The 'exit' option involves opting out of the political party, with the result that membership decline may impel the association to rectify faults; the 'voice' option involves

[47] *Payne* (n 46), para 75 – 76.

[48] *Duke v Cleland* (n 11) 1531; *Duke v Massey* (n 16) 1234.

[49] *Duke v Massey* (n 16).

[50] ibid 1234.

[51] Albert Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press) 1970.

[52] Persily (n 12); Beitz (n 7) 190; Nathaniel Persily and Bruce Cain, 'The Legal Status of Political Parties: A Reassessment of Competing Paradigms' (2000) 100 Columbia L Rev 775, 798.

remaining in the organisation and seeking to effect change from within by airing one's dissatisfaction.[53] The candidate seeking redress in the event of a pre-selection dispute is effectively exercising the option of 'voice' by aiming to remain within the party and to internally resolve the dispute regarding his/her selection. Yet, courts have been inclined to defer to party autonomy given the presence of the alternative option of 'exit'. However, as Persily aptly notes, the extent to which a party's pre-selection affects First Amendment rights necessarily turns on the viability of 'exit' as a realistic option, bearing in mind the overall competitiveness of the electoral environment as well as more general barriers to entry in the political market.[54] Therefore, a party's candidate selection process cannot be viewed in isolation as wholly unconnected from the member's right to stand; the extent to which it implicates the right to candidacy necessarily depends on the viability of 'exit', as determined by the more general openness and competitiveness of the political environment.

Beitz similarly emphasized the importance of a party's internal selection processes in his criticism of the Court of Appeals' decision in *Ripon Society v National Republican Party*,[55] where the Court held that parties were free to apportion delegates without upholding voter parity:

> The *Ripon* court remarked that those who are dissatisfied with the internal procedures of an established party are free to withdraw: they can 'gain access to the ballot by means other than a major party nomination'. Having been denied effective *voice*, party members retain the possibility of *exit*. But this is not much comfort where the political structure and positive law confer substantial competitive advantages on the two major parties.[56]

[53] Hirschman (n 51) 4.

[54] Persily (n 12) 2214.

[55] 525 F.2d 567 (DC Cir 1975).

[56] Beitz (n 7) 190 (emphasis added).

It should be noted that in highlighting the relevance of the impugned party's competitiveness, the claim is not being made that the candidate has a right to run with the party that offers him the greatest chance of success. As the ECtHR has noted, the right to candidacy does not contemplate that each candidate must possess an equal chance of winning.[57] However, what the right does contemplate is fair competition in a level playing field.[58] Therefore, as Beitz notes, where the 'political structure and positive law' confer competitive advantages on major parties, it will be argued that this militates against their associational autonomy and in favour of regulation protecting the right to candidacy. Further, as noted in Chapter 4, political expression, along with contribution to deliberative public reasoning, are central interests which underlie the right to candidacy. Therefore, quite apart from one's likelihood of winning, the right to candidacy would also be affected if exit options provide significantly less meaningful avenues for one's expression to be heard.

Having established the relevance and primacy of the right to candidacy in this area, the remainder of this section seeks to examine how states may balance the resulting conflict between this right and parties' freedom of association in fulfilling their duty to protect.

II. THE CONFLICT OF RIGHTS FRAMEWORK

In assessing guidelines for balancing the conflicting rights at stake, a framework originated by Eva Brems and revised by Stijn Smet will be adopted. As Brems notes, literature on the subject of conflicting human rights is scarce.[59] Therefore, while the framework is hardly

[57] *Mathieu-Mohin v Belgium* (1988) 10 EHRR 1, para 54.

[58] See Chapters 5 and 8.

[59] Eva Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27(1) Human Rights Quarterly 294, 302.

comprehensive, it represents a concerted first step towards the development of more systematic analysis in this area.[60] Four main factors of the Brems/Smet model will be given focus in analysing circumstances which militate in favour of each right.

[a] Core versus Periphery Infringement

Brems notes that the first factor to be assessed is whether the conflict in question implicates the core or periphery of each right.[61] Rather than listing core rights which should be given priority in all cases, Brems notes that it is more fruitful to identify a core and a periphery in each right.[62] This resonates with Feinberg's approach to conflicting rights where he notes that it is unwise to make categorical statements about one right always taking precedence over another, given that priority would largely hinge on the circumstances of each case.[63] Therefore, where the 'core' aspect of one right enters into conflict with a more 'peripheral' aspect of another right, the assumption is that priority should be given to the first right over the latter.[64]

[b] Severity of Infringement

This criterion assesses the severity of the infringement on each right if the opposing right were to take preference.[65] The outcome which leads to the least amount of interference on the opposing right, while still upholding the other right in question, is deemed optimal.[66] In

[60] ibid 326.

[61] ibid 303; Stijn Smet, 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict' (2010) 26(1) American University International LR 183, 189.

[62] Brems (n 59) 303.

[63] Joel Feinburg, *Social Philosophy* (Prentice-Hall 1973) 76 – 77.

[64] Brems (n 59) 303 – 4.

[65] Smet (n 61) 189.

[66] ibid.

assessing severity, Brem notes, 'if the exercise of one right is rendered utterly impossible, this will carry more weight than if it is merely made more difficult'.[67]

[c] Whether Additional Human Rights are Indirectly Implicated

Brems notes that the case for giving priority to a particular right is strengthened if the restriction on that right results in the additional infringement of another right.[68] In light of this, the extent to which the right to vote may also be implicated in pre-selection disputes will be assessed below.

[d] General Interest

The fourth criterion asks whether there is close involvement of a general interest which could strengthen the position of either human right in the conflict.[69]

These four factors have been incorporated into the analysis below, which outlines key circumstances that militate in favour of each right. However, before examining these factors in greater detail, it is first necessary to outline the institutional context in which this conflict of rights analysis would be taking place.

[e] On Implementation: the Institutions Balancing the Rights' Conflict

As noted in Chapter 5, the duty to protect broadly includes the creation of a legal and institutional framework which provides a disincentive against third party violation, and a means of recourse for those whose rights have been violated by such parties.[70] The duty to protect

[67] Brems (n 59) 304.

[68] ibid.

[69] Smet (n 61) 190.

[70] Shue (n 1) 60.

therefore contemplates a wide level of institutional involvement from various organs of the state. Further, the fulfilment of the duty need not involve coercive measures and may include intermediary steps such as regulation, monitoring and the creation of disincentives for non-compliance.[71] This rights-balancing exercise is therefore relevant at the legislative and policy-making levels where one seeks to decide how rigidly political parties should be regulated in order to safeguard the right to candidacy. Within the Canadian context, where there is currently no regulation of these processes, this analysis will seek to address the preliminary question of the extent to which regulation of candidate selection may be necessary and, if so, to what degree. This section does not aim to outline the precise contours of what such regulation should entail, instead, it aims to more generally identify factors which should inform decisions on the overarching level of stringency that such regulations should embody.

Within the context of the United States, it is well-settled that candidate selection occurs in state-administered primaries, which may be subject to judicial challenge given their quasi-public nature. In analysing the position in the US, this conflict of rights analysis is therefore highly relevant at the judicial level, in assessing how courts should seek to resolve conflicts between both rights within the course of their adjudication. The section below therefore seeks to outline factors which may militate in favour of each right in the balance, bearing in mind that these factors bear relevance not only at the judicial level, but also during legislative decision-making on the extent of regulation necessary.

[71] Shue (n 1) 59 – 60.

D. CONFLICT OF RIGHTS ANALYSIS: BALANCING FREEDOM OF ASSOCIATON WITH THE RIGHT TO CANDIDACY

I. FREEDOM OF ASSOCIATION AS POSSESSING PRIMA FACIE DOMINANCE IN THE CONFLICT

The first, and arguably most important, factor in the Brems/Smet model asks whether the infringement implicates the core or periphery of the rights in question, core aspects being those central to the overall protection of the right. Examples are given of political speech as core to the right to freedom of expression, and sexual life as core to one's right to privacy.[72] It may be argued that a political party's candidate selection lies closer to the core of the right to freedom of association than it does to the core of the right to candidacy. This is on the basis that candidate selection represents the pivotal activity which universally distinguishes parties from other political organisations.[73] Such selections have been regarded as central to defining what the party does and stands for.[74] As the United States Supreme Court has recognised, candidate selection represents a 'basic function' and 'crucial juncture' in the life of the party.[75] In contrast, the extent to which a party's candidate selection affects an individual's right to candidacy, largely depends on conditional factors outlined above, such as the viability of exit. This may be contrasted with more 'core' elements of the right to candidacy, such as legal eligibility to stand, without which exercise of the right is rendered wholly impossible. However, within the context of a multi-party or two-party democracy which also allows independent candidacies, the candidate hopeful always possesses the theoretical option of exit.

[72] Brems (n 59) 304.

[73] Giovanni Sartori, *Parties and Party Systems: A Framework for Analysis* (Cambridge University Press 1976) 64; Cross (n 6) 596.

[74] Austin Ranney, 'Candidate Selection' in David Butler, Howard Penniman and Austin Ranney (eds), *Democracy at the Polls* (American Enterprise Institute 1981) 103; Cross (n 6) 597.

[75] *Tashjian* (n 11) 216.

It is the presence of this theoretical option, along with the central (and constant) importance of candidate selection to the political party, which renders freedom of association as possessing prima facie dominance in the conflict. However, this dominance is by no means absolute and may be displaced as one looks beneath the surface at the actual viability of exit within the overall political landscape.

The prima facie dominance of free association is largely reflected in the regulatory status quo of the jurisdictions examined. As noted above, candidate selection is largely treated as a private, intra-party affair; even in the United States where there are mandatory state primaries, courts have generally sought to honour parties' associational autonomy in pre-selections taking place within that context.[76]

Even within this position of prima facie dominance, one key factor which further militates in favour of the party's associational freedom, are instances in which the member seeking selection is ideologically opposed to what the party stands for. Associational rights have been held to be at their 'zenith' when a candidate is denied party endorsement on account of ideological divergence from the party. In *Duke v Cleland*,[77] David Duke, who was a white supremacist and former Ku Klux Klan member, challenged his removal from the list of Republican presidential primary candidates in Georgia on the basis that his First Amendment rights to expression, association and candidacy were infringed. The court held that Duke possessed no right to associate with an 'unwilling partner'[78] and further, that the Republican Party had a constitutionally protected right to exclude Duke on the basis of his inconsistent

[76] See *Tashjian* (n 11); *California Democratic Party* (n 11); *Eu v San Francisco County* (n 23).

[77] *Duke v Cleland* (n 11).

[78] ibid 1530 – 1531.

political beliefs.[79] Similarly, in *LaRouche v Fowler*,[80] the court upheld the decision of the Democratic Party to exclude LaRouche's delegates from the national convention (where the party's presidential candidate is chosen) on the basis that he failed to satisfy the internal party requirement of being a 'bona fide Democrat'. This was on the basis that he expressed political beliefs which were racist, anti-Semitic and otherwise inconsistent with the beliefs of the Democratic Party.[81] The court held that while First Amendment interests weighed on both sides of the balance, the Party's interests were at their 'zenith' given that 'the Party's ability to define who is a 'bona fide Democrat' is nothing less than the Party's ability to define itself'.[82] In pointing to the candidate's exit options, the court noted that 'LaRouche retained the right to run, and his supporters the right to vote for him, as either a third-party or independent candidate'.[83] It may therefore be argued that in cases of stark ideological incompatibility, freedom of association comfortably retains priority in the balance.[84]

The remainder of this section seeks to explore circumstances which may potentially displace the prima facie dominance held by freedom of association and which ultimately militate in favour of greater intervention to protect the right to candidacy.

[79] ibid 1532.

[80] *LaRouche* (n 11).

[81] ibid 976.

[82] ibid 996.

[83] *LaRouche* (n 11) 993 – 4.

[84] See also Venice Commission Guidelines on Political Party Regulation (OSCE/ODIHR 2010) at para 116: 'Individuals are not guaranteed membership in any association based on a common belief to which they do not subscribe.'

II. FACTORS WHICH MILITATE IN FAVOUR OF THE RIGHT TO CANDIDACY

As noted above, the extent to which the right to candidacy is implicated by a political party's internal candidate selection largely hinges on the viability of 'exit' as a feasible option. Such viability is in turn determined by the extent to which the overall electoral system and political environment make it conducive for one to meaningfully exercise his right to candidacy outside of the party in question. This section addresses that primary determinant in more detail by looking at two main circumstances which weigh in favour of the right to candidacy: (i) the absence of an exit option and (ii) an electoral system and political environment which render 'exit' considerably less viable. These factors ultimately concern the 'severity of infringement' of the right to candidacy given that the less feasible one's exit options, the greater the potential interference with the right. This section will also address the importance of protecting the right in cases of invidious discrimination on account of race or gender, as well as circumstances in which there is also a potential infringement of the right to vote.

It should be noted that the presence of these factors does not warrant the absolute protection of the right to candidacy to the exclusion of associational freedom. Rather, conditions weighing in favour of the right to candidacy may be taken as indicators justifying more robust regulation of parties' internal candidate selection. However, a delicate balance of all relevant factors would still prove necessary in order to decipher the precise level of intervention necessary.

[a] The Absence of an 'Exit' Option

Within the context of a multi-party or two party democracy which allows independent candidacies, the dissatisfied party member generally possesses the theoretical option of 'exit'. However, peculiar circumstances may arise which operate to render exit a virtual nullity within the given time frame of a particular general election. The first such instance is a case in which

the political party in question sought to effectively force members to contractually forfeit their option of exit in the event that they were unsuccessful in seeking nomination within that party. In the New Zealand High Court decision of *Peters v Collinge*,[85] the plaintiff sought to preclude the enforcement of a nomination form issued by the New Zealand National Party in which applicants for candidacy had to undertake that, if unsuccessful, they would not stand as a candidate for any other party or as an independent. As the Court noted, the effect of the clause was such that 'the price of being considered for the candidacy is that the applicant relinquishes his right to stand in competition'.[86]

The Court held that the nomination clause was contrary to public policy, illegal and thereby unenforceable.[87] This was on the basis that it was contrary to the spirit of section 12 of the New Zealand Bill of Rights Act, which guaranteed a right to stand for election to parliament. The Court further held that it was incompatible with the object of 'untrammelled democratic government' to allow this right to be 'bargained away'.[88] The Court therefore rendered unenforceable the political party's attempt to deny unsuccessful nominees the option of exit. This case provides a quintessential example of the state fulfilling its duty to protect the right to candidacy against unjustifiable party infringement. The court highlighted the protective nature of its ruling by emphasizing that, while the right to stand was not directly enforceable against the party, the question was whether the party should be allowed to contractually prevent the nominee from exercising and enforcing his right to stand against the State.[89]

[85] [1993] 2 NZLR 554.

[86] *Peters v Collinge* (n 85) 562.

[87] ibid 565.

[88] ibid 564.

[89] ibid 565.

Another circumstance in which there exists no real exit option is in the case of United States presidential primary races where the candidate seeking nomination for a major party must run on the ballot of that same party in all fifty states.[90] Therefore, in the event that one state's laws prescribe particularly onerous ballot access rules for that party's primary, the candidate cannot opt out and run as an independent in that state.[91] He must appear on that party's primary ballot in that state or not at all. This issue came to a head in the cases of *Rockefeller v Powers*[92] and *Molinari v Powers*,[93] where Republican primary candidates challenged the burdensome ballot access rules associated with the New York Republican primary. The Court in *Rockefeller* noted that the nature of the presidential primary was such that the only choice of the candidate unable to meet the requirements in New York, was to forego that state's primary election altogether.[94] As such, one state's laws could affect a candidate's entire national campaign.[95] In the case of rules applicable for the New York Republican primary, these were crafted by Republican representatives in the legislature and opted for by the Republican State Committee. In both *Rockefeller* and *Molinari*, the Court noted that the rules operated to unduly burden candidates other than the one endorsed by the Republican State Committee. As such, the rules were held to undermine 'the very purpose of a primary, which is to protect the general party membership against this sort of minority control by the party leadership'.[96] The rules were struck down as being in violation of the First

[90] Persily (n 12) 2216.

[91] ibid.

[92] 917 F Supp 155 (EDNY 1996).

[93] 82 F Supp 2d 57 (EDNY 2000).

[94] *Rockefeller* (n 92) 160.

[95] ibid; Persily (n 12) 2217.

[96] *Molinari* (n 93) 77.

Amendment, thereby providing another example of court intervention in a case where the dissatisfied candidate does not have a clear 'exit' option.

More generally, a party member may lack an exit option if the timing of the internal selection is such that it is completed after the deadline for registering as an independent, and after other parties have already selected their nominees. It may therefore be argued that the state's duty to protect involves encouraging parties to engage in transparent and timely selections which give unsuccessful nominees ample opportunity to explore alternative options.

[b] An Electoral System and Political Environment which render 'Exit' Considerably less Viable

As noted above, the presence of a theoretical exit option may mean little in practice if its actual exercise proves to be unduly onerous or confers a considerably less meaningful opportunity for political participation and deliberative expression. As Persily notes, within the context of the United States, the extent to which a primary ballot access law infringes the rights of a candidate or her supporters, necessarily depends on the height of barriers to entry to the general election ballot which independent candidates face (ultimately a question of the member's ease of exit).[97] He notes that a hydraulic relationship exists between both sets of rules such that, the higher the barriers to entry into the general election ballot (by way of excessive signature and petition requirements), the lower the barriers to entry should be to the party's primary ballot.[98] Similarly, William Cross highlights that the general case for heightened regulation of political parties' internal candidate selection necessarily depends on the relative importance of such

[97] Persily (n 12) 2213.

[98] ibid 2214.

selection within a given democracy, as determined by the electoral system and overall competitiveness of general elections.[99]

In examining the impact of the electoral system, many US academics have highlighted the fact that the first-past-the-post (FPTP) single member plurality system structurally favours the presence of only two major parties,[100] a truism which has come to be termed 'Duverger's Law'.[101] As Benjamin Black explains:

> In an electoral system in which a plurality victor – the candidate who obtains the most votes – receives the entire political reward, small political parties are penalised because if they do not win that plurality, they receive nothing.[102]

In light of this, many have noted that the two dominant parties in the US ought to receive less constitutional protection, and thereby possess less associational autonomy, in light of their firmly entrenched and structurally favoured status.[103] Issacharoff eloquently articulated this position in particularly compelling terms:

> The powerful position of the major parties is an artefact of a distinct political arrangement: the use of single member, first-past-the-post electoral districts as the basis for all major elective office. It is this particular electoral mechanism that promotes the existence of two and only two serious parties, and provides a strong measure of immunity against displacement by third parties. It ill behoves the beneficiaries of such a state-conferred privilege to claim an absolute immunity against the state conditioning the terms under which they may operate within that beneficial environment.[104]

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[99] Cross (n 6) 596.

[100] Hasen (n 23) 826; Benjamin Black, 'Developments in the State Regulation of Major and Minor Political Parties' (1996) 82 Cornell L Rev 109, 176; Samuel Issacharoff, 'Private Parties with Public Purposes: Political Parties, Associational Freedoms and Partisan Competition' (2001) 101(2) Columbia Law Review 274, 292.

[101] Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* (Translated by Barbara and Robert North) (Methuen 1954).

[102] Black (n 100) 176.

[103] Hasen (n 23) 835; Black (n 100) 176; Persily (n 12) 2216.

[104] Issacharoff (n 100) 292.

It may therefore be submitted that the greater the state conferred benefits on a political party's candidates (by virtue of the electoral structure and positive law), the less associational autonomy that party may claim regarding its candidate selection process. In viewing this through the lens of the state's duties, one may cast the position in the following terms: the greater a state's structural and legal facilitation and maintenance of a two-party system, the stronger its duty to protect the right to candidacy through the regulation of candidate selection within those two dominant parties.

In examining the jurisprudence of US courts, many have noted that they have not given sufficient weight to these broader institutional factors and have, instead, tended to jealously guard the associational autonomy of the Republican and Democratic Parties.[105] This is evidenced by the Supreme Court's rulings in *California Democratic Party v Jones* and *Tashjian*, highlighted above, as well as the court's bald references to party members' exit options, without any analysis of the general viability thereof.[106] For example, in *Duke v Cleland*, Circuit Judge Kravtich, dissenting, noted that while the majority pointed to Duke's options of running as a third party or independent candidate, this view was erroneous given that Georgia law limited presidential primary access to parties which gained at least 20 percent of the vote in the previous presidential election.[107] Kravitch noted that, 'in view of the realities of our two-party system, the state restricts participation in the primary system to those individuals who qualify for the Republican and Democratic primaries'.[108] The court's articulated exit options were therefore well out of touch with the actual political reality.

[105] Guaja (n 6) 118; Black (n 100); Hasen (n 23).

[106] *Ripon* (n 55) 586; Beitz (n 7) 190; *LaRouche* (n 11) 994.

[107] *Duke v Cleland* (n 11) 1536.

[108] ibid.

Within the Canadian context, it becomes clear that these broader structural factors ought to be given more weight and added to the justificatory basis for state regulation in this area. In making the case for greater regulation, Cross points to the following aspects of the Canadian electoral system and political culture: (i) a single member plurality system which favours major parties[109] (ii) the presence of regional party enclaves and 'safe seats' such as Conservative Party dominance in the Alberta province[110] and (iii) the low level of independent candidate success, such that, the only path to election is essentially through a major party nomination contest.[111] Yet, the court's jurisprudence reveals a lack of appreciation of the importance of these broader contextual factors. As noted above, in *Knox v Conservative Party of Canada*, the Alberta Court of Appeal noted that candidate selection was essentially a 'private activity', the only recourse being the arbitration proceedings provided by the Party.[112] However, it is also significant that the court expressed a willingness to infer 'certain basic procedural protections' in the event that there was no dispute resolution mechanism provided for by the Party. As Geddis notes, this willingness suggests that the Court's refusal to apply broad judicial review remedies rested more on its satisfaction that the Conservative Party had provided adequate protections, rather than a general principle that parties may act as they wish when choosing candidates.[113] It remains to be seen how Canadian jurisprudence will develop in this area. The approach of Australian courts may prove instructive in this regard; there, courts have taken an expressly

[109] Cross (n 10) 172.

[110] Cross (n 6) 605.

[111] ibid 609; Cross (n 6) 174.

[112] *Knox* (n 30).

[113] Andrew Geddis, 'The Legal Status of Political Parties under MMP' (2009) 7 NZJPIL 21, 35.

functional and contextual approach in recognising the public significance of internal candidate selection, notwithstanding the otherwise 'private' status of political parties.[114]

[c] <u>Discrimination on Account of Race or Gender</u>

In its 'Guidelines on Political Party Regulation', the Venice Commission noted the importance of political parties respecting the principles of non-discrimination and equality in their internal dealings:

> Such principles may include measures to ensure party qualifications for membership, candidacy, and party activities that provide for the equal participation of women and minorities. While not legally mandated, such steps are seen as good practice given that both women and minorities have been subject to historical inequalities in the OSCE region and globally, which requires redress.[115]

As noted by the Commission, the importance of parties observing these principles stems from a long and painful history of inequality which still renders women and racial minorities under-represented in many parliaments the world over.[116] As Ely notes, in referencing the famous *Carolene Products*[117] footnote, prejudice against discrete and insular minorities may be a special condition which calls for more searching constitutional scrutiny if such prejudice seriously curtails the operation of those political processes ordinarily relied upon to protect minorities.[118] Discrimination in the field of a political party's candidate selection would

[114] Gauja (n 6) 103; *Coleman v Liberal Party* (n 33) paras 47 - 48.

[115] Venice Commission (n 84) para 61.

[116] Graeme Orr, 'Legal Conceptions of Political Parties through the Lens of Anti-Discrimination Law' in Joo-Cheong Tham, Brian Costar and Graeme Orr (eds), *Electoral Democracy: Australian Prospects* (MUP 2011) 130; Mala Htun, 'Is Gender like Ethnicity: The Political Representation of Identity Groups' (2004) 2(3) Perspectives on Politics 439; Aileen McHarg, 'Quotas for Women: The Sex Discrimination (Election Candidates) Act 2002' (2006) 33(1) Journal of Law and Society 141, 142.

[117] *United States v Carolene Products Co.* 304 US 144 (1938).

[118] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 76.

certainly represent one such instance. Yet, the Venice Commission noted that political parties' respect for such principles should not be legally mandated but should rather be regulated through 'party constitutions or voluntary codes of conduct elaborated and agreed to by the parties themselves'.[119] This brings to the fore the question of the appropriate level of state regulation in this area along a spectrum ranging from permissive to prescriptive. It is submitted that the answer to this question necessarily turns on the primary determinant explored above: the viability of one's exit as determined by the importance of a party's pre-selection within the context of the overall political system. As Orr notes, when assessing the desired applicability of anti-discrimination law to political parties, it is important to conduct functional analysis which incorporates the entire electoral system given that the ultimate regulatory goal is not a particular model of internal party affairs, but rather, the attainment of diverse and robust competition in political discourse and elections.[120]

In taking into account the overall political environment, one may understand the necessity of robust US court intervention in the 'White Primary Cases' in which the Democratic Parties in the South sought to prevent blacks from voting in its primaries in the mid-Nineteenth Century.[121] As Orr notes, the southern Democratic Parties were not pro-competitive and operated 'de facto one-party states to repress a competing racial group'.[122] Judicial intervention was therefore highly desirable in that instance. US jurisprudence in this area must also be understood in light of the unique system which obtains where primaries are largely state administered activities. Therefore, the court's application of anti-discrimination law may be

[119] Venice Commission (n 84) para 62.

[120] Orr (n 116) 122.

[121] *Smith v Allwright*, 321 US 649 (1944); *Terry v Adams*, 345 US 461 (1953); *Nixon v Condon*, 286 US 73 (1932).

[122] Orr (n 116) 135.

straightforwardly derived from attributing to the state, the action of endorsing and enforcing the party's discriminatory rules in its administration of the primary.[123]

A less straightforward position arises in most other polities where candidate selection is regarded as a private, internal affair of a voluntary association. The United Kingdom provides one interesting example of a context in which candidate selection, though largely regarded as a private activity, is still made subject to anti-discrimination law. In *Watt v Ahsan,*[124] the House of Lords held that a political party was not entitled to discriminate on racial grounds in choosing its candidates given that section 25 of the Race Relations Act made it unlawful for an association to discriminate against members in the access to any 'benefits, facilities or services'.[125] The Court held that there was racial discrimination at play in the Labour Party's decision to remove Ahsan, a Muslim Pakistani candidate for the city council, and to replace him with a white male candidate.[126] Ahsan originally brought his claim under section 12 of the Race Relations Act, which makes it unlawful for an authority to discriminate in conferring a qualification necessary for engagement in a 'profession or trade'. However, contrary to the previous line of candidate selection cases brought before employment tribunals, the House of Lords noted that political parties were not 'qualifying bodies' in the employment field and that public office did not amount to a 'profession or trade'.[127] The Court then held that the right field of law was club law (relevant to private associations), hence the application of section 25 of the Race Relations Act. Morris suggests that both the club law and employment law models are ill-suited for candidate selection disputes and posits that the important role of

[123] See *Smith v Allwright* (n 121) 664.

[124] [2007] UKHL 51.

[125] ibid para 19.

[126] ibid para 43.

[127] ibid para 18; See also *Ali v McDonagh* [2002] ICR 1026.

parties in public life warrants a public law approach which can more easily incorporate right to candidacy principles under Article 3, Protocol 1 of the ECHR.[128] However, as noted in Chapter 5, by focusing on the state's duty to protect, the use of private law remedies is also envisaged as a possible avenue in safeguarding the right against political party infringement. Therefore, while a public law framework would arguably prove more fitting, it is notable that there still exists a significant protective measure: the presence of a direct avenue for redress in the event of racial discrimination in a party's candidate selection.

Regarding discrimination on account of gender, given the vast underrepresentation of women in politics worldwide,[129] some parties have opted to positively discriminate in favour of female candidates in order to redress this imbalance. Research in this area is unanimous on the point that greater gender equality in candidate selection requires such deliberate, leadership-orchestrated measures.[130] It is submitted that the duty to protect should include the provision of a permissive legal environment which allows for such positive discrimination within parties to take place. While such measures should not be mandated, parties willing to undertake them should be legally free to do so. The United Kingdom once again provides a relevant example on this point. In 1997, the Labour Party introduced all-women shortlists for some of its most winnable seats. However, this policy was successfully challenged in *Jepson & Dyas-Elliot v Labour Party*[131] by two male members of the Party on the basis that it amounted to direct

[128] Morris (n 6) 427 – 8.

[129] Orr (n 116) 130; Inter-Parliamentary Union, 'Women in Parliament in 2013: The Year in Review' (IPU 2014) <http://www.ipu.org/pdf/publications/WIP2013-e.pdf> accessed 11 December 2014.

[130] Gideon Rahat, Reuven Hazan and Richard Katz, 'Democracy and Political Parties: On the Uneasy Relationships between Participation, Competition and Representation' (2008) 14(6) Party Politics 663, 676; Dennis C Spies and Andre Kaiser, 'Does the Mode of Candidate Selection affect Representativeness of Parties?' (2014) 20(4) Party Politics 576; Rhys Williams and Akash Paun, 'What Works in Candidate Selection?' (Institute for Government 2011) <http://www.instituteforgovernment.org.uk/sites/default/files/publications/What%20works%20in%20candidate%20selection.pdf> accessed 11 December 2014.

[131] *Jepson* (n 44).

discrimination under the Sex Discrimination Act.[132] In response to the *Jepson* ruling, the Sex Discrimination Act was amended in 2002 in order to allow parties to freely engage in such positive discrimination.[133] In its Fourth Report on the 2002 Amendment, the Joint Committee on Human Rights outlined the extent to which the allowance of such positive discrimination is fully compatible with its international obligations under CEDAW, the ICCPR and the ECHR.[134]

In Canada, such measures would be permissible by virtue of section 15(2) of the Charter of Rights and Freedoms which provides that the Charter's equality guarantee does not preclude any law, program or activity which has the object of ameliorating the conditions of individuals disadvantaged on account of sex.[135] Canada's New Democratic Party (NDP) recently adopted a 'Nomination and Affirmative Action Policy', committed to the goals of 'gender-parity and diversity'.[136] It is helpful that Canada's equality law framework provides an environment in which the policy's legality cannot be called into question by party members who may seek to undermine the measure.

The underrepresentation of women in public office is also a major problem in the United States, currently ranked at 85th worldwide regarding gender equality in legislative office, with only 18 – 20 per cent of seats occupied by women in each House.[137] However, within the context of state-administered primaries, as well as an equality law paradigm which

[132] ibid 119.

[133] Sex Discrimination Act (United Kingdom), s 42A.

[134] Joint Committee on Human Rights, *Sex Discrimination (Election Candidates) Bill (fourth report)* (30 November 2001) <http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/44/4403.htm> accessed 11 December 2014.

[135] Canadian Charter of Rights and Freedoms, s 15(2).

[136] Cross (n 10) 188 – 189.

[137] Inter-Parliamentary Union, 'Women in National Parliaments' <http://www.ipu.org/wmn-e/classif.htm> accessed 11 December 2014.

is arguably less friendly to affirmative action in recent years,[138] the possibility of major parties pursuing positive discrimination in candidate selection is, at best, extremely slim.

The legal framework in the United Kingdom may therefore be commended for the extent to which there are avenues for direct redress in the event of racial discrimination, as well as express statutory allowance of affirmative action in favour of female candidates. The importance of state action to safeguard equality on these bases stems from the underlying value of dignity, defined as social recognition of one's equal moral status.[139] By protecting the right to candidacy from discrimination on such invidious bases, the state is effectively affirming the importance of recognising the equal moral worth of all potential candidates.

[d] <u>Potential Infringements of the Right to Vote</u>

The third criterion in the conflict of rights framework asks whether the infringement of a given right in the conflict also incidentally infringes any other rights. The extent to which other rights are implicated by the infringement would be a factor weighing in favour of alleviating that infringement in the final resolution of the conflict. As noted in Chapter 4, the right to candidacy and the right to vote possess a strong degree of inter-dependence, such that, an infringement of the candidate's right quite likely also implicates the right to vote.[140] This is no different regarding potential violations in intra-party candidate selection processes.

The right to vote may be said to operate at two levels in this sphere. First, the right to vote acts as an additional justificatory basis for the imposition of more transparent, democratic pre-selection in instances where such selection has not yet been instituted. This position will be explored within the context of the Canadian system. Secondly, where democratic selections

[138] *Schuette v Coalition to Defend Affirmative Action*, 568 US 185 (2013).

[139] See Chapter 4.

[140] ibid.

are already in place, in the event of processes which seek to compromise the fairness of such methods, the incidental infringement of the right to vote adds weight to the case for resolving such conflicts in favour of the right to candidacy, and against freedom of association. This factor will be explored within the context of US presidential primaries and the attempt of some party committees to manipulate the results thereof.

In arguing for greater public regulation of candidate selection in Canada, Cross points to the extent to which the electoral system and political environment render intra-party candidate selection an important choice in which voters should have a say. He notes that within the context of a single member plurality system, unlike open list proportional systems, the voter has no choice between the candidates of a given party at the general election.[141] He has only one chance to vote for both party and candidate. Further, given the presence of regional enclaves and 'safe seats', in some cases the internal candidate selection is tantamount to choosing the constituency representative.[142] Therefore, in such cases, the only opportunity for the voter to meaningfully influence selection would be at the nomination contest.[143]

The overall competitiveness and openness of the political environment is also a factor which affects the right to vote. The less viable a candidate's exit options is the less likely that his supporters within the party will have an opportunity to vote for him elsewhere as a third party or independent candidate. Similarly, the extent to which such options provide less meaningful avenues for engagement in public discourse invariably affects the voter's right to hear such discourse and to make an informed choice.[144] US jurisprudence provides relevant

[141] Cross (n 10) 172 – 3; Cross (n 6) 606.

[142] Cross (n 10) 173.

[143] Cross (n 6) 605.

[144] On this point see Chapter 4.

examples of judicial intervention to protect these voting rights of a candidate's supporters within the context of intra-party democratic selection.

In *Molinari* and *Rockefeller*, discussed above, candidates for the NY Republican Presidential primary sought to challenge restrictive ballot access rules which operated to favour the candidate endorsed by the Republican State Committee. In *Molinari*, Senator McCain's campaign sought to challenge onerous and technical signature requirements which made it difficult for McCain to qualify for the ballot in a number of districts in the state, even though he possessed a great deal of intra-party support.[145] On the other hand, the court noted that the Republican State Committee's favoured candidate, George Bush, had no difficulty in collecting the required signatures given that the full party apparatus and resources were put behind his candidacy.[146] For example, the Committee delivered accurate and up-to-date lists of potential Republican voters to the Bush campaign, an item indispensable for effective signature collection. By contrast, the McCain campaign was denied the use of such lists and had to overcome significant obstacles in order to obtain such information from a variety of different databases.[147] The court held that the NY Republican ballot access scheme, coupled with the way in which it was applied by the Committee, posed an undue burden on the right to vote.[148] The court made a similar finding in *Rockefeller*, noting that the rules operated to make the primary 'little more than a state-sponsored endorsement of the candidate [favoured by] the party leadership'.[149]

[145] *Molinari* (n 93).

[146] ibid 62.

[147] ibid 66.

[148] ibid 71.

[149] *Rockefeller* (n 92) 868 – 9; Persily (n 12) 2201.

These cases provide a vivid example of the distribution of power between different aspects of the party in V.O. Key's tripartite framework of political parties. As noted in Chapter 5, Key posits that parties comprise of the party-in-government, party-organisation and party-in-electorate.[150] In these cases, the party-in-government enacted restrictive ballot access rules which the party-organisation applied in a way that unfairly favoured its endorsed candidate. Meanwhile, members of the party-in-electorate were not given the chance to vote for their candidate of choice given the difficulties associated with attaining ballot access. As Persily notes, the courts' rulings in these cases seek to safeguard the interests of the party-in-electorate against minority control by the party elite.[151] *Molinari* provides a particularly salient example of such attempts at minority control given McCain's broad popularity and his victory in the New Hampshire primary, which took place before the New York race.[152] The court's impetus to protect his right to candidacy was therefore stronger given his broad intra-party support.[153]

It may therefore be argued that within the context of democratic pre-selection, the greater the internal support for a given candidate within the party, the greater the weight accorded to that candidate's right to represent the party at the general election. This is to be contrasted with a unanimous decision of all segments of the party to exclude the candidate in question. On that basis, freedom of association is clearly dominant given that there is no right to associate with an 'unwilling partner'.[154] However, disagreements between the party-organisation and party-in-electorate raise complex questions about where the locus of power should lie. It is submitted that this question should also be resolved in reference to the primary

[150] VO Key, *Politics, Parties and Pressure Groups* (5th edn, Crowell 1964) 163 – 5.

[151] Persily (n 12) 2206.

[152] ibid 2205.

[153] ibid.

[154] *Duke v Massey* (n 16) 1234.

determinant of the overall organisation and competitiveness of the entire electoral system. In the event that the pre-selection contest will likely determine (or significantly shape) the final electoral outcome, this militates in favour of the party-in-electorate being given greater choice in that decision.[155]

E. GENERAL PRINCIPLES GOVERNING THE STATE'S DUTY TO PROTECT

Having established central factors which militate for and against each right in the conflict, this section seeks to briefly outline how these factors should inform the state's fulfilment of its duty to protect. In that regard, it will highlight and consolidate some of the main points explicated above in an effort to glean general principles which should guide state action in this area.

First, the prima facie dominance of freedom of association may be said to create a presumption in favour of a low level of regulatory coercion, given the central and constant importance of candidate selection to the party versus the somewhat conditional importance to the candidate.

Secondly, even within the context of this prima facie dominance, the duty to protect requires, at the very least, mechanisms to ensure that parties provide transparent candidate selection methods and that their actual selection abides by those predetermined rules. This position is reflected in the Venice Commission Guidelines on Political Party Regulation: 'Internal party rules for the selection of candidates should not be subject to regulation by the state except for ensuring that selection is consistent with the political party's constitution.'[156]

[155] Cross (n 6) 596.

[156] Venice Commission (n 84) para 127.

Some have argued that given the importance of candidate selection, regulation by the state should not be limited to merely ensuring consistency with party rules, rather, it should be extended to include the specification of a prescribed method, such as democratic selection.[157] However, as many notable political scientists have highlighted, there is no single method of candidate selection which adequately optimises the competing values of participation, representational diversity and competition.[158] For example, it is well noted that achieving gender parity in candidate selection often requires less democratic and more centralised methods.[159] Therefore, in outlining a general principle, it is best to limit state regulation to the remit of ensuring transparency and general fairness,[160] as opposed to the stipulation of a particular method, the suitability of which being dependent on a number of competing variables.

Thirdly, regarding the party's substantive criteria for the selection of candidates, the state should exercise great deference in this area given that associational autonomy is at its 'zenith' in the party's identification of its ideological position.

Fourthly, even within the context of general deference for substantive criteria, it is submitted that the state's duty to protect requires, at the very least, protection from discrimination on invidious bases such as race or gender. (The importance of such protection has been highlighted in greater detail in the preceding section.) The state's duty in this regard should also include the facilitation of positive discrimination in order to achieve greater gender equality in candidate selection. As noted by the Venice Commission in its guidelines,

[157] Gauja (n 6) 100.

[158] See n 130.

[159] ibid.

[160] On importance of transparency see: Venice Commission (n 84) para 98; Persily (n 12) 2212; Riddell (n 8) 43.

'Legislation on political parties should ensure that women and men have an equal chance to be candidates and to be elected.'[161]

Fifthly, the extent to which a greater measure of regulation may be necessary, over and above the basic level described above, depends on the viability of a candidate's exit from the party, as determined by the overall openness and competitiveness of the electoral system and political landscape. In this regard, as noted in the previous section, the greater a state's structural and legal facilitation and maintenance of a two-party system, the stronger its duty to protect the right to candidacy through the regulation of candidate selection within those dominant parties.

Sixthly, the level of regulation necessary is also determined by the extent to which political parties have previously violated the central principles of transparency and fairness in their candidate selection processes. This would in turn bear on the 'severity of infringement' of the right to candidacy. On this basis, the position in Queensland, Australia is noteworthy, where the extensive level of branch-stacking led to legislation entrusting the Queensland Electoral Commission with oversight of these processes.[162] Similarly, the extensive regulation of primaries in the US was largely borne out of early concerns regarding the centralization of power and corruption in US parties.[163]

Lastly, potential infringement of the right to vote is also a factor which may serve to strengthen the case for increased regulation in the state's fulfilment of its duty to protect. The extent to which the right to vote has been infringed also requires consideration of the importance of a given pre-selection within the context of the overarching electoral framework.

[161] Venice Commission (n 84) para 131.

[162] Gauja (n 6) 119.

[163] ibid124; Marty Cohen, David Karol, Hans Noel and John Zaller, *The Party Decides: Presidential Nominations Before and After Reform* (University of Chicago Press 2008) 2.

F. CONCLUSION

This Chapter has sought to outline the general principles which should inform the level of state regulation of a political party's candidate selection processes. However, the precise contours of such regulation and the details of its enforcement remain unexplored. Yet, the complex questions associated with such enforcement cannot be wholly ignored. For example, in assessing the importance of a given party's candidate selection within the broader electoral framework, this may lead to greater regulation of major parties with more lenient standards applied to smaller parties. This brings to the fore questions of what constitutes 'major party status' as well as the challenge of regulating parties gaining power and in transition between categories.[164] In a polity such as the United States, defining the two major parties is largely straightforward, however, this may be less so in other jurisdictions. Further, challenges arise regarding the definition of the general levels of 'fairness' to which parties should adhere. Some courts have imputed general principles of natural justice and procedural fairness in this sphere.[165] Additionally, in adjudicating on whether a party has followed its prescribed rules for selection, interpretation of the party's constitution will invariably require the application of substantive principles to guide such interpretation.[166] This makes the line between party autonomy and state intervention all the more tenuous. The reality is that, given the party's competing right of freedom of association, interventions in this area will always require a delicate balance.

In light of these difficulties, some have suggested that the focus of the state in this area should not be on 'voice' (in seeking to regulate internal party disputes), but rather on creating

[164] Orr (n 116) 134 – 135.

[165] Gauja (n 6) 105; Morris (n 6) 427.

[166] *Clarke v Australian Labour Party* (n 39) para 126; Gauja (n 6) 103.

more opportunities for 'exit' (by seeking to ensure greater openness in the political market). As Gauja notes:

> Rather than forcing individual political parties to accommodate all interests, the competitive space should be open enough to allow a plurality of political parties to form and contest elections. This would require a consistent and coordinated approach to legal regulation and the design of the electoral system that places more emphasis on the maintenance of competition between parties rather than regulating internal processes.[167]

In referring to the 'maintenance of competition between parties' Gauja is effectively referencing the state's duty to *fulfil* the right to candidacy which involves making 'exit' more viable through the maintenance of a competitive electoral environment (the subject of Chapter 8 of this thesis). As noted in Chapter 5, the duty to fulfil encompasses an obligation to organise and administer free and fair elections in which there is a reasonably 'level playing field' for candidates. This duty therefore focuses on creating opportunities for the dissatisfied party member to 'exit', whereas the duty to *protect* (herein examined) focused on safeguarding the exercise of 'voice' through the regulation of internal party processes.

These two duties centrally complement one another, given that limitations on the state's ability to regulate internal processes is mitigated by its efforts to enhance the broader competitiveness of the electoral process. However, unlike Gauja, it is not being submitted that the maintenance of a competitive environment is categorically more important than the regulation of internal party processes, given that both exit and voice are central and complementary responses.[168] As Persily and Cain note, the availability of exit as a real threat renders voice more effective, given that political parties are more likely to respond to minority factions within the party if there is a genuine risk of losing them.[169] They further note that the

[167] Gauja (n 6) 123.

[168] Hirschman (n 51) 123.

[169] Persily and Cain (n 52) 798.

'interrelatedness of voice and exit' require judicial protection for both avenues.[170] Therefore, regarding the duties to protect and fulfil, none should be regarded as more essential than the other. However, it may be argued that a somewhat hydraulic relationship exists between both duties, given that the greater the state's realisation of its duty to fulfil, through the creation of a competitive electoral environment, the less demanding is its duty to protect in the regulation of internal selection, given the greater viability of exit. The converse is also true given that a lack of openness and competitiveness in the electoral landscape renders the duty to regulate internal processes more demanding.

Notwithstanding, the duty to protect remains independently significant given that voice also bears importance in its own right. This is highlighted when one notes that ideological differences between parties often render exit, though theoretically possible, largely undesirable. In the event of a candidate selection dispute where the party and candidate are ideologically ad idem, mechanisms which safeguard effective 'voice' are more beneficial than opportunities to 'exit' and to join a party with opposing views. In order to avoid limitless fragmentation, voice remains a necessary response to intra-party candidate selection disputes, hence the concomitant importance of the duty to protect.

The proceeding Chapter will now turn to a delineation of the state's duty to fulfil. It will examine the extent of the state's duty in the creation and maintenance of a competitive electoral environment with a reasonably 'level playing field'. This duty will be shown to ultimately complement the duty to protect given that both remain necessary for the full realisation of the right to candidacy.

[170] ibid.

CHAPTER 8 – DUTY TO FULFIL:

THE ADMINISTRATION OF FREE AND FAIR ELECTIONS WITH A REASONABLY LEVEL PLAYING FIELD

A. INTRODUCTION

This Chapter addresses the nature of the state's obligation to fulfil the right to candidacy through the organisation and administration of free and fair elections. As noted in Chapter 5, the formal bestowal of the right to candidacy means little without the enabling context of fair elections in which the right may be freely exercised. While there are many facets which comprise a fair election, of particular salience to the right to candidacy is the creation and maintenance of a reasonably level playing field in which candidates may compete and meaningfully engage in public discourse. This Chapter therefore seeks to examine the extent of the state's obligation to provide such an environment in its fulfilment of the right to candidacy, as well as the legitimacy of judicial oversight and enforcement in this area.

As noted in Chapter 7, the duty to fulfil very closely complements the duty to protect. In assessing the individual's right to candidacy vis-à-vis his political party, it was noted in Chapter 7 that the duty to protect involves the regulation of parties' candidate selection processes in order to maximize a candidate's 'voice' in the event of a disagreement with the party. On the other hand, the duty to fulfil seeks to enhance the viability of 'exit' from a given party by maintaining a competitive electoral environment, free from prohibitively arduous barriers to entry or oligarchical control by the most dominant players. In light of this, Chapter 8 will assess the extent to which minor parties and independent candidates are given reasonable access to the ballot, as well as the effect of unreasonable access restraints on their rights to candidacy and associational freedom. Therefore, while Chapter 7 examined a context in which

the right to candidacy exists in conflict with the party's freedom of association, Chapter 8 highlights the interconnectedness of both rights by assessing the extent to which an individual's right to candidacy may be affected by a regulatory framework which prevents his party from gaining access to the ballot. Similarly, the political party's right to candidacy, as a collective unit, would also be implicated in that instance. This Chapter therefore addresses the 'group' element of the right to candidacy by looking at the extent to which political parties may also be considered right-holders in this context.

This Chapter is divided into four main segments. The first section seeks to define and unpack the concepts of 'free and fair elections' and a 'reasonably level playing field' in order to make clear the meaning ascribed to these terms within the Chapter. Reference will be had to regional and international instruments which reveal emerging consensus on aspects of 'free and fair elections' relevant to the right to candidacy. The jurisprudence of the European Court of Human Rights will also be examined given the light it sheds on the meaning of states' obligation to 'hold free elections' under Article 3 of Protocol 1, and the extent to which it has expounded on how that obligation implicates the right to candidacy. This section will also outline the general meaning and significance of a 'reasonably level playing field' as well as the broad nature of obligations which this contemplates. The second section then briefly examines how these electoral standards may be translated into positive human rights duties.

Having examined the general contours of the state's obligation in this sphere, the third section then seeks to assess the question of institutional implementation, focusing mainly on the legitimacy of judicial intervention in this area. Resort will be had to Ely's theory of representation-reinforcing judicial review in highlighting the special role of the courts as apolitical arbiters, specially placed to scrutinize self-interested legislation which may be aimed at stifling competition and entrenching incumbent power. This section will also address the question of the most appropriate form which this judicial intervention should take. The latter

question emerges in the wake of recent debates among election law scholars, in both the US and Canada, about the propriety of an 'individual rights' approach to electoral process adjudication. Notable scholars in the US, such as Pildes and Issacharoff, have posited that the framework of individual rights is ill-suited for adjudication on the electoral process given the complexity of broader 'structural' issues at play.[1] They have therefore put forward an alternative 'structural' conception of judicial review as more appropriate in this sphere.[2] In examining this 'rights-structure' debate, this section will seek to defend the propriety of an individual rights approach, and will aim to put forward the specific contribution which the right to candidacy offers in this area, given that preceding debates have only centred on the utility of viewing structural questions through the lens of the right to vote.

The fourth and final section of this Chapter will then address general principles which should guide the court in its adjudication of the duty to fulfil, as informed by the values and interests underlying the right to candidacy, as well as the limitations of its institutional competence in this area.

B. IDENTIFYING THE GENERAL REQUIREMENTS OF 'FREE AND FAIR ELECTIONS' AND A 'REASONABLY LEVEL PLAYING FIELD'

As noted in Chapter 5, judicial formulations of the right to candidacy, in both Canadian jurisprudence and that of the ECtHR, have recognised the extent to which the right to candidacy necessarily includes the guarantee of a fair electoral process in which the right may be

[1] Samuel Issacharoff and Richard Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50 Stanford L Rev 643; Richard Pildes, 'Foreword: The Constitutionalization of Democratic Politics' (2004) 118 Harvard L Rev 29.

[2] Ibid.

exercised.[3] However, the more difficult task lies in defining the concept of 'electoral fairness' and, by extension, translating that definition into more concrete positive duties on the part of the State. This section seeks to outline areas of emerging consensus regarding the requirements of 'free and fair elections', specifically as it relates to criteria which implicate the right to candidacy. Resort will be had to the growing body of regional and international declarations and guidelines on fair electoral standards, as well as the jurisprudence of the ECtHR in its interpretation of state parties' obligation to 'hold free elections' under article 3 of protocol 1. Canadian jurisprudence will also be examined, given the extent to which Canadian courts have also identified aspects of electoral organisation which implicate the right to candidacy.

I. THE INTERNATIONALLY RECOGNISED STANDARD OF 'FREE AND FAIR ELECTIONS'

The term 'free and fair elections' has rightly been characterized as a 'rhetorical touchstone'[4] and commonplace 'catchphrase'[5] in describing satisfactory electoral processes among international observers. In recent years, a number of international and regional institutions have sought to expound on the requirements of this standard, including the Inter-Parliamentary Union (IPU),[6] the OSCE,[7] the Venice Commission[8] and the National Democratic Institute

[3] See Chapter 5.

[4] Eric Bjornlund, *Beyond Free and Fair: Monitoring Elections and Building Democracy* (Woodrow Wilson Press 2004) 96.

[5] Jorgen Elklit and Palle Svensson, 'What Makes Elections Free and Fair?' (1997) 8.3 Journal of Democracy 32.

[6] Inter-Parliamentary Council, *Declaration on Criteria for Free and Fair Elections* (154th Session, 26 March 1994).

[7] Conference on Security and Cooperation in Europe, *The Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension* (Copenhagen, 29 June 1990); OSCE, *Election Observation Handbook* (6th edn, OSCE/ODIHR 2010); OSCE, *Existing Commitments for Democratic Elections in OSCE Participating States* (OSCE/ODIHR 2003).

[8] Venice Commission, *Code of Good Practice in Electoral Matters* (52nd Session, 19 October 2002).

(NDI).[9] In most general terms, the 'free' aspect of the standard has been taken to require a political environment free of intimidation in which electoral activities such as voting and campaigning may be exercised in the absence of coercion and in which there is respect for fundamental freedoms of speech, association and assembly.[10] The 'fair' element of the standard has been regarded as requiring a 'level playing field' in which all electoral contestants may compete on a reasonably equal basis, with equitable access to the media and, equal and impartial treatment under the law.[11] This section aims to broadly outline aspects of electoral fairness and freedom which directly affect the right to candidacy in an effort to map the general contours of the state's duty to fulfil.

II. ASPECTS OF ELECTORAL FAIRNESS NECESSARY FOR THE REALISATION OF THE RIGHT TO CANDIDACY

While many aspects of electoral organisation may conceivably impact one's right to candidacy, the main criteria of fair elections which most directly implicate the right may be summarized as follows:

(a) The equal opportunity to register as a candidate and to have one's name printed on the ballot;

(b) The reasonable opportunity of all candidates to campaign and to communicate their views to the electorate; and

[9] Patrick Merloe, 'Lessons Learned and Challenges Facing International Election Monitoring' (National Democratic Institute 1999) <https://www.ndi.org/files/3_elect_lessons99.html> accessed 11 December 2014.

[10] OSCE, *Election Observation* (n 7) 22; Elklit and Svensson (n 5) 35; Ron Gould, Christine Jackson and Loren Wells, *Strengthening Democracy: A Parliamentary Perspective* (Dartmouth 1995) 90.

[11] OSCE, *Election Observation* (n 7) 22; Gould (n 10) 90; Elklit and Svensson (n 5) 36; Bjornlund (n 4) 98; Patrick Merloe, 'Electoral Campaigns and Pre-election Issues: The 'Level Playing Field' and Democratic Elections' (National Democratic Institute) <http://iknowpolitics.org/sites/default/files/democratic20elections-english.pdf> accessed 11 December 2014.

(c) The fair and transparent counting of votes as well as an effective and impartial complaints procedure in the event of any alleged breaches of electoral law.

[a] <u>Equal Opportunity to Register as a Candidate without Unreasonable Restrictions</u>

Article 3(1) of the IPU's *Declaration on Criteria for Free and Fair Elections* stipulates that citizens shall have 'an equal opportunity to become a candidate for election'. As highlighted by Eric Bjornlund in his survey of international electoral standards, this widely recognised criterion is included in six other international and regional guidelines.[12] The OSCE's guidelines on *Commitments for Democratic Elections* elaborates on this standard by noting that,

> States must permit candidates to seek elective office, either independently or as representatives of political parties without unreasonable obstacles. Candidacies may be subject only to reasonable and equally applied registration procedures, such as… evidence of a minimum level of public support.[13]

Similarly, the Venice Commission's *Code of Good Practice in Electoral Matters* highlights that signature requirements for registration, as well as filing fees should not be excessive or unreasonable.[14] It has also been emphasized that rules pertaining to registration must be clear and foreseeable, in order to give candidates ample time to meet the relevant requirements.[15] For example, in *Ekoglasnost v Bulgaria*,[16] the ECtHR held that the imposition of additional deposit and signature requirements two months before the general election, infringed the political party's right to present candidates for election and was therefore in violation of its

[12] Bjornlund (n 4) 105.

[13] OSCE, *Commitments for Democratic Elections* (n 7) para 6.2.

[14] Venice Commission (n 8) para 1.3; See also UNHRC, 'General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service' (1996) UN doc CCPR/C/21/Rev.1/Add.7, para 16.

[15] Venice Commission (n 8).

[16] App no 30386/05 (ECHR, 06 November 2012).

Article 3 obligation to 'hold free elections'.[17] The Court highlighted the importance of stability in electoral law, as emphasized in the Venice Commission's *Code of Good Practice*, which recommends that there should be no changes in the fundamental elements of an electoral system less than one year before an election.[18]

The main principle underlying this criterion of reasonable ballot access is that requirements for inclusion on the ballot must not be 'overly burdensome or discriminatory', with the result that eligible citizens are unjustifiably denied the right to stand on account of onerous administrative hurdles.[19] While there is general consensus on this standard in principle, the difficulty arises in establishing what amounts to 'reasonable' requirements, particularly as it pertains to minimum levels of public support necessary to demonstrate the seriousness of one's candidacy. The state's interest in avoiding an unmanageably long ballot dictates that some showing of public support must be necessary, while the right to candidacy demands that its minimum level cannot be so high that it renders registration by smaller political groups a virtual impossibility. This tension will be explored in more detail in subsequent sections of this Chapter, particularly as manifested in United States ballot access cases regarding requirements for minor parties and independent candidates.

[b] Reasonable Opportunity to Campaign and to Communicate one's platform to the Electorate

International guidelines also reveal a great deal of consensus on the requirement that candidates should have reasonable opportunity to present their views to the electorate, including equal

[17] Ibid.

[18] Venice Commission (n 8).

[19] Patrick Merloe, 'Human Rights: The Basis for Inclusiveness, Transparency, Accountability and Public Confidence in Elections (National Democratic Institute 2008) 4 <https://www.ndi.org/files/2338_electionsprinciples_engpdf_07092008.pdf> accessed 11 December 2014.

opportunity of access to publicly controlled media.[20] The IPU Declaration outlines that, 'in order that elections shall be fair, States should take the necessary measures to ensure that parties and candidates enjoy reasonable opportunities to present their electoral platform.'[21] Similarly, OSCE guidelines provide that, 'the free and fair atmosphere needed for effective political campaigning requires the state to provide election contestants equal opportunity to convey their messages to the electorate.'[22]

This principle has also been recognised in the jurisprudence of the European Court of Human Rights. The Court has established that matters regarding unequal access of candidates to the media, and biased election coverage are matters which fall within the purview of the article 3 guarantee to hold free elections and to respect the right to candidacy. In *Communist Party of Russia v Russia*,[23] the government sought to argue that the party's complaint of unequal media coverage was inadmissible *ratione materiae* given that Article 3 did not guarantee parties and candidates equal access to the media.[24] However, the Court reiterated that 'free elections are inconceivable without free circulation of political opinions and information.'[25] It held further that Article 3 cannot attain its goal 'if candidates cannot disseminate their ideas during the electoral campaign'.[26] The Court therefore held that, as a

[20] Bjornlund (n 4) 107; IPU Declaration (n 6) Art 3(4), 4(3); OSCE, Copenhagen Document (n 7); OSCE, *Commitments for Democratic Elections* (n 7) para 7.10; African Union, 'Declaration on Principles Governing Democratic Elections in Africa' (2002) Art IV(5).

[21] IPU Declaration (n 6) Art 4(3).

[22] OSCE, *Commitments for Democratic Elections* (n 7) para 7.3.

[23] App no 29400/05 (ECHR, 19 September 2012).

[24] Ibid para 58.

[25] Ibid para 79.

[26] ibid.

matter of principle, it was competent to examine complaints about the allegedly unequal media coverage of elections under Article 3 of Protocol 1.[27]

This second criterion, which demands that the candidate possess a reasonable opportunity to share his views, underscores the importance of political expression as a central interest underlying the right to candidacy. As noted in Chapter 4 of this thesis, candidacy offers a uniquely meaningful platform from which one may contribute to public debate and help shape the content of the deliberative agenda.[28] These benefits can only be realised if the candidate is given a reasonable opportunity to make his views known.

[c] Post-campaign requirements: Fair and Transparent Vote Counting and Effective and Impartial Complaints and Appeals Procedures

The guarantees of a fair electoral process relevant to the right to candidacy no doubt extend beyond the candidates' opportunity to campaign and quite obviously include the procedure for the counting and tabulation of votes. The IPU's Declaration provides that states have a responsibility to 'ensure the integrity of the process for counting votes.'[29] Similarly, the OSCE guidelines provide that, 'the counting of ballots and determination of results of voting must be a transparent process that is open to observation by representatives of election contestants, as well as other observers.'[30]

The European Court of Human Rights had occasion to address how this requirement implicates the right to candidacy in a series of cases arising from the 2005 Azerbaijan general elections. In these cases, local authorities had taken the decision to invalidate election results,

[27] ibid.

[28] See Chapter 4.

[29] IPU Declaration (n 6) Art 4(2).

[30] OSCE, *Commitments for Democratic Elections* (n 7) para 9.2

on account of alleged irregularities, in a number of constituencies in which the candidates seeking redress may have received a majority of votes.[31] In all cases the Court held that the decision to annul the results was not sufficiently transparent and therefore arbitrarily prevented the applicants from effectively exercising their right to candidacy by affecting their chances of being elected.[32] The Court noted that while Article 3 does not guarantee 'a right to win the election *per se*', it does guarantee 'a right to stand for election in fair and democratic conditions'.[33]

There is also a great measure of international consensus on the fact that fair elections require impartial complaints procedures in which affected candidates may air their grievances and receive timely and effective remedies in the event of violations of their electoral rights.[34] In recognition of this standard, the European Court of Human Rights held that the right to candidacy was violated in the absence of sufficient safeguards to ensure the impartiality of an electoral appeals body,[35] and in the event of an electoral authority's failure to comply with a candidate's successful judicial appeal which ordered the reinstatement of his candidacy.[36]

[31] *Hajili v Azerbaijan* App no 6984/06 (ECHR, 10 April 2012); *Kerimli and Alibeyli v Azerbaijan* App nos 18475/06 and 22444/06 (ECHR, 04 June 2012); *Kermiova v Azerbaijan* App no 20799/06 (ECHR, 30 December 2010); *Mammadov v Azerbaijan (No 2)* App no 4641/06 (ECHR, 10 April 2012).

[32] *Hajili* (n 31) para 49;

[33] ibid.

[34] IPU Declaration (n 6) Art 4(9); OSCE, *Commitments for Democratic Elections* (n 7) para 10.3; Merloe (n 19) 5; African Declaration (n 20) Art IV(6).

[35] *Grosaru v Romania* App no 78039/01 (ECHR, 02 June 2010).

[36] *Petkov and Others v Bulgaria* App nos 77568/01, 178/02 and 505/02 (ECHR, 11 September 2009).

III. THE MEANING AND SIGNIFICANCE OF A 'REASONABLY LEVEL PLAYING FIELD'

This section seeks to unpack the requirements of a 'reasonably level playing field' by looking not only at areas of international consensus, but also by putting forward normative arguments about what this standard should require in light of the values underpinning the right to candidacy.

[a] A 'Reasonably Level Playing Field' does not demand Strict Equality

As noted above, many writers have come to synonymize 'fair' elections with the provision of a 'reasonably level playing field' wherein the criteria outlined above are made available to all candidates on an equal basis and in which there is no unreasonable advantage conferred on some candidates to the exclusion of others. However, it is generally accepted that 'fairness' in the electoral context is not necessarily tantamount to strict equality, such that, some differential treatment between candidates may be permissible provided it occurs on a reasonable and justifiable basis,[37] hence the terminology of a 'reasonably' level playing field. The more complex issues then become the identification of 'reasonable' bases on which such differentiations may be made, the circumstances in which they are appropriate, and the institutions best tasked with making such determinations. Broadly speaking, an analysis of these issues occupies much of the remainder of this Chapter.

In *Figueroa v Canada*,[38] the Canadian Supreme Court advanced its own test for determining whether differential treatment between candidates was constitutional. Following

[37] *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912, para 51; *Longley v Canada (Attorney General)* (2007) 288 DLR (4th) 599 (Ontario Court of Appeal); *Oran v Turkey* App nos 28881/07 and 37920/07 (ECHR, 15 April 2014).

[38] *Figueroa* (n 37).

its statement that 'fairness is not synonymous with formal equality',[39] the Court held that in order to violate section 3 of the Canadian Charter, 'the differential treatment must have an adverse impact upon the applicant's right to play a meaningful role in the electoral process'.[40] The Court in turn characterized a 'meaningful role' as including participation in 'the social discourse and dialogue that the electoral process engenders',[41] as well as the ability to effectively communicate one's views to the general electorate.[42] Here, the Court exhibited a strong appreciation of the fact that a candidate's reasonable opportunity to campaign is a central component of electoral fairness, and the right to candidacy.

[b] A Reasonably Level Playing Field should seek to Minimize the Impact of Disparities in Wealth on the Candidate's Ability to Effectively Campaign

Given the inevitable costs associated with communicating one's views to the electorate, the candidate's ability to effectively campaign is inextricably tied to the amount of financial resources at his disposal.[43] In light of the central importance of creating reasonable opportunities for such communication, it is submitted that a core aspect of providing a 'reasonably level playing field' is an attempt to minimize the distorting impact of wealth differentials on the candidate's ability to have his views heard.

Canadian courts have duly recognised this linkage and have held that exorbitant nomination fees can inhibit a party's capacity to communicate its position by diverting funds

[39] ibid para 51.

[40] ibid.

[41] Ibid para 50.

[42] Ibid para 54.

[43] Merloe (n 11) 14.

which could have otherwise been used for disseminating information to the electorate.[44] More fundamentally, the Canadian Supreme Court has recognised that general inequalities in wealth and income can lead to unequal opportunities to effectively campaign given the potential of those with greater resources to dominate electoral discourse.[45] The Court has therefore acknowledged the usefulness and constitutionality of campaign finance regulations aimed at securing greater equality in this area. In *Libman v Quebec (AG)*,[46] the Supreme Court of Canada noted that,

> If the principle of fairness in the political sphere is to be preserved, it cannot be assumed that all persons have the same financial resources to communicate to the electorate… Elections are fair and equitable only if… parties and candidates are given a reasonable opportunity to present their positions so that election discourse is not dominated by those with access to greater financial resources.[47]

The Canadian Court's egalitarian conception of electoral fairness deeply reflects the Rawlsian notion of the 'fair value of political liberties'. Rawls notes that political liberties, including standing for office, should be guaranteed their fair value[48] such that 'those similarly endowed and motivated should have roughly the same chance of attaining positions of political authority irrespective of their economic and social class.'[49] He notes further that political liberties lose much of their value 'whenever those who have greater private means are permitted to use their advantages to control the course of public debate'.[50]

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[44] *De Jong v Ontario* (Attorney General) (2007) 287 DLR (4th) (Ontario Superior Court).

[45] *Libman v Quebec* (Attorney General) [1997] 3 SCR 569 (Supreme Court of Canada) para 47; Harper v Canada (Attorney General) [2004] 1 SCR 827 (Supreme Court of Canada) para 24.

[46] *Libman* (n 45).

[47] ibid para 47.

[48] John Rawls, *Political Liberalism* (Colombia University Press 1996) 327, 356.

[49] John Rawls, *A Theory of Justice* (Revised edn, Harvard University Press 1999) 197.

[50] Ibid 198.

However, this position lies in stark contrast with the libertarian approach adopted by the United States Supreme Court, which has expressly provided that seeking to level the economic playing field between candidates is *not* a legitimate state aim.[51] In *Buckley v Valeo*,[52] the Court rejected the government's equalisation rationale underpinning its campaign finance regulation by noting that the government may not restrict the speech of some elements of society in order to enhance the relative voice of others.[53] Underlying this assertion is a narrow, negative conception of freedom which is thinly defined as total absence from interference, and which embodies no aspect of internal fairness within it. This is illustrated in the Court's 2011 decision in *Arizona Free Enterprise Club v Bennett*,[54] where the Supreme Court struck down a measure designed to achieve parity between private and publicly funded candidates:

> 'Leveling the playing field' can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom – the 'unfettered interchange of ideas' – not whatever the State may view as fair.[55]

However, in order for meaningful 'interchange of ideas' to take place, it must be ensured that those with greater resources do not stifle the capacity of less fortunate participants to put their views forward. As Justice Kagan's dissent in *Arizona PAC* noted, 'to invalidate a statute… that only provides more voices, wider discussion and greater competition in elections is to undermine, rather than to enforce the First Amendment'.[56] Further, as noted above, such

[51] *Davis v Federal Election Commission*, 128 S Ct 2759, 2773 (2008); *Arizona Free Enterprise Club v Bennett*, 131 S Ct 2806, 2826 (2011).

[52] 424 US 1 (1976).

[53] Ibid 48 – 49.

[54] *Arizona* (n 51).

[55] ibid 2826.

[56] ibid 2835.

attempts at levelling the financial playing field not only further freedom of speech, but also lie at the heart of the positive duty to fulfil the right to candidacy.

Much has been stated about the relative merits of the libertarian and egalitarian approaches to campaign finance taken in the United States and Canada respectively,[57] as well as arguments for and against specific regulatory measures adopted in both jurisdictions.[58] While a detailed examination of those arguments lies outside the scope of this thesis, the main point herein advanced is that the full realisation of the right to candidacy necessarily includes a duty on the State to provide a reasonably level financial playing field wherein candidates possess a fair opportunity to have their views heard. On that basis, there is specific insight to be derived from viewing campaign finance regulation (geared at equalising resources between candidates) through the lens of the right to candidacy. In so doing, there exists an additional justificatory basis for the constitutionality of such measures in principle, as well as undoubted legitimacy for the state's aim of seeking to equalise the relative impact of candidates' speech. As Dworkin notes, the Court's rejection of the equalisation rationale in *Buckley* reveals its failure to recognise that fairness is demanded among citizens not only when they exercise the right to vote, but also in their role as candidates competing for such votes and for the support of their ideas:

> Citizens play two roles in a democracy. As voters they are, collectively, the final referees or judges of political contests. But they also participate, as individuals, in the contests they collectively judge: they are candidates, supporters and political activists… [W]hen wealth is unfairly distributed and money dominates politics, then, though individual citizens may be equal in their vote and their freedom to hear the candidates they wish to hear, they are not equal in their own ability to command the attention of others… When the Supreme Court said, in

[57] Colin Feasby, 'Libman v Quebec (AG) and the Administration of the Process of Democracy under the Charter: The Emerging Egalitarian Model' (1999) 44 McGill LJ 5; Christopher Manfredi and Mark Rush, 'Electoral Jurisprudence in the Canadian and US Supreme Courts: Evolution and Convergence' (2007) 52 McGill LJ 457; Cass Sunsetin, 'Political Equality and Unintended Consequences' (1994) 94 Columbia L Rev 1390.

[58] Colin Feasby, 'Continuing Questions in Canadian Political Finance Law: Third Parties and Small Political Parties' (2010) 47 Alberta L Rev 993; Paige Whitaker, 'The Constitutionality of Campaign Finance Regulation: Buckley v Valeo and its Supreme Court Progeny' (CRS Report for Congress, 18 November 2008).

> the *Buckley* case, that fairness to candidates and their convictions is 'foreign' to the First Amendment, it denied that such fairness was required by democracy. That is a mistake because the most fundamental characterization of democracy – that it provides self-government by the people as a whole – supposes that citizens are equals not only as judges but as participants as well.[59]

[c] <u>A Reasonably Level Playing Field should provide Fair Competition between Incumbents and Challengers with no Unreasonable Advantages conferred upon Incumbents</u>

In addition to seeking to minimize the relative force of differentials in wealth on the electoral process, a reasonably level playing field should also provide an environment in which there are no unreasonable competitive advantages conferred on those currently holding political power. As is widely recognised, legislators occupy a position of acute conflict of interest in making the electoral rules for a contest in which they are themselves likely to compete.[60] Given the likelihood of electoral rules which serve to entrench incumbent power, it bears emphasizing that a reasonably level playing field demands general equality of opportunity between incumbents and challengers regarding candidate registration, access to the media and in the ability to win votes.

One particular challenge to this criterion is the phenomenon of 'gerrymandering' in which incumbent legislators delimit electoral districts in a manner which groups their assumed supporters together in order to increase the incumbent's chances of electoral victory.[61] This practice is particularly common in the United States where academic opinion on its legitimacy among constitutional scholars remains divided: it has been both decried for its blatant

[59] Ronald Dworkin, 'The Curse of American Politics' (1996) NY Rev Books 19, 23.

[60] Pildes (n 1) 43; Rawls, *Theory of Justice* (n 49) 199.

[61] Merloe (n 11) 12.

unfairness,[62] and defended as constitutionally permissible.[63] This issue has also arisen in Canada, albeit to a lesser extent.[64] While this section does not aim to settle that debate, it is submitted that when viewing gerrymandering through the lens of the right to candidacy, there is, at the very least, a strong presumption against its constitutionality given the extent to which it provides a decidedly competitive advantage to incumbents by tilting the electoral playing field in their favour.

C. TRANSLATING ELECTORAL STANDARDS INTO POSITIVE HUMAN RIGHTS DUTIES

The foregoing section outlined the general requirements of free and fair elections as derived from international and regional guidelines, as well as the central values and interests underpinning the right to candidacy. It may be argued that the standards outlined above, though laudable, are not necessarily tantamount to positive human rights duties given their generality and, in some cases, lack of judicial enforceability. This section aims to counter such arguments by highlighting the extent to which the criteria outlined above are sufficiently determinate aspects of the state's duty to fulfil. It will further be highlighted that these positive duties require a broad array of institutional implementation, not solely limited to enforcement by the courts, such that, justiciability need not serve as the litmus test for a duty's feasibility.

[62] Pildes (n 1) 56; Samuel Issacharoff, 'Gerrymandering and Political Cartels' (2002) 116 Harvard L Rev 593; Guy-Uriel Charles, 'Judging the Law of Politics' (2005) 103 Michigan L Rev 1099, 1137 – 1139.

[63] Larry Alexander and Saikrishna Prakash, 'Tempest in an Empty Teapot: Why the Constitution does not Regulate Gerrymandering' (2008) 1 William and Mary L Rev 1; Nathaniel Persily, 'In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders' (2002) 116 Harvard L Rev 649.

[64] See Yasmin Dawood, 'Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review' (2012) 62 University of Toronto Law Journal 499, 537 – 540.

I. POSITIVE DUTIES AS OPTIMISATION REQUIREMENTS

In addressing the issue of the determinacy of the positive duty to fulfil the right to candidacy, it will be recalled that Chapter 5 of this thesis outlined the extent to which positive duties are best regarded as what Alexy terms 'principles' rather than binary 'rules'.[65] As Fredman notes, instead of regarding positive duties as fixed rules, where it is possible to delineate precisely when they are breached, positive duties may be best characterized as 'principles' which are to be realised to the greatest extent legally and factually possible, in the light of competing principles which may take priority in a given case.[66] Alexy therefore terms principles 'optimisation requirements', 'characterised by the fact that they can be satisfied to varying degrees', the appropriate degree of satisfaction being dependent upon the priority given to opposing legal principles, and on the factual circumstances of each case.[67]

It is therefore accepted that the duties outlined above would not be absolute, given the presence of competing values and aims in a democratic polity, among which open competition, though important, remains only one.[68] For example, the criterion of equal opportunity to register as a candidate and to have one's name printed on the ballot would impose a positive duty on the state to institute only reasonable and equally applied requirements for ballot access which do not unduly burden any particular group or individual. However, this would have to be balanced against the competing principle of the state interest in a shorter ballot as motivated by aims of political stability, majority representation, and avoiding voter confusion. The degree to which the principle of open access to the ballot may be realised would therefore depend on

[65] Robert Alexy, *A Theory of Constitutional Rights* (OUP 2004) 47 – 48.

[66] Sandra Fredman, *Human Rights Transformed* (OUP 2008) 71 – 72.

[67] Alexy (n 65) 47 – 48.

[68] Pildes (n 1) 42; Daniel Farber, 'Implementing Equality' (2004) 3(2) Election Law Journal 371, 377.

the urgency and necessity of the particular state interests in question, as determined by the factual circumstances of the given electoral system. However, the importance of the values underlying the duty to fulfil would demand that any competing state interest must be of a sufficiently vital nature, with any measures curtailing the right being both necessary and suitable to further that interest.[69]

One may also consider the positive duty to provide a reasonably level playing field by minimizing the impact of disparities in wealth on the candidate's ability to effectively campaign. In order for this duty to be meaningful, one need not specify the precise steps to be taken by the state on an administrative or budgetary level. As Fredman notes, such a determination would undermine the autonomous decision-making power of the state in its implementation of the duties in question.[70] It is therefore worth noting that my espousal of a duty to level the financial playing field does not contemplate a rights-based principle of mandatory public funding for electoral campaigns. However, there are some writers who have taken this approach.[71] Most notably, Jospeh Grcic, building on Rawls 'fair value of political liberties', posits that in order for the fair value of the right to candidacy to be fully guaranteed, there should be a constitutional right to 'political leave'.[72] This includes 'the right to be a candidate for public office, the right to have the campaign publicly funded, and the right to return to one's place of employment at the end of the campaign or term in office'.[73] Quite apart from the logistical difficulties inherent in Grcic's submission, his formulation of the right

[69] See Alexy (n 65) 67 where he notes that the principles of necessity and suitability are important in determining what is 'factually' possible as one seeks to optimise competing principles.

[70] Fredman (n 66) 77.

[71] Edward Foley, 'Equal-Dollars-Per-Vote: A Constitutional Principle of Campaign Finance' (1994) 94 Columbia L Rev 1204, 1211 – 12; Jasmin Raskin and John Bonifaz, 'The Constitutional Imperative and Practical Superiority of Democratically Financed Elections' (1994) 94 Colombia L Rev 1160.

[72] Joseph Grcic, *Free and Equal: Rawls' Theory of Justice and Political Reform* (Algora 2011) 179.

[73] ibid.

remains objectionable in principle given the degree of rigidity with which issues of public resource allocation are presented. This ignores the complexity of competing values and interests as well as the decisional autonomy of the legislature in this area.[74]

Notwithstanding, eschewing a detailed and mandatory requirement of public funding does not leave the duty void of all determinacy. As Rawls notes, guaranteeing the fair value of political liberties may reasonably require applying limits on the speech of those with greater resources in order to ensure that the voices of those with lesser means are not drowned out.[75] Pursuing such measures would in itself involve a balance of competing principles: the duty to level the financial playing field could only be realised to the greatest extent legally and factually possible, bearing in mind the rights of others to have their speech uninhibited. In light of this, Rawls notes that measures which place limits on campaign expenditure and contributions, although central to achieving the fair value of political liberties, must also be compatible with the central role of free political speech as a basic liberty.[76] He further posits that such compatibility requires limiting restrictions to the volume of one's speech (with no restrictions on content), ensuring that the measure doesn't unduly burden any political group, and that it is carefully designed to achieve the fair value of political liberties, such that, there is no considerably less restrictive alternative for achieving the same end.[77]

It has also been noted that limits on campaign speech, if set too low, may serve to inhibit effective challenges to incumbents, given that current office-holders generally require less

[74] Rawls, *Political Liberalism* (n 48) 362.

[75] Ibid 357.

[76] ibid.

[77] ibid 357 – 8.

expenditure for their campaigns than newcomers.[78] In light of this, Dawood notes that equalising wealth differentials must also be balanced against the competing objective of ensuring that challengers are able to effectively compete against incumbents.[79]

Therefore, in navigating the implementation of the duty to provide a reasonably level playing field, far from encountering blind indeterminacy, one discovers a number of guiding principles which inform how constitutionally permissible measures should be structured.

II. THE NECESSITY OF BROAD INSTITUTIONAL IMPLEMENTATION

In analysing the content of the obligations which comprise the positive duty to fulfil, it becomes clear that a broad array of institutional power is necessary for its full realisation. Therefore, while courts do possess a special role in the enforcement of this duty, the principles which embody the duty are also applicable in guiding the content and administration of electoral rules at the legislative and policy-making levels.[80] This constitutes what has been termed the 'proactive normative role' of human rights 'where they guide political and executive decision-making so that legislation, policy and administration are formulated to meet human rights demands.'[81]

This role is of paramount importance in implementing the positive duty to provide free and fair elections. As noted above, such elections require the setting up of transparent and impartial procedures for the counting of votes, and for the timely appeal of any alleged

[78] Yasmin Dawood, 'Democracy, Power and the Supreme Court: Campaign Finance Reform in Comparative Context' (2006) 4(2) International Journal of Constitutional Law 269.

[79] ibid 272.

[80] Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 Law and Philosophy 451, 454.

[81] Fredman (n 66) 33.

breaches. In light of this, some international guidelines have contemplated an intermediary role for electoral commissions in the processing of such complaints, before such appeals may ultimately be brought before the court.[82] Similarly, it has been noted that independent commissions should play a central role in the process of delimiting electoral districts, in order to avert the anti-competitive effects of partisan gerrymandering.[83] The presence of such commissions is central in those areas, like redistricting, where there exists an institutional dilemma between the legislature and the courts, in which the courts are ill-equipped to make large-scale, structural changes, while the legislature lacks the requisite impartiality to do so. It is therefore clear that a central aspect of the duty to fulfil is the creation and oversight of transparent institutions and processes for the fair administration of elections. Before examining the legitimacy and scope of the role of the courts in this sphere, it is therefore necessary to acknowledge this broader institutional framework within which courts ought to be operating, given that the safeguarding of electoral rights need not lie exclusively within their domain.[84]

D. THE LEGITIMACY AND SCOPE OF JUDICIAL INTERVENTION IN ENFORCING THE DUTY TO FULFIL

I. THE LEGITIMACY OF JUDICIAL INTERVENTION IN QUESTIONS CONCERNING THE ORGANISATION AND STRUCTURE OF THE ELECTORAL PROCESS

As outlined above, the duty to fulfil the right to candidacy encompasses a range of subsidiary positive duties, the fulfilment of which involve the balancing of many competing values which

[82] Venice Commission (n 8) 30.

[83] Pildes (n 1) 78.

[84] As Pildes notes, the role of the court is best derived from a functional analysis of the strengths and weaknesses of various institutions in the overall institutional architecture of democracy: see Pildes (n 1) 42.

are operative in an electoral system such as competition, political stability, responsiveness and representativeness. A state's choice of electoral system broadly reflects its preference regarding the optimal trade-off among these values: the choice of a single member plurality system is generally regarded as prioritising the political stability derived from majority government while proportional representation systems give greater primacy to representational parity and open competition.[85] It is generally accepted that states enjoy a wide degree of latitude in this sphere, with a broad variety of electoral systems all classified as genuinely democratic.[86] This brings to the fore questions of the competence and democratic legitimacy of courts in overseeing aspects of electoral organisation, such as its level of competitiveness, which inevitably involve a complex balance of the competing values listed above. Yet, the duty to fulfil the right to candidacy contemplates judicial consideration of such questions given that 'fair competition' in a 'reasonably level playing field' are taken to form a central part of the right's very content. This section therefore seeks to defend the democratic legitimacy of judicial intervention in this area, and to outline the contours of its acceptable limits.

[a] <u>The Relevance of the Textual Foundation of the Court's Power</u>

In examining the legitimacy of judicial intervention in this sphere, it is important to consider the constituent document from which a given court derives its power. For example, in examining the European Convention on Human Rights, Article 3 of Protocol 1 expressly provides:

[85] Andrew Reynolds, Ben Reilly and Andrew Ellis, 'Electoral System Design: The New International IDEA Handbook' (International IDEA 2005); Venice Commission, 'Report on Electoral Systems: Overview of Available Solutions and Selection Criteria' (Adopted at 57th Plenary Session 2003).

[86] Ibid.

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.[87]

The ECHR therefore includes an express obligation to 'hold free elections', from which the Court subsequently derived the rights to vote and stand for election.[88] It is therefore important to note that within the context of ECtHR jurisprudence, the Court is necessarily operating from an express textual mandate which requires states to 'hold free elections' under conditions which ensure free expression of the people's choice. The Court's intervention on questions of electoral organisation therefore flows somewhat naturally and requires less justification given the clear textual hook on which it hangs. However, the same is not true for judicial intervention on the domestic plane in Canada and the United States where such an express provision is not operative. It is in these domestic contexts that the current examination of judicial legitimacy is primarily focused.

As previously noted, section 3 of the Canadian Charter of Rights provides that 'Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein'.[89] While this includes no express right to free and fair elections, Canadian courts have interpreted the right to candidacy as a right to stand in a 'fair election' and to 'meaningfully participate' in the electoral process.[90] This is in keeping with the broad and purposive approach to constitutional rights which is embedded in Canadian rights adjudication.[91] On that basis, the court has looked beyond the

[87] ECHR, Protocol 1, Art 3.

[88] *Mathieu-Mohin v Belgium* (1988) 10 EHRR 1.

[89] Canadian Charter of Rights and Freedoms, section 3.

[90] *Figueroa* (n 37) para 30.

[91] See *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 344; *Figueroa* (n 37) para 20.

formal conferral of the right, into questions of electoral organisation.[92] However, the fact that the concept of 'living constitutionalism' is firmly rooted in Canadian jurisprudence means that such purposive expansion by the court is arguably more easily legitimised, in principle, than in a context such as the United States where there is still live debate between originalists and non-interpretivists regarding the importance, or lack thereof, of rigidly adhering to the plain reading of the constitutional text.[93] It is therefore important to note that questions regarding judicial legitimacy generally take on a slightly different complexion in Canada than they would in the United States.[94] This is no different regarding judicial intervention in the democratic process.

As aforementioned, the United States constitution includes neither an express right to vote nor a right to candidacy. Judicial intervention in the electoral process has therefore been grounded in the First Amendment and the equal protection clause. There is therefore even less textual support for rights-based judicial involvement in the democratic process than exists in Canada. Additionally, US court intervention raises background questions regarding the underlying legitimacy of judicial review more generally (given that the constitution does not expressly provide for such review); such questions remain of less relevance in Canada given that the Canadian Charter expressly provides for judicial enforcement.[95] Canadian courts have also eschewed the American 'political questions doctrine', which provides that some questions are inherently non-justiciable given their political character.[96] The US Supreme Court had to overcome this doctrinal hurdle before venturing into the 'political thicket' in its adjudication

[92] *Figueroa* (n 37).

[93] Peter Hogg, 'The Charter of Rights and American Theories of Interpretation' (1987) 25(1) Osgoode Hall Law Journal 87, 97.

[94] Hogg (n 93) 88; Patrick Monahan, 'Judicial Review and Democracy: A Theory of Judicial Review' (1987) 21 Univ of British Colombia L Rev 87, 92.

[95] Monahan (n 94) 92 – 93; Hogg (n 93) 88.

[96] Peter Hogg, *Constitutional Law of Canada* (5th edn, Carswell 2007) 36-20.2; *Operation Dismantle v The Queen* [1985] 1 SCR 441, 472.

of voting apportionment cases.[97] In principle, no such hurdle was operative in Canadian jurisprudence before its consideration of similar questions.[98]

However, there are also notable similarities between the two North American states which render a joint examination of judicial legitimacy both meaningful and relevant in this sphere. First, it is important to note that neither court is working from an express textual mandate to regulate the electoral process in the protection of constitutional rights. Both have therefore struggled to clearly define the precise limits of their authority in this area, with sharp disagreements among justices on this question in both polities.[99] Secondly, both courts are seeking to affirm individual electoral rights within the context of a first-past-the-post, single member plurality system which does not structurally favour minor parties and independent candidates. Questions therefore arise regarding the courts' authority to advance its own order of values, which may be against those reflected in the wider political system.[100] Thirdly, both courts are engaged in what Waldron terms 'strong judicial review' where courts possess the power to strike down legislation, as opposed to merely declaring it incompatible.[101] Questions of democratic legitimacy are no doubt heightened in such cases.[102]

The question of the appropriate limits of judicial intervention in this sphere is therefore live in both polities. However, before one can meaningfully address the question of permissible limits, it is first necessary to examine the underlying basis of the court's legitimacy from a theoretical perspective, such that, the scope of intervention may then be formulated and situated

[97] *Baker v Carr* 369 US 186 (1962).

[98] *Reference re Provincial Boundaries (Sask.)* [1991] 2 SCR 158.

[99] See *Figueroa* (n 37) (Le Bel J dissenting); *Vieth v Jubelirer* 541 US 267 (2004).

[100] *Figueroa* (n 39) (Le Bel J dissenting); *Williams v Rhodes* 393 US 23, 60 – 61 (1968).

[101] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale Law Journal 1346, 1354 – 57.

[102] Ibid.

within the boundaries of this underlying legitimacy. The following section therefore seeks to provide a general account of the democratic legitimacy of judicial intervention in this area, bearing in mind the more general institutional capabilities and powers of the court, common to both jurisdictions.

[b] Legitimacy and Representation-Reinforcing Judicial Review

As noted in Chapter 6, the issue of the democratic legitimacy of judicial review is a vast and oft-ploughed terrain within the landscape of constitutional and human rights theory.[103] This section does not aim to reproduce the contours of this area in its entirety, but rather, it seeks to focus specifically on the democratic legitimacy of judicial review involving the organisation and 'fairness' of the electoral process. As Fallon notes, there is much to be gained from specific examinations on judicial legitimacy geared at particular constitutional rights, given that generalised arguments tend to overlook the fact that the entrenchment of some rights, such as voting, are actually necessary for democratic legitimacy to exist.[104] It will therefore be submitted that a constitutionally entrenched right to candidacy, which includes a positive duty to fulfil (as outlined above), provides the court with a fundamentally democracy-enhancing function in its enforcement of this positive duty. Resort will be had to Ely's representation-reinforcing theory of judicial review as possessing particular salience in this area.

In what has been termed a process-based theory of judicial review, Ely advances a conception of constitutional adjudication in which the court is primarily concerned with the fairness and openness of the political process, as opposed to an espousal of substantive goods or fundamental values.[105] He notes that, 'rather than dictate substantive results [the court]

[103] See Chapter 6.

[104] Richard Fallon, 'The Core of an Uneasy Case for Judicial Review' (2008) Harvard L Rev 1693, 1724.

[105] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 103.

intervenes only when the 'market', in our case the political market, is systematically malfunctioning'.[106] He defines malfunction as occurring when the process is undeserving of trust:

> 'When (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or vote, representatives beholden to an effective majority are systematically disadvantaging some minority… and thereby denying that minority the protection afforded other groups by a representative system.'[107]

For Ely, the source of the court's legitimacy is the fact that, under this model, the judiciary supposedly refrains from adjudicating on substantive values and focuses instead on the 'value-neutral' question of the representativeness of the political process. However, this aspect of Ely's theory has rightly been subject to intense criticism on the basis that adjudication on the democratic process is itself concerned with substantive values.[108] As Habermas notes, Ely is inconsistent insofar as 'those procedural and organisational principles that should guide the Court definitely have a normative content.'[109]

Notwithstanding this flaw in Ely's theory, the representation-reinforcing model of judicial review may still aid us in establishing the democratic legitimacy of judicial involvement in this area. As Fredman notes, it is neither possible nor necessary to clothe the court in a value-neutral mantle in order to establish its democratic legitimacy.[110] Given that constitutional adjudication necessarily involves normative value judgments, the question becomes one of the kinds of values being advanced by the court, and whether these serve to

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[106] ibid.

[107] Ely (n 105) 103.

[108] Laurence Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 Yale Law Journal 1063, 1071; Ronald Dworkin, 'The Forum of Principle' (1981) 56 NYU L Rev 469, 503 – 4; Fredman (n 66) 110.

[109] Jürgen Habermas, *Between Facts and Norms* (MIT Press 1996) 265 – 6.

[110] Fredman (n 66) 110.

undermine or enhance democracy.[111] In the area of adjudication on the fairness and competitiveness of the electoral process, Ely's representation-reinforcing theory of judicial review highlights the extent to which the court is particularly well-suited to advance the democracy-enhancing values of political equality and responsiveness.

As Hasen notes, regardless of the extent to which constitutional scholars have rejected many aspects of Ely's theory, the part which has 'survived the test of time is his idea that courts should intervene in the face of political market failure'.[112] As outlined above, this market failure includes situations in which those in power are blocking off the channels of political change through incumbency-entrenching measures. In his representation-reinforcing theory of review, Ely highlights the extent to which courts are particularly well-suited to detect these instances given their objective positioning outside of the political process.[113] He anchors this aspect of his argument in the well-known *Carolene Products* footnote in which Justice Stone noted that 'more exacting judicial scrutiny' would be necessary in cases where 'legislation restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation'.[114] Ely notes that this paragraph of the footnote suggests that, 'it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open'.[115] This is the precise role of the court which is contemplated in its enforcement of the duty to fulfil the right to candidacy. Adjudication in this area seeks to ensure that the legislature

[111] Ibid.

[112] Richard Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v Carr to Bush v Gore* (NYU Press 2003) 4.

[113] Ely (n 105) 103.

[114] *United States v Carolene Products Co.* 304 US 144 (1938).

[115] Ely (n 105) 76.

is not inhibiting the channels of political change by unjustifiably denying participatory and communicative opportunities to those wishing to stand for office.

Ely's theory is also significant for the extent to which he looks beyond the formal conferral of electoral rights, to the deeper questions of whether any systemic or structural factors serve to inhibit representational equality.[116] For example, in a less-quoted section of his text, he notes the importance of fully safeguarding candidates' access to the ballot and the extent to which this is centrally linked to the full realisation of the right to vote. After noting that the denial of the right to vote is the quintessential democratic stoppage, he goes on to note that,

> Other practices that go to the core of the right of the people to choose their representatives and express their preferences are the denial of places on the ballot to minor parties and the refusal to seat representatives the people have selected.[117]

Ely's theory therefore establishes the necessity of judicial intervention in this area given the conflicted position occupied by elected representatives who would be unable to objectively identify and repair stoppages in the democratic process.[118] As Colin Feasby has highlighted, the 'Court is uniquely suited, and Parliament is particularly ill-equipped, to police self-interested behaviour on the part of Parliament'.[119]

However, as Hasen notes, even though Ely's process theory lays a strong foundation for *why* courts should intervene, it does not tell us *how* and to what degree.[120] These latter

[116] Ibid 103.

[117] ibid 117.

[118] Ibid 103.

[119] Colin Feasby 'Freedom of Expression and the Law of the Democratic Process' (2005) 29 Supreme Court L Rev (2d) 237, 289.

[120] Hasen (n 112) 6.

questions form the subject of the sections which follow. First, a general rights-based approach to adjudication will be defended against claims made by some theorists for a structural approach to judicial review. Subsequently, general principles which should guide the court in its intervention will be outlined, in an effort to address the question of the appropriate limits of judicial involvement in this area.

II. DEFENDING THE SUITABILITY OF A RIGHTS-BASED APPROACH TO ELECTORAL PROCESS ADJUDICATION

In recent years, election law scholarship in the United States has been dominated by authors such as Pildes and Issacharoff who have argued for a judicial focus on the overarching structural and systemic factors which influence democratic politics. Instead of seeking to vindicate individual rights, in a field where a number of group and coalitional dimensions determine power, they argue that courts should instead focus on the 'second-order conditions' of electoral competition.[121] It has therefore been argued that the traditional conceptions of individual rights and equality are ill-fitted and 'dangerous' tools in adjudication on the electoral process.[122] Similar structuralist trends are also present in Canadian literature, albeit to a lesser degree.[123] It is important to engage with structuralism's rejection of the individual rights framework, given that the duty to fulfil necessarily contemplates judicial intervention in areas of electoral procedure in order to vindicate the right to candidacy. It will be argued that the individual rights framework offers the court a more democratically legitimate role. Additionally, given that the right to candidacy has largely been omitted from this rights-structure debate, it will be shown that this right, as herein formulated, offers a particularly

[121] Pildes (n 1) 54.

[122] Ibid.

[123] Dawood (n 64) 511.

useful lens through which courts may view and address the background, structural issues of electoral competition.

[a] The Main Tenets of the Structuralist Approach

The 'structural' approach, as put forward by Pildes, Karlan and Issacharoff, finds its root in Ely's anti-trust approach to judicial intervention where he notes that courts should intervene when the political market is 'systematically malfunctioning'.[124] Pildes and Issacharoff build upon Ely's political market paradigm in highlighting the extent to which the two major parties in the US have engaged in partisan 'lock-ups' of the political market by pursuing incumbency entrenching legislation.[125] However, unlike Ely, they argue against a rights-based approach to intervention and posit instead that courts should focus on the 'second-order' 'background rules that structure partisan political competition'.[126] One example often advanced by structuralists is that of partisan gerrymandering. In this area, they emphasize the extent to which the court has had difficulty articulating the specific infringement of individual rights at stake when electoral boundaries are drawn based on voters' political affiliations.[127] Pildes notes that these cases involve structural judgments about the fair distribution of seats among groups and do not implicate the individual right to vote.[128] Similarly, Karlan and Issacharoff argue that a rights-based approach to gerrymandering is unhelpful given that the First Amendment has nothing to say about which groups of voters deserve to have districts drawn that reflect their interests.[129]

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[124] Ely (n 105) 102 – 103; Pildes and Issacharoff (n 1) 710.

[125] Pildes and Issacharoff (n 1) 644.

[126] Ibid 648.

[127] See *Vieth* (n 99); Issacharoff (n 62); Samuel Issacharoff and Pamela Karlan, 'Where to Draw the Line?: Judicial Review of Political Gerrymanders' (2004) 153(1) UPenn L Rev 541; Pildes (n 1).

[128] Pildes (n 1) 59; Charles (n 62) 1132 – 3.

[129] Issacharoff and Karlan (n 127) 563 – 4; Charles (n 62) 1132.

In this area, among others, structuralists argue for a shift away from an individual rights approach towards a focus on 'the systemic consequences that institutional structures and legal rules generate for political practice'.[130] Pildes notes that a conventional understanding of individual rights and equality is ill-suited for this task given that narrowly focusing on the individual often ignores the 'coalitional matrix that determines actual political power'.[131] On this basis, structuralists criticize the court for failing to adequately redress self-entrenching measures in the areas of gerrymandering, ballot access rules, and campaign finance regulation.[132]

[b] <u>Political Candidacy as a 'Structural Right'</u>

Among the many criticisms of the structuralist account, that of Guy-Uriel Charles stands apart as particularly formidable. Charles outlines the extent to which the structuralist approach is based on a mistaken assumption that individual political rights do not also possess a structural dimension.[133] He notes that the theory overlooks the inherently dualistic nature of election law claims which make it untenable to seek to discretely separate individual rights from structural concerns.[134] As Charles notes, 'one cannot make sense of individual rights unless one comes to terms with the institutional and electoral structures that provide content to those rights'.[135] On this basis, Yasmin Dawood has posited that electoral rights are best conceived of as 'structural rights' which he defines in the following terms:

[130] Pildes (n 1) 41.

[131] Ibid 54.

[132] Pildes (n 1); Issacharoff (n 62); Karlan and Issacharoff (n 127); Pildes and Issacharoff (n 1).

[133] Charles (n 62) 1124.

[134] ibid 1120.

[135] ibid 1124.

> 'Structural rights [are] individual rights that take into account the broader institutional framework within which rights are defined, held and exercised… on this view, rights and structure are not distinct; instead, structure is contained within the very definition of a right.'[136]

On this view, the main obstacle to adequately addressing structural, anti-competitive practices is not a rights approach in itself, but rather, it stems from whether the right in question has been formulated, and applied, in a manner which places sufficient emphasis on the institutional factors necessary for its effective realisation.[137] It is submitted that the right to candidacy is of particular utility in this area, given that it has been conceptualised with the inherent structural component of 'free and fair elections with a reasonably level playing field'.

The usefulness of the right to candidacy in this area is particularly evident when one assesses the structuralist criticism that the court's individual rights approach has been ineffective at adequately addressing anti-competitive ballot access laws. However, a closer examination of the cases in question reveal that the problem does not lie with the framework of individual rights *per se*, but rather, on how the court conceptualises and applies electoral rights in a given case. For example, in *Timmons v Twin Cities*,[138] the Supreme Court upheld a ban on fusion candidacies which would have allowed third parties to gain additional influence by officially endorsing a candidate who is also listed under another party.[139] Such cross-endorsement is of major assistance to third parties seeking to build their platform. Notwithstanding, the Supreme Court upheld the ban on fusion candidacies, noting that the measure only minimally affected third parties' rights and was pursued in the furtherance of the

[136] Dawood (n 64) 519 – 520.

[137] Ibid 537.

[138] 520 US 351 (1997)

[139] Ibid.

legitimate aim of fostering a 'healthy two-party system'.[140] Pildes and Issacharoff criticize *Timmons* by noting that the 'unilluminating' individual rights approach caused the court to overlook the pernicious nature of the law's anti-competitive effect.[141] They note that under a 'political markets' or structuralist analysis, the anti-fusion laws would have triggered exacting judicial scrutiny.[142] However, one need not look further than Justice Steven's compelling dissent in *Timmons* to realise that an individual rights framework, in and of itself, was not the cause of the objectionable result arrived at by the majority.

Justice Stevens equally employed an individual rights approach and came to the conclusion that the fusion ban was an unconstitutional infringement on the right of political parties to choose and support their candidate of choice.[143] The difference lay in how each judgment conceived of the content of the political rights in question, as well as the extent to which surrounding institutional factors affected the right's realisation. For example, Justice Stevens insightfully noted that 'the right to be on the election ballot is precisely what separates a political party from any other interest group'.[144] Here, Justice Stevens recognises the right to candidacy as part and parcel of the party's right to association and therefore acknowledges the seriousness of a law which inhibits a third party's opportunity to appear on the ballot.[145] It is therefore evident that a right to candidacy, as encompassing a duty to provide a reasonably level playing field, would have offered a particularly useful lens through which this ballot access case could have been viewed by the court.

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[140] *Timmons* (n 138) 367.

[141] Pildes and Issacharoff (n 1) 685.

[142] Ibid.

[143] *Timmons* (n 138) 372 – 3.

[144] ibid 373.

[145] Ibid 378.

Similarly, the right to candidacy may be said to offer useful insight in identifying the individual harm at play in gerrymandering cases. As noted above, structuralists have highlighted the extent to which there is no clearly identifiable harm to voters' representational rights in the event of districts being drawn according to one's political affiliation.[146] Issacharoff notes that this is particularly the case when one considers bipartisan gerrymandering which has been agreed upon by both major parties.[147] However, this conclusion ignores the effect of such measures on the candidate's right to run in a reasonably level playing field. This right is undoubtedly infringed in a district in which boundaries have been drawn which confer a substantial competitive advantage on one or both parties, to the exclusion of other candidates in the race. As Charles notes, 'Of what use are liberal ballot access laws, or generous early filing deadlines, or low contribution limits, if the state can shape political outcomes by the manner in which it aggregates voters through the construction of electoral institutions?'[148]

Another area of interest to structuralists is that of campaign finance regulation. Pildes and Issacharoff note the importance of such regulation and its effects on the competitiveness of the political environment.[149] Yet, they lament the fact that the Supreme Court's intervention has also been inadequate in this area.[150] However, as noted above, the right to candidacy is also of utility in this area given that it offers an additional justificatory basis for judicial oversight, on the basis that the provision of a reasonably level playing field has been taken to include an equal opportunity to campaign and to have one's views heard, regardless of wealth or political affiliation. Yet again, the problem lies not in individual rights per se, but in which rights are

[146] Farber (n 68) 375.

[147] ibid.

[148] Charles (n 62) 1139.

[149] Pildes and Issacharoff (n 1) 688.

[150] ibid.

recognised by the Court and how those rights are structured. As Dworkin notes, the Court's objectionable campaign finance jurisprudence stems partially from its limited conception of political equality which ignores the rights of candidates, and is focused solely on the rights of voters.[151]

[c] <u>The Suitability and Legitimacy of the Individual Rights Approach</u>

Quite apart from the unique insights offered by the right to candidacy in this area, the individual rights approach is also to be preferred to its structuralist rival given that the former provides the court with a more democratically legitimate role. Structural theorists have been unclear about the constitutional basis on which courts will become seized of these underlying structural issues, if not through the avenue of individual rights. As Charles notes, a rights framework provides the court with a pre-established mechanism for addressing structural values and provides 'the patina of constitutional legitimacy', given that the court is not broadly embarking on matters of political philosophy or policy without reference to specific cases of individual harm.[152]

However, Pildes is of the opposite opinion and argues that the expansive nature of political rights makes judicial overreach more likely in that area.[153] He notes further that if the courts adequately protect the 'second-order conditions' of electoral competition, there would be less need for judicial intervention to safeguard 'first-order' individual rights issues.[154] However, even though structuralists argue for a judicial focus on competition, one of the main criticisms of their approach is the lack of a precise theory of what amounts to 'appropriate

[151] Dworkin (n 59) 23.

[152] Charles (n 62) 1128; Dawood (n 64) 524.

[153] Pildes (n 1) 48.

[154] Richard Pildes, 'The Theory of Political Competition' (1999) 85 Virginia L Rev 1605, 1619.

competition' or a clear normative baseline against which courts may measure competitiveness.[155] Issacharoff responds by noting that it is still possible to identify anticompetitive behaviour without a comprehensive theory on what amounts to 'optimal competition' in the political market.[156] While this is true, the identification of such behaviour in the absence of a comprehensive theory is a role much more suited to the individual rights approach, which is inherently reactive and ad hoc. On the other hand, structuralists seem to envisage a proactive role of the court in addressing structural issues which thereby lessen the likelihood of future rights harm. This broader role contemplates some overarching normative theory on optimal competitiveness, which courts are not institutionally best placed to espouse.

Given the wide range of competing values at play in a given electoral system, many writers in this area agree that judicial minimalism should obtain in matters regarding the priority to be placed between values of representativeness, competition, responsiveness and stability.[157] Farber notes that trying to maximise a single value in isolation is not the best approach: 'A better strategy is to "satisfice": try to achieve a minimum satisfactory level of each one. In short, the best the Court can do is to prevent any one value from taking too serious a hit'.[158] He notes further that courts should seek to maintain a floor of fairness, as opposed to aspiring to a ceiling as contemplated by the structuralists.[159] This more modest approach resonates with Ely's theory of judicial intervention in specific cases of political market malfunction in order to redress instances of political inequality, as and when they arise. A proactive posture, unmoored from individual rights, would rid judicial intervention of its

[155] Hasen (n 112) 144 – 5.

[156] Issacharoff (n 62) 627.

[157] Farber (n 68) 377; Hasen (n 112) 154; Dawood (n 78) 291.

[158] Farber (n 68) 377.

[159] ibid.

underlying legitimacy. As Rawls notes, regarding the kinds of electoral arrangements required to establish the fair value of political liberties, 'it is not the task of the Court to say what these arrangements are, but to make sure that the arrangements enacted by the legislature accord with the Constitution'.[160]

The limitations of the court's competence in this area point to the need, as noted above, for other institutions which are equipped to more systemically foster electoral fairness. As Pildes himself notes regarding the issue of gerrymandering, recognising the limits of judicial redress should motivate attention towards a search for other institutional solutions such as non-partisan commissions for the drawing of electoral boundaries.[161] Yet, on the whole, the structuralist approach seems to overlook the possible role of such complementary institutions by seeking to place too great a burden on the judiciary alone.

Having established the suitability of an individual rights approach, as well as the unique significance of the right to candidacy in this area, the following section seeks to address principles which should guide the court in its adjudication on the duty to fulfil. As rightly noted by scholars in this field, the rights-structure debate, while important, should not be the main focus of election law discourse given that the moral fundamental questions are 'what are the values that judicial review ought to vindicate, and how best to vindicate those values'.[162]

E. GUIDING PRINCIPLES FOR JUDICIAL ENFORCEMENT OF THE DUTY TO FULFIL THE RIGHT TO CANDIDACY

This section aims to outline principles which should guide the court in its decision-making as it relates to the state's positive duty to provide free and fair elections with a reasonably level

[160] Rawls (n 48) 362.

[161] Pildes (n 1) 78.

[162] Charles (n 62) 1102.

playing field. These principles have been derived by taking into account a number of factors: the relative institutional competences of the judiciary and legislature, the core content of the duty to fulfil as described in sections A and B, as well as the underlying values which underpin the right to candidacy, as outlined in Chapter 4 of this thesis. These principles are by no means presented as an exhaustive list of relevant considerations which should guide the court. Rather, they may be taken to embody two general factors which are essential for the court's cognisance if it is to effectively enforce the duty to fulfil as described above. This section will also assess the jurisprudence of Canadian and US courts in the light of these principles, with an emphasis on case law related to ballot access, party registration rules and campaign finance regulation.

The principles may be summarised as follows: (i) Courts should apply deference regarding the broad aims and values of electoral system design but high scrutiny regarding whether the means employed are necessary and proportionate to further the state's aim and (ii) Courts should holistically take into account both the expressive and decision-making functions of the electoral process in balancing rights and interests in this area.

I. DEFERENCE REGARDING THE BROAD AIMS AND VALUES OF ELECTORAL SYSTEM DESIGN

As noted above, the first principle suggests that while courts should be deferent to legislative choice on the broad aims and values of an electoral system, they should exercise high scrutiny regarding the suitability of means employed to further the stated aim. While this embodies a single principle, the 'deference to aims' aspect has been separated from the requirement of 'high scrutiny on means' for explicatory purposes. This sub-section therefore seeks to outline the reasons why the court should exercise deference regarding the aims and values of electoral system design. Focus will be placed on the aims of majority government and a two-party

system as linked to a more general aim of political stability under the single member plurality, FPTP systems which obtain in the United States and Canada.

An electoral system may be defined as 'the set of procedural rules governing the expression of votes cast in a given election and their conversion into seats.'[163] It is well accepted that plurality and majority systems prioritise the perceived benefits of centrism and governmental majorities over the proportional transposition of votes into seats.[164] Further, FPTP or 'winner-takes-all' systems generally trend towards the formation of two major parties, as noted in Chapter 7.[165] The question therefore arises regarding how courts should view such state aims within the context of protecting the right to candidacy of minor parties and independents. It is submitted that courts should exercise deference regarding these aims, such deference defined as an acceptance of their legitimacy as permissible state objectives. This is on the basis that a state's choice of electoral system is a matter within the legislature's purview, with a wide range of acceptable variation in this sphere.[166] As firmly established in regional and international human rights jurisprudence, the rights to vote and candidacy do not contemplate any particular choice of electoral system;[167] states enjoy wide latitude to choose among the trade-offs between competing values which is inherent in such choice.[168]

In light of this, Feasby posits, within the context of the Canadian system, that courts should be deferent to Parliament's assessment of the democratic values and norms which should inform the electoral process, while applying strict scrutiny of the means employed,

[163] Venice Commission (n 85) 6.

[164] ibid; Reynolds (n 85) 50.

[165] See Chapter 7.

[166] Reynolds (n 85) 2.

[167] *Mathieu-Mohin* (n 88) para 54; *Yumak and Sadak v Turkey* App no 10226/03 (ECHR, 8 July 2008) para 110; *Gutman v Mexico* I/A Court, Judgment of 6 August 2008, para 165.

[168] *Yumak and Sadak* (n 167) para 112.

given the risk of incumbency-entrenching legislation.[169] Feasby develops this position as informed by a similar notion advanced by American academic Richard Hasen regarding how the courts should approach certain 'contested equality claims'.[170] Hasen notes that since contested political equality claims are neither strictly essential for democratic governance, nor the subject of social consensus, courts should apply deference to the state's value judgments regarding the priority to be given to political equality, while adopting strict scrutiny regarding the means employed, given the risk of self-interested legislation.[171]

While Feasby's and Hasen's contributions have informed my formulation of this first principle, it is important to note that there are central differences. First, deference has been limited to aims and values regarding 'electoral system design' as opposed to the broad characterisation of deference to 'democratic values' and 'political equality' advocated by Feasby and Hasen respectively. Electoral system design centres on the translation of votes into seats and balances values regarding majority versus coalitional rule, competition, and the proportionality of representation. These are the questions to which deference are due, given the well-established positon of such system design falling within the competence of the legislature.[172] However, broader factors such as 'democratic values' and 'political equality' necessarily inform the content of constitutional rights; it is therefore within the purview of the judiciary to help define their shape and content in its adjudication on such rights. It is accepted that both categories are not wholly severable given that a government's underlying philosophy on political equality and substantive democracy would have likely informed its choice of electoral system design. However, given that these values also necessarily underpin the content

[169] Feasby (n 119) 289.

[170] Hasen (n 112) 102.

[171] ibid.

[172] Michael Gallagher and Paul Mitchell, *The Politics of Electoral Systems* (OUP 2005) 3.

of constitutional rights, they represent too broad a basis on which it may be claimed that courts should defer to legislative judgment on these matters.

The second point of departure is that no distinction is made between 'core' and 'contested' political equality claims as employed by Hasen. It is submitted that this posture of deference to electoral system design should obtain in all cases regarding adjudication on the right to candidacy which touch and concern the organisation of the electoral process. This is on the basis that given the complexity of competing values at play, a dialogic approach to judicial review is paramount, and such dialogue is foreclosed if the courts are too hasty to preclude certain system design values as wholly illegitimate.[173] This point is made quite eloquently by Le Bel J in his dissent in *Figueroa*, where the majority of the Canadian Supreme Court questioned whether a 'majority government' was a legitimate aim for a state measure which favoured larger, broad-based parties.[174] In the Court's majority judgment, Iacobucci J noted that it is questionable whether majority governance may be seen as a legitimate aim given the government's failure to present clear evidence that majority governments are 'substantially better' and more democratic than minority governments.[175] In rightly noting that this was not a question within judicial competence to assess, Le Bel J highlighted the importance of judicial deference in this area:

> In suggesting that the motive behind the legislation may itself be illegitimate, the Court risks unduly expanding the scope of judicial review of the design of the electoral system. I would sound a note of caution against blurring the distinction between the respective roles of the Court and the legislature … [B]alancing competing democratic values and choosing between the various species of democratic electoral systems primarily fall within the domain of political debate and of the legislative process…

[173] See Pildes (n 1) 154 on the importance of courts not stifling legitimate electoral change and design in this area.

[174] *Figueroa* (n 37) paras 80 – 83.

[175] Ibid paras 81, 89.

> The *Charter* mandates that whatever system is adopted must respect the right of each individual to meaningful participation. But we should be circumspect about defining that right too inflexibly, lest legitimate political debate on the issues be impeded. The possibility of dialogue between courts and legislatures on the meaning of the right to vote may be unduly constrained if this Court declares that certain values, even though they have long been part of our political tradition, must be excluded from consideration in the interpretation and application of s. 3 of the *Charter*.[176]

These submissions apply with equal force to the right to candidacy, particularly as it relates to judicial enforcement of the duty to fulfil.

The Maintenance of a Two-Party System as a Legitimate State Aim

One particularly contentious issue in this area is whether the maintenance of a two-party system, in which electoral victory is primarily concentrated between two dominant parties, should be accepted as a legitimate state aim for measures which disadvantage third parties and independents. In *Timmons v Twin Cities*, the US Supreme Court upheld a ballot access law which was unfavourable to third parties and noted that it was within the legislature's purview to decide that political stability is best served through a healthy two-party system.[177] The Court noted further that while states cannot completely insulate the two dominant parties from competition, they can enact reasonable legislation which favours the traditional two-party system.[178] Hasen criticized the court's acceptance of a two-party system as a legitimate aim, noting that its stabilising effects are empirically contested and that states should not be permitted to rely on it unless they can put forward compelling evidence of the system's benefits.[179] Similarly, Pildes notes that a two-party structure, while a product of FPTP systems,

[176] ibid paras 182 – 183.

[177] *Timmons* (n 138) 367.

[178] ibid.

[179] Richard Hasen, 'Do the Parties or the People Own the Electoral Process?' (2001) UPenn L Rev 815, 826.

is not necessarily a part of the system's underlying justification and should not therefore be considered as a legitimate state aim.[180]

However, given that a two-party structure is logically connected to the aims of political stability and majority governance, and on the basis of judicial deference to overarching system design, it is submitted that such an aim should be considered legitimate. While it may not be incontrovertibly proven that such systems lead to greater stability, there is a sufficiently rational basis for this connection.[181] The extent of reasonable disagreement on this point, and the presence of conflicting empirical results, strengthen the argument for this question to be placed outside the scope of judicial resolution. Contrary to Hasen's suggestion, courts are not well placed to consider 'evidence' on the relative stabilising benefits of a two-party system.

The aim of maintaining a two-party system must, however, be carefully defined. As noted by the US Supreme Court in *Williams v Rhodes*,[182] while a two-party system may be a legitimate aim, it is not legitimate for courts to seek to entrench two particular parties: the Republicans and the Democrats.[183] Maintaining the dominance of two parties in the abstract would not be a legitimate aim. Legitimacy is derived from the extent to which the two-party system is connected to the ideal of political stability. Therefore, in employing high scrutiny regarding measures employed, the key question is whether the law in question is strictly necessary to maintain the over-arching political stability of the two-party system. In answering this question, courts should take into account the high degree to which the two-party system in the US is already firmly entrenched by virtue of the FPTP electoral system.[184] This was the

[180] Pildes and Issacharoff (n 1) 676.

[181] Reynolds (n 85).

[182] 393 US 23 (1968)

[183] Ibid 31 – 32.

[184] See Chapter 7.

approach adopted by the dissenting justices in *Timmons*. Instead of explicitly rejecting the legitimacy of a two-party aim, Justice Stevens applied strict scrutiny in assessing whether the fusion-ban was necessary to maintain the two-party system and noted that it was not, given the extent of entrenchment which that system already enjoys.[185] He went on to note that it demeans the strength of a two-party system to assume that major parties need to discriminate against minor parties and independents in order to preserve their dominance.[186] Therefore, a two-party state aim must in itself contemplate some measure of reasonable participation and competition from third parties, such that, the identity of the two major parties are not fixed but may change over time. On this basis, it has been noted that electoral laws cannot aim to 'freeze the political status quo'[187] by unreasonably inhibiting the growth of minor parties.

This posture of deference to system design aims does not render the court's role void of force and meaning, given that recognising the legitimacy of the state's aim is hardly dispositive of the case. The Court must then embark upon close scrutiny in assessing the necessity and proportionality of the means employed given the risk of self-interested legislation in this area.

II. CLOSE SCRUTINY OF THE NECESSITY AND PROPORTIONALITY OF MEASURES REGULATING ELECTORAL COMPETITION

As Feasby notes, close scrutiny in this area is demanded by the insights of Ely's process theory which warns of the danger of legislative measures which may seek to block the channels of political change, given the conflict of interest faced by the legislature.[188] As noted in the

[185] *Timmons* (n 138) 379 – 381.

[186] ibid 381.

[187] *Jenness v Fortson* 403 US 431, 438 (1971).

[188] Feasby (n 119) 285.

preceding section, a major aspect of the court's legitimacy is derived from its suitability to objectively detect and safeguard against such measures. In order to effectively carry out this role, courts must employ high levels of scrutiny to laws which curtail the participation of minor parties and independents and which have the effect of entrenching incumbent power.

On the whole, courts in the United States have failed to apply sufficiently strict levels of scrutiny in their assessment of laws which govern candidate's access to the ballot.[189] For example, in *Munro v Socialist Workers Party*,[190] the Supreme Court considered the validity of a Washington statute which provided that a minor party candidate for office must receive at least 1% of votes cast in the state's primary before his name may be printed on the general election ballot. This measure proved particularly burdensome for minor party candidates, most of whom were not able to qualify for the general election ballot.[191] The state advanced the aim of seeking to avoid voter confusion by keeping the ballot shorter. In upholding the measure, the Court noted that the state was under no duty to provide evidence of the risk of voter confusion or ballot overcrowding given that States may proactively adopt measures with these interests in mind, even if there is no current particularized risk.[192] As Hasen notes, this measure of deference regarding the state's means falls short of the careful balancing demanded in this area.[193]

It is acknowledged that there is difficulty in distinguishing between a reasonable modicum of support necessary for evidencing non-frivolous candidacy, versus onerous measures which seek to freeze the political status quo. One useful indicator, which courts have

[189] Hasen (n 112) 95 – 99.

[190] 479 US 189 (1986).

[191] Ibid 206.

[192] ibid 204.

[193] Hasen (n 112) 96.

largely failed to employ, is looking at the extent to which minor parties have been historically able to surmount the given obstacle and to gain access to the ballot. This was highlighted in Justice Marshall's dissent in *Munro* where he noted that since its enactment, the measure had effectively eliminated minor party candidates from the general election ballot.[194]

Justice Marshall's dissent also quite insightfully recognises the need for strict scrutiny in such cases, given the risk of self-entrenchment:

> 'The necessity for [strict scrutiny] becomes evident when we consider that major parties, which by definition are ordinarily in control of legislative institutions, may seek to perpetuate themselves at the expense of developing minor parties. The application of strict scrutiny to ballot access restrictions ensures that measures taken to further a State's interest in keeping frivolous candidates off the ballot do not incidentally impose an impermissible bar to minor-party access.'[195]

Unfortunately, most other ballot access cases reveal no such cognizance of this need for strict levels of scrutiny.[196] For example, in *Storer v Brown*[197] the Court applied a more flexible standard of a 'sufficiently important state interest' in upholding a law which banned individuals from running as independents if they had a 'registered affiliation' with a political party within one year prior to running. In noting the restrictive nature of the measure, Justice Brennan, in his dissent, highlighted that the majority should have insisted that the state proves the absence of less restrictive means, as opposed to merely speculating that there were none.[198]

The express recognition of political candidacy as a fundamental right would provide a clear and principled basis for a uniform adoption of strict scrutiny in all ballot access cases. In

[194] *Munro* (n 190) 206.

[195] ibid 201.

[196] Hasen (n 112) 95.

[197] 415 US 724 (1974).

[198] Ibid 761.

the absence of such recognition, courts in the US will continue to adopt shifting standards which inadequately safeguard the interests of minor parties and independent candidates.

III. THE IMPORTANCE OF TAKING INTO ACCOUNT BOTH THE EXPRESSIVE AND DECISION-MAKING FUNCTIONS OF THE ELECTORAL PROCESS AND OF CANDIDATES' INVOLVEMENT THEREIN

Even in the face of an electoral system which systemically favours larger, broad-based parties as the objects of electoral victory, there is also a fundamental expressive purpose of elections which transcends a state's choice of electoral system, given that such system design is primarily concerned with the decision-making aspect of elections, which seeks to translate votes into seats. Therefore, in applying deference to the broad aims of the electoral system regarding 'outcome', courts must also give keen consideration to the 'expressive' value of candidacy, which is not inextricably tied to a candidate's ability to win.[199] For example, a state's preference for majority government or a two-party system should not foreclose the question of the importance of minor parties given that they also serve a crucial expressive role in fostering debate and dialogue on issues which may have been neglected by major parties.[200]

As noted in Chapter 4, the Supreme Court of Canada has most expressly recognised this communicative element in *Figueroa*, where it was noted that 'participation in the electoral process possesses intrinsic value independent of its impact on the actual outcome' given that it was the primary means by which the average citizen could engage in debate on social policy and present his ideas to the electorate.[201] Therefore, even though the government sought to

[199] *Munro* (n 190) 202.

[200] ibid.

[201] *Figueroa* (n 37) para 29.

present an aim of majority government, the court considered this communicative aspect as a separate interest which bore relevance regardless of the state's desired electoral outcome.

The US Supreme Court has also recognised the expressive value of candidate participation in a number of its ballot access cases,[202] one of which being *Illinois State Board of Elections v Socialist Workers Party*.[203] In striking down a 5% signature threshold for access to the ballot, the Court highlighted the significant role that third parties play in the political process given that 'an election campaign is a means of disseminating ideas as well as attaining political office'.[204]

On establishing the significance of both the expressive and decision-making elements, it may be argued that decision-making, as the primary role of the electoral process, should be given priority over expressive functions.[205] However, such a position ignores the extent to which the expression of candidates necessarily feeds into the decision-making process, where under the deliberative conception, preferences are refined during a process of ongoing discourse and debate. This more dynamic function of electoral communication was recognised by the US Supreme Court in *Anderson v Celebrezze*[206] where it noted that 'political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream'.[207] Diversity in public debate ultimately assists voters in making an informed choice and is therefore itself fundamentally linked to the decision-making aspect of elections.

[202] See Chapter 3.

[203] 440 US 173 (1979).

[204] ibid 186.

[205] See *Burdick v Takushi* 504 US 428, 438 (1992); *Timmons* (n 138) 363.

[206] 460 US 780 (1983).

[207] Ibid 794.

It is this interconnectedness which courts ought to recognise in their adjudication on the duty to fulfil.

A strong recognition of candidacy's expressive value is also necessary in order to fully safeguard the candidate's right to a reasonable opportunity to present his campaign. The formal conferral of the right to candidacy without such opportunities is theoretical at best. The Ontario Superior Court, taking its cue from *Figueroa*, highlighted the importance of this communicative aspect in *De Jong v Ontario*.[208] The court struck down a requirement of non-refundable nomination deposits, the burden of which fell disproportionately on minor parties, on the basis that it served to unreasonably divert party funds which could have been used for election campaigning.[209] Unfortunately, US courts have not sought to similarly safeguard the candidate's opportunity to campaign. While the Court has guaranteed formal access to candidacy regardless of income by striking down exorbitant filing fees,[210] the Court has contrarily struck down state measures aimed at ensuring a reasonable opportunity to campaign regardless of one's personal wealth or economic status.[211] This discrepancy reveals an impoverished view of the right to candidacy, void of one the most basic requirements for its effective realisation.

F. CONCLUSION

This Chapter has effectively sought to outline the more detailed requirements of the state's positive duty to provide free and fair elections with a reasonably level playing field. While this

[208] *De Jong* (n 44).

[209] ibid para 50.

[210] *Lubin v Panish* 415 US 709 (1974); *Bullock v Carter* 405 US 134 (1972).

[211] *Arizona* (n 51); *Davis* (n 51).

is an admittedly broad objective, it has been shown that more specific duties can be derived therefrom. In this way, this Chapter more generally forms a part of the justification of the feasibility and reasonableness of the duty to fulfil, as initiated in Chapter 5 of this thesis. Further, while many aspects of electoral fairness herein discussed have been analysed elsewhere without reference to a justiciable right to candidacy, one of the central contributions of this Chapter is to highlight what may be added by viewing these issues through right to candidacy lens. On that basis, it has been revealed that one of the central elements preventing US courts from effectively tackling anti-competitive legislation, is its lack of an express recognition of the right to candidacy, which includes the provision of a reasonably level playing field. On the other hand, Canadian courts, operating within the framework of an express right to candidacy, have been able to progressively recognise this right as including competition in a 'fair election' which allows for 'meaningful participation' of candidates. However, given the comparatively limited Canadian jurisprudence in this area, it remains to be seen how effectively Canadian courts will be able to combat anti-competitive measures geared at entrenching those in power.[212]

Given the comprehensive nature of questions involving the regulation and organisation of the electoral process, this Chapter represents a first step in understanding how a human right to candidacy may inform adjudication, and more general institutional implementation, in this area. It is hoped that the principles outlined herein will provide a useful platform for more expansive discussion on this subject and for further refinement of the relative institutional competences of the judiciary and legislature in this sphere.

[212] One Canadian academic has noted that Canadian courts have thus far generally been reluctant to expressly identify self-entrenching measures adopted by the legislature: See Dawood (n 64).

CONCLUSION

The broad objective of this thesis was to examine the justificatory basis of conceptualising political candidacy as a human right and to assess the implications of its characterisation as such, with a specific focus on the duties this imposes on the state. As outlined in the introduction to this thesis, this broad aim constitutes a first step in seeking to fill an analytical void in academic discussions on electoral rights, given that most scholarly writings have focused solely on the right to vote, with no detailed conceptual analysis of the right to stand for election. While this thesis could not hope to have filled this gap in its entirety, it has sought to make a crucial preliminary advance towards that end. It is therefore important to highlight the main contributions which this thesis has offered on this subject, while also noting areas ripe for further enquiry which remain unexplored. This final Chapter provides such an account as it relates to each of the three major segments in which this dissertation was divided.

I – THE RECOGNITION AND STATUS OF THE LEGAL RIGHT TO CANDIDACY

Part I of this thesis examined the recognition and status of the right to candidacy in domestic, regional and international human rights law. In so doing, it examined a question which had not been heretofore investigated, namely, whether the right to candidacy has crystallised into a norm of customary international law (CIL). Consistent with the progress mapping approach adopted to CIL, it was found that the right to candidacy is steadily gaining traction at the international level and is trending towards full crystallisation as a norm of customary international law. As noted in Chapter 2, the question of CIL status remains an important one, particularly in light of its potential applicability at the domestic level, including in the United States where a number of authorities recognise that CIL constitutes part of federal

law.[1] In light of this, CIL stands as an additional potential source of electoral rights in the US, its importance being underlined by the absence of express constitutional rights to vote and candidacy. For example, in arguing for the repeal of prisoner disenfranchisement laws in the US, some claimants and academic writers have sought to argue that such laws stand in violation of the right to universal and equal suffrage which, they argue, constitutes a norm of customary international law (CIL).[2] While the court has yet to embrace this argument, strong reasons have been advanced regarding the legal basis on which it should do so,[3] as well as evidences which support the case for universal suffrage as a norm of CIL.[4] Similar analysis regarding the right to candidacy is undoubtedly useful in this area, given that a number of state laws in the US also disqualify individuals from office-holding on account of previous felony conviction.[5] The analysis contained in Chapter 2 therefore provides a crucial first step in assessing the customary law status of the right to candidacy. Scope remains for a more in-depth study which takes into account a broader number of sources at the domestic and international levels. However, the analysis herein provides a solid starting point towards that end through its examination of the

[1] *Filartiga v. Peña-Irala*, 630 F.2d 876, 885–86 (2d Cir. 1980); *Restatement (Third) of the Foreign Relations Law of the United States*; Jordan Paust, 'Customary International Law and Human Rights Treaties are Law of the United States' (1998 – 9) 20 Michigan Journal of International Law 301.

[2] *Hayden v Pataki*, First Amended Complaint, No 00 Civ 8586 (LMM), SDNY (January 15 2003); Richard J Wilson, 'The Right to Universal, Equal, and Nondiscriminatory Suffrage as a Norm of Customary International Law: Protecting the Prisoner's Right to Vote' in Alec Ewald and Brandon Rottinghaus (eds), *Criminal Disenfranchisement in an International Perspective* (Cambridge University Press 2009) 116.

[3] Wilson argues that based on the authority of the US Supreme Court's decision in *Sosa v Alvarez-Machain*, 524 US 692 (2004), customary international law can itself provide a necessary cause of action in federal courts. He therefore argues that the court in *Hayden* was wrong to dismiss this ground of the complainant's argument. See: Wilson (n 2) 117.

[4] Wilson (n 2).

[5] National Conference of State Legislatures, 'Examples of Constitutional Provisions Re: Disqualifications for Legislative or Public Office' <http://blogs.chicagotribune.com/files/disqualifications-4-public-office.pdf> accessed 10 December 2014; Eric Zorn, 'Convicted Felons: When and Where They Can Run for Office' *Chicago Tribune* (Chicago, 25 February 2014).

right's recognition in human rights treaties, General Assembly resolutions, national constitutions and election observation reports.

II – THEORETICAL JUSTIFICATION OF THE MORAL RIGHT TO CANDIDACY IN LIBERAL DEMOCRACIES

The overarching objective of Part II of this thesis was to subsequently outline the theoretical justification for the existence of a moral right to candidacy in liberal democracies. To this end, Chapter 4 examined both primary and derivative justificatory bases for the right to candidacy. It was noted that political expression stood among the primary interests underlying the right to candidacy given the unique participatory platform which candidacy confers. The opportunity to stand for election was therefore noted to possess a somewhat intrinsic expressive value, independent of the candidate's ability to win. This expressive value has proven central in later establishing the content of the duties to protect and fulfil. Regarding the duty to protect, in examining the extent to which a political party's candidate selection implicates the right to candidacy, regard must be had to the extent to which exit options offer the candidate a meaningful opportunity to contribute to public debate and deliberative public reasoning. Therefore, in engaging in the conflict of rights analysis central to the duty to protect, one factor militating in favour of the right to candidacy is where exit options provide significantly less meaningful avenues for one's expression to be heard. Similarly, in analysing the content of the duty to fulfil, it was established that a reasonably level playing field includes the opportunity to campaign and to communicate one's platform to the electorate on a fairly equal basis. An adequate judicial appreciation of the importance of the expressive and deliberative functions of candidacy, and of elections more generally, is therefore central to effective adjudication in this area.

Regarding the derivative justificatory basis for the right to candidacy, it was established that the right to stand is essential for the full realisation of the right to vote. The interdependence

between both rights has featured centrally in examining the content of all duties to which the right to candidacy gives rise. The presumption of voters' sovereignty in their choice of representatives centrally underpins the duty to respect, which requires the state to refrain from imposing unjustifiable eligibility requirements for elective office. Similarly, the extent to which voters' rights may also be affected by a party's internal candidate selection is one factor which may militate in favour of the right to candidacy when assessing the level of party regulation necessary to fulfil the duty to protect. Regarding the duty to fulfil, the importance of the candidate's ability to effectively campaign is itself partially derived from the voter's interest in making an informed choice (having heard each candidate's platform).

The justificatory account contained in Chapter 4 also outlined the extent to which the following values and interests underlie the right to candidacy: dignity (as social recognition of one's equal moral status), autonomy (in possessing the freedom to control the agenda of public discourse) and self-development. All these factors point concertedly to the existence of a moral right to candidacy in all liberal democracies. Of the jurisdictions examined in this thesis, this finding has the greatest implication for the United States, which still lacks unequivocal recognition of the right to candidacy as a fundamental right. Recognition as a 'fundamental right' is essential in the US given the system of tiered scrutiny which obtains in equal protection cases: differential treatment concerning a fundamental right is necessarily subject to strict scrutiny.[6] This standard of scrutiny requires the state to establish that the measure in question has been 'narrowly tailored' to further a 'compelling state interest'.[7] As noted in Chapter 6, such stringent levels of scrutiny are required in enforcing the duty to respect. Given the strength of the democratic presumptions of voter sovereignty and inclusive eligibility, restrictions on qualification for candidacy ought to be subject to exacting levels of judicial scrutiny. Similarly,

[6] Michael Dorf and Trevor Morrison, *The Oxford Introductions to US Law: Constitutional Law* (OUP 2010) 144.

[7] ibid.

regarding the duty to fulfil, Chapter 8 highlighted the extent to which courts ought to apply strict scrutiny to measures which obstruct candidates' ability to compete in a reasonably level playing field. It is therefore necessary that the right to candidacy be unequivocally recognised as a fundamental right in the United States.

The necessity of such recognition is underscored by the central role which courts in the US play in the regulation of electoral fairness. As Gallagher and Mitchell note, 'it is hard to think of another system where the courts play such a large role in defining the implementation of electoral laws'.[8] This is partly due to the decentralised nature of electoral administration, regulated by a variety of laws in fifty different states. In the absence of a central, non-partisan body in charge of electoral procedure, courts have by default been unofficially tasked with ensuring a consistent level of fairness and constitutionality in regulations across states.[9] Yet, this increased judicial involvement has taken place in the absence of a sufficiently developed jurisprudence on electoral rights. This has led to frustrations about the inadequacy of the court's rights-based approach to electoral adjudication, as noted by structuralists such as Pildes.[10] However, as highlighted in Chapter 8, the problem lies not in a rights-based approach per se, but on which rights are utilised and how. The recognition of the right to candidacy in the US would provide a meaningful basis upon which the courts may more adequately address broader structural issues regarding anti-competitive rules. It is hoped that the court's active involvement in electoral regulation will soon be coupled with an appreciation of the fundamentality of the full gamut of electoral rights, as opposed to a sole focus on the right to vote.

[8] Michael Gallagher and Paul Mitchell, *The Politics of Electoral Systems* (OUP 2005) 202.

[9] ibid.

[10] Richard Pildes, 'Foreword: The Constitutionalization of Democratic Politics' (2004) 118 Harvard L Rev 29.

III – THE INSTITUTIONAL IMPLEMENTATION OF THE DUTIES TO RESPECT, PROTECT AND FULFIL

Part III of this thesis examined the more detailed enforcement of the duties to respect, protect and fulfil the right to candidacy. Regarding the duty to respect, judicial oversight of qualification requirements was defended in principle on the basis that courts are ultimately undertaking a democracy-enhancing role in ensuring that a voter's choice of candidate is only curtailed in the presence of the most compelling reasons. It was further established that there is no legal or historical basis upon which parliamentary privilege ought to operate as bar to judicial oversight of statutory qualifications in the Canadian context.

However, as noted in Chapter 6, it is still open to question whether parliament possesses a residual power to refuse to seat a duly elected member.[11] Given that the Canadian Supreme Court has held that the right to candidacy includes a right to take one's seat if elected,[12] this raises a potential conflict between parliament's privilege and the member-elect's right to stand. This conflict forms a part of the more general tensions which have surfaced regarding the continued applicability of dated parliamentary privileges in Canada's post-Charter era.[13] This points to the need for a comprehensive review of parliament's privileges in the light of the Charter of Rights, as advocated by a number of Canadian academics.[14] The analysis in Chapter 6 contributes to this broader end by clarifying one crucial area of perceived conflict central to the right to candidacy: it established that statutory disqualifications from legislative office do not amount to exercises of parliamentary privilege. However, scope remains for further

[11] Marcel Pelletier, 'Privilege in the Canadian Parliament' (1973) 54 Parliamentarian 143, 149.

[12] *Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876, para 28.

[13] Colette Langlois, 'Parliamentary Privilege: A Relational Approach' (LLM thesis, University of Toronto 2009); Charles Robert and Vince MacNeil, 'Shield or Sword? Parliamentary Privilege, Charter Rights and the Rule of Law' (2007) 75 The Table: The Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments 17; Floyd McCormick, 'Reconciling Parliamentary Privilege with the Canadian Charter of Rights and Freedoms: Who Gets to Decide? (2009) Australia and New Zealand Association of Clerks-at-the-Table Conference, Norfolk Island.

[14] ibid.

research in this area, as well as mechanisms for judicial resolution of genuine conflicts, given the extent to which other presumed privileges further implicate the right to candidacy.

Regarding the duty to protect, this embodies a central obligation to safeguard against infringements by political parties in their candidate selection processes. By framing the duty in this way, this thesis has offered a new framework from which to address the issue of the appropriate level of state regulation in such internal party processes. While most previous analyses pitted the state's interest in regulation against the political party's freedom of association, Chapter 7 highlights the extent to which this issue also engages the party member's right to candidacy. This question was therefore examined through the lens of a conflict of rights analysis between freedom of association and the right to stand. In balancing the party's right to associational autonomy against the individual's right to stand, of central importance is the viability of exit in determining the extent to which the potential candidate's right has been implicated. The extensive oversight of such candidate selection in the US, in the form of state-mandated primaries, is therefore appropriate given the strong two-party system and more general barriers to entry in the American political landscape. However, it was noted that even within the context of such publicly administered primaries, courts have still aimed to generally uphold associational autonomy without adequately considering the extent to which the 'political structure and positive law' diminishes the viability of exit from the two dominant parties.[15]

The duty to protect, as formulated herein, also has important implications in the Canadian context. Despite the recognition of an express right to candidacy in the Canadian Charter, there is virtually no regulation of political parties' internal candidate selection processes. This has led to many calls for reform given the lack of transparency operative in a

[15] Charles Beitz, *Political Equality* (Princeton University Press 1989)190.

number of cases.[16] Yet, these calls for reform have failed to identify the extent to which greater regulation would also serve to safeguard party members' right to candidacy. Here, the right to candidacy can operate as an additional justificatory basis for such reform given Canada's recognition of an express constitutional right and given that the duty to protect imposes a more general obligation to take reasonable measures in this regard.

Chapter 8 of this thesis then offered an examination of the state's duty to fulfil by outlining the more specific content of the duty to provide free and fair elections with a reasonably level playing field. In defending the suitability and legitimacy of a rights-based approach to electoral adjudication, it was highlighted that candidacy operates as a structural right, one which necessitates the existence of a broader institutional framework, with such institutional structure being part and parcel of the very content of the right.[17] A fair electoral process in which the candidate may compete therefore forms part of the content of the right to candidacy itself. In light of this, it was demonstrated that the right to candidacy offers a meaningful basis on which courts may embark upon adjudication regarding the fairness of ballot access rules, filing fees, campaign finance regulations and the demarcation of electoral districts. This Chapter served to firmly establish the extent to which these aspects fall within the purview of a justiciable right to candidacy, given that issues regarding campaign finance and redistricting had not heretofore been considered as directly implicating the right to stand for office. It further delineated two basic principles which should guide the court in its adjudication in this area. However, further work remains in this sphere, including more detailed assessments at the individual jurisdictional level of structural and systemic reforms necessary

[16] Royce Koop and Amanda Bittner, 'Parachuted into Parliament: Candidate Nomination, Appointed Candidates, and Legislative Roles in Canada' (2011) 21(4) Journal of Elections, Public Opinion and Parties 413; William Cross, 'Candidate Nomination in Canada's Political Parties' in Jon Pammett and Christopher Dornan (eds), *The Canadian Federal Election of 2006* (Dundurn 2006) 171.

[17] Yasmin Dawood, 'Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review' (2012) 62 University of Toronto Law Journal 499, 519 – 520.

to effect the full realisation of the right to candidacy. The analysis provided herein offers a firm foundation upon which such future investigations may be built.

IV - A FOUNDATIONAL CONTRIBUTION

Perhaps the single most suitable characterisation of the aim of this thesis, in its entirety, is that it has sought to provide a foundational contribution regarding the justificatory basis and content of the right to stand for election. While it has not aimed to address all substantive issues which implicate the right to candidacy, it has sought to provide a solid foundation from which further enquiry in this area may be embarked. For example, regarding the duty to respect, a pressing need remains for academic discussion on the propriety of specific eligibility requirements and disqualifications from elective office. Quite similar to the issue of felon disenfranchisement, which has received significant academic and judicial attention,[18] many states also impose disqualifications from candidacy on account of a previous felony conviction or other past misconduct.[19] This raises important issues regarding whether voters should have the choice to restore trust in the impugned individual, or whether the state's interest is sufficient to warrant a paternalistic decision to take that choice away. Regard would also need to be had of the extent to which such measures undermine the dignity, autonomy and expression of those disqualified.

A detailed examination of these issues lay outside the scope of the present thesis, given that such analyses are best undertaken at the individual jurisdictional level, bearing in mind the role and functions of the office in question, the nature of the misconduct, as well as the historical and political evolution of the jurisdiction concerned. This thesis has sought to more

[18] See Michael Plaxton and Heather Lardy, 'Prisoner Disenfranchisement: Four Judicial Approaches' (2010) 28 Berkeley Journal of Intl Law 101; Andrew Shapiro, 'Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy (1993) 103 Yale LJ 537; *Suave v Canada* [2002] 3 SCR 519; *Hirst v United Kingdom* (No. 2) (2006) 42 EHRR 849.

[19] See Zorn (n 5); *Harvey* (n 12); *Paksas v Lithuania* App no 34932/04 (ECHR, 6 January 2011); *Zdanoka v Latvia* (2007) 45 EHRR 17.

generally establish and defend the nature of the duties concerned and to examine their institutional implementation. However, the analysis herein offers a strong foundation upon which such further, more specific enquiries may be embarked, given that this thesis highlights the central values and interests underlying the right to candidacy and defends the feasibility and reasonableness of the correlative duties to which it gives rise. It is hoped that this foundational contribution will be built upon in further analyses of the scope and content of this pivotal democratic right.

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