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Op-ed

PROPOSED LOCAL GOVERNMENT: MUNICIPAL STRUCTURES AMENDMENT BILL IS FLAWED Throwing away of votes for smaller parties unconstitutional

By Daryl Swanepoel

There are several unsettling legal, constitutional and policy concerns about the recently gazetted Municipal Structures Amendment Bill for which public submissions were called for. The aim of the amendments is to bring more stability to coalition government at municipal level by introducing a number of mostly procedural mechanisms around municipal structures. But an analysis of the Bill found important flaws in these new mechanisms.

For starters, from a legal and constitutional perspective, one section of the Bill sets out an amendment that requires a municipality with a mayoral executive system to automatically convert to a collective executive system where no single party has a majority in the council – whether as the result of a declared election or by-election. In a legal opinion obtained by the Inclusive Society Institute, it was found that this would be in contravention of the Constitution, which states that provincial legislation must determine for each category of municipality the different types of municipalities that may be established in that category in the province.

A potential solution to this problem is to adopt a different approach in the Bill to achieve the same outcome. Rather than prescribing in a separate section what type of municipality must be established, based on the outcome of an election, the Bill could amend the definitions of types of municipalities to achieve its purpose. The Bill should include the conditions in the proposed new section as part of the definitions of types of municipalities. It will then be within the mandate of national legislation to set the definitions for types of municipalities, and it will no longer prescribe the determination of types of municipalities.

In short, the solution would include conditions for municipality types within the definitions in the Municipal Structures Act, although an amendment would be required to facilitate changes in municipality types following elections.

As for policy concerns, at the same time as the Bill envisages the establishment of coalition governments in municipalities in which no party has a majority of seats on the council, the Bill also says councils in which no party holds a majority, are automatically converted into a collective executive system. But surely under an arrangement whereby municipalities are automatically converted into collective executive systems, the need for coalition agreements falls away? The democratic system should still be flexible enough to allow for mayoral executive systems through coalitions in instances where no party obtains an outright majority.

Another flawed amendment is to introduce a 1% threshold for allocation of seats. Once again, in line with the legal opinion obtained by the Institute, it is highly questionable whether the amendment would pass constitutional muster, since it flies in the face of the right to free political choice as set out

in the Constitution. It is also likely in conflict with the constitutional requirement that the outcome of the election cannot be viewed as resulting in proportional representation. And the rationality of the proposed 1% threshold can also be questioned on the basis of the lack of a rational connection between the proposed rule and the reason given for it.

It appears that the motive for the 1% threshold amendment is twofold. Firstly, to reduce the number of political parties in the system, and secondly, to ensure more stable coalitions.

The problem with eliminating parties that receive less than 1% of the vote, is that it results in a re-engineering of the will of the people. As voting patterns in previous South African elections have shown, a substantial percentage of votes are cast for parties that receive less than 1% of the vote.

For example, in the last national election, the combined vote of parties in parliament that received less than 1% of the total vote, amounted to 3,42%. Under the system proposed in this Bill, that would have disenfranchised 3,42% of the electorate, which would flout the law of all votes being equal.

Secondly, apart from deviating from the constitutional principle of general proportionality already raised, the electoral system should enable the empowerment of citizens' political rights as espoused in the Bill of Rights. This was again confirmed by the Constitutional Court in their ruling on the Electoral Amendment Act. The 1% threshold is inconsistent with this. At the very least, if a candidate receives enough votes to make up a quota for a seat in the Council, the legislation must empower the candidate to take up that seat.

Another reason for doubting the constitutionality of the proposed 1% threshold rule, is the disproportionate effect it may have in different municipal jurisdictions based on the size of the jurisdiction and the number of voters. It is self-evident that 1% of the total number of valid votes cast in a large municipality will be a much larger number of votes than in a smaller municipality. The result is that votes cast in one municipality will carry more weight than in another municipality. On this basis, the proposed threshold will most likely violate the constitutional right and value of equality. This is especially the case given the absence of any mechanism in the Bill aimed at mediating the difference in size of different municipalities.

South Africa's history has shown us that one cannot assert that small parties are disposable. Under apartheid, the lone anti-apartheid voice of the PFP's Helen Suzman would have been silenced under the scheme being proposed in the Bill, as would the ability of the GOOD party to participate in the Executive's 6th administration. The simple point made here is that small does not mean that the party doesn't have the capacity to make a valuable contribution in the body politic of the nation.

There is no evidence to substantiate the claim that by limiting the number of parties in municipal councils, more stable coalitions will be promoted. Coalitions comprising only larger parties can also be unstable, and coalitions comprising a number of smaller parties can be stable. There are many examples in history where coalitions comprising only larger parties have collapsed. And, in any event, it is absurd to assert that a 1% party will ensure greater stability in a coalition than a 0,99% party, is it not?

Coalition stability has little to do with the number of parties participating. It has much more to do with the political maturity of the leaders.

Daryl Swanepoel is the Chief Executive Officer of the Inclusive Society Institute. This article draws on its submission to the Minister of Home Affairs.