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**A LEGAL ANALYSIS OF THE RIGHT OF AN INDEPENDENT CANDIDATE TO
STAND FOR PUBLIC OFFICE IN SOUTH AFRICA**

by

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A mini-dissertation submitted in partial fulfillment of the requirements for the degree

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OF
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2022

DECLARATION

I, MALEBGOGO FAITH MASHISHI, hereby declare that the mini-dissertation entitled: **A Legal Analysis of the Right of an Independent Candidate to Stand for Public Office in South Africa**, is submitted in fulfillment of the requirements of the Master of Laws (LLM) in Human Rights degree. I herewith further declare that this is my original work, with the exception of a wide range of sources acknowledged herein, that I have not at any prior time submitted to any university or institution of higher learning.

Signature of Candidate:

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Date: 30-01-2023



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Firstly, I would like to express my sincere gratitude to the Almighty God. I am infinitely grateful for His goodness and faithfulness. He has proven to me over and over again, that He is such a promise keeper. All that I am and ever hope to be, I owe it all to Him – to God be the glory, great things He hath done.

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“And we know that in all things God works for the good of those who love Him, who have been called according to His purpose” – Romans 8:28 (NIV).

DEDICATION

This mini-dissertation is dedicated to my loving and supportive parents Dipuo and Nkwatle Mashishi. Thank you so much mom and dad for all your contributions and sacrifices. I love you so much!!!



ABSTRACT

The Constitution of the Republic of South Africa, 1996, prescribes an electoral system “that results in proportional representation”, which has been in use for both provincial and national elections since 1994.

However, in 2020, the New Nation Movement, a civil society organisation, in the case *New Nation Movement NPC and Others v President of the Republic of South and Others* 2020 6 SA 257 (CC), It challenged the electoral system for unfairly and unreasonably preventing independent candidates, from standing for public office, and if elected to hold office. running for office and being elected. In the court’s view, this exclusion prevented voters from having a direct link to provincial and national representatives who can be accountable to them directly.

This study focuses on the ConCourt ruling, taking cognisance of elections malpractice, one-party dominance and voter dynamics in South Africa. In doing so, the researcher seeks to understand whether the ConCourt was correct in declaring certain parts of the Electoral Act unconstitutional, to the extent that it unfairly and unreasonably excluded independent candidates from standing for public office and to hold office; and thereby called for electoral reform in South Africa. Furthermore, the researcher investigates whether the electoral commission, parliament and other stakeholders, could find suitable solutions to this conundrum before the general national elections to be held in 2024.

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CHAPTER ONE

RESEARCH OUTLINE

1.1 Introduction

Article 13 of the African Charter¹ provides everyone the right to “participate freely in the government of their country, through their freely chosen representatives”. Free, fair, transparent, and credible elections continue to be a top priority for African citizens, and as a result, ensuring their realisation needs to be a fundamental requirement of democracy in every African nation. When conducted effectively and efficiently, elections should reflect the wishes of the electorate. However, given the lived reality of many African states, electoral processes often do not reflect the will of the people.

Consequently, elections in Africa have drawn significant interest of many other stakeholders, including the voters and sadly, this is not going to change very soon, particularly considering the prevalent malpractices, such as electoral fraud, patrimonial leadership, and one-party dominance. For example, issues of poor service delivery in South Africa have resulted in various clashes and protests between disgruntled groups and security forces. As a result, it can be deduced that South Africa reflects the continent's general unhappiness with the government's inability or slow response to handle the socioeconomic issues or challenges of its citizens. Against this background the paper considers the implications of the Constitutional Court of South Africa (hereinafter the ConCourt) ruling in the *New Nation Movement NPC and Others v President of the Republic of South Africa*² (hereinafter the *New Nation Movement* case), that declared certain parts of the Electoral Act³ (hereinafter the Act) unconstitutional.

This ruling was due to the fact that the Act does not provide for adult citizens to be elected to the provincial legislatures and national assembly as independent candidates, and thus gave parliament 24 months to amend the unconstitutionality.⁴ This study focuses on the experience with election malpractice, one party dominance and voter dynamics. In doing so, the researcher seeks to understand whether the court was correct in declaring certain parts of the Act unconstitutional, and calling for electoral reform in South Africa, and whether the electoral commission and parliament will find a solution to the conundrum before the national general

¹ on Human and Peoples Rights 1981, African Charter on Democracy, Elections and Governance 2007.

² 2020 6 SA 257.

³ 73 of 1998.

⁴ *New Nation Movement* case (n 2) par 4.

elections scheduled to take place in 2024. This is especially urgent because the electoral commission has already indicated that it is not capacitated to perform this task due to inadequate resources.

1.2 Background to the study

People are born equal and free and should not be confined to a life of servitude. Thus, individuals can only be subjected to an authority constituted by consent and participation. Many political thinkers have attempted to explain the legitimacy of political representation. The 18th century philosopher, Jean-Jacques Rousseau⁵ (hereinafter Rousseau), for example, proposed direct participation of each citizen in the national assembly, as according to him, one person cannot represent the will of another.⁶ His idea of democracy is a direct democracy, in which the entire citizenry comes together in a public setting and passes laws.⁷ Furthermore, Rousseau opposed representation through political parties or associations, as this would pose the danger of unequal representation arising from unequal strengths of political parties.

Political parties that are stronger would represent the electorate's interests as the expression of the collective will. Hence, Rousseau reasoned that, when political parties or associations are formed, there should be as many as possible and of equal strength. This would guarantee equal representation and that no citizen is left outside public affairs. The advantage of direct representation is that it ensures that all the rules and laws, reflect the will of individuals or citizens of that state, and that citizens do not delegate law-making powers to the elected representatives.⁸ Instead, citizens from the onset are encouraged to voice their inputs on the proposed policies¹⁰ and form part of the law-making process.¹¹ Thus, direct participation permits maximum and active involvement of the citizens, in all aspects of public decision

⁵ A civic Republican.

⁶ Adams and Dyson *Fifty Major Political Thinkers* (2207) 80. This represents a strong form of democracy; Friend *Social Contract Theory* 2004 available at: <http://www.iep.utm.edu/soc> 10 (accessed 02 September 2022).

⁷ Adams and Dyson (n 6) 80; Rousseau's model would apply to the city states of Ancient Greece.

⁸ ss 1(a) and (d) of the Constitution; *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) par 110-111, 115.

⁹ Rousseau "The general will" in Arthur J (ed) *Democracy: Theory and Practice* (1992).

¹⁰ The electorate can partially support or apposed the proposed legislation, Phooko "Conflict between participatory and representative democracy: A call for model legislation on public participation in the law-making process in South Africa" 2017 *Obiter* 517, 519.

¹¹ Nyathi *Law Democracy and Development* (2008) 102, Phooko "What should be the form of public participation in the lawmaking process? An analysis of South African cases" 2014 *Obiter* 40; Phooko (n 10) 519.

making-¹² For John Stuart Mill¹³ (hereinafter Mill), political participation and engagement improves the moral and intellectual state of the human beings. People's involvement in formulating issues that go beyond their personal concerns requires intellectual capacity, application, and stimulates the mind. Similarly, people who have values outside their own get to understand others better.¹⁴

Moreover, Mill argues that this guarantees national progress. As both are of paramount importance to continued progress. Furthermore, government must be a representative of all sectors of society and ensure that every view is taken into consideration. In this way, the society is assured not to suffer mediocre decisions thrust upon them by hegemonic powers. Liberal theorists, though supportive of representative democracy or government, qualify the principle of equality. Thus, suffrage depends on property and merit, as voters must be able to read and write, and be able to "perform the common operations of arithmetic" hence Mill promotes the slogan "universal teaching must precede universal enfranchisement".¹⁵ Consequently, Mill contends that education will assure the public that such elected individuals can handle the vast and complex issues of government. As he believed that every voice mattered and also pointed out that, the public voice should be determined by reason and intellect.¹⁶ Thus, according to Mill, states are not composed of homogenous interests. Rather, states are made up of different classes of people and social groups with different interests. Evident in his preposition is a concern that, if the property-less assumed power, people would use them to their advantage, while marginalising the interests of the "propertied" class.

Thus, he argued for limited suffrage to ensure that only members of elite groups were in power, and used it to protect their shared "elite" interests. Nevertheless, he continued to argue that

¹² Quinot "Snapshot or participatory democracy? Political engagement as fundamental human right" 2009 *SAJHR* 397; Roux "Democracy" in *Constitutional Law and South Africa* (2008) ch 10, describes this model of democracy as "essentially about the question whether...citizens should be given the right to participate in the decisions that affect them..., notwithstanding the fact that the basic form of political organization in the modern notion state is and is likely to remain representative democracy"; Du Plessis "Public participation, good environmental governance and the fulfillment of environmental rights" 2008 *PELJ* 6 refers to representative democracy that is in itself a form of public participation. Du Plessis also refers to direct participation supplementary to representative democracy.

¹³ A liberal theorist.

¹⁴ Mill "Considerations on representative government" in Arthur J (ed) *Democracy: Theory and Practice* (1992).

¹⁵ Mill (n 14) 37.

¹⁶ Mill (n 14) 38.

equality is a hallmark of democracy and that representation should be proportional.¹⁷ From the above exposition, it can be deduced that these political thinkers support the argument of the researcher, that independent candidates and political parties should be incorporated equally into the electoral system. In the sense that one independent candidates like political parties, would play a critical role in guaranteeing free and fair elections and national progress. Furthermore, government would have an opportunity to be a representative of all sectors of the society, and ensure that every viewpoint is taken into consideration, so that the society is assured not to suffer mediocre decisions thrust upon them by hegemonic powers.

Furthermore, these political theories were put to test in the case *Doctors for Life International v Speaker of the National Assembly*.¹⁸ The content and nature of the duty to facilitate citizens' participation, was first outlined in this particular case. This case was based on an allegation by the applicant, that during the legislative process in the promulgation of four statues,¹⁹ the National Council of Provinces (NCOP) and the provincial legislatures, did not comply with their constitutional mandate to facilitate citizen participation.²⁰

The court held that the duty to facilitate citizen participation had to be understood based on:

- (a) the constitutional role of the NCOP in the national legislative processes and in particular, its relationship to the provincial legislatures;
- (b) the right nature of our constitutional democracy; and
- (c) the right to political participation under international and foreign law.²¹

The court further held that, the Constitution provides for both direct and representative democracy that is transparent, accountable, and responsive. Moreover, the Constitution provides citizens the opportunity to participate in the legislative process.²² The court also specified that it is important for legislators to provide ways to give citizens a reasonable

¹⁷ “[A] majority of electors would always have a majority of representatives. Man for man, they would be as fully represented as the majority. Unless, they are, there is no equal government but a government of inequality and privilege: one part of the people rule over the rest”. See Mill (n 14) 32.

¹⁸ 2006 12 BCLR 1399 (CC) 1408-1409.

¹⁹ The Choice on Termination of Pregnancy Amendment Act 38 of 2004, the Sterilisation Amendment Act 3 of 2005, the Traditional Health Practitioners Act 35 of 2004 and Dental Technicians Amendment Act 24 of 2004.

²⁰ *Doctors for Life International v Speaker of the National Assembly v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) 1408E-F, 1409B. The applicant contended that the NCOP and the various provincial organs of state were required to invite written comments and hold hearings on these statutes before passing them.

²¹ *Doctors for Life International* (n 20) 1428J.

²² *Doctors for Life International* (n 20) 1443E-F, the two elements viz. the representative and direct should be balanced.

opportunity to participate effectively and efficiently in the legislative process.²³ This judgment demonstrates the court's intent to apply constitutional and democratic principles in favor of direct and representative democracy.

The Constitutional Court (hereinafter the ConCourt), in June 2020, made a landmark ruling, in *New Nation Movement* case,²⁴ declaring certain parts of the Act unconstitutional, to the extent that it does not provide for adult citizens to be elected to the provincial legislatures and national assembly as independent candidates. Furthermore, the ConCourt noted that the right to stand for public office is related closely to the right to “freely” make political choices as provided for in section 19(1) of the Constitution of the Republic of South, 1996 (hereinafter the Constitution).

Moreover, the ConCourt found that the right to make political decisions and the right to freedom of association must be interpreted broadly. In other words, the right to make political decisions and to associate, includes the right not to make political decisions and the right not to associate. Furthermore, the ConCourt recognised the right to freedom of conscience under section 15(1) of the Constitution and held that, compulsion to join a political party may leave one susceptible to the dictates of a party, limiting the exercise of individual conviction, as illustrated by the case of *United Democratic Movement v Speaker of the National Assembly and Others*.²⁵

The weight of the rights mentioned above, led the ConCourt to reject the High court's stance on the matter. Thus, the ConCourt concluded that none of the sections relied on by the High Court, prescribed the exclusive implementation of a party-based system. After, the High Court had dismissed the applicants' application relying on sections 1(d), 46 (1)(a) and 105(1)(a) of the Constitution. The applicants had argued that the Act is unconstitutional for unjustifiably limiting their right to stand for public office, and if elected, to hold office, as enshrined in section 19(3)(b) of the Constitution. In addition, applicants submitted that the Act infringed on their right to freedom of association, provided for in terms of section 18 of the Constitution.

1.3 Problem statement

²³ *Doctors for Life International* (n 20) 1443E-F, the two elements viz. the representative and direct should be balanced.

²⁴ [2022] ZACC 11.

²⁵ 2017 8 BCLR 1061 CC.

Section 19(3)(b) of the Constitution provides that “every citizen has the right to stand for public office and, if elected to hold office”. For its part, section 18 of the Constitution provides that “everyone has the right to freedom of association”. In addition, section 1(d) of the Constitution defines South Africa as a sovereign, democratic state founded on universal adult suffrage, a national common voter’s roll, regular elections and multi-party system of democratic government, to ensure accountability, responsiveness and openness.²⁶

The ConCourt²⁷ held that section 19 of the Constitution gave the right to South Africans to stand for public office as independent candidates. However, the Act, limits this right by only allowing political parties the right to contest elections (the outcome of which is based solely on proportional representation). Thus, the ConCourt²⁸ recognised that the Constitution and the Act did not expressly provide for the right of individuals to run for public office as independent candidates. Furthermore, the ConCourt²⁹ insisted that the principle of harmonious interpretation demands that judges construe the Constitution in a manner that does not offend other rights provided for in the Constitution, including the right to vote in section 19 of the Constitution and the right to freedom of association in section 18 of the Constitution.

In adopting the principle of harmonious interpretation, the majority of judges in the *New Nation Movement* case held that, the applicants had the right to stand for public office, even if the Constitution or the Act, does not expressly provide for them to do so, as permitting independent candidates to stand for public office, ensures that the right to freedom of association enshrined in section 18 of the Constitution is not violated.

Similarly, the ConCourt³⁰ held that freedom of association entails the freedom of every individual to choose who to associate with and who to choose not to associate. Furthermore, freedom of association includes the obligation of the state to permit the freedom not to associate with others within a political party. Therefore, forcing individuals to join political parties in order to stand for public office violates the constitutionally protected right to freedom of association.

²⁶ Emphasis added.

²⁷ *New Nation Movement* case (n 2) par 16.

²⁸ *New Nation Movement* case (n 2) par 16-19.

²⁹ *New Nation Movement* case (n 2) par 20-63.

³⁰ *New Nation Movement* case (n 2) par 20-63.

Accordingly, there is a need to assess the South African electoral system, in particular, the legal framework for elections for both the national assembly and provincial legislature. The obvious significance lies with the judgment in *New Nation Movement* case, that declared certain provisions of the Electoral Act unconstitutional, for the unreasonable limitation of the right provided for in section 19 of the Constitution.

1.4 *Research question*

1.4.1 Overarching research question

Therefore, the overarching research question of the study is: whether the current legal framework is adequate and/or robust enough to accommodate independent candidates to stand for public office in South Africa. In response to the overarching question, the following questions are relevant

1. What is the proposed individual candidate electoral system?
2. What is the role of the Electoral Act in the implementation of the proposed electoral system?
3. How does Parliament implement recommendations of the ConCourt?
4. Is the current legal framework and other measures for implementation adequate to extract the most benefit of their desired intent?

These questions will be answered in relation to the ConCourt judgment in the *New Nation Movement* case, on the right of independent candidates to stand for public office and if elected to hold office in South Africa.

1.5 *Rationale of the study*

From the foregoing literature, it is evident that there is no academic study that has categorically addressed the question that this study undertakes, namely, a legal analysis of the proposed independent candidate electoral system in South Africa. It will be revealed that most scholars involved in discussions on this topic are from the public administration field. As such, their deliberations and considerations lack a sense of legal clarity, that this seeks to provide.

Thus, the study is relevant because it explores the question, whether the current legal framework underpinning the role of all stakeholders in elections, impedes or facilitates the effective implementation of the recommendation made by the ConCourt to permit independent candidates to stand for public office, and if elected to hold office, in order to achieve effective

and efficient elections. Put differently, the question is whether the legal framework governing elections provides an enabling environment for the ruling and recommendations of the ConCourt. This inquiry is timely, in that it is undertaken in the wake of upcoming national elections in 2024. The context of the study is therefore based on the *New Nation Movement* case,³¹ in which a recent ruling was made on the proposed individual candidate electoral system in South Africa.

1.6 *Research methodology*

The study employs a library-based and desktop research method. It contains both primary and secondary sources that are relevant to the subject-matter of the study. The main primary sources include the Constitution, the Electoral Act, Acts of Parliament, policies and case law. The secondary sources relied upon include textbooks, journal articles, newspaper articles, working papers, conference papers and other variable internet sources.

1.7 *Overview of chapters*

This study is presented in five chapters, as outlined below:

Chapter one introduces the study, provides a background to the topic, outlines the problem statement, poses the research question(s), explains the rationale/importance of undertaking the study, methodological approach and the overview of the chapters of the study.

Chapter two provides the historical aspects of elections and electoral systems in South Africa. It commences with a historical overview of elections and electoral systems, different types of electoral systems and their comparative analysis; finally concludes with a brief synopsis of the ConCourt judgment.

Chapter three investigates the current legal framework. It discusses whether it is adequate and robust enough, to ensure free and equal elections for all. It also looks at provisions of the Electoral Act, which were declared unconstitutional.

Chapter four analyses the possible success of the proposed electoral system in South Africa.

³¹ *New Nation Movement* case (n 2).

Chapter five concludes the study, provides key findings, offers recommendations and makes suggestions for future research.



CHAPTER TWO

HISTORICAL ASPECTS OF ELECTIONS AND ELECTORAL SYSTEMS IN SOUTH AFRICA

2.1 Introduction

The foundation of South Africa's current electoral system is shaped by the country's history, in particular apartheid. For purposes of this study, the history of electoral systems in South Africa is traced from 1994 to date. This is because in 1994, South Africa held the first democratic regular elections, and these elections played a critical role in the shaping and development of electoral system and elections in general in South Africa.

This chapter seeks to trace the history of elections and the electoral system in South Africa. It provides the different types of electoral systems, and their comparative analysis. It also delves into a brief synopsis of the ConCourt judgment, on the right of individual candidates to stand for public office in South Africa.

2.2 Historical aspects of the elections and electoral systems in South Africa

Since 1994, South Africa has been holding regular elections which are administered by the Electoral Commission of South Africa (IEC), as provided for in section 190 of the Constitution. Notably, South Africa uses a closed-list proportional representation electoral system with elections held every five years for the national and provincial legislatures. For both the national and provincial elections, there are two ballots available to voters. All the political parties running in the national and provincial elections are listed on these ballots. To support the party of their choice, voters cast one national and one provincial ballot.

In this current electoral system, voters, vote for a political party rather than an independent candidate. The political party would then get a share of seats in parliament in direct proportion to the number of votes received in the election. As a result, each party would then determine members to fill the seats that it has won, this is known as the proportional representation (PR) electoral system,³² that is based on a closed list for the national and provincial elections. The PR was chosen in 1993 against the backdrop of a society that is deeply divided, hurt and fragmented by the system of apartheid.³³

³² Electoral Commission of South Africa. Available at: <https://www.parliament.gov.za> (accessed 04 October 2022).

³³ 2008 Multi-Stakeholder Conference *Reflections on the state of Electoral Democracy in South Africa* 116.

Moreover, the electoral system was agreed upon at the time, as the most appropriate and suitable to guide South Africa through the transformation and transition from a divisive and oppressive form of government to a true democracy. Furthermore, it was also seen as a system that facilitated and supported nation-building, reconciliation and the pursuit of stability and peace.³⁴ In 1996, the Constitutional Assembly reaffirmed the current electoral system as the one moving the country forward. The Constitutional Assembly did so after having embarked on one of the most consultative, transparent and publicly debated processes of the Constitution-making the world had ever seen.³⁵

In 2002, the Cabinet established an Electoral Task Team (ETT), with the aim, among other things, to “draft the new electoral legislation required by the Constitution”.³⁶ The ETT tabled a report known as the Van Zyl-Slabbert Report in 2003,³⁷ that recommended a new electoral system that would “align the electoral systems for all three spheres of government and allow for independent candidates to participate in elections and stand for public office”. Regrettably, the recommendations were ignored, and the system was not changed. Interestingly, the Van Zyl-Slabbert Report found that the existing system, based purely on party-based proportional representation, diminished accountability as members of parliament, owe their accountability, salaries and seats in parliament, to their political parties and not the South African voters.³⁸

Moreover, there is no direct relations between members of parliament and the electorate, and thus, no sense of accountability to the voters. So tragically, has fostered mediocrity and complacency in politics. As, it is an electoral system that promotes party obedience over debate that is robust; one that stifles individual excellence and certainly does not put the voters first. Furthermore, in 2017 an assessment of key legislation and the acceleration of fundamental change, also tabled a report, that recommended that “Parliament should amend the Electoral Act³⁹ to “provide for an electoral system, that makes members of parliament accountable to defend constituencies on a proportional representation and constituency system for national

³⁴ 2008 Multi-Stakeholder Conference *Reflections on the state of Electoral Democracy in South Africa* 116.

³⁵ 2008 Multi-Stakeholder Conference *Reflections on the state of Electoral Democracy in South Africa* 116.

³⁶ Electoral Task Team. 2003 Report of the Electoral Task Team, Pretoria.

³⁷ Van Zyl Slabbert Report 2003.

³⁸ News 24 2020 Lindiwe Mazibuko: Judgment in this case could lead to electoral reform <https://news24.com/citypress/voices/lindiwe-mazibuko-judgment-in-thid-case-could-lead-to-electoral-reform> (accessed 4 October 2022).

³⁹ News 24 2020 Lindiwe Mazibuko: Judgment in this case could lead to electoral reform <https://news24.com/citypress/voices/lindiwe-mazibuko-judgment-in-thid-case-could-lead-to-electoral-reform> (accessed 4 October 2022).

elections”.⁴⁰ Since the tabling of this report, like the Van Zyl-Slabbert Report, nothing significant has been done to implement the recommendations.

Consequently, in 2018, Mosiuoa Lekota, the leader of Congress of People (COPE), introduced a Private Member’s Bill in the national assembly, that would allow individual candidates to contest elections at national and provincial levels.⁴¹ Unfortunately, this was also met with opposition and was never implemented. Most recently, concerns have been raised about the constitutionality of the Electoral Act. At the core of the debate is the fact that the Electoral Act, is unconstitutional in that it does not allow independent individuals to participate in elections unless they are members of a political party. This led to a legal dispute that ended at the ConCourt.

2.3 The different types of electoral systems

There are three electoral systems, namely, the majoritarian system, proportional representation and a mixed system.

2.3.1 Majoritarian system

The majoritarian system is the oldest and most popular system. In this system, South Africa is divided into single member or multi-member constituencies, and the candidate who receives majority votes wins the seat. A government is then formed by the part with the most seats. Thus, in accordance with the plurality principles, one obtaining the most seats are sufficient, rather than winning the majority of popular votes. As such, this guarantees the party a majority of seats in parliament and the ability to form a government. Therefore, the majority seats are not determined by the majority of votes cast, rather it is a “manufactured majority”.⁴²

2.3.2 Proportional representation

Proportional representation (PR) is the second oldest electoral system. In this particular system, South Africa may be divided into multi-member constituencies, or one large constituency (as in South Africa) and the number of seats, a party gets on the percentage of electoral support.

⁴⁰ News 24 2020 Lindiwe Mazibuko (n 42).

⁴¹ Business Tech 2020 “Proposed changes to elections in South Africa <https://businesstech.co.za/news/government/429539/proposed-changes-to-elections-in-south-africa/> (accessed 5 December 2022).

⁴² 2008 Multi-Stakeholder Conference *Reflections on the state of Electoral Democracy in South Africa* 57.

Parties draw up a list of party officials and this may be either open or closed. In a closed-list, voters simply vote for the party, which decides the names of its party officials according to its own criteria and preference. While in an open-list, voters vote for the candidates in the order of preference.⁴³

2.3.3 *Mixed systems*

This is a recent electoral system that merges or compromises two systems, namely, majoritarian and proportional representation. The idea is to get the best out of the two systems.⁴⁴ Therefore, it combines proportional representation and constituency elections, based on party lists. So that the voters have two votes, one for the constituency and another for party list.

2.4 *A comparative analysis of electoral systems*

In terms of promoting democratic values and governance, the above electoral systems have various advantages and disadvantages. These advantages and disadvantages are of paramount importance when comparing the two systems, namely, majoritarian and proportional representation (PR) systems. The former provides “stable” government as is constituted of just one-party with policies that are clear and implemented through parliamentary support, while the latter tends not to be “stable”, because it is made up of coalition government, that is formed by multiple parties which are not stable enough to constitute a majority.

Moreover, PR means that parties get a certain number of seats in parliament, depending on the percentage of votes received in an election. Consequently, with the incorporation of independent candidates into the new electoral system, pertaining to the PR system, the requirement should be the same for independent candidates as is for political parties. In other words, if an independent candidate receives enough votes, to qualify for a seat in the provincial legislature and national assembly, the candidate should be regarded as a “party type” for purposes of distributing seats equally. Thus, the independent candidate would need an equal number of votes to win a seat parliament. Furthermore, the key point of the PR system is that the composition of the legislature must proportionally reflect the preferences of voters expressed in the number of votes cast in a particular election.

⁴³ 2008 Multi-Stakeholder Conference *Reflections on the state of Electoral Democracy in South Africa* 58.

⁴⁴ 2008 Multi-Stakeholder Conference *Reflections on the state of Electoral Democracy in South Africa* 58.

In addition, a PR- based government or parliament relies on representativeness, as independent candidates are also guaranteed parliamentary seats. And representivity goes beyond the multiplicity of parties and entails the inclusion of vulnerable groups in the society such as women. Therefore, PR tends to encourage multipartyism, as voters are provided with a wide range of choices of political parties, and independent candidates to choose from, and turn-out tends to be high because each voter can find a party that appeals to them. Conversely, votes cast for independent candidates in a majoritarian system, do not count, as they lack sufficient support to win a seat.⁴⁵ Hence this may even discourage support for independent candidates, because their votes do not count. Consequently, the number of independent candidates may even be reduced to either one or a dual-party system, with even minimal electoral choice offered to voters.

Therefore, it is evident that including independent candidates, in the PR system would enable parties to be accessible easily and responsive to voters, because they have a constituency for which they are directly responsible. Voters would have a dedicated person to whom they can report their grievances and concerns, since their re-election hinges on voter satisfaction and not necessarily the approval of political party leadership.

2.5 Synopsis of the ConCourt judgment on the right of independent candidates to stand for public office

In the *New Nation Movement* case, the matter that impacted constitutional law, electoral laws and the general interpretation of the law, in the sense that it is likely going to be a leading case on independent candidates in South Africa, as enabled South Africa to join countries like the United States of America and Namibia in allowing independent candidates to stand for elections, and if elected to hold office.

The applicants, in 2018, instituted an urgent application at the Western Cape division of the High Court. In this application, the applicants argued that the Electoral Act violates section 19(3)(b) of the Constitution, for unjustifiably limiting the right of independent candidates to stand for public office, and if elected to hold office. The applicants also submitted that the Electoral Act infringed the right to freedom of association, enshrined in section 18 of the Constitution, as opposed to a member of a political party. The court held that indeed certain

⁴⁵ A majoritarian based legislative represents a section of society to the exclusion of others.

provisions of the Constitution, belie the applicants' argument, for instance, those relating to the "multi-party system"⁴⁶ and the discretion of parliament to prescribe through national legislation; and the electoral system that applies to the national assembly and provincial legislatures.⁴⁷

Desai J, with the approval of *Majola v State President of the Republic of South Africa and Another*,⁴⁸ which dealt with almost identical issues and observed section 1(d) of the Constitution on multi-party system entrenched a party system in South Africa.⁴⁹ It is of paramount importance to note that, the judge in the ConCourt judgment in the *New Nation Movement* case, and the judge in *Ramakatsa v Magashule*,⁵⁰ leaned on the claim that section 19 of the Constitution, locates political parties at the centre of political rights.⁵¹ While Desai J, with the help of the ConCourt judgment in *New National Party of South Africa v Government of the Republic of South Africa*⁵² held that "the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy, it is both useless and empty".⁵³

Moreover, he also noted that, apparently, there is no legislative framework that existed to facilitate independent candidates standing for elections. Desai J, however, distinguished the *New Nation Movement* case, from the ConCourt judgment in *My Vote Counts NPC v Minister of Justice and Correctional Services*,⁵⁴ in which Mogoeng CJ, read section 19 of the Constitution as meaning that "every adult citizen may in terms of the Constitution, stand as an independent candidate to be elected to municipalities, provincial legislatures or the national assembly".⁵⁵ Thus, treated Mogogeng's stance as *obiter*, accordingly it did not bind the High Court.⁵⁶

⁴⁶ Section 1 (d) of the Constitution.

⁴⁷ Sections 46 (1) (a) and 105 (1) (a) of the Constitution.

⁴⁸ [2012] ZAGPJHC 236.

⁴⁹ *Majola* case (n 51) par 18.

⁵⁰ 2013 2 BCLR 202 (CC).

⁵¹ *Ramakatsa v Magashule* (n 53) par 30.

⁵² 1999 3 SA 191 (CC) par 11.

⁵³ *New Nation Party* case (n 55) par 30.

⁵⁴ 2018 5 SA 380 (CC).

⁵⁵ *My Vote Counts* case (n 57) par 29.

⁵⁶ *My Vote Counts* case (n 57) par 23.

Furthermore, Desai J, found that, the Constitution does not prescribe a system which allows independent candidates to run for public office.⁵⁷ It only permits parliament, to choose between permitting independent candidates to run public office at the national and provincial levels, and only permits them to run for public office at local level.⁵⁸ Thus, once the parliament has made a choice, that choice (whether for national or provincial levels) does not in any way violate the Constitution. It is for these reasons that, Desai J dismissed the applicants' case.⁵⁹ The judgment in ConCourt, however, ruled in favor of the applicants. Although, Froneman J dissented, the majority judgment, penned by Madlanga J, accepted the applicants' arguments that the Electoral Act violates the right to vote,⁶⁰ the right to freedom of association,⁶¹ the right to dignity, and freedom of conscience.⁶²

Delving into the majority judgment,⁶³ Madlanga J held that, section 19 of the Constitution provides the right to stand for public office as independent candidates. Both Madlanga and Jafta recognised the violations of the Constitution and the Electoral Act for not providing for individuals, to run for public or political office as independent candidates. However, they asserted that the principle of "harmonious interpretation", demands judges to construe the Constitution in a manner that does "offend" other rights provided for in the Constitution, including but not limited to rights enshrined in sections 18 and 19 of the Constitution.⁶⁴ Hence, in the adoption of the principle of "harmonious interpretation", the majority held that the applicants had the right to stand for public office, even if the Constitution and the Electoral Act does not provide for independent candidates.

Similarly, Madlanga J noted that, "at the very least, the silence on independent candidates in the Constitution and Electoral Act, does not permit or prohibit those candidates". However, in order to avoid contravening the freedom of association, these provisions had to be read as obliging the state to permit independent candidates to run for public office. In addition, he reasoned that, freedom of association entails the freedom of every individual to choose

⁵⁷ *My Vote Counts* case (n 57) par19.

⁵⁸ *My Vote Counts* case (n 57) par 19.

⁵⁹ *My Vote Counts* case (n 57) par 34.

⁶⁰ See s 19 of the Constitution.

⁶¹ See s 18 of the Constitution.

⁶² *New Nation Movement* case (n 2) par 62 (Madlanga J held that, the independent candidates question implies three rights, namely the right to freedom of association, freedom of conscience, and the right to dignity).

⁶³ Cameron J, Jafta J, Khampepe J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurred in Madlanga J's judgment. Jafta J wrote a separate judgment that concurred with the majority judgment.

⁶⁴ *New Nation Movement* case (n 2) par 20.

whomsoever they wish to associate with and their freedom to choose with whom not to associate. Moreover, freedom of association entails the duty of the state to permit the freedom not to associate in a political party.⁶⁵

Therefore, bearing this in mind, forcing individuals to join political parties in order to run for public office, violates the right to freedom of association that is constitutionally protected. Thus, ruled that indeed the Electoral Act is unconstitutional to the extent that it excludes independent candidates to run for public office, and if elected, to hold office.

2.6 Conclusion

This chapter traced the history of elections and electoral system. It has been shown that from a historical point of view, the current electoral system was chosen or agreed upon, as the most appropriate one given our past. However, it was supposed to be reformed based on the recommendations at a later stage, to align all the electoral systems of all spheres of government and allow for independent candidates to stand for public office. To date, the lack of a robust and inclusive electoral system is a plight for independent candidates, as it deprives them their constitutional right to stand for public office.

The next chapter investigates, the current legal framework. To determine whether our current electoral system is adequate and robust enough, to ensure free and equal elections for all.

⁶⁵ *New Nation Movement* case (n 2) par 22-63.

CHAPTER THREE

LEGAL FRAMEWORK

3.1 *Introduction*

The Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution), as the supreme law⁶⁶ provides for political rights, including the right to stand for public office.⁶⁷ It also protects the right of citizens to free, fair and regular elections, as a fundamental political right enshrined in the Bill of Rights. In addition, sections 46 and 105 of the Constitution provide an electoral system of proportional representation, in terms of which amendments to the system must be made.

This chapter looks into the current legal framework. In particular, the Constitution, the Electoral Act and the Electoral Amendment Bill, to determine whether the current legal framework is adequate and robust enough to ensure free and equal elections for all.

3.2 *The Constitution of the Republic of South Africa, 1996*

Section 19(3)(a) of the Constitution, provides for the right to vote. The equality of votes affects the amendment, because the electoral system cannot be established where some votes outweigh others. Therefore, independent candidates, cannot be accommodated in a way that the votes brought out for them weigh less. Furthermore, Section 19(3)(b) of the Constitution provides that “every citizen has the right to stand for public office, and if elected to hold office”. However, the current electoral system, limits the rights provided for in sections 19(1) and 19(3)(b) of the Constitution, because it only permits political parties to contest elections, of which the outcome is based solely on proportional representation, which simply means that one must belong to a political party, in order to stand for public office.

3.3 *The Electoral Act, 1998*

⁶⁶ Section 2 of the Constitution.

⁶⁷ Section 19 of the Constitution reads:

Political rights

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

The Electoral Act⁶⁸ (hereinafter the Act) is a piece of legislation that was passed by parliament to regulate the exercise of the right to vote and the holding of elections in South Africa. However, it omitted to cater for the exercise by individual South Africans of the right to contest elections and hold office if elected. This oversight may have been caused by the fact that, at the time the Act was passed into law, transitional requirements emanating from the interim Constitution were still in place.⁶⁹ These transitional arrangements lasted until the first elections under the “new order”, as the elections in 1994 were a special case. However, the elections in 1999, were based on pure proportionality, which was never meant to be the final electoral system. Thus, these arrangements required that candidates for membership of the national assembly and provincial legislature be nominated from party-lists which excluded nomination of independent candidates.

Section 57A of the Act and section 15 of the Electoral laws Amendment Act,⁷⁰ which entails the system of representation in the national assembly and provincial legislatures, provides that Schedule 1A applies in general to elections for the national assembly and provincial legislatures held under this Act, but without detracting from the generality of its application in particular.⁷¹ In essence, this provides for representation in the national assembly and the provincial legislature, only through political party-list. Thus, inconsistent with the Constitution because it violates the fundamental rights of independent candidates to stand for public office, as enshrined in section 19(3)(b) of the Constitution, which was the crux of the matter before the ConCourt. In addition, the Act is also inconsistent with the fundamental right to freedom of association,⁷² in the sense that it forces the individual candidates for public office, to join political parties, in order to be placed on party-lists and be eligible for election to public office.

Moreover, the electoral system in the national and provincial elections, is also inconsistent with the constitutionally enshrined value of accountability. It does not allow citizens to nominate and vote for their own candidates from their own constituencies, so that such candidates can

⁶⁸ 73 of 1998.

⁶⁹ Schedule 6 of the Constitution.

⁷⁰ 34 of 2003.

⁷¹ (a) lists of candidates;
(b) the allocation of seats;
(c) the designation of candidates from lists as representatives in those seats; and
(d) the filling of vacancies.

⁷² s 18 of the Constitution.

represent them directly at both the national and provincial levels of government. The current system does not truly give effect to the will of the people. This is because the members of the public are not able to choose their own representatives or candidates, to represent their interests. Instead, they must rely on the choice made by political parties. Thus, those chosen to become obligated to their party leadership and the people or voters.⁷³

3.4 *The Electoral Amendment Bill, 2022*

The Electoral Amendment Bill⁷⁴ (hereinafter the Bill), was adopted in the national assembly despite the fierce opposition on 20 October 2022. A total of 330 votes were cast, with 98 members of Parliament rejecting it, 232 voting for the Bill and 3 abstaining from the vote. This was after, the ConCourt judgment in the *New Nation Movement* case, warranted the amendment of certain provisions of the Electoral Act, for being unconstitutional to the extent that it requires adult citizens to be elected for public office only through political parties. Put differently, the Electoral Act excludes independent candidates or all those who may want to participate in elections but do not belong to any political party.

The Bill was intended to put independent candidates and political parties on an equal footing. However, due to the flaws in the current Bill, this is not the case. The Bill is flawed in the sense that; the Constitution provides every citizen the right to be a member of a party. However, clause 31B(3)(f) in the Bill, determines that one of the requirements for an independent candidate to stand for public office, is that they should not have been a member of a political party for at least three months prior their nomination date. This violates section 19(1)(b) of the Constitution, which provides the right to everyone to participate in the activities of a political party. It is against this background that the phrasing of this clause in the Bill missed the point. In the sense that, from the public's point of view, the emphasis was on having alternatives to candidates who already form part of the internal party nomination processes. Therefore, the minimum requirement for such an independent candidate should have been that a candidate is not nominated by a political party, nor their nominations and campaign funded by a political party.

⁷³ *New Nation Movement* case (n 2) par 131.

⁷⁴ of 2022.

Additionally, public participation throughout the process of amending the Bill was inadequate. The committee did not give the required notice to the public for its public hearings on the Bill, in March 2022. Furthermore, the committee did not provide the public with sufficient information to properly understand the purpose of the process and the complexities of the electoral system. Furthermore, the Minister of Home Affairs disregarded the majority view of the ministerial advisory committee.⁷⁵ The committee had compiled a report that included two possible options, namely, the minority and majority views. The majority option of this report was ignored by the minister, and therefore not presented to the public and parliament for the necessary engagement. Moreover, the Bill contradicts the ConCourt judgment, in the sense that the electoral system does not “in general” result in proportionality. Independent candidates are required to attain a higher threshold of votes for a seat than political parties, and a higher threshold of signatures for registration.

This is another infringement and violation of rights of independent candidates, because political parties are not required the same high thresholds.⁷⁶ Interestingly, the surplus of votes belonging to independent candidates gets added to the pool of votes, again disadvantaging independent candidates. Furthermore, the Bill is now classified as a section 75-bill in terms of the Constitution yet was introduced as a section 76-bill because it also affects provinces. This change may result in participation of provinces not being extensive (as the Bill has been referred to provinces for engagement), because section 75 does not concern provinces.

3.5 Conclusion

From the above discussion, it is evident that the current legal framework is not adequate or robust enough to ensure free and equal elections for all. It was argued that the Act is inconsistent with the supreme law of the country, in the sense that it does not permit independent candidates to stand for public office and, if elected, to hold office. Thus, the Act was declared unconstitutional. Furthermore, it was also shown that even the Bill itself, is inadequate as it is flawed and failed to put independent candidates and political parties on an equal footing.

⁷⁵ Democracy Development Program “We are sleepwalking into a constitutional crisis” <https://ddp.org.za/blog/2022/10/20/we-are-sleepwalking-into-a-constitutional-crisis/> (accessed 5 December 2022).

⁷⁶ Clause 2 of the Bill.

The Bill was supposed to assist in the reform of the electoral system, as required by the *New Nation Movement* case ConCourt judgment. Regrettably, the Bill in its current form fails to assist in this new reform. In fact, it disenfranchises independent candidates and the voters, in the sense that it “betrays” the Constitution and centuries of the liberation struggles. This shows the need for legal framework that is adequate and robust enough to ensure equal and free elections for all.

The next chapter analyses the possible success of the proposed electoral system in South Africa.



CHAPTER FOUR

THE PROPOSED ELECTORAL SYSTEM IN SOUTH AFRICA

4.1 Introduction

This chapter delves into the culmination of the proposed electoral system in South Africa. It outlines the criteria relied on by experts in the creation of the most suitable electoral system, given South Africa's history and current circumstances regarding elections in general. Essentially, the criteria relied on for the proposed electoral system needed to accommodate independent candidates and adhere to the ConCourt judgment that required a composition of the legislature and reflect proportional representation. Moreover, it should be simple for the IEC to implement the proposed changes and for voters themselves to understand. Furthermore, it needs to promote inclusiveness, representativity, gender parity within the legislature, accountability and require minimal or no amendments to the Constitution.⁷⁷

In addition, the proposed electoral system must be incorporated into one of the three broad approaches, namely, a simplistic proportional representation model, pure constituency approach (a winner takes it all) and a hybrid model that accommodates constituencies with a compensatory proportional list, allowing for overall proportionality to be established. This chapter analyses the possible success of the proposed electoral system in South Africa.

4.2 The proposed electoral system in South Africa

The pure constituency approach was flatly rejected, as it would not be able to reflect, in general, proportionality in accordance with the *New Nation Movement* case ConCourt judgment. It would also not accommodate sufficient diversity within the legislature. Similarly, the simplistic proportional representation model was also rejected, on the grounds that it would be impractical to administer. Moreover, it would not necessarily promote geographic representation and would do little to improve accountability to voters and voters representativity.⁷⁸

Therefore, a hybrid model that accommodates constituencies together with a compensatory proportional list, allowing for overall proportionality to be established was the most preferred between the systems. Put differently, this proposed model is a 400-seat national assembly of which 75% of these seats are allocated to multi-member constituencies (MMC), comprised of

⁷⁷ Inclusive Society Institute 2021 *Proposed Electoral Model for South Africa* 22.

⁷⁸ Inclusive Society Institute (n 77) 22.

three to seven members per MMC. These constituencies will be supplemented by a proportional list of 25%, which will be used to ensure overall proportionality, in terms of the total number of votes cast for parties in the election.⁷⁹

4.2.1 *The structure of the proposed system*

The proposed system would have two components in the establishment of the legislature. The first one being representatives elected through MMCs.⁸⁰ The second one would comprise of representatives elected through the compensatory proportional representation (PR) list.⁸¹

4.2.2 *Ballot papers, candidates and seat allocation*

In the proposed system, there will be one ballot paper in each MMC, for the national elections, comprising only the names of the parties (not the political parties' individual candidates), followed by the names of independent candidates.⁸² The challenge with this option is that it has independent candidates on the same ballot paper as political parties. Sections 46 and 105 of the Constitution, provide for national and provincial legislatures, that requires elections to result in proportional representation (this system refers to political parties). Hence, the moment independent candidates are on the same ballot as political parties, they capture a single seat.

Moreover, under proportional representation, there is a possibility that if an independent candidate, for instance, is awarded five seats, they can only get one. Now, the issue here is that these other four seats do not disappear but are given to the parties in proportion to the party's existing support. This means that, if there are four seats that are in excess, the largest party gets two of them. Put differently, the largest party gets a bonus of two seats above their proportional share of the vote.

Furthermore, parties are permitted to nominate several candidates equal to the quote size of each MMC plus one. Thus, parties will be able to nominate four candidates to a three-seat MMC, or eight candidates to a seven-seat MMC, the additional candidate is to provide for filling any vacancies that may occur over time.⁸³ Moreover, a single vote will be cast by a voter, for either a political party or independent candidate of his/her preference and seats will be

⁷⁹ Inclusive Society Institute (n 77) 22.

⁸⁰ 66 MMCs of three to seven members each.

⁸¹ That ensures that parties are represented to their share of the overall national vote.

⁸² Inclusive Society Institute (n 77) 23.

⁸³ Inclusive Society Institute (n 77) 23.

allocated proportionally based on the number of votes received, for each political party or independent candidate. Therefore, should an independent candidate receive enough votes to be elected, he or she will be appointed to parliament.⁸⁴

In addition, an open-list system, where voters selected their preferred candidates through political parties or independent candidates and whomever receives the most votes then qualify. However, this option was suggested to be left until voters are more accustomed to the new electoral system. In the first instance, the closed-list system would ensure procedural simplicity, and in the second instance, gender equality could be promoted by requiring parties to alternate their candidates based on gender, that is a woman followed by a man, or a man followed by a man, on the MMC candidate list.⁸⁵ It must be noted that, it would be difficult to promote gender equality through the ballot paper amongst independent candidates, as each candidate represents only himself or herself. However, overtime measures can be put in place to ensure that there is a fair balance and equality as far as gender is concerned.

4.2.3 *Number of seats in Parliament*

In the proposed system, there would be 400 seats, of which 300 of those seats would be allocated to 66 MMCs and 100 compensatory seats, will be used to ensure the overall proportionality based on votes cast for each of the parties. Thus, it is important to have at least three members per MMC to promote inclusivity and diversity within each MMC. A number that is too large would be “counterproductive” in terms of promoting representativity, or for bringing the representatives closer to the electorate. As a result, accountability is strengthened when the representatives are closer to the electorate.⁸⁶

However, it should be borne in mind that, given the closed-list system being proposed, the electorate will to a lesser extent be able to hold candidates accountable, than it would in an open-list system. Nevertheless, knowing one’s representative and thereby having access to him or her, strengthens the representative-voter nexus. As a result, the maximum number of seats per MMC is suggested as seven.⁸⁷ Thus, MMCs are demarcated along the metropolitan lines and district. In a case where the number of voters within a district council border is too few to

⁸⁴ Inclusive Society Institute (n 77) 24.

⁸⁵ Inclusive Society Institute (n 77) 24.

⁸⁶ Inclusive Society Institute (n 77) 23.

⁸⁷ Inclusive Society Institute (n 77) 23.

warrant at least three representatives, two or more district councils can be added together.⁸⁸ And where the number of voters within a metropolitan are too many, MMCs can be allocated along the sub-council or metropolitan regional lines.

Therefore, each vote cast should carry equal weight. So, in the determination of borders of the MMCs, the total number of registered voters will be divided by 300 (the number of MMC seats), which results in a quota per seat. In the 2019 general election, there were 26 756 649 registered voters, which, if divided by 300 seats would equate to a seat-quota of 89 189. Therefore, an MMC will have approximately 270 000 to 624 000 voters.⁸⁹

In the allocation of seats, either sainte-laguë divisor system or quota system can be used. Whilst the preferred one is the former, it may be prudent to retain the latter simply because it is known and trusted by the current political regime. For purposes of this study the two systems are explained as follows: the sum of votes for political parties and the votes for independent candidates, in a divisor system, is divided successively by the divisors distinct to the specific divisor method.⁹⁰ In the sainte-laguë system the string of divisors is: 1, 3, 5, 7 etc. This means that the first seat in the MMC is allocated to the party with the largest quotient, while the next seat goes to the party or independent candidate with the second largest quotient until all seats are allocated.

This is against the equality clause, enshrined in section 9 of the Constitution, in the sense that votes are not counted equally or do not carry the same weight between political parties and independent candidates. Ultimately, independent candidates do not really stand a chance to have much power in parliament. In addition, there is no proposed threshold, for a party to qualify for seats in the legislature. This is because, in the MMC a “natural” threshold is at play.⁹¹ Hence, in a 7-seat MMC, a political party or independent with more than 7,15% of the vote is guaranteed a seat, while in the 3-seat constituencies the natural threshold guarantees a seat at 16.67%.⁹² Thus, the idea is that a small political party or independent candidate, cannot lose the last seat in the MMC to a big party winning all votes, other than what the small political party or independent candidate wins, as long as the voters for these two are more than those of

⁸⁸ Inclusive Society Institute (n 77) 23.

⁸⁹ Inclusive Society Institute (n 77) 23.

⁹⁰ Inclusive Society Institute (n 77) 25.

⁹¹ Inclusive Society Institute (n 77) 25.

⁹² Inclusive Society Institute (n 77) 25.

big political party, divided by five (the divisor of three seats). Furthermore, if independent candidates obtain more votes than required for election, the surplus or votes in excess are discarded, in the sense that an independent candidate cannot be more than one individual. Thus, only political parties will compete for seats on the compensatory proportional lists.

Therefore, it is evident that the proposed system marginally disadvantages independent candidates, in that every vote cast in favor of an independent candidate will impart a fraction of that vote, as the votes in excess will be gained by the largest party in that election. And regrettably, there are no alternative remedies available to independent candidates, should they wish to lay claim to the additional votes cast over and above the required seat in the legislature, as an independent candidate cannot choose to be a lone representative in parliament and at the same time claim the rights and benefits of political parties.

4.3 Conclusion

This chapter investigated the possible success of the proposed electoral system. Given the reasons mentioned above, it is evident that the proposed electoral system, in essence, must be a hybrid model that consists of proportional representation and a combined system. Owing to South Africa's diversity, proportional representation is necessary and constitutionally required. This chapter argued that for the proposed system to be successful, it needs to promote equality and accountability through a hybrid or combined system.

Therefore, for as long as the proposed system does not accommodate independent candidates and political parties, on an equal footing, then unfortunately, it would not be successful in guaranteeing free and fair elections for all. This would then mean that our democracy and elections would be greatly compromised.

The next chapter provides recommendations, to answer the question whether there are any legal solutions or practical answers that tackles the issue at hand. Finally, it provides a general conclusion to the study.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

In this final chapter of this study, several constructive recommendations modelled towards access to free and fair elections for all, in accordance with the Constitution are presented. Then, relying on the insights emanating from critical literature review, the research questions are answered drawing together the research findings in a general conclusion. Finally, the chapter highlights key issues that may possibly assist in future research.

5.2 Recommendations

In view of the preceding chapters and forgoing discussion, the following recommendations are proposed to improve the state of elections in general, and the proposed electoral system in South Africa. These recommendations are by no means a “silver bullet” that will solve all issues concerning the right of independent candidates to stand for public or political office in South Africa, but it is believed that they present a fresh look at elections and the proposed electoral system.

5.2.1 The Electoral Act should be amended to provide regulations and guidelines to safeguard the rights of independent candidates

Given the fact that the Electoral Act (the Act), is the main piece of legislation, after the Constitution, with powers to regulate the right to vote and having access to free and fair elections in South Africa, it needs to constitutionally cater for the right of independent candidates to stand for public office. Furthermore, once the Act has been reformed in accordance with the ConCourt judgment in the *New Nation Movement* case regarding the fundamental right of independent candidates, it will regulate elections and the electoral system in South Africa.

Therefore, it is recommended that clear regulations and guidelines be crafted in a way that the fundamental right of independent candidates, as enshrined in section 19(3)(b) of the Constitution⁹³ which provides that every adult citizen has the right to vote in elections for any legislative body that is established in terms of the Constitution; and to hold office if elected.

⁹³ of 1996.

5.2.2 The Electoral Amendment Bill Should be Reformed to be in Line with the Constitution

There is a serious need for change and reform of the Electoral Amendment Bill (the Bill), regarding the amendments of certain provisions in the Act, which were declared unconstitutional for unjustifiably and unreasonably infringing on the right of independent candidates to stand for public office, and if elected to hold office. The Bill should be crafted and designed in a way that puts both political parties and independent candidates on an equal footing in terms of fairness and accountability. Accordingly, the Bill should be accompanied by guidelines and regulations that, provide practical guidance on its provisions (once promulgated), as the mere existence of the Bill is not enough.

Moreover, the Bill in its current form has been demonstrated to be inconsistent with the Constitution. Furthermore, the Bill is against the advancement or promotion of free and fair elections. This does not only affect the right of independent candidates, but also elections and electoral systems in general, as the Bill does not guarantee free elections. Therefore, it is recommended that the Bill be reformed and be crafted in a way that will be consistent with the Constitution, to avoid any other challenges that may arise once promulgated. Otherwise, the Bill will compromise the general elections in 2024 if there were to be another dilemma or delays caused by another court case regarding elections and electoral systems.

Therefore, it is believed and expected that reforming the Bill will assist in ensuring free and fair elections, as other stakeholders, like the IEC will have the capacity and necessary resources to start preparing for the next election in terms of the new electoral system in order to ensure that the new electoral system would not be unconstitutional and ultimately challenged in the courts of law.

5.2.3 A hybrid electoral system should be adopted in South Africa

It is recommended that the proposed electoral system, namely, a hybrid model that consists of both the PR and constituency system, assume a more focused and strategic role to provide necessary resources and support to independent candidates. The support may be in various forms incorporating key elements such as equality and accountability. The implementation of this recommendation will not be too difficult, provided that the Electoral Act and Electoral Amendment Bill are reformed to ensure a smooth transition, from the current system (which does not permit independent candidates to stand for public office, and if elected to hold office to the proposed system.

5.3 Conclusion

5.3.1 General background

The main objective of this study was to provide a critical legal analysis of the right of an independent candidate to stand for public office in South Africa. This was done with reference to the current legal framework, namely, the Electoral Act, the Electoral Amendment Bill, and the proposed electoral system. The discussion was guided by the research question that strengthens the study: whether the current legal framework is adequate and/or robust enough to accommodate independent candidates to stand for public and if elected to hold office.

This research question was underpinned by the following ancillary questions:

1. what is the proposed electoral system?
2. What is the role of the Electoral Act in the implementation of the proposed electoral system?
3. How does parliament and other stakeholders implement recommendations of the ConCourt?
4. Is the current legal framework and other measures adequate and/or robust enough to accommodate independent candidates to stand for public office, and if elected to hold office.

5.3.2 Answering the research question

In answering the research question, it was demonstrated in chapter three that, the current legal framework is not adequate or robust enough to accommodate independent candidates, to stand for public office and if elected to hold office, in the sense that the current legal framework disadvantages against independent candidates. Several provisions in various pieces of legislation were delved into, to prove this. Finally, the shortcomings and flaws of the current legal framework were explored in much detail, in respect of the proposed electoral system in chapter four.

5.4 Suggestions for future research agenda

It is of paramount importance to state that the inquiry set out in this study had limitations, in the scope and effect of the proposed electoral systems, as the study did not explore all other avenues in much detail. It mainly focused on the role of the proposed electoral system, in advancing the right of independent candidates to stand for public office. Therefore, it may as well be necessary for future research to evaluate the entire electoral system in much detail, and

not just limit it to one aspect, for efficiency purposes. Furthermore, future research could be more comparative in the sense that it should investigate other electoral systems in the world.



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