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*PRACTICAL IMPLICATIONS FOR THE  
ELECTORAL SYSTEM:  
NEW NATION MOVEMENT NPC v PRESIDENT  
OF THE REPUBLIC OF SOUTH AFRICA*

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*In New Nation Movement NPC v President of the Republic of South Africa, the Constitutional Court declared parts of the Electoral Act 73 of 1998 unconstitutional in so far as the Act does not provide for independent candidates to stand for political office in the national and provincial legislatures. The court has given the National Assembly two years to redesign the electoral system. Given the constitutional and logistical constraints, the legislature will probably not be able to avoid a major electoral reform. It will be very hard to justify that voters may select a candidate of their choice only when such a candidate runs as an independent but not when a candidate elects to run on a party ticket. The best option would therefore be to introduce a mixed electoral system which combines constituency-based elections with proportional representation of political parties. To keep ballots manageable it would be appropriate to use other electoral design tools such as an entrance hurdle for political parties and deposits and/or nominations by registered voters supporting independent candidates as well. Such a reform might contribute to weed out candidates tainted by corruption because the capacity of political parties to shield them from the electorate in closed lists where the voters have no say about which candidates get elected will be constrained.*

*New Nation Movement NPC v President of the Republic of South Africa – electoral reform – constitutional constraints – constituency-based elections – proportional representation*

I INTRODUCTION

In *New Nation Movement NPC & others v President of the Republic of South Africa & others*,<sup>1</sup> the Constitutional Court ruled that the Electoral Act 73 of 1998 is unconstitutional in so far as it provides for a pure proportional electoral system that caters only for representation by political parties, and precludes adult citizens from standing as independent candidates in elections for the National Assembly and the provincial legislatures. The National Assembly has 24 months to bring the Act in line with constitutional norms. This article will explore the implications of the ruling for redesigning the electoral system. The background to the case will be set out first. Thereafter the judgment is summarised in some detail because the ruling sets out the shortcomings of the current electoral system and offers a guideline for necessary reforms. The merits of the judgment

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<sup>1</sup> 2020 (6) SA 257 (CC) (*New Nation Movement (CC)*).

need to be touched upon only briefly. The gist of the argument is that the legislature will probably not be able to avoid a major electoral reform. It will not be able to justify why voters should be able to elect independent candidates of their choice, but not candidates of their choice who run on a political party ticket. The constitutional and logistical constraints will also leave it no other option.

## II BACKGROUND TO THE CASE

The application, which was originally heard by the Western Cape High Court, Cape Town, challenged s 57A in conjunction with Schedule 1A to the Electoral Act as unconstitutional to the extent that it does not provide for adult citizens to be elected to the National Assembly and provincial legislatures as independent candidates.<sup>2</sup>

The high court dismissed the application. The court reasoned that nowhere does s 19(3)(b) of the Constitution of the Republic of South Africa, 1996 ('the Constitution') expressly provide 'that standing for office must include standing ... "as an independent candidate" as opposed to a member of a political party'.<sup>3</sup> Relying on s 1(d) of the Constitution, the court held that the Constitution entrenches a party system and, further, that ss 46(1)(a) and 105(1)(a) of the Constitution accord Parliament a discretion to prescribe an electoral system for the National Assembly and the provincial legislatures with representation through political parties. Whether there should be a framework that caters for the participation of independent candidates should, found the high court, be left to the exclusive discretion of Parliament.<sup>4</sup> The high court found support for this in *Majola v State President of the Republic of South Africa*,<sup>5</sup> a judgment of the South Gauteng High Court, Johannesburg. The latter ruled that Majola did not have the right to stand as independent candidate within the scope of s 19(3)(b) of the Constitution. The Western Cape High Court also relied on the judgment in *Ramakatsa v Magashule*, where the Constitutional Court ruled that '[t]he Constitution itself obliges every citizen to exercise the franchise through

<sup>2</sup> Section 57A reads as follows: 'Schedule 1A applies in general to elections for the National Assembly and the provincial legislatures held under this Act, but without detracting from the generality of its application, in particular to – (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.'

Section 57A was inserted by s 15 and Schedule 1A by s 25 of Act 34 of 2003.

<sup>3</sup> *New Nation Movement NPC & others v President of the Republic of South Africa & others* 2019 (5) SA 533 (WCC) para 13 ('*New Nation Movement (WCC)*').

<sup>4</sup> *Ibid* paras 14–19 and 30.

<sup>5</sup> [2012] ZAGPJHC 236. While this is the title of the case on the official court record, this nomenclature is legally incorrect. South Africa does not have a 'State' President under the Constitution.

a political party'.<sup>6</sup> In contrast, the court held that the view expressed by Mogoeng CJ in *My Vote Counts NPC v Minister of Justice and Correctional Services* to the effect that in terms of the Constitution every adult citizen may stand as an independent candidate for election to any legislative sphere, was 'quite patently obiter'.<sup>7</sup>

The applicants launched a direct appeal to the Constitutional Court, which was granted.<sup>8</sup> At the centre of the challenge were two issues. The first was whether — in making accession to political office possible only through membership of political parties — the Electoral Act unjustifiably limited the right to freedom of association guaranteed in s 18 of the Constitution. The second involved a determination of the content of the right enshrined in s 19(3)(b) of the Constitution, and whether the Electoral Act unjustifiably limited the right of every adult citizen 'to stand for public office and, if elected, to hold office'.<sup>9</sup>

Of the four respondents cited, only two opposed the application — the Minister of Home Affairs and the Electoral Commission. The President and the Speaker of the National Assembly elected to abide by the judgment of the respective courts.<sup>10</sup> The opposing parties countered that the wording of s 19(3)(b) is neutral and does not require that membership of the National Assembly and provincial legislatures must provide for independent candidates. They argued that other provisions of the Constitution, notably ss 1(d), 46(1)(a), 105(1)(a) and 157(2) point away from the interpretation attached to s19(3)(b) by the applicants.<sup>11</sup>

The Council for the Advancement of the South African Constitution ('CASAC') and the Organisation Undoing Tax Abuse ('OUTA') intervened as *amici curiae*.<sup>12</sup>

### III THE JUDGMENT IN A NUTSHELL

The Constitutional Court's judgment was delivered in three parts, each of which will be summarised briefly.

<sup>6</sup> *New Nation Movement (WCC)* supra note 3 para 26, quoting *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) para 68.

<sup>7</sup> *New Nation Movement (WCC)* ibid para 23, citing *My Vote Counts NPC v Minister of Justice and Correctional Services* 2018 (5) SA 380 (CC) para 29 ('*My Vote Counts II*').

<sup>8</sup> *New Nation Movement (CC)* supra note 1 paras 2, 11–13.

<sup>9</sup> Ibid para 10.

<sup>10</sup> Ibid para 3.

<sup>11</sup> Ibid paras 83–4, 88, 92–93, 95 and 117–18.

<sup>12</sup> Ibid paras 8–9. The gist of their arguments is set out in paras 78–79, 94 and 96–7.

*(a) The majority judgment*

The first part was penned by Madlanga J with the majority (Cameron J, Jafta J, Khampepe J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ) concurring. Section 19(1) of the Constitution guarantees the right of every adult citizen to make political choices, including the right to form political parties, to participate in the activities of a party and to campaign for that party. The court reasoned that adult citizens cannot be coerced to be members of political parties, and consequently, they may exercise the s 19(3)(b) rights as individual citizens who elect not to associate with a political party.

The court held that, despite having been pleaded as being discrete,<sup>13</sup> the freedom of association challenge (based on s 18 the Constitution) is inextricably linked to the content of s 19(3)(b).<sup>14</sup> In determining whether the respondents' interpretation of s 19(3)(b) indeed results in a denial of s 18, the court set out to determine the content of s 18. It considered the constitutional purpose of freedom of association, as well as its treatment in international and foreign law, and finally concluded that s 18 not only protects the positive right to associate, but also the 'negative right' not to be compelled to associate.<sup>15</sup> The court held that if the state compels an individual to associate with a political party when such individual does not want to — whether by joining or forming a party — that limits the right to freedom of association.<sup>16</sup>

The court held that the political choices itemised in the subsections of s 19(1) all relate to political parties, but this 'does not mean those choices concern political parties only'. The provision uses the wording 'which includes'. If the political choices were restricted to those enumerated in s 19(1)(a) to (c), however, the subsection would have stated the rights 'are' the ones following. By using the term 'includes' the provision indicates that political rights 'are more than what is itemised'.<sup>17</sup>

Although for some there may be advantages in being a member of a political party, undeniably political party membership also comes with impediments that may be unacceptable to others. It may be too

<sup>13</sup> It appears that the word 'discrete' has been used by the court to mean 'implicit' or 'supportive of'. See *New Nation Movement* (CC) *ibid* para 17, where the court reasoned that adult citizens cannot be coerced to be members of political parties, and thus they may exercise the s 19(3)(b) right on the basis of free association. 'Thus on its own, the freedom of association challenge begs the question', but one cannot avoid determining the content of the s 19(3)(b) right without taking it into consideration. The freedom of association challenge is therefore not 'a standalone challenge'. See also a similar reference in paras 96 and 98.

<sup>14</sup> *Ibid* para 14.

<sup>15</sup> *Ibid* paras 22–58.

<sup>16</sup> *Ibid* para 59.

<sup>17</sup> All the quotations in this paragraph are to be found *ibid* para 17.



trammelling to those who are averse to control. It may be overly restrictive to the free spirited. It may be censoring to those who are loath to be straight-jacketed by predetermined party positions. In a sense, it just may — at times — detract from the element of self; the idea of a free self; one's idea of freedom.<sup>18</sup> Thus a conscious choice not to form or join a political party is as much a political choice as is the choice to form or join a political party; it is equally deserving of protection.<sup>19</sup> The court rejected the respondents' argument that s 19(3)(b) must be read to imply that an adult citizen must stand for and hold political office 'through a political party'.<sup>20</sup> In order to avoid pitting the two rights against each other, a harmonious interpretation of s 19(3)(b) that promotes freedom of association is to be preferred.<sup>21</sup>

The court proceeded to balance these rights with other provisions in the Constitution that prescribe proportional representation of political parties. The court ruled that the measures provided for in items 6 and 11 of Schedule 6 (Transitional Arrangements) of the Constitution have no independent existence and applied only 'to the *first* National Assembly and Provincial legislature elections'.<sup>22</sup> Thus 'any continued employment of an exclusive party proportional representation system can no longer be sourced' from these provisions.<sup>23</sup> The court relied on *United Democratic Movement v President of the Republic of South Africa*, where the Constitutional Court held that the transitional proportional representation system was 'to remain in place until the *second* election which [was] to be regulated by the legislation envisaged in sections 46(1)(a) and 105(1)(a) of the Constitution'.<sup>24</sup> The 'second' election referred to in the quote was the second in a democratic South Africa, but that was the first election under the 1996 Constitution, the preceding election having been conducted under the 1993 interim Constitution.<sup>25</sup> The court concluded that the legislation regulating the electoral system in terms of ss 46(1)(a) and 105(1)(a) cannot rely on Schedule 6 in support of 'an exclusive party proportional representation system' (i.e. pure proportionality with closed lists).<sup>26</sup>

Next, the court considered founding values specified in s 1(d) of the Constitution, which include universal adult suffrage, a national common

<sup>18</sup> Ibid para 49.

<sup>19</sup> Ibid para 17.

<sup>20</sup> Ibid para 63.

<sup>21</sup> Ibid paras 18–19, 63.

<sup>22</sup> Ibid paras 65–7.

<sup>23</sup> Ibid paras 68.

<sup>24</sup> *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 495 (CC) para 86.

<sup>25</sup> *New Nation Movement* (CC) supra note 1 para 68, referring to the *United Democratic Movement* case *ibid*.

<sup>26</sup> *New Nation Movement* (CC) *ibid* para 69.

voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. In reliance again on *United Democratic Movement*, the court ruled that the concept of 'a multi-party system of democratic government' only precludes 'a one-party-state, or a system of government in which a limited number of parties are entitled to compete for office'.<sup>27</sup> The court concluded that s 1(d) 'says nothing about the exclusivity of multi-party representation'.<sup>28</sup> To put it differently, the founding values include other norms as well, which are equally protected elsewhere in the Constitution.

The Electoral Commission relied on ss 46(1)(a) and 105(1)(a) of the Constitution, which prescribe that the electoral system for the national and provincial legislatures should be cast in legislative form by the National Assembly, in support of its argument that if Parliament could not even prescribe an exclusive party proportional representation system, it would be left with very little under the powers conferred on it by these provisions.<sup>29</sup> The applicants, in turn, argued that such legislation must nevertheless be compliant with constitutional norms.<sup>30</sup> The court ruled in favour of the applicants. In reliance upon *New National Party v Government of the Republic of South Africa*, the court reasoned that these provisions do not provide Parliament with a carte blanche to select any kind of electoral system:

'It is to be emphasised that it is for Parliament to determine the means by which voters must identify themselves ... But this does not mean that Parliament is at large in determining the way in which the electoral scheme is to be structured. There are important safeguards aimed at ensuring appropriate protection for citizens who desire to exercise this foundational right.'<sup>31</sup>

Two hurdles must be taken for such legislation to be constitutional, namely first that the electoral scheme must not infringe on any of the fundamental rights and, secondly, that there must be a rational relationship between the scheme which Parliament adopts and the achievement of a

<sup>27</sup> Ibid para 71, referring to *United Democratic Movement* supra note 24 para 24. This can be interpreted to mean that so-called 'bloc systems' are also precluded. They may technically resemble multi-party systems but are not democratic. The bloc system denotes legal (i.e. not forbidden) political parties in an authoritarian or totalitarian regime in the sense of auxiliary parties and members of a ruling coalition. A 'bloc party' thus signifies a political party that is a constituent member of such an electoral bloc. Candidates of the bloc coalition were consolidated in a single party list that was controlled by party leaders.

<sup>28</sup> Ibid para 72.

<sup>29</sup> Ibid para 74.

<sup>30</sup> Ibid para 75.

<sup>31</sup> Ibid para 76, citing *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) paras 19–20.

legitimate purpose.<sup>32</sup> The court proceeded to examine whether this was the case, and concluded that in varying degrees, the proportional representation provisions relied upon by the respondents had some measure of support for their arguments. None of them, however, comes anywhere near indicating sufficiently that the Constitution requires an exclusive party proportional representation system.<sup>33</sup>

The court considered whether s 157(2)(a) of the Constitution offers support for the proposition of the respondents that if the applicants' challenge were to be upheld, that would not mean there is, within the Constitution, an internal contradiction between the rights asserted by the applicants under ss 18 and 19(3)(b) of the Constitution, on the one hand, and the power conferred on Parliament by section 157(2)(a) to enact legislation that prescribes a system of proportional representation that is exclusively based on party lists, on the other hand.<sup>34</sup> Section 157(2) stipulates that membership of a Municipal Council must be in accordance with national legislation and confers the power on Parliament either (a) to prescribe a proportional electoral system, or (b) to combine proportional election of party candidates with 'a system of ward representation'. Section 157(3) determines that the outcome of the election, irrespective of which system is selected, 'must result, in general in proportional representation'.

The court took the background to negotiations for the new constitutional dispensation into account in so far as there were issues that uniquely affected municipalities.<sup>35</sup> The court reasoned that the s 157(2)(a) option, which allows Parliament to prescribe proportionality for municipal council elections, should be seen as 'a discrete, internal limit applicable only to the system of election of members of Municipal Councils'.<sup>36</sup> Section 157(2)(b) clearly does not preclude independent candidates from standing for office, and hence, the court ruled, s 157(2) does not contradict the rights under s 19(3)(b) read in conjunction with s 18.<sup>37</sup> Given the importance of political rights and the far-reaching implications that such rights have on the right to human dignity, the court held that the rights in ss 18 and 19(3)(b) of the Constitution must be interpreted generously, rather than restrictively.<sup>38</sup>

The court concluded that s 57A of the Electoral Act limits political rights under s 19(3)(b) in that it precludes candidates to stand for political

<sup>32</sup> Ibid paras 75–6.

<sup>33</sup> Ibid paras 78–87.

<sup>34</sup> Ibid paras 88–96.

<sup>35</sup> Ibid para 97.

<sup>36</sup> Ibid para 98.

<sup>37</sup> Ibid para 99.

<sup>38</sup> Ibid paras 100, 104–11.

office unless they are members of political parties.<sup>39</sup> The court then proceeded to examine whether the limitation is reasonable and justifiable within the framework of s 36(1) of the Constitution. The court could not conceive of any reason that justified the limitation, and found that the respondents had offered no compelling justification for such a far-reaching limitation of political rights.<sup>40</sup> Thus, the court upheld the appeal and set aside the order of the Western Cape High Court. The declaration of unconstitutionality took effect on the date of the judgment, but its operation has been suspended for 24 months to afford Parliament an opportunity to remedy the defect.<sup>41</sup>

*(b) The concurring judgment*

A supporting judgment was penned by Jafta J (Cameron J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurring),<sup>42</sup> which highlighted two principles which guide the interpretation of s 19 of the Constitution. The first principle is that s 19 must be read in its historical context, in which Africans were denied the right to vote and the right to be voted into public office. The other principle is that the language employed in s 19 must be accorded a generous and purposive meaning to give every citizen the fullest protection afforded by the section.<sup>43</sup>

Jafta J reasoned that s 19(3) confers rights upon a specific class of individuals, and implicitly limits the exercise of political rights to adult citizens of the country. To safeguard the freedom to exercise political rights, the provision further prescribes that voting must be conducted in secret. These conditions reveal the inter-relatedness of the right to vote and the right to free, fair and regular elections guaranteed by s 19(2).<sup>44</sup>

Section 19(3)(b) must be construed in the same way that s 19(3)(a) is read and understood. According to Jafta J, it cannot be refuted that the right to vote, which is conferred in similar terms, is exercised by voters as individuals, without the need to add words such as ‘as individuals’. One therefore cannot argue that the right to contest elections and hold office cannot be claimed by individuals personally and must be exercised through political parties. That would subvert the meaning and clear wording of s 19(3)(b) as the provision confers this right on adult citizens and not political parties.<sup>45</sup>

<sup>39</sup> Ibid para 112.

<sup>40</sup> Ibid paras 113–20.

<sup>41</sup> Ibid paras 120–5 and 128.

<sup>42</sup> Ibid paras 129–95.

<sup>43</sup> Ibid paras 141–4.

<sup>44</sup> Ibid paras 148–53.

<sup>45</sup> Ibid paras 154–62.

(c) *The dissenting minority judgment*

Froneman J delivered a dissenting minority judgment in which he granted leave to appeal but dismissed the application. He disagreed with the majority on its interpretation of s 19(3)(b) for not having proper regard to the constitutionally required electoral framework within which the right ‘to stand for and, if elected, to hold office’ must be exercised.<sup>46</sup> The right under s 19(3)(b), according to him, needs to be determined, not according to ‘the notional ability or preferences of individual adult citizens to stand for, and hold political office in any general, everyday sense, but according to the actual content of the right within the constitutional democracy envisaged in the Constitution’.<sup>47</sup>

Froneman J referred to the Constitutional Court’s judgment in *Matatiele Municipality v President of the Republic of South Africa*, where the court adopted the principle of harmonic interpretation of constitutional provisions, which implies that one provision may not be ousted in favour of another.<sup>48</sup> He reasoned that a contextual interpretation of s 19 therefore requires consideration of the foundational values and the constitutional norms governing the electoral system in order to determine its proper role and meaning within the system of democratic governance.<sup>49</sup> He took the view that the foundational value of a ‘multi-party system’ specified by s 1(d) of the Constitution should be linked to democratic representation by political parties on the basis of an electoral system that ‘results in general, in proportional representation’ (ss 46(1)(d), 105(1)(d) and 157(3) of the Constitution).<sup>50</sup> The entrenchment of proportional representation, and its achievement through the vehicle of political parties, flows from the prioritisation of equality in political voice (every vote counts equally) over the accountability that might be better secured through a constituency-based system or a mixed system.<sup>51</sup>

Participation in democratic processes is therefore not confined to participation in elections, but also ‘makes provision for direct democracy’. This serves as a counterweight to the importance of political parties in a representative democracy. Direct democracy is therefore of particular importance for those individuals and groups whose interests are neglected by political parties, or who find it difficult to make use of the possibilities for participation. Direct forms of participatory democracy are found in the s 17 right to assembly, demonstration, picket and petition, and in the

<sup>46</sup> Ibid paras 196, 233.

<sup>47</sup> Ibid para 198.

<sup>48</sup> Ibid para 197, referring to *Matatiele Municipality v President of the RSA* 2007 (6) SA 477 (CC) para 36.

<sup>49</sup> Ibid para 198.

<sup>50</sup> Ibid paras 199–205.

<sup>51</sup> Ibid para 221.

constitutional provisions which provide for the calling of national and provincial referendums.<sup>52</sup>

Froneman J took the stance that *individual* political rights of *every adult citizen* specified in s 19(1) to form political parties, to participate in its activities and to campaign, implies that their rights under s 19(3) ‘to vote in elections for any legislative body in terms of the Constitution’ and ‘to stand for public office and, if elected, to hold office’ must be channelled ‘through the medium of political parties’.<sup>53</sup> It would be illogical, he said, to conclude that they may exercise these rights *directly* as individuals in the sense of standing as independent candidates not affiliated to a political party. Such a leap could not be sustained because it conflates electoral preferences with constitutional rights.<sup>54</sup> In other words, political rights under s 19(3)(b) can only be exercised *indirectly*.

#### IV THE MERITS OF THE JUDGMENT

The *Majola* judgment was highly controversial at the time it was handed down.<sup>55</sup> It can only be welcomed that a majority of the Constitutional Court now has affirmed the political rights of individual adult citizens to stand for office and, if elected to a legislature, to hold office irrespective of political party affiliation. The reasoning in the majority judgment cannot be faulted. The judgment essentially affirms the idea of an open society in a democracy where individual choices matter and political rights are protected by institutions of the constitutional state.<sup>56</sup>

One comment seems justified, though. There has been some controversy about the rational-connection test which the court applied in *New National Party*.<sup>57</sup> In a dissenting opinion, O’Regan J reasoned that the rational-connection test is far too deferential a standard for determining whether legislation enacted by Parliament to enable citizens to exercise their right

<sup>52</sup> Ibid paras 206–7.

<sup>53</sup> Ibid paras 205–8.

<sup>54</sup> Ibid para 231.

<sup>55</sup> For a critical appraisal see Loammi Wolf ‘The right to stand as an independent candidate in national and provincial elections: *Majola v The President*’ (2014) 30 *SAJHR* 159 at 168–9.

<sup>56</sup> The concept of an ‘open society’ was first coined by the French philosopher Henri Bergson and was further developed by the Austrian-born British philosopher Karl Popper *The Open Society and its Enemies* (1945) in two volumes. In open societies, the government is expected to be responsive and tolerant; its political mechanisms should be transparent (not secretive) and flexible. It places emphasis on personal responsibility. In an electoral context, this implies that every adult citizen has to make responsible choices in selecting political representatives and removing them peacefully from office if necessary. An open society is the opposite of an authoritarian system.

<sup>57</sup> For a critical perspective, see Glenda Fick ‘Political rights’ in Iain Currie & Johan de Waal (eds) *The Bill of Rights Handbook* 6 ed (2015) 194.

to vote gives rise to an infringement of the right to vote. In creating an electoral scheme Parliament should seek positively to enhance that, and not limit it. It is therefore appropriate to require such laws also to be reasonable and not merely rational. The government is therefore under an obligation to seek alternatives.<sup>58</sup> O'Regan J's approach at the time was more in line with the court's approach in *August & another v Electoral Commission & others*, and also in conformity with the limitation clause.<sup>59</sup>

It appears that the majority in *New Nation Movement* has now returned to the traditional proportionality test to determine whether a 'limitation is reasonable and justifiable as envisaged in section 36(1) of the Constitution'.<sup>60</sup> Traditionally, the proportionality test is a structured test consisting of three elements, viz the *suitability* of measures taken; the *necessity* of such measures; and the *reasonableness*, or proportionality in the narrower sense, of the measures.<sup>61</sup> The wording of s 36(1) has been aligned to reflect the Constitutional Court's interpretation of the proportionality test in s 33(1) of the 1993 Constitution in *S v Makwanyane*.<sup>62</sup> In *De Lange v Smuts NO & others*, Ackerman J reiterated that

'[t]he relevant considerations in the balancing process are now expressly stated in s 36(1) of the 1996 Constitution to include those itemised in paragraphs (a)–(e) thereof. In my view this does not in any material respect alter the approach expounded in *Makwanyane*, save that *paragraph (e) requires that account be taken in each limitation evaluation of 'less restrictive means to achieve the purpose* (of the limitation). ... In the balancing process and in evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose *as well as the existence of less restrictive means to achieve this purpose*.'<sup>63</sup>

<sup>58</sup> Dissenting judgment of O'Regan J in *New National Party* supra note 31 para 122.

<sup>59</sup> *August & another v Electoral Commission & others* 1999 (3) SA 1 (CC).

<sup>60</sup> In *New Nation Movement* (CC) supra note 1 para 113 the court refers to the proportionality test as a test of reasonableness.

<sup>61</sup> The proportionality test (Verhältnismäßigkeitsstest) originated in German constitutional and administrative law and was subsequently adopted in many other countries and in European law. Literally, Verhältnismäßigkeit may be translated as proportionality, but as Singh observes, proportionality only does not convey the true meaning and import of the concept. The closest but not an exact correspondence can be found in the word 'reasonableness'. See M P Singh *German Administrative Law in Common Law Perspective* (1985) 88; also see Loammi Blaauw-Wolf 'The balancing of interests with reference to the principle of proportionality and the doctrine of *Güterabwägung* — A comparative analysis' (1999) 14 *SA Public Law* 178 at 194–7.

<sup>62</sup> 1995 (3) SA 391 (CC) para 104. For a discussion, see Blaauw-Wolf *ibid* at 199–213.

<sup>63</sup> *De Lange v Smuts NO & others* 1998 (3) SA 785 (CC) paras 86–8 (emphasis supplied).

In effect, s 36(1) still deals with a proportionality/reasonableness test where all the hurdles specified must be taken. Given the fact that it is a structured test, the order of the list could have been better: sub-subsecs (a) and (d) deal with the *suitability* or rationality of a measure to achieve a specific objective, whereas sub-subsecs (b) and (c) reduce suitable measures to those that are *necessary* to achieve the objective. In a final step, sub-subsec (e) requires that even if a measure is suitable and necessary, the ‘less restrictive means to achieve the purpose’ is to be preferred (*reasonableness*, or proportionality in the narrower sense). O’Regan’s critique in *New National Party* was therefore quite justified. Section 36(1)(d) cannot be invoked at the cost of s 36(1)(e).

The concurring judgment of Jafta J addressed the apparent contradiction between the Constitutional Court’s judgments in *Ramakatsa* (2012) and *My Vote Counts II* (2018). This contradiction played an important role in the court a quo’s reasoning. In *Ramakatsa* the lack of democratic participation in the ANC’s internal political processes was challenged, inter alia on the basis that it infringed upon the applicants’ political rights under s 19(1)(b) of the Constitution.<sup>64</sup> The Constitutional Court was required to scrutinise methods of candidate selection in terms of the ANC’s party rules. In the majority judgment, the court found that there were gross irregularities in the process of candidate selection in certain ANC branches in the run-up to the party’s national congress. That infringed upon the s 19(1) rights of the applicants, and thus the court set aside elections in some Free State branches. The court held that where political parties deny some of its own members the right to take part in leadership elections or where these internal leadership elections are corrupted by foul play and cheating, they undermine democracy.

In support of its judgment in *New Nation Movement*<sup>65</sup> that adult citizens may not stand as independent candidates in elections, the Western Cape High Court relied on a specific passage in *Ramakatsa*. The relevant passage of the majority judgment penned by Moseneke DCJ and Jafta J reads as follows:

‘Our democracy is founded on a multi-party system of government. Unlike the past electoral system that was *based on geographic voting constituencies*, the present electoral system for electing members of the national assembly and of the provincial legislatures must ‘result, in general, in proportional representation’. This means a person who intends to vote in national or provincial elections must vote for a political party registered for the purpose of contesting the elections *and not for a candidate*. *It is the registered party that nominates candidates for the election on regional and national party lists*. *The Constitution itself obliges every citizen to exercise the franchise through a political party*. *Therefore political parties are indispensable conduits for the enjoyment of the right given by section 19(3)(a) to vote in elections.*’<sup>66</sup>

<sup>64</sup> *Ramakatsa* supra note 6 para 10.

<sup>65</sup> *New Nation Movement* (WCC) supra note 3 para 26.

<sup>66</sup> *Ramakatsa* supra note 6 para 68 (emphasis supplied).



In a later judgment, however, the Constitutional Court took a different view. In *My Vote Counts II*, the applicant had sought information relating to the private funding of some political parties in terms of the Promotion of Access to Information Act 2 of 2002 ('PAIA'), which the parties refused to disclose. The applicant then challenged the constitutionality of the PAIA in the Western Cape High Court because it failed to give effect to the right of access to information under s 32 of the Constitution. The case was essentially that, properly understood, s 32, read with ss 19 and 7(2) of the Constitution, imposes an obligation on Parliament to pass legislation that provides for the recording and disclosure of information on the private funding of political parties and independent candidates. The high court agreed, hence the confirmation proceedings in the Constitutional Court. In that judgment, Mogoeng CJ held:

'Finally, the section [i.e. s 19(3)(b) of the Constitution] addresses the fundamental right every adult citizen has 'to stand for public office and, if elected, to hold office'. *Our Constitution does not itself limit the enjoyment of this right to local government elections. The right to stand for public office is tied up to the right to 'vote in elections for any legislative body' that is constitutionally established. Meaning, 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.* The enjoyment of this right is not and has not been proscribed by the Constitution. It is just not facilitated by legislation. But that does not mean that the right is not available to be enjoyed by whoever might have lost confidence in political parties. It does, in my view, remain open to be exercised whenever so desired, regardless of whatever logistical constraints might exist.'<sup>67</sup>

The court a quo in *New Nation Movement* espoused the view that the reference to s 19(3)(b) in the passage cited above was 'quite patently obiter'.<sup>68</sup> Obviously, this passage did not suit the court a quo, which opted to follow the controversial judgment in *Majola* by another high court, which is of lower ranking in the scheme of precedent. In fairness, if Mogoeng CJ's statement should be regarded as an obiter dictum, it is not clear why the statement of Moseneke DCJ and Jafta J in *Ramakatsa* should not also be 'quite patently obiter', because the constitutional challenge in the latter case was based on s 19(1) and not s 19(3).

What Mogoeng CJ said cannot be faulted from a constitutional point of view. The same cannot be said of the passage in *Ramakatsa* cited above. To start with, the court associated constituency-based electoral systems exclusively with majoritarian electoral systems, thus creating the impression that proportional electoral systems cannot be constituency-based, and that the sole choice is that of pure proportionality on the basis

<sup>67</sup> *My Vote Counts II* supra note 7 para 29 (emphasis supplied).

<sup>68</sup> *New Nation Movement* (WCC) supra note 3 para 23.

of closed lists. Section 19 of the Constitution also does not oblige every citizen to exercise the franchise through a political party. Section 19(1) merely states that the political rights of individual citizens ‘include’ the right to form a political party, to be a member of it, and to campaign for it. It is not obligatory. Fortunately, the majority judgment in *New Nation Movement* has now made that clear. The court in *Ramakatsa* also overlooked the internal qualifier in s 19, which restricts these rights to *individual adult citizens*. It is not a right that could be claimed by political parties (legal persons).<sup>69</sup> In support of the claim that it is the registered party that nominates candidates for election on regional and national party lists, the court cited Schedule 6 of the Constitution, but that only contained the transitional arrangements for the very first election after the 1994 elections.<sup>70</sup> The majority in *New Nation Movement* has now also rejected this proposition.

It is certainly not easy for any court to concede mistakes in its reasoning in previous judgments. Jafta J handled this elegantly in *New Nation Movement*:

‘The High Court held that the statement in paragraphs [sic] 29 of *My Vote Counts II* to the effect that independent candidates have a right to stand for public office and if elected to hold office is contrary to *Ramakatsa*. ... As New Nation Movement argued, this contradiction is more apparent than real. *Ramakatsa* was concerned with and its reach was limited to cases where an adult South African has chosen a political party to be a vehicle through which she would exercise the right to vote. That case was concerned with the representation that involved political parties. Within that system, a voter is obliged to vote for a political party and it is the party which nominates candidates. Whether those candidates meet the approval of the voters or some of the voters is irrelevant. Once they have voted for the party, it falls upon the party to identify who will be their representative. And that representative is directly accountable to the party concerned. ...

However, this does not mean that *Ramakatsa* held that the right to vote can only be exercised through political parties. Read in its proper context, the statement was addressing the question of voting in a system involving participation of political parties.<sup>71</sup>

The only hair in the soup in the above passage is that the constitutional premise of popular sovereignty is embedded in political rights of every adult citizen:<sup>72</sup> the ‘National Assembly is elected to represent *the people*’ in terms of s 42(3) of the Constitution. The representatives are therefore

<sup>69</sup> Loammi Wolf ‘Democratic representation: A critical assessment of the current South African electoral system’ (2015) 132 *SALJ* 780 at 803–4.

<sup>70</sup> *Ramakatsa* supra note 6 para 68n47.

<sup>71</sup> *New Nation Movement* (CC) supra note 1 paras 192–4 (emphasis supplied).

<sup>72</sup> The foundational values of ‘universal adult suffrage’ based on a ‘common voters roll’ are guaranteed by 1(d), and the political rights of every citizen are enshrined in ss 3(2) and 19 of the Constitution.

accountable to the voters, not primarily to political parties. Section 106 of the Constitution is similar in tenor with regard to provincial legislatures.

Three comments about the dissenting judgment should suffice. The discrepancy of Froneman J's reasoning is that s 19(1), (2) and 3(a) rights may apparently be exercised *directly* by adult citizens, whereas 19(3)(b) rights can only be exercised 'through the medium of political parties'. No distinction may therefore be drawn between adult citizens affiliated to political parties and those who are not in regard to their s 19(3) rights. There is no basis in the Constitution that some political rights could be claimed directly whereas others could only be asserted indirectly. All political rights under s 19 accrue to 'every adult citizen'. This implies that the only categories of persons excluded by the internal qualifier from claiming these rights are minor citizens, foreigners and legal persons. A political party is a legal person, and whereas it would otherwise be entitled to assert fundamental rights in terms of s 8(4) of the Constitution if the nature of a right permits it, political parties are not entitled to stand for political office or to vote.

What *Matatiele* has in mind, furthermore, is that various constitutional provisions should be interpreted in a harmonious way without one ousting another. In this case, the interpretation attached to s 19(3)(b) by Froneman J in fact ousted the individual rights of the vast majority of adult citizens to stand for political office unless they are members of political parties. A representative democracy as envisaged by s 42(3) is 'elected to represent the people and to ensure government by the people'. There is no justification for transforming 'the people' — that is, the sum total of adult citizens who qualify as voters — to mean political parties, as Froneman J assumed.<sup>73</sup> The concept of 'the people' refers to popular sovereignty that 'ensure[s] government by the people', and harks back to the founding value of 'universal adult suffrage' in s 1(d). Section 3(2)(b) guarantees that all citizens 'are equally entitled to the rights, privileges and benefits of citizenship'. Popular sovereignty is therefore not embedded in the 'multi-party system of democratic government' (another foundational value enumerated in s 1(d) of the Constitution) as Froneman J suggested, but in the right of every adult citizen to make political choices.

The argument why constituency-based elections for local governments should be allowed in terms of s 157(2)(b), but otherwise not, simply because mixed electoral systems have not been expressly prescribed by the Constitution, is not convincing either.<sup>74</sup> Sections 46(1)(d), 105(1)(d) and 157(3) contain a broad-spectrum specification, namely that the electoral system 'results, *in general*, in proportional representation'. In other words, what it excludes is a majoritarian electoral system where the winner takes all.

<sup>73</sup> *New Nation Movement* (CC) supra note 1 paras 203, 224.

<sup>74</sup> *Ibid* paras 226–9.

It is not the purpose of the Constitution to prescribe everything in minute detail, but to lay down general norms. The specification does not either prescribe a pure proportional or a mixed proportional system, neither does it prescribe open or closed lists for candidates standing on behalf of political parties. The provisions also do not prescribe a specific seat allocation method (e.g. the d'Hondt or Sainte-Laguë systems).<sup>75</sup>

There is a good reason why these provisions only determine that the electoral system must 'in general' result in proportional representation of political parties. No proportional electoral system would ever be able to allocate a number of seats to a party that corresponds mathematically exactly to the proportion of votes that the party got for the simple reason that, first, there are only a limited number of seats for the various legislative bodies and, secondly, individual seats cannot be split to half or a third of a candidate. By implication seat allocations will therefore always have to be rounded up or down according to a formula that 'in general' results in proportional representation.

## V LEGAL CONSTRAINTS IN REDESIGNING THE ELECTORAL SYSTEM

There are legal constraints on the power of the National Assembly to design a new electoral system. Section 1(d) of the Constitution specifies a number of constitutional norms that have a direct bearing on the electoral system: universal adult suffrage, a common voters' roll, regular elections, and a multi-party system of democratic government to ensure accountability, responsiveness and openness. In redesigning the electoral system by the deadline of 10 June 2022 set in the judgment, the National Assembly must take care that *all* these requirements are met. A common voters' roll and regular elections are not likely to be sticking points. But the tricky issue will be how to give effect to proportional representation of political parties whilst doing justice to individual political rights to vote and stand for office. The foundational values are regulated in more detail by various provisions of the Constitution, which will be set out briefly.

<sup>75</sup> Seat allocation methods are conveniently divided into different groups: those based on largest remainders and those based on highest averages. The d'Hondt system is based on a quota which is aimed at ensuring that seats are allocated to the party with the largest average number of votes per vacancy, and that, once all the seats have been allocated, the average number of votes which is required to win one seat will be the same for each party. The Sainte-Laguë system is based on a formula that tends to favour moderately strong parties at the expense of both the very strong and the very weak parties. On seat allocation methods, see Michael Gallagher 'Proportionality, disproportionality and electoral systems' (1991) 10 *Electoral Studies* 33.

(a) *Universal adult suffrage*

Universal adult suffrage is a core element of popular sovereignty: it is captured by the idea of a government of the people by the people for the people. That presupposes that the representatives of the people in a parliamentary democracy must have been chosen by the people themselves.<sup>76</sup> Section 42(3) of the Constitution therefore stipulates that the National Assembly 'is elected to represent the people and to ensure government by the people'. Hence, ss 46(1) and 105(1) refer to 'women and men elected as members'. Such men and women are adult citizens who are eligible to be elected in terms of ss 19(3), 46(1)(c), 47(1), 105(1)(c) and 106(1) of the Constitution.

The implications of these provisions are twofold. First, popular sovereignty may not be shifted to political parties in that only parties can be elected instead of individual candidates running for office. A pure proportional electoral system with closed lists is therefore by implication unconstitutional. Secondly, a strong argument can be made that to do justice to the norm of popular sovereignty, adult citizens must be able to vote for the candidates of their choice to represent them. If any adult citizen may stand for political office as an independent candidate and may be elected on the basis of his/her reputation, then the same ought to apply to members of political parties. It will be hard to justify that voters may select a candidate of their choice only when such a candidate runs as an independent, but not when a candidate elects to run on a party ticket. In other words, even though political rights may be exercised in a political-party context as a form of freedom of association, political parties can only play an *intermediate* role. In *Ramakatsa* the Constitutional Court affirmed the importance of the right of party members to participate freely in the activities of a political party to which they belong, and also found that the constitutions of political parties have to ensure this happens.<sup>77</sup>

(b) *A common voters' roll*

The foundational value of a common voters' roll has been captured by ss 46(1)(b) and 105(1)(b), read with s 3(1) and (2) of the Constitution. There

<sup>76</sup> Pacheka Ncholo 'The right to vote' in Nico Steytler et al (eds) *Free and Fair Elections* (1994) 57; Johan de Waal 'Political rights' in Matthew Chaskalson et al (eds) *Constitutional Law of South Africa* (1998) para 23.6(b); I M Rautenbach & E F J Malherbe *Constitutional Law* 5 ed (2009) 123.

<sup>77</sup> Pierre de Vos 'It's my party (and I'll do what I want to?): Internal party democracy and section 19 of the South African Constitution' (2015) 31 *SAJHR* 30 has argued that *Ramakatsa* can be interpreted to place a positive duty on the legislature to pass a 'party law' that sets minimum requirements to protect the democratic participation of party members in the activities of the party.

may be no discrimination on the basis of race or colour with schemes aimed at disenfranchising certain categories of citizens.<sup>78</sup>

(c) *Regular elections*

The norm of regular elections finds its expression in the wording of s 19(2), which guarantees the right ‘to free, fair and regular elections for any legislative body’. Thus, ss 49 and 50 of the Constitution limit the duration of a legislative term of the National Assembly to five years. When the term expires new elections must be called. The same applies to provincial legislatures in terms of ss 108 and 109 of the Constitution.

The fairness of elections includes fair election campaigns and electoral procedures.<sup>79</sup> The requirement of fairness implies that each citizen must not be allowed to vote more than once in the elections, and that any person not entitled to vote must not be permitted to do so.<sup>80</sup> Likewise, voters must be informed for which party a candidate standing for office runs. It is highly questionable whether elections are fair when candidates run on a ticket where two parties pool their candidates to gain an unfair advantage over other parties.<sup>81</sup>

(d) *A multi-party system*

A multi-party democratic system obviously precludes a one-party system and the Constitutional Court ruled accordingly.<sup>82</sup> However, a multi-party system should also be distinguished from a two-party system in so far as it denotes a system where *three or more* political parties have the capacity to gain control of government separately or in coalition.<sup>83</sup> A multi-party system typically results from electoral systems that cater for proportional representation of political parties. In contrast to majoritarian

<sup>78</sup> See the dictum of Sachs J in *August* supra note 59 para 17.

<sup>79</sup> See in general Fick op cit note 57 at 427–30, 434–7; Pierre de Vos & Warren Freedman *South African Constitutional Law in Context* (2014) 567–9.

<sup>80</sup> *New National Party* supra note 31 para 12.

<sup>81</sup> In all past elections the SACP refrained from taking part in elections although it continues to register as a political party. Instead it pools its candidates with those of the ANC on the ANC’s lists of candidates. This practice creates confusion for voters about which party is elected and infringes upon their s 19(1) rights to participate in the activities of a specific political party. It also hampers equal opportunities of political parties in elections, which is guaranteed by s 9 read with s 8(4) of the Constitution. By condoning this practice the Electoral Commission is infringing upon the right to equal treatment of other political parties. See Wolf op cit note 69 at 799, 809–15.

<sup>82</sup> *United Democratic Movement* supra note 24 paras 24 and 26; *New Nation Movement* (CC) supra note 1 paras 71–2.

<sup>83</sup> Wolf op cit note 69 at 796–7.

electoral systems,<sup>84</sup> proportional electoral systems provide a more accurate representation of parties, and are more inclusive in so far as small parties or parties representing special interests have a better chance of representation. The advantage is that a broader spectrum of voter opinion can be accommodated.<sup>85</sup>

The link between the criteria of multi-party system and proportional representation has been established by ss 46(1)(d), 105(1)(d) and 157(2) and (3) of the Constitution. Sections 47(3)(c) and 106(3)(c) of the Constitution also safeguard the share of seats allocated to a party, in that a person loses membership of the national and provincial legislatures when he or she ceases to be a member of the party that nominated that person.

(e) *Ensuring accountability, responsiveness and openness*

Finally, s 1(d) of the Constitution requires that the system of political representation must 'ensure accountability, responsiveness and openness'. Voters must be able to hold their representatives in parliament accountable. It is important to take note of the wording of s 3(2) of the Constitution, which specifies that all citizens are, first, equally entitled to the rights, privileges and benefits of citizenship and, secondly, equally subject to the duties and responsibilities of citizenship. It is an individual right of adult citizens to elect representatives of their choice to Parliament or to stand for political office in terms of s 19(3), but it is not merely a privilege — it is also the duty of voters to exercise these political rights in a responsible way. A typical way in which voters can respond when they are not satisfied with a specific political representative is not to re-elect that person. This is one of the most effective ways to ensure quality leadership and clean governance. The Constitution further guarantees public access to, and involvement in, legislative and other processes of the legislative bodies to ensure openness and responsiveness to the public, including the media (ss 59 and 118).<sup>86</sup>

<sup>84</sup> A two-party system usually results from a majoritarian single-member constituency-based electoral system where the winner takes all. The main advantages of the first-past-the-post system are its simplicity and the fact that it is conducive to strong, stable government. The disadvantage is that it does not provide a fair reflection of political opinion or the relative support for specific political parties. Non-majority parties may therefore be frozen out completely, while small parties are unlikely to win representation even if more than two parties compete. Gretchen Carpenter *Introduction to South African Constitutional Law* (1987) 168; Bernard Grofman & Andrew Reynolds 'Electoral systems and the art of constitutional engineering: An inventory of the main findings' in Ram Mudambi, Pierrro Navarra & Guiseppe Sobbio *Rules and Reason: Perspectives on Constitutional Political Economy* (2001) 125 at 130.

<sup>85</sup> See diverse contributions in Joseph M Colomer (ed) *Handbook of Electoral System Choice* (2004).

<sup>86</sup> Henk Botha 'Representing the poor: Law, poverty and democracy' (2011) 22 *Stellenbosch LR* 521 at 539–40.



## VI THE PRACTICAL IMPLICATIONS OF THE JUDGMENT

The Constitutional Court elected not to venture into which electoral system better affords electorate accountability, but focused only on the issue whether the current electoral system is compliant with the Constitution.<sup>87</sup> It is up to the National Assembly to redesign the electoral system. Before venturing into the options available to the legislature, some peculiarities of transitional democracy that affect political accountability will be discussed first. These issues should be taken into account when redesigning the electoral system if the very core of the constitutional state should survive rampant corruption by politicians.

(a) *Difficulties arising from transitional democracy*

Although proportional electoral systems usually result in three or more relatively strong political parties, this process is evolving very slowly in South Africa. After 25 years elections still reflect the fault lines of a deeply divided society.<sup>88</sup> Voters continue to vote in racial blocks, with many black voters continuing to vote for the ANC because it is a symbol of liberation.<sup>89</sup> The role of xenophobia and epigenetic trauma passed on to later generations should therefore not be underestimated. Such collective trauma takes about three to four generations to ebb off.<sup>90</sup> South Africa's fundamental dilemma is therefore that liberation movement domination is a necessary condition for the legitimacy of democratic institutions, but it is also and at the same time a threat to them. One-party dominance becomes a threat when the governing party is assured of electoral victory and, as a result, sees less and less need to respond to public opinion and weed out maladministration.<sup>91</sup> It is a very real factor that must be taken into account

<sup>87</sup> *New Nation Movement* (CC) supra note 1 para 15.

<sup>88</sup> Yonatan Fessha 'Ethnic identity and institutional design: Choosing an electoral system for divided societies' (2009) 42 *CILSA* 323 at 328–9 points out that the proportional electoral system has made it possible for small ethnic-based parties (e.g. the Freedom Front, Minority Front, United Christian Democratic Party) to secure seats in the national Parliament after the 1999 election. Some analysts hold the view that the proportional electoral system, even if it is not the major cause, has contributed to the re-entrenchment of racial cleavages.

<sup>89</sup> Eddie Maloka 'White political parties and democratic consolidation in South Africa' in Roger Southall (ed) *Opposition and Democracy in South Africa* (2001) 227 at 235 noted that since the ANC does not need the support of the white minority to retain its dominance, it has displayed a tendency to abandon non-racialism and has instead placed emphasis on its 'liberation struggle heritage' in order to appeal to its own supporters.

<sup>90</sup> Once in power, Afrikaners also continued to vote for the National Party for decades because it was a symbol of their liberation from British colonial subjugation. On the power of epigenetic trauma see Hélène Opperman Lewis *Apartheid — Britain's Bastard Child* (2016).

<sup>91</sup> Anthony Butler *South Africa's Political Futures* (2003) 12.



so that the electoral system enables quality leaders to be elected who can carve out a just and abundant future with sustainable policies.

Another issue which is closely related to overcoming collective trauma is that of entitlement. Patterns of patronage and corruption have become deeply embedded in the political culture of South Africa.<sup>92</sup> Many politicians no longer enter politics with the intention of public service, but with the intention of getting rich.<sup>93</sup> The result is that political battles are a kind of proxy for deciding not how socio-economic issues are to be addressed, but which faction running on the slate of a lobby group will gain the ability to insert itself into the circulation of money streams.<sup>94</sup>

Evidence presented to the Zondo Commission of Inquiry into State Capture have revealed where the heart of corruption lies, and how completely normalised it has become for companies winning big state tenders to give money back to the ANC.<sup>95</sup> According to reports, ANC election campaigns cost roughly R1 billion to run. Kickbacks for tenders therefore became a well-oiled practice of a predator government to fund the bloated apparatus of the ANC and fill the pockets of the well-connected.<sup>96</sup> Not even the coronavirus pandemic could dampen the procurement greed of politicians.<sup>97</sup>

Parliament adopted the Political Party Funding Act 6 of 2018, which requires a declaration every three months to the Independent Electoral

<sup>92</sup> Jacques Pauw *The President's Keepers — Those Keeping Zuma in Power and out of Prison* (2017); Pieter-Louis Myburgh *Gangster State — Unravelling Ace Magashule's Web of Capture* (2019); Pieter-Louis Myburgh *The Republic of Gupta — A Story of State Capture* (2017).

<sup>93</sup> In 2012, the ANC conducted an assessment of its 264 constituency offices. There was open critique that quality leadership has been sacrificed for influence and self-enrichment. See 'Mandela-style leadership discarded for self-enrichment' *Times Live* 9 November 2012.

<sup>94</sup> 'Slates and leadership battles: The ANC's double-headed demon' *The Daily Maverick* 25 September 2015; 'Election "slates" undermine ANC: Manuel' *The New Age* 13 February 2011; 'Slates make mockery of ANC internal democracy: Analyst' *SABC News* 20 December 2012.

<sup>95</sup> 'Nomvula "Mama Action" Mokonyane denied all, but revealed everything about where the heart of corruption lies in SA' *The Daily Maverick* 23 July 2020; 'SA corruption: No action following theft of R500bn during Zuma's rule' *BizNews* 4 August 2020.

<sup>96</sup> In evidence before the commission of inquiry into state capture, Bosasa's Angelo Agrizzi told Justice Zondo how money laundering ended up in the coffers of the ANC for election campaigns: 'No angles on ANC candidate election lists' *City Press* 3 February 2019; 'The ANC is fast becoming a predator government' *Business Day* 5 August 2020.

<sup>97</sup> 'The ANC's tender love: How Covid-19 became the golden goose that kept on giving' *The Daily Maverick* 4 August 2020; 'SCI: Magashule cronies "blew state cash" on Range Rovers, Maseratis' *The South African* 4 August 2020; 'Ace Magashule claims nothing in law stops politicians' families from doing business with government: Not so fast SG' *The Daily Maverick* 12 August 2020.

Commission any donation (in cash or kind) of above R100 000. There is a limit on donations set at R15 million per party per year, but given the cost of elections, this figure may be too low to keep things clean. This might also explain why President Ramaphosa has postponed the Act's coming into force.<sup>98</sup>

Surveys of public opinion and voter intentions have suggested that the election victories of the ANC are not matched by unquestionable voter satisfaction and contentment with the government and its delivery on election promises. Other polls confirm a pervasive level of cynicism and mistrust in politicians, their motives, and their general failure to deliver on election promises.<sup>99</sup> One-party dominance of the ANC and

<sup>98</sup> There is some evidence that regular ANC funders have become reluctant to support the party while tainted individuals remain in senior positions: 'Donors shy away from tainted party — ANC salary payments are "delayed" again' *The Daily Maverick* 3 July 2020. At the time of writing this article, Corruption Watch was threatening to institute proceedings against the President to implement the Act: 'Just why has the president been delaying the Political Party Funding Act?' *Business Day Live* 14 January 2021. The Act was assented to on 21 January 2019 and promulgated on 23 January 2019 (see GG 42188), but did not enter into force in the manner specified by s 81 of the Constitution because s 26 of the Act postponed its implementation indefinitely and made it subject to the President announcing the commencement of the Act. This is a highly controversial practice because the provision confers powers of the National Assembly to determine a commencement date for national legislation adopted by Parliament on the President, who should then announce the implementation of the Act by way of a simple executive proclamation. This blurs the separation of powers in a manner that has not been foreseen by the Constitution. In fact, a delegation of legislative power to any other non-legislative state organ is explicitly prohibited by s 44(1)(a)(iii) of the Constitution. That legislation is promulgated without entering into force, which has even been upheld by the Constitutional Court in the past, has no constitutional substance and has long been subject to critique. See e.g. Loammi Wolf 'Revisiting section 81 of the Constitution: The commencement date of legislation (legislative power) distinguished from promulgation (legislative process)' (2015) 30 *SA Public Law* 193. It would have been interesting to observe a standoff between Corruption Watch and the President on the issue. However, President Ramaphosa responded to the threat of legal action and has publicly announced that the Act will enter into force on 1 April 2021, so that it can find application to the local government elections of 2021: 'Political party funding law will come into effect on April 1: Cyril Ramaphosa' *Sowetan* 22 January 2021.

<sup>99</sup> The Human Sciences Research Council ('HSRC') survey on voter participation in the 2010/2011 local government election showed that only 27 per cent of voters were satisfied with the elected politicians and 29 per cent with political parties. See *Voter Participation Survey 2010/11: An Overview of Results* (April 2011) 16, available at <http://www.hsrc.ac.za/uploads/pageContent/562/IECVPSPresentationFinal09Apr2011.pdf>. A more recent HSRC study found that only 50 per cent of the respondents polled found that the national government was doing a good job. Councillors of local governments have slipped lower with an approval rating of 24 per cent: 'The calculus of trust: Diminished public confidence in the president's performance' *The Daily Maverick* 11 August 2020. Polls referred to by Victoria Graham 'South Africa's democracy: The quality of

weak opposition have been resulting in voter apathy and even withdrawal amongst some sections of the electorate, who prefer not to vote at all.<sup>100</sup> Accountability of elected representatives remains the Achilles heel and a major stumbling block towards substantive democracy in governance systems. These difficulties emanate partly from the electoral system and partly from the calibre of officials holding public office.<sup>101</sup>

Chief Justice Mogoeng recently observed that something is fundamentally wrong with the election process. He called on the electorate to insist that stringent mechanisms be put in place to scrutinise those who want to occupy positions of authority. Only those with integrity to assume leadership responsibilities should be allowed to contest for those positions.<sup>102</sup>

(b) *Electoral design options available to the National Assembly*

The gap between constitutional norms regulating the electoral system set out above in part V and the current electoral system is quite pronounced. The principal challenge for the legislature in redesigning the electoral system will be to give effect to the right of voters to select candidates of their choice to represent them in the national and provincial legislatures, whilst doing justice to proportional representation of political parties.

(i) *Disadvantages of a pure proportional system with closed lists*

The lack of accountability of the political class is attributable, at least in part, to the pure proportional electoral system with closed lists. Such an electoral system has major disadvantages. First, the direct link between eligible citizens running for office and being elected by voters to represent them is severed. Voters are expected to vote for a particular party, and the seats are allocated to the parties in proportion to the votes polled by them. The electoral system is therefore party-orientated and not candidate-orientated. Thus, the focus shifts to representation of political parties

political participation over 25 years' (2020) 19 *Journal of African Elections* 28 at 38 paint an equally grim picture.

<sup>100</sup> For the 2019 elections alone, more than 9 million eligible voters did not register to vote. The 26 756 649 who registered represented only 74.6 per cent of the total voting age population. Even among those who registered to vote, only 66 per cent of them showed up to cast their ballot on the election day. This was a significant drop in turn-out rate from 73.48 per cent in the previous election. See also H Brooks 'The dominant-party system — Challenges for South Africa's second decade of democracy' (2004) 3 *Journal of African Elections* 121 at 128, 139–42, 149.

<sup>101</sup> K J Maphunye, M L Ledwaba & M K Kobjana 'Democracy without accountability, or accountability without democracy? "Born-free" perspectives of public representatives in South Africa' (2014) 49 *Journal of Public Administration* 161.

<sup>102</sup> 'Something is fundamentally wrong about this election process — Mogoeng' *EWN* 28 June 2019. The statement was made at the handing over of the list of MPs of the National Assembly and provincial legislatures on 15 May 2019.

(indirect representation) instead of representation of citizens as constituent power of the representative bodies (popular sovereignty).

Secondly, a pure proportional system tends to be impersonal since most candidates on party lists would be ‘faceless’ as far as the average voter is concerned.<sup>103</sup> Such a system can easily be manipulated by party elites to create a system of political patronage that wipes out democracy at base within political parties.<sup>104</sup> In practice, this has had a negative impact on the quality of leaders who are elected.<sup>105</sup>

Thirdly, members of Parliament in a pure proportional system cannot be held accountable by the electorate in a personal capacity. Voters do not have the power to vote corrupt politicians or party officials with little popular support out of power. Parliamentarians derive their position not from any necessary connection with the electorate, but from their status within the party. The crucial thing is not knocking on doors, fixing the problems of constituencies, or even just representing concerns of people living in any identifiable geographic region.<sup>106</sup> The voting for parties without the option to select specific candidates thus erodes the principle of democratic representation.<sup>107</sup>

(ii) *Parameters and logistics of a new electoral system*

The sheer number of candidates who have been nominated in the past election makes it impractical to have an electoral list with hundreds of independent candidates running for office in a single huge constituency, alongside those nominated by parties. In the 2019 elections a record number of 48 parties had registered candidates for the national parliamentary election. This is 19 more parties than those which contested the 2014 national elections. The number of candidates running for office in the National Assembly alone amounted to 3535 people.<sup>108</sup> This development already strained the manageability of a ballot to the extreme.

<sup>103</sup> Dren Nupen ‘Elections, constitutionalism and political stability in South Africa’ (2004) 4 *African Journal on Conflict Resolution* 119 at 142.

<sup>104</sup> ‘Democratic internal party processes? Hmmm, unlikely’ *The Daily Maverick* 27 January 2014.

<sup>105</sup> During the 2014 elections a group of ANC members even took the unprecedented step to launch a campaign that ANC supporters should not vote for their own party or should spoil their ballots. Steven Friedman ‘Spoilt votes are blunt instrument of democracy’ *Business Day* 16 April 2014.

<sup>106</sup> Roger Southall ‘The continuing case for electoral reform’ (2004) 3 *Journal of African Elections* 154 at 155–7.

<sup>107</sup> Rautenbach & Malherbe op cit note 76 at 127–8; Wolf op cit note 69 at 797–8.

<sup>108</sup> See data on the website of the Independent Electoral Commission available at <https://www.elections.org.za/ieconline/2019-Candidate-Lists>.

A major electoral reform is inevitable.<sup>109</sup> It was set out above that it will be hard to justify why voters may select a candidate of their choice only when such a candidate runs as an independent but not when a candidate elects to run on a party ticket. The legislature will therefore hardly be able to get around a mixed electoral system that is constituency-based to provide for direct election of candidates, combined with a compensating proportional list system. It would also help not to merge elections at a national and provincial level. The issues at stake in these elections differ vastly anyway. The merging of the elections has had the effect in the past that national issues completely subsume the provincial ones in election campaigns, exerting a down-ballot pressure.<sup>110</sup>

There have been two previous studies into electoral reform: the Slabbert Electoral Task Team (2003) and the Independent Panel of Assessment of Parliament (2009). Both of these found that the current system should be changed to allow for a mixed system of constituency-based representation, alongside a compensating proportional list system.

In 2013 the Democratic Alliance submitted an Electoral Reform Bill in Parliament to amend the Electoral Act to ensure that members of Parliament are directly accountable to the people they represent. The Slabbert Electoral Task Team recommendations and the Bill may offer a departure point to design a future electoral system. It could be useful to have a closer look at the advantages and disadvantages of these proposals. Other tools to make the implementation of a future electoral system fair, simple and practical will also be canvassed.

### (iii) *Recommendations of the Slabbert Electoral Task Team*

Former President Mbeki appointed the Slabbert Electoral Task Team ('ETT') in 2002 to formulate parameters for an electoral system that would comply with all constitutional norms. The ETT Report, published in January 2003, recommended that a proportional electoral system with multi-member constituencies should be implemented.<sup>111</sup> It was foreseen that 300 members of Parliament should be elected on a constituency basis, and that a hundred seats should be allocated to political parties to restore overall proportionality.

<sup>109</sup> Professor de Vos, a well-known constitutional law expert, is of a similar opinion: 'Next elections will look drastically different after court's "long overdue" electoral ruling' *The Citizen* 11 June 2020.

<sup>110</sup> Recently a former IEC commissioner even suggested that local government elections should also be on the same date as the national and provincial elections: 'Merging elections would hurt South Africa's democracy — here's why' *The Daily Maverick* 6 June 2020.

<sup>111</sup> *Report of the Electoral Task Team* (2003), available at [www.elections.org.za/content/WorkArea/Download.Asset.aspx?id=918](http://www.elections.org.za/content/WorkArea/Download.Asset.aspx?id=918).

The ETT recommended that there should be 69 constituencies, which are aligned to the areas of the district or metro councils, and that between three and seven candidates should be elected for each constituency, depending on the size of the constituency. Closed lists should be used initially for constituency-based elections as well as the compensatory party lists, but the ETT expressed a preference for open lists, where voters can vote for individual candidates of their choice in the medium and long term, irrespective of the fact whether they run as independent candidates or on a party ticket. How the voting should work is not quite clear from the report. It appears that each voter should have two votes — one for a candidate/party on the constituency list (depending on whether the lists are open or closed) and one for a party on the compensatory closed list to ensure proportional representation.<sup>112</sup>

The difficulty with this model is that it is not clear how the multi-member seats in constituencies will be allocated to the competing candidates. Can one party win more than one seat per constituency, and which candidates will win if voters cannot select their candidates directly to determine who got the most votes? How will the quotas be determined to ensure that candidates running for office in a constituency with three representatives are not subject to different electoral parameters than those where seven candidates can be elected? To put it differently, the weighting of votes of registered voters in different constituencies will not be equal. With the option of closed lists for constituency elections, voters will also not have the opportunity to select candidates of their choice to represent them. This model might therefore not be able to take the hurdles of ss 9 and 19(3) read with s 3(2)(a) of the Constitution.

(iv) *The Democratic Alliance's proposals for electoral reform*

The electoral model favoured by the Democratic Alliance is similar, except that the number of representatives per constituency will be the same.<sup>113</sup> The Bill was tabled in 2013 but did not take independent candidates into account, as is now required by the Constitutional Court.

It has proposed the establishment of 100 three-member constituencies, each with approximately the same number of voters. The task of determining the boundaries of constituencies would rest with the Electoral Commission. In practical terms, political parties would submit a ranked list of five names to the IEC for inclusion in the constituency contest. These names and the logo of the party would appear on the ballot paper for that constituency, but voters would still vote for a party. The three members who obtain the requisite quota of votes or largest surpluses would be

<sup>112</sup> Ibid para 5.4.1.

<sup>113</sup> 'The DA's plan for electoral reform — J Selfe' *Politicsweb* 4 March 2013.

elected as the members of parliament for that constituency. Three hundred members of the National Assembly will be elected in this way.

The Bill contemplated a further 100 members of the National Assembly being elected from national lists submitted by the various parties. A second ballot paper would contain only the list of parties contesting the election and voters could vote for the party of their choice. If parties failed to have sufficient concentration in particular geographic areas to ensure equitable representation in the National Assembly, it would be corrected by seat allocation from the party list. Thus, once the constituency representatives have been elected, the chief electoral officer would calculate the number of seats in the National Assembly to which each party is entitled, based on the proportion of total votes they obtained in the constituency-based election, and would allocate to parties seats from the lists so that the overall composition of the National Assembly reflects, as closely as practical, the proportion of votes obtained by each party.

The motivation for having three members in a constituency instead of single-member constituencies is said to be that, first, it would increase the likelihood of an individual voter being able to identify with at least one of his or her elected constituency MPs; and, secondly, that it enhances the practicality of achieving the correct party proportionality in the National Assembly after the 100 members from the national list have been allocated.

This model has some advantages, but also disadvantages. The possible advantage of the DA's proposal is that it already has an element of proportionality built into the constituency-based vote, but a concomitant disadvantage is that it may also distort proportional representation. Another disadvantage is that voters will still only be able to elect a party with both ballots, and not specific candidates of their choice. The party bosses will still determine who are nominated as candidates, instead of voters or party structures in the constituency nominating the candidates.

Open lists, where voters can select a candidate of their choice instead of the party ranking the list of candidates for constituency-based election, would be required to comply with the requirements of s 19(3) of the Constitution. This would harmonise the right of individual candidates to stand for office, either as an independent candidate or on a party ticket, and the right to vote for representatives in a legislative body. The DA's proposal that candidates should be elected on the basis of a closed list of five candidates for each party, where the party determines the order of preference, faces two difficulties: first, the right of individual candidates to stand for office might be unconstitutionally ousted and, secondly, the ballot might become overly convoluted should the trend persist that 48 parties participate, with each of them putting up five candidates for election next to all the potential independent candidates. This would hardly enable clear-cut and viable choices for voters, or to make it possible for them to hold a representative accountable.



If the ballots should still be manageable, it might therefore be preferable to have 300 constituencies where party candidates and independent candidates contest elections in single-member constituencies, with a second ballot paper where voters could vote for a party of their choice for purposes of proportional representation. Such a personalised election campaign might be a very effective mechanism to weed out corrupt politicians. If a voter chooses a constituency candidate on strength of character, it is unlikely that the same voter would vote blindly on the proportional representation ballot. Unless the party has an equally credible list of leaders, it is not likely to get the proportional representation ballot.

(v) *A threshold to reduce splinter parties*

When there is no threshold for political parties to enter Parliament, proportional representation could give rise to a proliferation of small parties or splinter groups without any real political bargaining power in Parliament.<sup>114</sup> In Germany, for example, a party must get at least 5 per cent of the voter support to enter Parliament.<sup>115</sup> Other countries with proportional electoral systems also have an entrance hurdle, but that is usually lower.

South Africa faces a real problem with the proliferation of small parties. Currently 323 parties are registered at a national level.<sup>116</sup> Apparently not even the high electoral deposits to participate in elections can deter people from forming new parties.

In the 2019 election, the ANC received 62.2 per cent, the DA 22.2 per cent and the EFF 6.4 per cent of the votes for the National Assembly. All the other parties together received 5.3 per cent of the votes. Many tiny parties are really vehicles for one person to get elected. The option to run as independent candidates might therefore have the effect of reducing the number of small parties, but one cannot assume that it will be the case.

If the ballots should still be manageable, the number of parties participating in elections needs to be reduced to those who have actual chances to

<sup>114</sup> Michael Gallagher 'Comparing proportional electoral systems: Quotas, thresholds, paradoxes and majorities' (1992) 22 *British Journal of Political Science* 469.

<sup>115</sup> This relates only to the allotment of list candidates and not to the directly elected members. See Ernst Becht *Die 5 Prozent-Klausel im Wahlrecht: Garant für ein funktionierendes parlamentarisches Regierungssystem?* (1990). The hurdle for entrance has been set at 5 per cent of voter support after the experience in the Weimar era with its pure proportional system, which led to a proliferation of many splinter parties and instability of coalition governments. During the fourteen years of the Weimar Republic's existence there were twenty separate coalition governments. The longest government lasted only two years. In post-war Germany, both a majoritarian and the pure proportional electoral system were unanimously rejected when the 1949 Constitution was drafted. See Peter James *The German Electoral System* (2003) 14.

<sup>116</sup> See <http://www.elections.org.za/content/Parties/Political-party-list/>.



make it into Parliament and to have potentially enough bargaining power to form stable coalition governments. It would therefore be sensible to introduce a threshold for political parties to enter parliament. The threshold need not be as high as 5 per cent. A threshold of 2 to 3 per cent would probably suffice. Such a measure would certainly qualify as a reasonable regulation which is compatible with an open democratic society.<sup>117</sup>

(vi) *Nomination of candidates*

The legislature will also have to conceive of an entrance threshold to avoid a proliferation of independent candidates, or else ballots may become impossible to manage. There are potentially two ways to achieve that. One option is to require that candidates must pay an electoral deposit to make sure that candidates are serious about running for office, since the deposit will be lost if the candidate is not elected. In all probability, it will not be reasonable and justifiable in an open and democratic society based on equality and freedom in terms of s 36 of the Constitution to differentiate between candidates standing for office on a party ticket, and those running as independent candidates. Obviously, such deposits will have to be lower compared to those payable by political parties, which could still pay lump-sum electoral deposits on behalf of their candidates on the proportional representation list. A less restrictive means would achieve the same purpose. Thus, a deposit per candidate of between R10 000 and R15 000 might potentially qualify as reasonable. To prescribe the same electoral participation hurdle to independent candidates and candidates running for direct election on a party ticket will have the additional advantage that parties will have to consider carefully which candidates they put up for election and whether they have a viable chance of being elected, because they might risk losing the deposit.

Another option, if a candidate has substantial support in a community but is too poor to afford the deposit, is to require that such a candidate must be nominated by a reasonable number of registered voters in that constituency — for example, 1000 voters. These options can also be combined as alternatives. It will surely enhance inclusiveness of the poor and destitute, and make it possible to give them a voice in Parliament.

(vii) *Seat allocation*

Section 46(1) of the Constitution limits the number of seats in the National Assembly to ‘no fewer than 350 and no more than 400’. Section 105(2) of the Constitution also limits the members of provincial legislatures to

<sup>117</sup> *United Democratic Movement* supra note 24 paras 24 and 26.

'between 30 and 80 members' and is to be determined according to a formula prescribed by national legislation.<sup>118</sup>

The largest remainder method and the Droop quota are currently used to allocate seats at both the provincial and national level, with the national list seats allocated by subtracting seats won at the provincial level from a party's allocated total seats to give a more proportional result. The calculation of quotas according to this method could be retained, but a constituency-based electoral system would make the provincial party lists for election to the National Assembly redundant.

Since the electoral system must now also make provision for the election of independent candidates, quotas for seat allocation will have to be invoked to first allocate seats to directly elected candidates by dividing the number of votes by 300 (if that should be the number of directly elected members). Thereafter, the number of votes for independent candidates will have to be deducted from the total number of votes for all candidates to arrive at a quota for compensatory seat allocation to ensure proportional representation of political parties. Having done that, the Electoral Commission will have to determine which parties took the hurdle for entrance into parliament. The remaining 100 seats would then be allocated to these parties according to their proportional share of the vote.

## VII CONCLUSIONS

Given the constitutional and logistical constraints, the legislature will probably not be able to avoid having to undertake a major electoral reform. It will be very hard to justify that voters may select a candidate of their choice only when such a candidate runs as an independent, but not when a candidate elects to run on a party ticket. The best option would therefore be to introduce a mixed electoral system which combines constituency-based elections with proportional representation of political parties. To keep ballots manageable it would be appropriate to use other electoral design tools such as an entrance hurdle for political parties and deposits and/or nominations by registered voters supporting independent or other directly elected candidates. The electoral reform should be well considered, and should allow voters to elect candidates of their choice and to weed out candidates tainted by corruption, whom they do not want to represent them.

<sup>118</sup> Items 1 and 2 in Schedule 3 to the Electoral Act.

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