Electoral Amendment Bill

Comments to the NCOP Select Committee on Security and Justice

8 November 2022

1. Introductory comments

The Helen Suzman Foundation ("**HSF**"), as a non-governmental organisation, has been an active participant in a variety of public interest areas in South Africa over many years. Its essential aim is to promote constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability.

Against this background, and given the importance of an electoral system that is able to function in accordance with the needs and aspirations of society, this submission sets out our comments on the content of the Electoral Amendment Bill (the "**Bill**"). This follows our submissions on the Bill which we have made to the National Assembly's Portfolio Committee on Home Affairs over the past year.

2. The Bill should have two purposes - to provide for broader electoral reform and to accommodate independent candidates

Following the Constitutional Court judgment of June 2020 which directed Parliament to amend the Electoral Act to make provision for independent candidates to compete for seats in the National Assembly, Parliament was given the opportunity not only to cater for independent candidates, but also to effect broader electoral reform. Accommodating independent candidates is therefore not the only issue which should be addressed by the Bill.

Each of these two issues is dealt with in detail below.

Broader electoral reform

In the first place, the current electoral system, which provides for members of Parliament to be appointed *via* party lists, has led not only to an increasing distance between voters and the national legislature, but has also increased the hazards of unlimited centralised control by party leaders, who are able to decide on the identities of their Parliamentary representatives.

The recent South African experience with state capture underlines the dangers of a remote or non-existing relationship between the electorate and members of Parliament, as it can only further increase what is already perceived to be a substantial lack of accountability.

Independent candidates

In the second place, provision has to be made for independent candidates, in terms of the Constitutional Court's judgment. The Minister of Home Affairs ("the Minister") decided to do so by following the recommendations of the minority of the Ministerial Advisory Committee ("MAC"), which had been appointed by him for advice on this question. The minority of the MAC suggested including independent candidates within the existing electoral system, with as little change as possible, purely requiring such candidates to reach a certain percentage of votes on a provincial basis. No provision is made in the Bill for meaningful reform.

As a result, we are unfortunately confronted with the prospect of independent candidates being elected on a proportional basis in individual provinces, with no connection to voters on a local level, where independent candidates would typically resonate.

The recommendation of the majority of the MAC was that voters should have two votes: the first for an individual person to represent their constituency (constituting half of the National Assembly), and a second for the party that they wished to see in Parliament (accounting for the other half). This would encourage a much more direct personal connection to the national legislature (through voters having a representative of their own constituency in Parliament), whilst at the same time not infringing on the Constitution's requirement that Parliamentary representation has to be proportional, in general.

The second vote would act to correct any proportional imbalance in Parliament, if a party won too many (or too few) constituency seats, expressed as a proportion of their share of the second vote. This mixed-member proportional system may seem complicated at first sight, but it is quite straightforward and is very similar to the system employed in local government elections. It is therefore not a new or an unusual concept.

However, the Minister chose not to follow the advice of the majority of the MAC, which he had himself appointed.

3. Several calls have been made for a change to the electoral system since 2003

Since 1994, South Africa's national elections have been based on the closed party list proportional representation system. The framework for the first two elections was specified in the interim and final Constitution, but since 1999, it has been open to Government to make changes to the electoral system through legislation, provided that it results, in general, in proportional representation.

Since 1999, several attempts have been made to advocate for electoral change through the inclusion of constituency representatives, combined with a number of seats to be allocated to parties on a proportional basis, to ensure overall proportionality in the National Assembly.

An electoral task team, appointed by Cabinet in 2002 and led by Dr Frederik van Zyl Slabbert, and a subsequent high-level panel chaired by former President Kgalema Motlanthe in 2017, both recommended a mixed-member proportional system. The aim of both these recommendations was to advance accessibility and responsiveness between voters and their representatives and to promote an environment with greater accountability to the electorate. However, Government decided not to pursue these recommendations.

The majority report of the MAC, in recommending a mixed-member proportional system, followed the same approach in June 2021, as detailed above.

The most recent call for change in this direction has come from the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State ("the Commission"). In its recommendations, which were published a few months ago, the Commission states as follows:

> *"It is recommended that Parliament should consider whether introducing a constituency-based (but still proportionally representative) electoral system would enhance the capacity of members of Parliament to hold the executive accountable. If Parliament considers that introducing a constituency-based system has this advantage, it is recommended that it should consider whether, when weighed against any possible disadvantages, this advantage justifies amending the existing electoral system."*
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> *"It is recommended that serious consideration be given to the majority recommendation on electoral reforms as given in the Report of the Electoral Task Team of January 2003. The Task Team included Dr F Van Zyl Slabbert who was the Chairperson."*[1]

In his response to the Commission's recommendations, President Ramaphosa stated:

> *"Noting that a part of the electoral reforms proposed by the Commission are currently under consideration in Parliament in relation to the Electoral Laws Amendment Bill and considering that Parliament has a court prescribed deadline to approve the Bill by 10 December 2022, it will be necessary to await the finalisation of the Bill before determining whether it satisfies the concerns raised by the Commission."*[2]

However, in its current form, it is clear that the Bill addresses none of the issues raised by the Commission on the subject of electoral reform.

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[1] As quoted on page 58 of the Response of October 2022 by President Ramaphosa to the recommendations of the Commission.

[2] On page 59 of the Response.

4. The number of signatures needed by independent candidates to register

A specific aspect of the current Bill could well be expected to be taken up in constitutional litigation: this concerns the unfairness of the registration requirement for independent candidates to participate in an election. Such candidates are required to present signatures amounting to 20% of the previous election's quota for a seat. However, this amounts to a multiple of the number of signatories which is required by political parties to register. Depending on the interpretation of the definition of "quota" in the Electoral Amendment Bill (ie. whether it is interpreted on a national or a provincial basis), the number of signatories which an independent candidate would have to present, could be anything from 9 to 18 times the number of signatories which are required to register a political party (the latter's Deed of Foundation only requires 1000 signatures).

It is therefore likely that litigation will ensue, based on the fact that this is an attempt to make it as difficult as possible for independent candidates to compete, by placing profoundly unfair and irrational obstacles in their way. As a result, it would not be surprising if a court were to find this arrangement to be unlawful and unconstitutional. In these circumstances, we find it astounding that this provision was accepted by the National Assembly and we recommend that the Select Committee on Security and Justice reconsiders the Bill's provisions in this regard.

5. Concluding comments

The marginal amendments to the electoral system to include independent candidates, as proposed by the Electoral Amendment Bill, will not increase political accountability to the electorate and will not affect the steadily increasing distance between the electorate and their representatives in Parliament. Broader electoral reform is required, consisting of constituencies within a system which ensures overall proportional representation.

The Bill's minimal changes to accommodate independent candidates, will only enable such candidates to stand on a provincial basis and not on a local level. This negates the very essence of independent candidates, who are rarely figures with any real influence outside of their local communities. A system which allows independent candidates to stand for election on a constituency basis, would therefore be far more appropriate - and at the same time, such constituency voting would greatly increase the accountability of members of the National Assembly to voters.