

Independent Candidacy and Electoral Reform: *New Nation Movement NPC v President of the Republic of South Africa*

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Abstract

In the *New Nation* case, the Constitutional Court declared the provisions of the *Electoral Act* that prevent independent candidates from competing in provincial and national elections unconstitutional. It ruled that the impugned provisions violated independent candidates' constitutional rights to stand for public office, to freedom of association and to dignity. In a minority judgment, Froneman J disagreed and held that the *Constitution* contemplates a right to contest elections as a party-nominee only. The differences between the majority and minority judgments are largely the result of distinct interpretive approaches. The majority conducted an analysis of the right to stand for public office within a restricted textual framework that has the potential to disturb the harmonious inter-relationship between the right and the electoral and parliamentary framework for its realisation. This result flows from the fact that the *Constitution* still reflects the exclusively party-based electoral and parliamentary systems of its predecessor in several important respects. At best, this situation may result in independents being largely at the mercy of political parties for meaningful execution of their legislative and oversight obligations. At worst, they may be excluded from exercising core parliamentary functions altogether. Therefore, to avoid disturbing the normative coherence between the right to stand for public office, the foundational democratic values, and the electoral and parliamentary arrangements, constitutional amendments appear to be necessary for the implementation of the court's order. In any event, expectations about the contribution to electoral reform of allowing independents to contest elections must be tempered by the low political impact of independent representatives on governance, as well as the ambivalence surrounding the democratic functionality of independent candidacy, when measured against the values of transparency and accountability.

Keywords

Accountability; closed-list party system; electoral system; inclusivity; independent candidacy; multi-party democracy; parliamentary system; proportional representation; transparency.

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1 Introduction

The *Constitution of the Republic of South Africa 200 of 1993* (the *Interim Constitution*) introduced the current exclusively party-based proportional representation system for the election of members of the National Assembly and the provincial legislatures. In terms of the transitional provisions of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*),¹ this system was to remain in place until the 1999 national election, after which an electoral system had to be introduced through the enactment of national legislation.² However, no constitutional amendments pertaining to the electoral system followed and the *Electoral Laws Amendment Act 34 of 2003* simply retained the pre-existing system of closed-list proportional party representation for the National Assembly and the provincial legislatures.³ The *Constitution* also retained the initial parliamentary system, which in important respects made provision for party representation only. In particular, this concerns important aspects of the internal functioning of the legislatures, such as representation in committees, the participation of parties in certain decision-making processes, the role of opposition parties, the loss of membership of the legislatures and the funding of parties.⁴

Under the closed-list system, parties compile lists with the names of candidates nominated and ranked in order of preference by them. Voters have no say in the ranking of candidates.⁵ Although many have commended the closed-list system for its fairness, inclusiveness and simplicity,⁶ calls for electoral reform came from various quarters. As one might expect, much of the criticism centred on the system's perceived public accountability deficiency brought about by the absence of a constituency-based direct relationship between representatives and the electorate.⁷ As early as 26

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¹ Items 6(3)(a) and 11 of sch 6 of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*).

² Sections 46(1)(a) and 105(1)(a) of the *Constitution* provides that the electoral system must be prescribed by national legislation.

³ Schedule 1A to the *Electoral Act 73 of 1998* (the *Electoral Act*), introduced by s 25 of the *Electoral Laws Amendment Act 34 of 2003*.

⁴ This will be discussed more fully below.

⁵ Fick "Elections" 29–10.

⁶ Electoral Task Team 2003 <https://static.pmg.org.za/docs/Van-Zyl-Slabbert-Commission-on-Electoral-Reform-Report-2003.pdf> 7.

⁷ Amongst many, see De Vos 2009 <https://constitutionallyspeaking.co.za/electoral-system-in-need-of-a-change/>. Also see Wolf 2021 *SALJ* 80-81; Kreuser and Slade 2021 *SAPL* 9-10.

March 1999, former president Nelson Mandela in his farewell speech in the National Assembly queried whether the electoral system should be revisited to improve the nature of the relationship between public representatives and voters.⁸ The electoral task team established by Cabinet in 2002 to draft the new electoral legislation required by the *Constitution* for the national and provincial elections after 1999 shared the former president's sentiments. The task team submitted a majority and minority report on the reform of the electoral system.⁹ The minority favoured the retention of the existing system. The majority recommended a mixed system where a percentage of representatives are elected in multi-member constituencies and the rest in terms of compensatory closed party lists to achieve overall proportionality.¹⁰ They reasoned that the fact that candidates would have to campaign in their constituencies would result in "face to face representation" and a much closer link with the electorate than is the case under the present system.¹¹

No follow-up occurred after this report, except that, in 2009, the Report of the Independent Panel Assessment of Parliament¹² identified the electoral system as one of several serious structural weaknesses in the functioning of Parliament. The Panel mentioned the absence of a constituency-based electoral system and the top-down effect of the party-list system as a major impediment to Parliament's ability to exercise its oversight mandate properly and to members of Parliament being accountable to voters.¹³ They proposed that the current electoral system should be replaced by a mixed system to capture the benefits of both the constituency-based and proportional representation systems.¹⁴

Thereafter, in December 2015, the Speakers' Forum, as the representative body of the South African legislative sector, established an independent high-level panel of eminent South Africans to review legislation for its effect on the government's transformational and developmental agenda. In its

⁸ Quoted in Independent Panel 2009 https://www.gov.za/sites/default/files/gcis_document/201409/panelassessparl.pdf 35.

⁹ Electoral Task Team 2003 <https://static.pmg.org.za/docs/Van-Zyl-Slabbert-Commission-on-Electoral-Reform-Report-2003.pdf>.

¹⁰ Electoral Task Team 2003 <https://static.pmg.org.za/docs/Van-Zyl-Slabbert-Commission-on-Electoral-Reform-Report-2003.pdf> 21.

¹¹ Electoral Task Team 2003 <https://static.pmg.org.za/docs/Van-Zyl-Slabbert-Commission-on-Electoral-Reform-Report-2003.pdf> 24.

¹² Independent Panel 2009 https://www.gov.za/sites/default/files/gcis_document/201409/panelassessparl.pdf.

¹³ Independent Panel 2009 https://www.gov.za/sites/default/files/gcis_document/201409/panelassessparl.pdf 36.

¹⁴ Independent Panel 2009 https://www.gov.za/sites/default/files/gcis_document/201409/panelassessparl.pdf 45.

report,¹⁵ the Panel once again revisited the influence of the electoral system on effective parliamentary oversight of the executive and the public accountability of individual representatives. It reaffirmed the findings and recommendations of the foregoing reports regarding the accountability weaknesses of the closed-list proportional representation system and recommended that Parliament should amend the *Electoral Act* to provide for an electoral system that made members of Parliament accountable to defined constituencies on a combined proportional representation and constituency system for national elections.¹⁶

No direct legislative changes followed from any of these initiatives. However, the recent judgment of the Constitutional Court in *New Nation Movement NPC v President of the Republic of South Africa*¹⁷ (*New Nation* case) has now firmly forced the issue of electoral reform onto the legislative agenda for the immediate future. The court declared the provisions of the *Electoral Act* that prevent independent candidates from standing for election to the national and provincial legislatures unconstitutional.¹⁸ It ordered Parliament to remedy the constitutional defect within two years.¹⁹

Despite the fact that the reach of the judgment does not go beyond the legalisation of independent candidacy and does not directly address the foundational features of the electoral system,²⁰ some have hailed it as a landmark in fundamental reform.²¹ However, so far there has been no

¹⁵ High Level Panel 2017 https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf.

¹⁶ High Level Panel 2017 https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf 568.

¹⁷ *New Nation Movement NPC v President of the Republic of South Africa* 2020 6 SA 257 (CC) (the *New Nation* case).

¹⁸ The majority judgment was delivered by Madlanga J. Seven judges concurred. Jafta J wrote a separate concurring judgment, while Froneman J penned the lone dissenting opinion. I will refer to the Madlanga and Jafta judgments as the first and second majority judgment respectively.

¹⁹ The Portfolio Committee on Justice and Security gazetted a call for comment on 28 August 2020 on a notice of intention to introduce a private member's bill (by Mosiuoa Lekota, leader of the opposition party, the Congress of the People), for an amendment of the *Electoral Act* to make provision for independent candidacy: see Chetty 2020 <https://hsf.org.za/publications/hsf-briefs/electoral-reform-understanding-the-new-nation-movement-case>. The *Electoral Laws Second Amendment Bill* [B34-2020] was subsequently tabled in the National Assembly on 4 December 2020.

²⁰ See in particular *New Nation* case para 15.

²¹ See, for instance, Feltham 2020 <https://mg.co.za/politics/2020-08-18-reforming-a-broken-system-can-electoral-act-amendments-revive-faith-in-sas-democracy/>; Ndletyana 2020 <https://www.theafricareport.com/29970/south-africa-independent-candidates-will-change-the-game/>; Tandwa 2020 <https://www.news24.com/news24/southafrica/news/concourt-judgment-brings-power-back-to-the-people->

indication that the government intends to use the court order to effect systemic electoral reform.²² Nevertheless, the extent to which the legalisation of independent candidacy on its own can satisfy expectations for electoral reform still needs to be considered.

In what follows, I will first evaluate the majority and minority judgments. For reasons that will become clear, I consider the result reached in the minority judgment as the correct one in terms of the law as it stood at the time. Nevertheless, since the reality is that the Constitutional Court has now declared the prohibition of independent candidacy unconstitutional, it is also necessary to reflect on the reformative implications of allowing independent candidates to participate in national and provincial elections. This assessment will be done with reference to foundational electoral principles, in particular inclusivity, transparency and accountability. The discussion is limited to this broad normative question and does not address the considerable practical logistical challenges associated with the implementation of the *New Nation* judgment.²³

2 Issues and main submissions

After losing in the Cape High Court,²⁴ the appellants challenged the constitutionality of the provisions of the *Electoral Act*,²⁵ which allow only candidates nominated by political parties to stand for election to the National Assembly and provincial legislatures. The appellants' main contention was that the *Electoral Act* is unconstitutional for unjustifiably limiting the right conferred by section 19(3)(b) of the *Constitution* to stand for public office

political-leaders-react-20200611. For a more sceptical view, see Griffiths 2020 <https://www.dailymaverick.co.za/opinionista/2020-06-24-changes-to-electoral-act-will-not-fundamentally-alter-south-africas-political-landscape/>; Fakir 2020 <https://www.africanews24-7.co.za/in-political-rehabilitation-dex.php/southafrica-forever/a-referendum-and-thorough-going-system-reform-is-the-way-to/>.

²² Grootes 2021 <https://www.dailymaverick.co.za/article/2021-09-16-our-political-system-has-failed-the-election-structure-and-the-players-within-it-may-have-to-change/>; Paton 2021 <https://www.businesslive.co.za/bd/national/2021-09-15-anc-leadership-opts-for-minimal-changes-to-electoral-law/>. The government's minimalist response to the *New Nation* case is also clear from the *Electoral Amendment Bill* [B1-2022] (explanatory summary published in GN 1660 in GG 45716 of 31 December 2021). The provisions of the Bill are limited to the logistical and administrative changes required of the *Electoral Act* to accommodate independent candidates. The Bill has several problematic features, which, however, fall outside the scope of this article.

²³ For a discussion of the need for broader electoral reform to address the practical logistical obstacles in implementing the judgment, see Wolf 2021 SALJ 77-87.

²⁴ *New Nation Movement NPC v President of the Republic of South Africa* 2019 5 SA 533 (WCC).

²⁵ Section 57A read with sch 1A of the *Electoral Act*.

and, if elected, to hold office. In addition, some applicants submitted that the *Electoral Act* infringes their right to freedom of association.

On their part, the respondents contended that section 19 of the *Constitution* does not explicitly include or exclude the right to stand as an independent. However, such an exclusion is to be found in other constitutional provisions, in relation to which section 19 should be interpreted. An exclusive political party proportional representation system, so the argument went, is indicated by several provisions connected to the electoral system, as well as the composition and operational functioning of the legislatures. In sum, they contended that the way the *Constitution* has institutionalised political parties in these contexts makes it clear that only members of political parties are allowed to stand for election.

3 First majority judgment

3.1 Textual analysis of section 19

Given the issue before it, the court first had to interpret the scope of the right to stand for public office, in particular the question of who would qualify as beneficiaries of this right. As will appear in what follows, there is frequent resort to "natural" or "plain" (that is, purportedly interpretation-free) word meanings during the court's referencing of the relevant constitutional provisions. The court's preferred literalist approach largely obviated the need for wider contextualisation, with reference to underlying democratic values and the operative electoral and parliamentary systems within which the right to stand for public office is constitutionally constructed. In so far as the majority judgments resorted to intra-textual contextualisation, this contextualisation was limited mainly to the Bill of Rights itself – in particular, the inter-relationship between the right to stand for public office and the right to freedom of association.²⁶ This resulted in a contextualisation exercise that did not afford due weight to foundational democratic values and the way that the right has been embedded in the electoral and parliamentary systems.

Moreover, this tendency was aggravated by the court's reluctance to make value judgments regarding electoral systems that best serve democratic values.²⁷ It is one thing to say that a court should not be prescriptive about

²⁶ *New Nation* case paras 14, 20-59.

²⁷ *New Nation* case para 15: "Before I proceed to deal with the interpretative exercise, let me mention that a lot was said about which electoral system is better, which system better affords the electorate accountability, etc. That is territory this judgment will not venture into. The pros and cons of this or the other system are best left to

which electoral system best serves core democratic values (such as accountability, inclusiveness, fairness, transparency and responsiveness), but quite another to treat these values as if they have only a marginal bearing on a dispute about electoral norms.²⁸ These values imply at least minimum legally binding thresholds for the constitutionality of electoral provisions, including the provisions that impact on independent candidacy.²⁹ Also, the principle of interpreting the *Constitution* – not just the Bill of Rights³⁰ – as comprising a coherent normative unity requires the right to stand for public office to be interpreted within a harmonious inter-relationship with the associated electoral and parliamentary framework of the *Constitution*.

According to the court, the "plain meaning" of section 19 of the *Constitution* suggests that its central theme is individual freedom of choice; namely, the individual right to make political choices, such as to form or join or not to form or join political parties, to take part in their activities or not, to stand for public office or not, *etcetera*.³¹ Once adult citizens are compelled to exercise the right to stand for public office through a political party, they are divested of the very freedom of choice not to form or join a political party. This, in the court's view, is exactly what the denial of the right to stand as an independent candidate entails; in order to stand for election, they are forced to join or form a political party. That the right to stand for public office includes the right to stand as an independent is therefore a necessary implication of the right so understood.³²

The court felt strengthened in this conclusion by its analysis of the right to freedom of association.³³ In this instance too, in the court's view, the core content of the right is one of individual choice – the right to choose to associate or to disassociate. It considered the constitutional purpose of freedom of association and its treatment in international³⁴ and foreign law

Parliament which ... has the mandate to prescribe an electoral system. This Court's concern is whether the chosen system is compliant with the Constitution."

²⁸ See, for instance, *New Nation* case paras 167-168.

²⁹ Section 39(1) of the *Constitution* explicitly requires the court to promote the values underlying an open and democratic society.

³⁰ This appears to be how both majority judgments limited the interpretive process: see *New Nation* case paras 63, 165.

³¹ *New Nation* case para 17.

³² *New Nation* case para 18.

³³ Section 18 of the *Constitution*.

³⁴ The court considered several judgments of the European Court of Human Rights (ECHR), which confirm that in principle freedom of association includes the right not to associate. However, none of these cases dealt with the prohibition of independent candidates specifically. As I will mention later, many member states of the European Union explicitly forbid independent candidates taking part in elections. Moreover, in

and concluded that section 18 of the *Constitution* protects not only the positive right to associate but also the "negative right" not to be compelled to associate.³⁵ The court thus held that the right to freedom of association is limited when the state compels individuals to associate with a political party against their will – whether by joining or forming a party.

The court's portrayal of the precise nature of the evil of being forced to form or join a party is completely in line with its libertarian understanding of the nature of these rights. It rejected the respondents' view that requiring candidates to stand for public office only as political party nominees does not deny the right, but simply prescribes a particular avenue for its exercise. If a prospective candidate therefore does not find any existing party acceptable, they are free to form their own party, which is a relatively undemanding option.³⁶ The court argued that 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 trammeling 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.³⁷

Based on this understanding of the right to stand for political office, the court then proceeded to assess the arguments of the respondents that other constitutional provisions indicate an exclusive party-based system.

Oran v Turkey (ECHR) Applications nos 28881/07 and 37920/07 (2014) the court upheld a ban on independent candidates standing for election in Turkey. In addition, in *Castañeda Gutman v México* (IACHR) Series C no 184 (6 August 2008) (*Gutman* case) the court also found no violation of the *American Convention on Human Rights* by México's prohibition of independent candidates taking part in the elections. The first majority judgment in the *New Nation* case did refer to *Tanganyika Law Society v United Republic of Tanzania*; *Mtikila v United Republic of Tanzania* Applications nos 009/2011 and 011/2011 no (ACHPR) (2011) (*Tanganyika* case), where the court declared the Tanzanian ban on independent candidacy a violation of Article 10 of the *African Charter on Human and Peoples' Rights*, which explicitly mentions the negative right of freedom not to associate. See Kreuser and Slade 2021 SAPL 15-18 for a discussion of the *Tanganyika* case. The authors criticise the *New Nation* judgment for not engaging in sufficient depth with the view of the African Court on Human and Peoples' Rights regarding the content of the right to stand for public office.

³⁵ *New Nation* case para 58.

³⁶ *New Nation* case para 53. It should be noted that this argument found favour with the court in the *Gutman* case para 202.

³⁷ *New Nation* case para 49.

3.2 Section 1(d): the founding value of a multi-party system of democratic government

The Republic of South Africa is one, sovereign, democratic state founded *inter alia* on the value of a multi-party system of democratic government, to ensure accountability, responsiveness and openness. The respondents contended, also with an appeal to the "plain meaning" of the words, that this founding provision entails an exclusively party-based proportional representation system. The court disagreed, by arguing that all that this provision does is to stipulate that the Republic must never be a one-party state,³⁸ which does not exclude the participation of independent candidates in elections.³⁹

Clearly, there is no single unambiguous word meaning at play here, which could dictate either of the interpretations with absolute certainty. Interestingly, in the *Gutman* case the Inter-American Court of Human Rights (the IACHR) found historical and political justification for the ban on independent candidacy in México's national elections, by specifically emphasising the necessity to create and strengthen a system of multi-party democracy. Such a system did not exist for a considerable period of the history of that country under the dominance of a hegemonic official state party regime.⁴⁰ The court also pointed out that allowing independent candidates to stand for election could actually impede the development of a viable multi-party system because of the large-scale fragmentation of popular representation it would bring about.⁴¹ Given our own history, it seems therefore that applying a similar historical context to the interpretation of section 1(d) of the *Constitution* would not have been out of place either.

3.3 Sections 46(1)(a) and 105(1)(a): the electoral system to be prescribed by legislation

These sections respectively provide that the National Assembly and provincial legislatures consist of women and men elected in terms of an electoral system prescribed by national legislation. The respondents argued that these provisions empower Parliament to prescribe the electoral system,

³⁸ The court relied on its earlier interpretation of this founding value in *United Democratic Movement v President of the Republic of South Africa* 2003 1 SA 495 (CC) paras 24 and 26.

³⁹ *New Nation* case para 71.

⁴⁰ *Gutman* case para 187.

⁴¹ *Gutman* case para 188. The court in the *Tanganyika* case (para 107.2) took a different view on this matter. Also see Kreuser and Slade 2021 *SAPL* 17.

which is what it did with the *Electoral Act*.⁴² The court rejected their contention by pointing out the obvious that this mandate does not imply that the legislation prescribing the electoral system is free of constitutional constraints, particularly section 19.⁴³

3.4 Sections 47(3)(c) and 106(3)(c): loss of membership of the legislatures

The two sections respectively provide that a person loses membership of the National Assembly or a provincial legislature if that person ceases to be a member of the party that nominated her or him for membership. According to the respondents, this supports the view that membership of the legislative institutions is exclusively party based.⁴⁴ The court again found otherwise and held that the provisions mean no more than that it is the membership of members nominated by parties that is lost in this manner. That says nothing about loss of membership of members who were not sponsored by parties. Nor, in the court's view, is it in any way indicative of their exclusion from membership.⁴⁵

Here is another example of the lack of depth of analysis due to the literalist approach, which, given the inherent ambiguity of word meanings, could frankly support both interpretations. One could just as plausibly argue that had the *Constitution* contemplated independent candidacy, it would have explicitly dealt with the conditions for loss of their membership also. This underlines the need for broader contextual analysis, especially with reference to the underlying constitutional values of the electoral system. In particular, the court's finding in this respect could be questioned in terms of its implications for a consistent and equal application of the principle of accountability to all categories of members of legislative bodies. Should the *Constitution* be interpreted to allow independent candidates, then the lack of a constitutionally prescribed functional equivalent to sections 47(3)(c) and 106(3)(c) applicable to them would result in imputing to the *Constitution* a serious voter accountability deficit compared to members nominated by parties. The generic constitutional conditions for loss of membership of the legislatures⁴⁶ do not suffice to fill this voter accountability gap. An example of a constitutional arrangement for eventualities such as these, in a system that expressly caters for independent candidacy, is to be found in section

⁴² *New Nation* case para 74.

⁴³ *New Nation* case para 75. However, see the discussion in section 3.7 below.

⁴⁴ *New Nation* case para 77.

⁴⁵ *New Nation* case para 77.

⁴⁶ Sections 47(3) and 106(3) of the *Constitution*.

83(h) of the *Constitution of the Republic of Uganda*, 1995. This section specifically provides for a member of Parliament to vacate his or her seat, if, having been elected as an independent candidate, that person joins a political party. On the court's reading, it would be constitutionally acceptable to allow members elected as independent candidates, but who decide during their tenure to join a political party, to retain their seats, whereas party-nominated candidates who change their party affiliation cannot.

3.5 Sections 46(1)(d) and 105(1)(d): the electoral system must in general result in proportional representation

These sections respectively provide that the National Assembly and provincial legislatures consist of women and men elected in terms of an electoral system that "results, in general, in proportional representation". The respondents argued that this implies an exclusive party-proportional representation system. The court disagreed again. It correctly held that proportionality does not equal exclusive party-proportional representation. Proportional representation is not incompatible with independent candidate representation.⁴⁷ According to the court, these sections do not refer to party-proportional representation, let alone exclusive party-proportional representation. The sections only require that elections result, in general, in proportional representation, whoever the participants may be.⁴⁸ The constitutional provisions regarding ward representation for local government elections also show that proportional representation is not incompatible with independent candidates.⁴⁹

3.6 Section 157(2)(a): provisions for local government elections

This section provides that the electoral system for municipal elections must be either one of proportional representation, based exclusively on the election of candidates from closed party lists, or one of proportional representation that combines ward representation and party representation. On the strength of the first option, which patently disqualifies independent candidates, the respondents contended that section 19 could not be interpreted to render the *Electoral Act* unconstitutional. It would be illogical to argue that a system that provides for exclusive party representation is unconstitutional under section 19(3)(b), but constitutional under section 157(2)(a) of the *Constitution*. The only way to avoid this contradiction is to

⁴⁷ *New Nation* case para 78.

⁴⁸ *New Nation* case para 78.

⁴⁹ *New Nation* case paras 79-80.

read section 19 as not including the possibility of independent candidature.⁵⁰

The court, again, was not convinced that this is so. It held that the provisions of section 157(2)(a) do not contradict sections 18 and 19 of the *Constitution*. Here, obviously, the court could not fall back on ostensibly "natural" word meanings to resolve the contradiction between the sections. In the exercise of redefining an apparent contradiction as an exception, the court resorted to historical contextualisation in aid of its view. The court considered it significant that – without explaining how – constitutional negotiations in respect of municipalities were conducted separately from the rest of the negotiation process.⁵¹ It also pointed to the history of race-based spatial separation and the concomitant inequality of services and living conditions.⁵² From this it concluded that the framers of the *Constitution* must have seen fit to make an exception in the case of local government elections and thus sanction the option of party-nominated candidates only within a proportional representative system.

However, the court did not in any explicit way make clear how the electoral options mentioned in section 157 of the *Constitution* relate to the unique position of local governments, or how their position differs substantially from the historical legacies also to be found at the provincial and national levels of government. The court appears to have implied that the *Constitution* provided for the option of exclusive party representation for local government to avoid the perpetuation of the legacy of spatial apartheid that could flow from geographical ward representation. If this is the motivation for section 157(2)(a) of the *Constitution*, then it is difficult to comprehend why as much as fifty per cent of ward representation was implemented country-wide for local government elections.⁵³ This has the potential to accentuate racial divisions in the geographic distribution of voters and even skew the over-all proportionality of elections – should a significant number of ward representatives be made up of non-party-aligned candidates. This might be the result, for instance, if a party with an overall majority of votes

⁵⁰ *New Nation* case para 89.

⁵¹ *New Nation* case para 97. Also see *Executive Council Western Cape v Minister of Provincial Affairs and Constitutional Development* 2000 1 SA 661 (CC) para 44.

⁵² *New Nation* case para 98.

⁵³ In the case of metros and local councils: item 6(b) of the *Local Government: Municipal Structures Act* 117 of 1998.

narrowly loses in a substantial number of wards won on the first-past-the post system by independents.⁵⁴

More importantly for the point in question, however, is that there is no indication in the judgment as to how the historical considerations canvassed by the court actually relate to the question of whether the *Constitution* contemplates specifically *independent* candidacy for provincial and national elections. If independent candidacy is linked to some form of constituency-based representation, then the same spectre of the legacy of spatial apartheid in municipalities will also be present at the national and provincial levels. If, on the other hand, independent candidacy is not linked to geographical constituencies, then the history of spatial apartheid has no obvious relevance for the question of whether independent candidacy is constitutionally mandated or not. In this context, the respondents' reading of the *Constitution* therefore seems the more plausible one.

3.7 Schedule 6: transitional provisions

The respondents also relied on the transitional provisions in schedule 6 of the *Constitution*, which provide for the exclusive party-based proportional representation system of the *Interim Constitution* to remain in place temporarily. However, the court pointed out that this was to apply only until the first election after the coming into force of the *Constitution*. Once this moment had passed, this provision on its own could therefore not be sourced as a basis for arguing in favour of the perpetuation of an exclusive party-based system.⁵⁵

The Court seems to have erroneously assumed that since the exclusive party-based system was contained in transitional provisions, it meant that this system had to be discarded after the 1999 elections.⁵⁶ However, neither

⁵⁴ This may complicate compliance with s 157(3) of the *Constitution*, which requires that local government elections must result, in general, in proportional representation. Also see Schaffner, Streb, and Wright 2001 *Political Research Quarterly* 7-30 for examples of how independents' electoral participation can be related to the increased saliency of race in electoral politics.

⁵⁵ *New Nation* case paras 67-69. This was how the transitional provisions were interpreted in *Majola v The State President of the Republic of South Africa* [2012] ZAGPJHC 236 (30 October 2012). For a critique of the position taken in this case on the transitional provisions, see Wolf 2014 *SAJHR* 164-165.

⁵⁶ This is clear from the following *dictum* in the *New Nation* case para 102: "[I]tems 6(3)(a) and 11(1)(a) of Schedule 6 to the Constitution make plain that the exclusive party proportional representation system was never meant to last forever. The items are contained in 'transitional arrangements' under the Constitution. That immediately tells us that what these items provide for was part of a passing constitutional phase."

the transitional provisions, nor sections 46(1)(d), 105(1)(d) and 157(2) of the *Constitution* are prescriptive about the electoral system that was to be adopted after the 1999 elections,⁵⁷ which means that the retention of the existing exclusive party-based system remained a *constitutionally* endorsed possibility. The 2003 *Electoral Laws Amendment Act* then simply implemented the option left open by these constitutional provisions. What is more, as I will show next, constitutional provisions that hang closely together with this system have also been preserved unchanged. After all, if the intention had been to bring about systemic electoral modifications after 1999, then why change nothing regarding the compositional and operational constitutional arrangements pertaining to the legislatures that were devised with an exclusive party-based system in mind?

3.8 Sections 57(2), 178(1)(h), 193(4), 193(5) and 236: provisions regarding the institutionalisation of political parties in the composition and functioning of the National Assembly

The respondents also relied on the way that the *Constitution* institutionalises political parties in the composition and functioning of the National Assembly and its committees. In particular, they referred to the following provisions.

First, the rules and orders of the National Assembly must make provision for the participation of minority parties in its proceedings and those of its committees; provide for the financial and administrative assistance of all parties represented in the National Assembly; and make provision for the recognition of the leader of the largest opposition party in the National Assembly as the Leader of the Opposition.⁵⁸ Secondly, the *Constitution* reserves the National Assembly's participation in making core appointments for political parties only. The Judicial Service Commission must consist of six people designated by the National Assembly from amongst its members, at least three of whom must be members of opposition parties.⁵⁹ In addition, the *Constitution* requires the President to appoint the Public Protector, the Auditor-General and members of the South African Human Rights Commission, the Commission for Gender Equality and the Electoral Commission from persons recommended to the President by the National Assembly. The National Assembly must recommend persons nominated by

Also see *Aparty v Minister of Home Affairs, Moloko v Minister of Home Affairs* 2009 3 SA 649 (CC) para 80.

⁵⁷ Apart from the provisions that elections must be based on the national voters' roll, provide for a minimum voting age of 18 years and result, in general, in proportional representation.

⁵⁸ Section 57(2) of the *Constitution*.

⁵⁹ Section 178(1)(h) of the *Constitution*.

a committee of the Assembly proportionally composed of members of all political parties represented in the Assembly.⁶⁰ Thirdly, to enhance multi-party democracy, national legislation must provide for the funding of political parties that participate in the national and provincial legislatures.⁶¹

The substance of the respondents' argument is that since the *Constitution* provides for funding of and participation in the above-mentioned processes by parties only, it was never intended for independents to be elected to these bodies. If the intention were otherwise, independents would have been included in these arrangements.⁶² There is another important constitutional provision related to the composition and functioning of the legislatures that adds strength to this conclusion, which was, however, not canvassed by the parties or addressed by any of the judgments. Provincial delegates to the National Council of Provinces are drawn exclusively from political party nominations.⁶³ This would be anomalous if it was constitutionally envisaged that independent candidates could stand for election to provincial legislatures.

This argument also failed to impress the court. The court held, somewhat incongruously, that the reason that the *Constitution* refers only to political parties in the relevant operational arrangements of the National Assembly is because of the founding provision endorsing multi-party democracy.⁶⁴ In the court's view, the particular focus on political parties in these provisions seeks to strengthen multi-party democracy but does not negate the possibility of the participation of independents in the National Assembly and provincial legislatures.⁶⁵ If this is so, then the question remains: why would the *Constitution* discriminate in such a deliberate manner to privilege only some categories of representatives (and, by extension, only some categories of voters), if it was the case all along that not only political party nominees could be represented in the legislatures? If independent candidates could be elected, would these constitutional provisions then not conflict with the founding democratic principles of equality and fairness and detract from the representative, legislative and oversight powers and obligations of the non-party-aligned categories of representatives – thus also compromising the founding value of democratic accountability?⁶⁶

⁶⁰ Sections 193(4), 193(5) of the *Constitution*.

⁶¹ Section 236 of the *Constitution*.

⁶² *New Nation* case para 84.

⁶³ Section 61 of the *Constitution*.

⁶⁴ See the remarks made in this respect in para 3.2 above.

⁶⁵ *New Nation* case para 85.

⁶⁶ See s 42(3) of the *Constitution*.

Independent candidates would be either expressly excluded from taking part in the parliamentary processes mentioned above or – to the extent that they could be included – exposed to the whims of party representatives. In so far as the court's interpretation has these implications, it negates the much-vaunted interpretive principle of maintaining the normative coherence of the *Constitution*.⁶⁷ It would mean that multi-party democracy is enhanced at the cost of the foundational democratic values of the *Constitution*. It is difficult therefore to escape the inference that these operational provisions of the *Constitution* were initially designed and retained after 1999 with an exclusive party-representative system in mind.

4 Justification

None of the respondents submitted evidence in justification of the limitation of the right to stand for public office. This is a pity, since the limitation analysis would have offered the framework for arguing the broader democratic implications of the opposing views, since section 36 of the *Constitution* requires a consideration of the reasonableness and justifiability of the limitation of rights in an open and democratic society, based on human dignity, equality and freedom. Although the lack of evidence on justification does not exempt the court from the obligation to conduct the justification analysis,⁶⁸ Madlanga J merely concluded, without further elaboration: "I can conceive of no reason to hold that the limitation is justified."⁶⁹

5 Second majority judgment

Jafta J delivered a separate judgment in which he agreed with the outcome reached in the first judgment but chose to underscore further the importance of section 19(3) of the *Constitution*.⁷⁰ He stressed that the right to stand for public office, which is closely linked to the right to vote, is unequivocally afforded to all individual adult citizens. In his view, it would be a clear violation of the individual nature of the right if citizens were to be compelled to exercise this right through the medium of political parties only.⁷¹ The first

⁶⁷ See, amongst many, *S v Mhlungu* 1995 3 SA 867 (CC) paras 45, 105; *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC) para 204; *Matatiele Municipality v President of the RSA (No 2)* 2007 6 SA 477 (CC) para 36.

⁶⁸ See *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* 2003 3 SA 345 (CC) para 20.

⁶⁹ *New Nation* case para 119.

⁷⁰ *New Nation* case para 129.

⁷¹ *New Nation* case paras 159-160.

majority judgment also raised this point,⁷² and it therefore needs no further elaboration. Apart from also rejecting the respondents' arguments regarding section 157(2) of the *Constitution*, Jafta J did not address the other submissions considered in the first majority judgment.

6 Minority judgment

Froneman J opened his judgment by taking issue with the majority's literalist approach. To him, the right to stand for public office and, if elected, to hold office does not have an uncontested, pre-given meaning that can be determined without having regard to the constitutional context.⁷³ The content of this right is not to be determined notionally,⁷⁴ but contextually by considering the foundational values and the constitutional norms governing the electoral system.⁷⁵ Given the accepted interpretive principle of the "inner unity" of the *Constitution*, the right to stand for public office must not be interpreted on its own, but with reference to the *Constitution* as a whole.⁷⁶ He therefore faulted the majority judgments for not having proper regard to the constitutionally required electoral and parliamentary framework within which this right must be exercised.⁷⁷

In pursuing this route, Froneman J commenced with the foundational features of the democratic system. The democratic framework established by the *Constitution* allows for representative, participatory and direct democracy. In his view, representative electoral government requires a multi-party system, which, "in ordinary parlance and understanding, constitutional detail and the Court's jurisprudence", has political parties at its core.⁷⁸ The *Constitution* is devoid of indications that any other grouping than political parties is included under this term.⁷⁹ He found support for this proposition in section 236 of the *Constitution*, which makes provision for the funding of political parties only in order to enhance multi-party democracy, as well as in the *dictum* of the Constitutional Court in *Ramakatsa v Magashule*⁸⁰ that political parties occupy centre stage and play a vital part

⁷² *New Nation* case para 18.

⁷³ *New Nation* case para 198.

⁷⁴ That is, ascribing a wide, literal (a-normative) meaning to the scope of activities protected by rights. See Botha and Woolman "Limitation" 34–17.

⁷⁵ *New Nation* case para 198.

⁷⁶ Here he relied on *Matatiele Municipality v President of the RSA (No 2)* 2007 6 SA 477 (CC) para 36.

⁷⁷ *New Nation* case para 196.

⁷⁸ *New Nation* case paras 201, 215.

⁷⁹ *New Nation* case para 204.

⁸⁰ *Ramakatsa v Magashule* 2013 2 BCLR 202 (CC) para 16.

in facilitating the exercise of political rights in our multi-party democratic system.

Froneman J distinguished participatory democracy as a further foundational feature of the democratic system.⁸¹ The democratic government contemplated by the *Constitution* is one that is accountable, responsive and transparent, and makes provision for public participation by way of public access to and involvement in the legislative and other processes at national, provincial and local government levels.⁸² While contestation among multiple political parties is an essential feature of the system of elected democratic government, the *Constitution's* vision of democracy is complemented by additional forms of participatory democracy. Apart from envisioning democracy as being participatory in relation to representative government, the *Constitution* also makes provision for direct democracy. He believed this to be "a counterweight to the importance of political parties in a representative democracy", because it provides an alternative 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.⁸³ Direct forms of participatory democracy are found in the right of freedom of assembly, demonstration, picket and petition, and in the constitutional provisions that provide for the calling of national and provincial referendums.⁸⁴

In Froneman J's opinion, the constitutional recognition of different forms of democracy dispels the allegation that the choice not to form or join a political party under section 19(1) of the *Constitution* has the consequence of rendering the prohibition of independent candidates constitutionally defective. He contended that those who do not wish to participate through the party-political process are not deprived of their democratic political voice.⁸⁵ The consequence of that choice is that democracy may be pursued directly, by the use of the right to assembly, demonstration, picket and petition, or by calling for a referendum.⁸⁶ The choice to champion a cause rather than a political party, thus, still remains and may be pursued by other constitutionally protected democratic means.⁸⁷ Froneman J argued that this also explains why the appellants' attempt to seek support from the right not

⁸¹ *New Nation* case paras 205-206.

⁸² *New Nation* case para 206.

⁸³ *New Nation* case para 207.

⁸⁴ *New Nation* case para 201.

⁸⁵ *New Nation* case para 232.

⁸⁶ *New Nation* case para 217.

⁸⁷ *New Nation* case para 217.

to associate is inapposite. No one is compelled to form or join a political party, but should they decide not to, then the *Constitution* itself limits their political participation to the direct democratic means at their disposal.⁸⁸

These arguments regarding the *Constitution's* menu of different forms of democratic participation are unpersuasive and do not – on their own – provide a sufficient constitutional basis for the premise that both representative and direct democratic participatory rights are reserved for party-affiliated members of the legislatures, not for independent members.⁸⁹ Nevertheless, based on his understanding of the relevant constitutional values and electoral norms, Froneman J concluded that the right to stand and hold elective office in terms of section 19(3)(b) of the *Constitution*

is an individual right to represent the people in a multi-party system through the medium of political parties that results, in general, in proportional representation.⁹⁰

Froneman J also addressed the implications of the constitutional endorsement of proportional representation. He observed that the choice of proportional representation at the provincial and national levels amounts to the prioritisation of equality above accountability.⁹¹ He stated that accountability might be better secured through a constituency-based system or a mixed system, and that at local government level the option of ward representation therefore points to the prioritisation of accountability over equality.⁹²

This reasoning seems questionable. The *Constitution* requires that the electoral system at all levels of government must in general result in proportional representation.⁹³ If his linking of proportional representation with a prioritisation of equality over accountability is correct, then it is puzzling to assume, as he does, that at the municipal level, the *Constitution* has prioritised accountability over equality, since, as noted above, both electoral options for local government must be proportional in result.⁹⁴ Equality is therefore endorsed in the same way regarding the over-all

⁸⁸ *New Nation* case para 218.

⁸⁹ Also see Wolf 2021 SALJ 18.

⁹⁰ *New Nation* case para 208.

⁹¹ See *New Nation* case para 221: "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."

⁹² *New Nation* case para 225.

⁹³ Sections 46(1)(d), 105(1)(d) and 157(3) of the *Constitution*.

⁹⁴ Section 157(3) of the *Constitution*.

electoral result. Secondly, forms of accountability that are functionally equivalent to constituency-based representation are also to be found in exclusive party-list systems, such as open-list systems, where voter preference regarding candidate selection is accommodated.

Moreover, it is not immediately apparent what the alleged relative prioritisation of equality and accountability at the different levels of government implies for the specific question of whether the legalisation of independent candidacy is constitutionally mandated or not. Froneman J appears to have assumed that independent candidacy is only possible on a constituency basis,⁹⁵ and since the *Constitution* expressly caters for constituency (ward) representation at the municipal level only, it is accordingly not permitted at the provincial and national levels. Proportional representation is, however, not incompatible with constituencies, as is the case, for example, in multi-member constituency electoral systems.⁹⁶ Such proportional representation systems are common around the world and should the *Electoral Act* be amended to make provision for it, it would be constitutionally compliant. This cannot therefore be an argument against independent candidates. What is more, although most elections under proportional representation systems are conducted exclusively with candidates who belong to a political party, this is not necessarily the case. For instance, because of its candidate-centredness, independent candidates are a common occurrence under the single transferable vote proportional representation system (as in the Republic of Ireland).⁹⁷ Independent candidates could simply be treated as a one-person party, presenting a list with only one name on it, and gain a seat if they receive the required electoral votes.⁹⁸ Therefore, no conceptual contradiction between proportional representation, whether constituency-based or not, and independent candidacy exists.

Notwithstanding the caveats expressed above, Froneman J's general interpretive approach, to embed the right to stand for public office in the overall democratic, electoral and parliamentary framework of the

⁹⁵ *New Nation* case para 229.

⁹⁶ This was correctly stressed by the first majority judgment, see *New Nation* case para 78.

⁹⁷ Electoral Knowledge Network date unknown <https://aceproject.org/ace-en/topics/lf/lfb/lfb05/lfb05b/lfb05b02>.

⁹⁸ Electoral Knowledge Network date unknown <https://aceproject.org/ace-en/topics/lf/lfb/lfb05/lfb05b/lfb05b02>. In countries with no specific regulation of independent candidates, such as Austria, Finland, Luxembourg, the Netherlands and Poland, there is a (theoretical) possibility that independent candidates could compete by forming single-candidate lists: Ehin *et al Independent Candidates* 19.

Constitution, cannot be faulted. As argued earlier, such an analysis makes it difficult to avoid the conclusion that the initial institutionalisation of political parties in the functioning of the electoral and parliamentary systems by the *interim Constitution* was retained by the *Constitution* after 1999. It would be challenging to give effect to the court's order without a simultaneous amendment of these provisions, if the internal contradictions mentioned above are to be avoided.⁹⁹

The correctness of the outcome of the case in terms of the current state of the law aside, the broader normative question remains whether, from a purely constitutional reformist point of view, constitutional space should be made for independent candidacy. One can sympathise with the democratic sentiment expressed in the first majority judgment that the right to stand for public office must be interpreted generously to make the scope of electoral participation and choice as wide as possible.¹⁰⁰ Self-evidently, independent candidacy can enhance democratic participation and inclusivity and is practised in many countries of the world. However, experience at home and elsewhere reveals a general picture of independent candidacy as only modestly politically impactful and frequently ambivalent in terms of its democratic functionality, particularly when measured against the democratic values of transparency and accountability.

7 Democratic impact and functionality of independent candidacy

7.1 Increased inclusivity and participation

South Africa's current democratic malaise speaks strongly in favour of legalising independent candidacy as a legitimate option for non-party-aligned voters. Findings from a recent *Afrobarometer* survey confirm the very low levels of public trust in most of South Africa's public institutions.¹⁰¹

⁹⁹ The "integrated roadmap" for the amendment process of the *Electoral Act*, presented at a joint sitting of the Portfolio Committee on Home Affairs and the Select Committee on Security and Justice on 18 August 2020, proposed four different scenarios – none of which anticipates constitutional amendments. However, in his response to the roadmap, the Minister of Home Affairs, Aaron Motsoaledi, advised that it would not be possible to implement the legislative process without constitutional amendments. See Chetty 2020 <https://hsf.org.za/publications/hsf-briefs/electoral-reform-understanding-the-new-nation-movement-case>.

¹⁰⁰ *New Nation* case paras 106-111. Also see Mateng'e 2012 *Journal of Politics and Law* 19; Wolf 2021 *SALJ* 67, 74.

¹⁰¹ Moosa and Hofmeyr 2021 https://afrobarometer.org/sites/default/files/publications/Dispatches/ad474-south_africans_trust_in_institutions_reaches_new_low-afrobarometer-20aug21.pdf 2.

Trust in elected representatives is especially weak, with only 27 per cent of those surveyed indicating that they trust members of Parliament "somewhat" or "a lot".¹⁰² The low level of public trust in state institutions also applies to political parties. At the moment, the ruling party enjoys the trust of only a quarter of citizens, in comparison to 61 per cent in 2011.¹⁰³ Opposition parties fare no better, with a public trust count of only 24 per cent, which intimates the inability of these parties to present themselves as viable alternatives to the ruling party.¹⁰⁴ Most alarmingly, about two-thirds of respondents expressed a willingness to forego elections altogether if a non-elected government could provide improved security and better services.¹⁰⁵ The loss of belief in the meaningfulness of electoral participation has manifested itself in a steady decline in voter participation since the founding democratic elections in 1994. Less than half of all eligible South Africans cast a vote in the 2019 national and provincial elections.¹⁰⁶ Out of a total of just over 40 million eligible voters, more than 13 million did not even register for the 2021 local government elections.¹⁰⁷

Against this disconcerting background, even a modest theoretical possibility of enhanced democratic participation offered by independent candidacy is probably enough reason to support this option. Independent candidacy could present itself as a possibility for mainly those who are averse to strict party discipline, voters estranged from established parties, and protest

¹⁰² Moosa and Hofmeyr 2021 https://afrobarometer.org/sites/default/files/publications/Dispatches/ad474-south_africans_trust_in_institutions_reaches_new_low-afrobarometer-20aug21.pdf 5.

¹⁰³ Moosa and Hofmeyr 2021 https://afrobarometer.org/sites/default/files/publications/Dispatches/ad474-south_africans_trust_in_institutions_reaches_new_low-afrobarometer-20aug21.pdf 11.

¹⁰⁴ Moosa and Hofmeyr 2021 https://afrobarometer.org/sites/default/files/publications/Dispatches/ad474-south_africans_trust_in_institutions_reaches_new_low-afrobarometer-20aug21.pdf 12.

¹⁰⁵ Moosa and Hofmeyr 2021 https://afrobarometer.org/sites/default/files/publications/Dispatches/ad474-south_africans_trust_in_institutions_reaches_new_low-afrobarometer-20aug21.pdf 1.

¹⁰⁶ Schulz-Herzenberg 2020 <https://www.kas.de/documents/261596/10543300/The+South+African+non-voter++An+analysis.pdf/acc19fbd-bd6d-9190-f026-8d311078b670?version=1.0&t=1608> 4.

¹⁰⁷ Haffajee 2021 <https://www.dailymaverick.co.za/article/2021-09-21-the-no-voters-more-than-13-million-south-africans-who-can-vote-havent-registered-for-1-november-polls/>. Also see the analysis of Kreuser and Slade 2021 *SAPL* 5-6 regarding the 2019 elections.

votes (those who do not wish to vote for rival parties).¹⁰⁸ In addition, if a party candidate under the current system in South Africa can win a parliamentary seat with only a tiny fraction of the vote (0.18 per cent or about 30 000 votes in the 2019 elections),¹⁰⁹ there does not seem to be good reason to deny independents the same opportunity.

However, expectations should be tempered by the modest effect independent candidates generally have on governance. As a rule, independents and groups of non-affiliated candidates have such limited practical prospects of competing successfully in regional and national¹¹⁰ elections that their role in modern democracies remains marginal.¹¹¹ They do not enjoy the electoral benefit of straight-ticket voting by being associated with established parties, or a party's significant organisational and financial support.¹¹² Add to this independents' limited access to free broadcast time in public media and the fact that very few jurisdictions make provision for independents to access state financial support in advance for their election campaigns.¹¹³ The *Political Party Funding Act* 6 of 2018 restricts state electoral financial support to political parties represented in the national and provincial legislatures.¹¹⁴ The same applies to the Multi-Party Democracy Fund established by the Act, which is mandated to raise and distribute donated funds from corporate and private donors.¹¹⁵

Statistics on independent candidates' voter support reflect the difficulties they experience in competing successfully in regional and national elections. A comprehensive transnational study covering 34 countries

¹⁰⁸ For an example of the latter, see Ehin and Solvak 2012 *Journal of Elections, Public Opinion and Parties* 269-291. Also see Eisner 1993 *U Pa L Rev* 973-1027 (independents and small parties can be an important voice for change and conduits for the expression of discontent with the major parties).

¹⁰⁹ Feltham 2020 <https://mg.co.za/politics/2020-08-18-reforming-a-broken-system-can-electoral-act-amendments-revive-faith-in-sas-democracy/>.

¹¹⁰ Not surprisingly, independents often fare better in local government elections. See Tavares, Raudla and Silva 2020 *Journal of Urban Affairs* 955-974.

¹¹¹ There are, of course, many exceptions. Independents can do well under the following circumstances: where party systems are underdeveloped and party loyalties are less established (see Karyeija 2019 *Africa Journal of Public Sector Development and Governance* 60-71; Brancati 2008 *Journal of Politics* 655; Ehin *et al Independent Candidates* 15-16); in situations of wide-spread voter dissatisfaction with the performance of established parties (see Šebík 2016 *Contemporary European Studies* 5-24; Ehin *et al Independent Candidates* 16); and during stages of democratic transition (see Wolf 2018 *Journal of North Africa Studies* 551-556; Brancati 2008 *Journal of Politics* 653).

¹¹² Brancati 2008 *Journal of Politics* 650.

¹¹³ Electoral Knowledge Network date unknown <https://aceproject.org/ace-en/topics/lf/lfb/lfb05/lfb05b/lfb05b02>. Also see Ehin *et al Independent Candidates* 15.

¹¹⁴ Section 6(1) of the *Political Party Funding Act* 6 of 2018.

¹¹⁵ Section 3(1) of the *Political Party Funding Act* 6 of 2018.

revealed that whilst independents comprised seven per cent of the candidates that competed for office, they won approximately two per cent of the vote and only one per cent of the seats.¹¹⁶ Similar results appear from a 2013 study commissioned by the European Parliament's Committee on Constitutional Affairs,¹¹⁷ which covered national elections in the 18 European Union member states that allow independent candidates to contest national elections. In most elections in which they competed, independent candidates attracted only marginal voter support, with an average share of the vote of under two per cent. Since most of these countries also apply threshold requirements for election, the number of independents actually winning seats is even more modest: only 36 out of 1368 participating independents over the course of two successive national elections in their particular countries.¹¹⁸ Although South Africa after 1994 does not have similar statistics for provincial and national elections, the success rate of independents who stood for election as municipal ward councillors in 2016 points in the same direction, with an overall representation of independents in councils across the country of less than one per cent.¹¹⁹ In the 2021 municipal elections, 1546 independent candidates drew 1.75 per cent of voter support and won 51 seats.¹²⁰

Once elected, independents generally have no sustained political impact on governance. Being independent comes at the price of foregoing factional strength and cohesion, which means that – except as a minor coalition participant – independents cannot form a governing majority to dictate legislative policy. Although it is not unheard of, the notion of independents joining party caucuses seems hard to reconcile with standing as an independent in the first place. Yet, aligning with particular parties is often the only plausible way to realise any of their manifesto promises. Independents can sponsor private member bills, but these receive little discussion time and are rarely enacted.¹²¹ They are also heavily reliant on party caucuses to serve as members of standing and *ad hoc* parliamentary committees.¹²² Within the limited space allotted to them, independents can engage in executive oversight by posing oral and written questions, but

¹¹⁶ Brancati 2008 *Journal of Politics* 655.

¹¹⁷ Ehin *et al Independent Candidates* 29.

¹¹⁸ Ehin *et al Independent Candidates* 28.

¹¹⁹ Griffiths 2020 <https://www.dailymaverick.co.za/opinionista/2020-06-24-changes-to-electoral-act-will-not-fundamentally-alter-south-africas-political-landscape/>.

¹²⁰ Independent Electoral Commission date unknown <https://results.elections.org.za/dashboards/lge/>; Mafole 2021 https://www.dailymaverick.co.za/article_tag/2021-elections/#article-1090739.

¹²¹ Ehin *et al Independent Candidates* 53.

¹²² Ehin *et al Independent Candidates* 54-55.

interpellations remain a prerogative of parliamentary caucuses in many countries.¹²³

7.2 Transparency

From the perspective of predictability of policy orientation, there is something inherently perplexing about the notion of being "independent". Seeking election as an independent means no more than that a candidate is not affiliated to a political party.¹²⁴ However, nominal independence of this kind does not imply a substantive absence of ideological partisanship or even strong non-party political group loyalties.¹²⁵ The ease with which the label of "independence" can obscure such partisanship makes evident that the choice to exercise one's political commitments free of the organisational control and discipline of a party could come with clear transparency deficiencies. Being open about strong ideological partisanship and non-party group alliances always runs the risk of contradicting candidates' claim to independence.

Parties develop the transparency of their policy platforms over the course of regular policy conferences where important issues are publicly deliberated and decided upon. They also have relatively easy access to the media for issuing statements and holding press conferences through designated spokespersons and media liaison offices to articulate party positions. As Brancati¹²⁶ notes, in developing their political agendas, independents frequently do not formulate full political programmes and their manifestos are thin on detail. Independents also commonly stand on single issues.

Adding to the lack of clarity about the ideological commitments of independents is the fact that the dividing line between independents and party-endorsed candidates is often blurred. Independents sometimes organise themselves into larger "non-partisan associations", which many recognise as *de facto* political parties in all but name.¹²⁷ Independents also form electoral alliances with parties and, in some countries, party lists even

¹²³ Ehin *et al Independent Candidates* 55-57.

¹²⁴ See Mateng'e 2012 *Journal of Politics and Law* 19; Ehin *et al Independent Candidates* 11.

¹²⁵ Ehin *et al Independent Candidates* 12.

¹²⁶ Brancati 2008 *Journal of Politics* 650.

¹²⁷ Such as the Nonpartisan Bloc for Support of Reforms in Poland, 1993-1997, or the Civic Platform in the Polish 2001 national elections (Ehin *et al Independent Candidates* 12). A South African example for the 2021 local government elections is the sponsorship of a group of independent candidates by the former leader of the Democratic Alliance Musi Maimani's One South Africa Movement.

include non-party members who claim to be independent.¹²⁸ Party members who have failed to secure a favourable position on party lists also often stand as independents. All of this makes it difficult to predict an independent's position on many important political matters beforehand with any measure of certainty.

7.3 Accountability

Enhanced accountability is seen as one of independent candidacy's strongest selling points. One can distinguish between periodic and interim, as well as individual and collective, accountability.¹²⁹ "Periodic accountability" refers to voters holding parties or individual representatives to account through their vote at elections, whereas "interim accountability" concerns the possibility of exercising some control over the conduct of parties or individual representatives between elections. "Collective accountability" is about holding parties to account, while "individual accountability" concerns voters having effective means of expressing their approval or disapproval of individual representatives. In the case of independent candidacy, only individual/periodic and individual/interim accountability is at stake.

Unlike party candidates under closed-list proportional systems, independents are not party nominees and could potentially have a closer individual relationship with constituency voters (if there are constituencies). Voters can withdraw support in a next election if a representative does not perform according to expectations. However, this accountability may be more apparent than real. If, as argued above, independents generally have a negligible impact on the policies adopted in national or regional representative bodies, there may be little point in holding independent candidates accountable for failure to fulfil promises they are not really able to keep. If the odds are stacked so heavily against them being able to substantially influence events in legislative bodies and carry out their manifestoes, it may be unreasonable to expect them to build up a record that could be used as a basis for holding them to account at the next election. Often, their only concrete accomplishments would be off the back of political parties. Only in unique circumstances would that accomplishment be something that the political parties would not have been able to do on

¹²⁸ Ehin *et al Independent Candidates* 12.

¹²⁹ See Electoral Task Team 2003 <https://static.pmg.org.za/docs/Van-Zyl-Slabbert-Commission-on-Electoral-Reform-Report-2003.pdf> 9, 18-19, 23.

their own, for instance in those rare cases where an independent held the balance of power.

What mechanisms are in place to hold independents accountable in-between elections? It is here where independent candidacy has some obvious drawbacks. If party-nominated members fail to live up to reasonable standards of conduct they could be ousted from their parties in terms of the established disciplinary procedures.¹³⁰ In the absence of such organisational control, there is no functional equivalent to the loss of membership to regulate the behaviour of representatives elected as independents. It therefore begs the question whether there is much substance to the claim that independents are more "directly accountable to voters" if there is no organisational process for making this true. However, as mentioned earlier, a well-regulated right of recall could be a means of securing the accountability of elected representatives in-between elections. Since this would be the case for both independent and party-nominated elected representatives, it would not be the result of any inherent accountability advantage of independent candidacy as such.

8 Conclusion

Although one may disagree with the result reached in the *New Nation* case, the reality is that independents will in future stand as candidates in national and provincial elections. Implementing the court's decision without concomitant constitutional amendments may cause disharmony between the right to stand for public office and current constitutional arrangements that were designed with an exclusive party-representative system in mind. The latter mainly concern aspects of the electoral system and provisions regarding the composition and functioning of the legislatures. In particular, as things stand, independent representatives could be excluded from participating in some of the legislatures' committees and from involvement in making key appointments. In addition, no independent member of a provincial legislature would be eligible to be appointed as a delegate to the National Council of Provinces (unless nominated by a political party). This result would seriously detract from independent representatives' legislative and oversight functions. In any event, although the legalisation of independent candidacy may enhance electoral inclusivity, the actual political impact of independent representatives would likely be marginal.

¹³⁰ Of course, this assumes a functional internal party disciplinary system, which is often compromised by a party-political culture strong on internal discipline and the maintenance of the perception of party solidarity.

The democratic functionality of independent candidacy, when measured against the values of transparency and accountability, is also far from a straight-forward matter.

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List of Abbreviations

ACHPR	African Court on Human and Peoples' Rights
ECHR	European Court of Human Rights
IACHR	Inter-American Court of Human Rights
SAJHR	South Africa Journal on Human Rights
SALJ	South African Law Journal
SAPL	Southern African Public Law
U Pa L Rev	University of Pennsylvania Law Review