

Decreasing Voter Participation in South Africa and the Call for Electoral Reform through Allowing Independent Candidates

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Abstract

Sections 1 and 19 of the Constitution of the Republic of South Africa provides citizens the right to vote in free, fair and regular elections. The Electoral Act sets out the framework for and regulates national and provincial elections. Although South African elections are generally considered to be free and fair, voter registration and voter turnout has decreased since the first democratic election of 1994. This article considers the trends in voter participation in South Africa at a national level. It considers the various calls for electoral reform in light of the claim brought by New Nation Movement NPC to permit independent candidates to contest elections at national and provincial level.

In *New Nation Movement NPC v President of the Republic of South Africa*, the Constitutional Court declared relevant sections of the South African Electoral Act invalid as it does not allow for individual candidates in the national and provincial elections and therefore violated section 19(3)(b), read with section 18 of the Constitution. This decision is similar to a 2011 decision of the African Court on Human and Peoples' Rights, where it was held that requiring candidates to form part of political parties to run for office is an unjustifiable restriction of citizen's political participation in terms of the African Charter. This article considers the reasoning of the Constitutional Court in *New Nation Movement* in light of the jurisprudence of the African Court, and ultimately, to what extent an amendment to the Electoral Act in the terms prescribed by the Constitutional Court can address the decreasing participation rate in electoral processes.

Keywords: South Africa; elections; democracy; political participation

Introduction

One of the values upon which the Republic of South Africa is founded is ‘universal adult suffrage, a national common voters’ roll, regular elections and a multi-party system of democratic government.’ The purpose of these values is to ensure ‘accountability, responsiveness and openness’.¹ As a result of the exclusion of the black vote during the colonial and apartheid era, the importance of universal suffrage cannot be overemphasised. The importance of this underlying value should be seen in the historical context of South Africa. At the first democratic elections in 1994, most of the voting-age population (VAP) voted. However, there has been a dramatic decrease in voter turnout since 1994. There have also been calls for reform of the current electoral system, specifically for allowing independent candidates to contest national and provincial elections.

This article considers the importance of the right to vote in light of this historical context before turning to a discussion on the electoral system at national and provincial level as regulated by the Constitution of the Republic of South Africa, 1996 (Constitution) and relevant legislation. The article proceeds to consider voting patterns and voter turnout to contextualise the various calls for electoral reform. Central to the discussion is the interpretation of section 19(3)(b) of the Constitution, which provides every adult citizen with the right to ‘stand for public office’. In the recent Constitutional Court judgment of *New Nation Movement NPC and Others v President of the Republic of South Africa and Others (NNM)*², it was found that certain provisions in the Electoral Act 73 of 1998 is invalid in that it does not allow independent candidates to contest national elections. In light hereof, this article questions whether the reform of the law to allow independent candidates to stand for and be elected to office has the ability to address decreasing voter participation.

Importance of the Right to Vote: Historical Overview

The Union of South Africa, which joined together the four colonies in the territory of what is now South Africa, was underpinned by the notion of ‘the territorial segregation of black and white as a mandatory feature of public life.’³ Since the Union Constitution of 1909 mostly dealt with the powers of the Union Parliament, to ‘be essentially representative of white male adults’,⁴ the Union Parliament set out to remove the limited voting rights of the native population.

1 Section 1(d) of the Constitution of the Republic of South Africa, 1996.

2 [2020] ZACC 11.

3 Stu Woolman and Jonathan Swanepoel, *Constitutional Law of South Africa* vol 1 (2nd edn, Juta RS 6 2014) 2-14.

4 *ibid* 2-14.

In 1936, the Union Parliament passed the Representation of Natives Act,⁵ removing Africans, who were eligible voters in terms of the qualified franchise in the Cape, from the common voters' roll.⁶ Similarly, the Union Parliament removed Coloureds from the common voters' roll after the Appellate Division of the High Court upheld the South African Amendment Act.⁷ The effect of the changes in the legislative scheme meant that only White men and women could vote for representatives to the House of Assembly.⁸ The historical disenfranchisement of 'all South Africans of colour'⁹ paved the way for parliament to enforce apartheid as a formal policy of the State, exacerbating the violation of the Black, Coloured and Indian population groups' human rights.¹⁰

Against this backdrop, a central theme running through the fight for liberation and emancipation was the extension of the franchise to all citizens within South Africa. As a result, the political rights guaranteed in section 19 of the Constitution, including the right to vote, is 'a badge of dignity and personhood [which] [q]uite literally ... says that everybody counts.'¹¹

South Africa's Electoral System: Representative Democracy and Political Parties

It is said that '[r]epresentative democracy undoubtedly lies at the heart of our system of government, and needs resolutely to be defended.'¹² At regular intervals, citizens vote in national, provincial and local elections for the relevant legislative body, which, in turn, elects the executive of that body. In relation to the seminal judgment in *NVM*, which considered the validity of the current electoral regime in light of section 19(3)(b) of the Constitution, this article focuses on national and provincial elections, as the electoral regime does not permit independent candidates to contest national and provincial elections.

It is through national and provincial elections that parliament, which consists of the National Assembly (NA) and the National Council of Provinces (NCoP), and which exercises national legislative authority throughout the Republic, is constituted.¹³ Whereas the NA represents the people,¹⁴ the NCoP represents the interests of the

5 Act 12 of 1936.

6 Iain Currie and Johan de Waal, *The New Constitutional and Administrative Law* (vol 1, Juta 2001) 55.

7 Act 9 of 1956. See Currie and De Waal (n 6) 46–50 for a more detailed exposition.

8 The 1983 Constitution provided voting rights to the Coloured and Indian population, but still excluded the Black population from voting in the Republic of South Africa.

9 CLoSA (n 3) 2-17.

10 *ibid* 2-17–22.

11 *August and Another v Electoral Commission and Others* [1999] ZACC 3 para 17.

12 *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11 para 229.

13 Section 43(a) of the Constitution.

14 Section 42(3).

provinces at national level.¹⁵ Section 46 of the Constitution provides that the NA consists of between 350–400 individuals, elected in terms of national legislation, based on a common voters’ roll and must ‘in general’ result in proportional representation.¹⁶ Section 105(1), in turn, applies to the composition of the NCoP.

As the Constitution provides for a ‘multi-party system of democratic government’, political parties play a central role in democratic South Africa. Voters therefore vote for political parties and not for individuals.¹⁷ The Electoral Act, which regulates elections, provides for a closed-list proportional representation system.¹⁸ This system requires political parties to compile a list indicating its preferred candidates in order.¹⁹ Political parties are awarded a number of seats in the NA based on the percentage of the total votes cast in its favour.²⁰ Thus, in terms of legislation, votes can only be made through political parties.

The election of the NA is extremely important in the South African context. Although the NA shares national legislative competency with the NCoP, the NA elects the President, and can remove him and the executive authority from office. The Constitution further empowers the President to appoint members of the NA to the national executive authority.²¹ Due to the proportional representation system, the party with the majority seats in the NA would elect its leader as president. The President, in turn, appoints senior party members to positions in the executive. The executive authority is specifically mandated to implement various legislation, particularly those related to the realisation of socioeconomic rights in establishing the society as set out in the Preamble to the Constitution. The number of failed attempts to remove the former president from office demonstrates the frustration that minority parties represented in the NA may experience in holding the executive arm of government accountable for failing in its various duties.²² The fact that one party may hold the majority of seats in the NA may make it difficult for minority parties to persuade the NA as a whole to hold the president and the executive authority accountable. This may raise questions as to the suitability of the

15 Section 42(4).

16 Section 46.

17 Section 1(d).

18 Act 73 of 1998.

19 Section 57(a) read with Schedule 1A.

20 CLoSA (n 3) 29–10.

21 See s 91 of the Constitution. Only two members of the national executive authority may be individuals not part of the National Assembly.

22 On 5 April 2016, the Opposition Party instituted impeachment proceedings against the former president, and on 10 November 2016, the Opposition Party instituted a motion of no confidence in the former president. Both attempts to remove the president were unsuccessful.

current electoral system, which only allows for the expression of the vote through a political party, as the accountability measures seem to be weakened.²³

As the current legislative scheme only allows for eligible citizens to vote for political parties, citizens with different political ideologies to those of the existing political parties may feel dissuaded to participate in elections. The next section considers the elections over the past twenty-five years in order to determine whether, and if so, to what extent, the current electoral system has contributed to a decrease in voter participation rates.

Problematising the Electoral System: Overview of the 2019 Elections

In the first democratic elections of South Africa in 1994, the African National Congress (ANC) received 62.2 per cent of the national vote.²⁴ The National Party—who formed the apartheid government before 1994—received 20.4 per cent of the national vote.²⁵ Although there have been changes to the political landscape in subsequent elections in terms of the rise and fall of political parties, the ANC’s consistent dominance has remained. In the 1999 and 2004 elections, the ANC received 66.35 per cent and 69.69 per cent of the national vote, showing increased support. However, since the 2009 national elections, their support has declined.²⁶ In 2019, the ANC received 57.5 per cent of the national vote. For the first time since 1994, they hold less than 60 per cent of the seats in parliament.²⁷

The current official opposition to the ANC, the Democratic Alliance, grew from 16.66 per cent in 2009 to 22.23 per cent in 2014, but lost some support during the 2019 elections.²⁸ Of interest is the quick rise of the Economic Freedom Fighters (EFF), established in 2013 in the aftermath of the Marikana massacre of 2012.²⁹ During the

23 George Devenish, ‘SA’s Electoral System Need to Accommodate Individual Candidates’ (*Business Day*, 7 May 2019) <<https://www.businesslive.co.za/bd/opinion/2019-05-07-sas-electoral-system-needs-to-accommodate-individual-candidates/>> accessed 16 November 2019.

24 Anonymous, ‘April 26–29, 1994 General Election Results Republic of South Africa Totals: National Assembly’ (*Election Resources on the Internet*) <[http://electionresources.org/za/provinces.php?election=1994 &province=ZA](http://electionresources.org/za/provinces.php?election=1994&province=ZA)> accessed 16 November 2019.

25 *ibid.*

26 Anonymous, ‘2019 National and Provincial Elections: Results Dashboard’ (*IEC*) <<https://www.elections.org.za/NPEDashboard/app/dashboard.html>> accessed 16 November 2019.

27 *ibid.*

28 *ibid.*

29 Anonymous, ‘Welcome to the EFF’ (EFF) <<https://effonline.org/>> accessed 16 November 2019. See: Collette Schulz-Herzenberg, *Voter Participation in the South African Elections of 2014* (Policy Brief 61, Institute for Security Studies 2014) 1–7; Sithembile Mbete, ‘The Economic Freedom Fighters — South Africa’s turn towards Populism?’ (2015) *Journal of African Elections* 45–59 for information on the EFF’s establishment.

2014 elections, the EFF garnered 6.35 per cent of the national vote, growing to 10.8 per cent in 2019.³⁰

The shift in voting behaviour can be viewed against the backdrop of declining voter turnout. According to the Independent Electoral Commission (IEC), there was a 66 per cent voter turnout for the 2019 elections.³¹ The IEC calculates voter turnout as a percentage of registered voters. However, in countries like South Africa where voter registration is low in comparison with the VAP, calculating voter turnout as a percentage of the VAP delivers a more accurate result of voting behaviour.³²

Table 1: Voter turnout as percentage of voting eligible population

Year	Registered voting population	Voter turnout	Percent age	Voting age population	Voting turnout as percentage of voting age population
1994	*	19 726 610	86.87	23 063 910	85.53
1999	18 172 751	16 228 462	89.3	25 411 573	63.86
2004	20 674 923	15 863 558	76.73	27 944 712	56.77
2009	23 181 997	17 919 966	77.3	31 678 238	56.57
2014	25 388 082	18 654 771	73.48	34 691 652	53.77
2019	26 756 649	17 671 615	66.05	37 372 792	47.28

* The 1994 election was organised without a voters' roll.

[Data from: (1) Independent Electoral Commission (IEC), www.elections.org.za; (2) International Institute for Democracy and Electoral Assistance (IDEA), <https://www.idea.int/data-tools/country-view/310/40>]

Table 1 illustrates that voter turnout as a percentage of the registered voting population has decreased from 89.3 per cent in 1999 to 66.05 per cent in 2019. The difference between voter turnout as a percentage of the registered population and voter turnout as a percentage of the VAP is concerning. In the 2019 elections, only 47.28 per cent of the VAP voted, which indicates a drastic reduction in the number of votes cast by those eligible to vote.

30 IEC (n 26).

31 *ibid.*

32 Bruce Bartlett, 'South Africa's Voter Turnout: a Mathematician Runs the Numbers' (*The Conversation*, 27 May 2019) <<https://theconversation.com/south-africas-voter-turnout-a-mathematician-runs-the-numbers-117199>> accessed 10 December 2019.

The Gender Audit of the 2019 elections report that the largest proportion of the non-voting population is younger than thirty.³³ In light of this, the question arises why the youth, as the largest proportion of the 52.72 per cent who did not vote, are choosing not to vote. Research conducted by the Institute for Security Studies (ISS) on the factors that influence voting among those aged eighteen to twenty-four reported that (i) socioeconomic challenges, (ii) corruption and low trust in government, and (iii) declining partisan attachment, are the main drivers behind low election participation.³⁴ Although the ISS focused on those aged eighteen to twenty-four, these findings can be extended to those under the age of thirty.

With regard to socioeconomic challenges, it is significant that in the third quarter of 2020, 61.3 per cent of those aged eighteen to twenty-four and 37.8 per cent of those aged twenty-five to thirty-four were unemployed.³⁵ These two categories have much higher rates of unemployment than other age categories.³⁶ Participants complained of the impact of unemployment on poverty, the normalisation of crime, and access to opportunities.³⁷ Participants also criticised poor and inadequate infrastructure, stating that development is concentrated in urban areas with little investment in rural communities or townships. As a result, even the most basic services are lacking.³⁸

According to Southall, despite a reduction of inter-racial economic disparities after 1994, ‘the benefits of redistribution accrued disproportionately to a politically connected black elite.’³⁹ Furthermore, wealth and access to opportunities remain concentrated in the hands of the White minority. Therefore, socioeconomic challenges are continuing to affect the poorest and most marginalised groups of the population.

33 Of the almost ten million unregistered voters, about two thirds were under the age of thirty. StatsSA reports that eighteen to nineteen per cent of those aged eighteen to nineteen registered, whereas around fifty per cent of those aged twenty to twenty-nine registered. See: Kubi Rama and Colleen Lowe Morna, *Beyond Numbers: Gender Audit of the May 2019 South African Elections* (Gender Links and the African Women’s Development Fund 2019) 10; Ferial Haffajee, ‘The Disappeared—more than 15 Million Eligible Voters will not Vote on SA’s Future’ (*The Daily Maverick*, 1 May 2019) <<https://www.dailymaverick.co.za/article/2019-05-01-the-disappeared-more-than-15-million-eligible-voters-will-not-vote-on-sas-future/>> accessed 13 December 2019.

34 Lauren Tracey, *Do you Want my Vote? Understanding the Factors that Influence Voting among Young South Africans* (Monograph 163, Institute for Security Studies 2016) 1–2. See also, World Bank Group, *World Development Report 2017: Governance and the Law* (World Bank 2017) Figure 8.4. Election turnout has decreased worldwide since the late 1980s.

35 Statistics South Africa, ‘Quarterly Labour Force Survey’ (P0211, Quarter 3: 2020, November 2020, StatsSA) Table 2.2.

36 *ibid.*

37 Tracey (n 34) 11.

38 *ibid.* 15.

39 Roger Southall, ‘South African Democracy at Risk?: The Troubled Context of the 2019 General Elections’ in Colette Schulz-Herzenberg and Roger Southall (eds), *Election 2019 South Africa: Change and Stability in South Africa’s Democracy* (Jacana Media 2019) 13.

In addition, support for the ANC and trust in their governance have also come under increasing strain since mounting evidence of ‘state capture’ at the hands of former President Zuma and his allies came to light after the 2014 elections.⁴⁰ By the end of Zuma’s second term, annual economic growth had decreased significantly. Increasing State debt, decreasing investment prospects, and the operational crisis of State-owned enterprises meant that government was spending less on ensuring access to basic services for the poor.⁴¹ This gave rise to a wave of ‘service delivery’ protests which ‘indicated a growing impatience ... with the continuing extreme levels of poverty, inequality and unemployment, and a failure to fulfil popular aspirations.’⁴²

In line with Southall’s observations, the perception among participants in the ISS study was that the government ‘is not doing enough’ and that the political parties do not care about the plight of the people, but are only concerned with their own political power.⁴³ Schulz-Herzenberg and Southall explain that the perception of unaccountable politicians has fuelled a widespread narrative ‘that elections are irrelevant, and that whichever party wins them, nothing much will change.’⁴⁴

Considering increasing socioeconomic challenges and low trust in government, it is unsurprising that those younger than thirty show less partisan attachment than the generations before them, decreasing their likelihood to vote.⁴⁵ The ISS report indicates that the youth are disillusioned with political parties as ‘there is no difference between them’.⁴⁶ This is in line with Schulz-Herzenberg’s criticism of political parties’ failure to establish clear ideological differences in their policies during the 2019 election campaign.

The likelihood of the youth participating in elections largely depends on the potential of democratic processes to engage them and the efficiency of political leaders to address the socioeconomic factors that affect them.⁴⁷ The youth’s reluctance to vote therefore indicates dissatisfaction with the government in general, but also with the available political parties, and their failure to acknowledge and listen to them.⁴⁸

40 *ibid* 14.

41 *ibid* 18–19.

42 *ibid* 19–20.

43 *ibid* 11 and 24–25.

44 Collette Schulz-Herzenberg and Roger Southall, ‘Introduction: The South African Elections of 2019’ in Schulz-Herzenberg and Southall (n 39) 3.

45 Collette Schulz-Herzenberg, ‘Trends in Voter Participation: Registration, Turnout and the Disengaging Electorate’ in Schulz-Herzenberg and Southall (n 39) 61.

46 Tracey (n 34) 2.

47 *ibid* 27.

48 *ibid* 26.

Against this backdrop, it is relevant to briefly recall the report of the Electoral Task Team (ETT),⁴⁹ which noted that a change in the electoral system to allow for a constituency system coupled with a proportional representation system *could* pave the way for increased accountability over elected officials. In no way is it suggested that electoral reform will successfully address all the issues highlighted above.⁵⁰ Rather, it has the potential to invigorate electoral participation which *may* create larger political awareness and a revitalised demand that political leaders give effect to constitutional promises. In light hereof, the various calls for reform of the electoral system at national and provincial level are considered in the next section. In particular, the discussion focuses on the recent judgment in *NNM* where the Constitutional Court had to determine whether section 19(3)(b) of the Constitution allows for independent candidates to contest elections at the national and provincial level.

Claims for Reform and the Right of Independent Candidates to Contest Elections

It is generally accepted that the current electoral system is simplistic, inclusive and fair.⁵¹ It has nonetheless been criticised for enabling a diminished form of accountability.⁵² Because political parties contest elections, it is difficult to hold

49 Frederick van Zyl Slabbert, *Report of the Electoral Task Team* (Electoral Task Team 2003) 17.

50 See Carlos Sanz, 'The Effect of Electoral Systems on Voter Turnout: Evidence from a Natural Experiment' (2015) 5 *Political Science Research and Methods* 689; André Blais and Kees Aarts, 'Electoral Systems and Turnout' (2004) 41 *Acta Politica* 180. There is ample support for the statement that proportional representation does, in fact foster a sense of free and fair elections with an accountable government. However, the question of whether individual candidates within this system can increase voter turnout remains largely unexplored. Blais and Aarts considered voter turnout in the European Legislative National Elections for 2000–2004. The impact of the ballot structure (ie whether independent candidates, political parties, or a combination) on voter turnout was briefly discussed, with attention drawn to the finding that the median turnout (66 per cent) amongst countries with independent candidates and closed-list ballots are largely similar. It seems that, in Europe, the ballot structure is insignificant. In a more recent study, Sanz too highlight that 'little is known about the effects of the ballot structure.' Sanz considered the unique voter framework of Spanish local elections whereby municipalities may follow either closed list proportional representation (as is the current position in South Africa) or an open list, plurality-at-large system. Municipalities with more than 250 inhabitants follow a closed-list system. In comparison, municipalities with less than 250 inhabitants follows an open-list system, whereby 'voters can vote for up to four individual candidates from the same or different party-lists.' Sanz found that an open-list system increased voter turnout by 1–2 per cent. At this stage, the impact of the ballot structure on voter turnout is inconclusive.

51 Gregory Solik, 'Is South Africa's Electoral System in Urgent Need of Change' (2014) 72. *The Journal of the Helen Suzman Foundation* 40. See also Robert Mattes and Roger Southall, 'Popular Attitudes towards the South African Electoral System' (2004) 11 *Democratization* 51. Mattes and Southall analysed the results of the ETT's survey of 2 760 citizens of the VAP conducted from 16 July to 16 August 2002. A substantial majority of the participants in the survey perceived the current electoral system as equal, inclusive, and fair.

52 Devenish (n 23); Judith February, 'SA's Electoral System is Weak on Accountability' (*EWN*, 5 October 2018) <<https://ewn.co.za/2018/10/05/opinion-judith-february-sa-s-electoral-system-weak-on-accountability>> accessed 16 November 2019; Roger Southall, 'Electoral Systems Need Urgent Reform. South Africa is No Exception' (*Mail and Guardian*, 23 April 2019)

individual members accountable.⁵³ Members of parliament or the executive are beholden to ‘party bosses’ and risk removal if they do not act in terms of party directives.⁵⁴ As a result, ‘the system itself predisposes [political parties] to ignore the wishes of those who voted for them.’⁵⁵ Increasing corruption and the inability to hold elected representatives accountable has given rise to numerous calls for the reform of the electoral system.⁵⁶

Devenish, in advocating for electoral reform, explains that the existing electoral system allows corruption and maladministration.⁵⁷ Relying on the report of the ETT,⁵⁸ he argues for a hybrid electoral system; one that allows for independent candidates to contest elections at the national and provincial level in addition to a proportional list system. Since such a system would still result in proportional representation, no amendment to the Constitution would be necessary; only the legislative framework must be amended.⁵⁹

The inability of candidates to contest elections independently in terms of section 19(3)(b) of the Constitution was recently considered in the *NNM* case.⁶⁰ Section 19(3)(b)

<<https://mg.co.za/article/2019-04-24-electoral-systems-need-urgent-reform-south-africa-is-no-exception>> accessed 16 November 2019. See also: Mattes and Southall (n 51). Considering the data from the ETT’s survey, Mattes and Southall found that ‘South Africans want an electoral system, that enables them to select their legislators and legislative candidates more directly.’ In this regard, 43 per cent of participants stated that ‘local candidates would better represent people’s opinions and interests.’ Furthermore, despite the perception of the current electoral system as equal, inclusive, and fair, Mattes and Southall draw attention to the dissatisfaction of participants with the ability of the current electoral system to produce ‘independently minded legislators accountable to local grass-roots opinions.’

53 See also Mattes and Southall (n 51). On analysing the ETT’s survey results, Mattes and Southall found that only 60 per cent of participants felt that the current system allows holding individual representatives of government accountable. Moreover, although most participants (it is unclear how many) indicated their preference for political party candidates, there were still many who expressed interest in an electoral system that allows independent candidates. Interestingly, 42 per cent of participants stated that ‘they would like to see independent candidates elected to parliament’ and 35 per cent indicated that they would consider voting for an independent candidate. These findings illustrate that, at the very least, there is some support for the argument that independent candidates may motivate individuals to vote if they have lost interest. Mattes and Southall ultimately conclude that, although there is a high level of public satisfaction with the current electoral system, ‘[s]ignificantly higher proportions were dissatisfied than was preferable given that a voting system is an integral part of the overall constitutional framework.’

54 February (n 51) states that ‘if the party “owns” the seat, the MP is pretty much beholden to the party, no matter what.’

55 Schulz-Herzenberg and Southall (n 44) 3. See also February (n 51). See also Mattes and Southall (n 51). Related hereto is that only 20 per cent of participants in the ETT survey perceived their national and provincial legislator to be receptive to their opinions and promoting their interests.

56 February (n 51); Devenish (n 23); Southall (n 51).

57 Devenish (n 23); Southall (n 51).

58 ETT (n 49).

59 Devenish (n 23).

60 *NNM* (CC) (n 2). In an earlier decision, *Majola v State President of the Republic of South Africa* [2012] ZAGPJHC 236, it was argued that s 57A, read with sch 1A of the Act is in conflict with s 19(3)(b) as

provides that ‘[e]very adult citizen has the right to stand for public office and, if elected, to hold office.’ The applicants claimed that section 57A of the Electoral Act, as well as Schedule 1A to the Act, is unconstitutional in that it violates section 19(3)(b).⁶¹ The applicants argued that every citizen has the right to stand as an independent candidate in municipal, provincial and national elections. As a result, the legislature is *required* to provide for this right in legislation. The applicant argued that the decision not to provide for the exercise of political rights through individual candidates conflicts with the Constitution. The applicants therefore asked for the invalidation of the Electoral Act insofar as it does not provide for independent candidates to contest provincial and national elections.⁶²

The High Court dismissed the application.⁶³ It relied on *Ramakatsa v Magashule* where the majority of the Constitutional Court stated that the Constitution ‘obliges every citizen to exercise the franchise *through* a political party.’⁶⁴ The High Court held that the Constitution requires the promulgation and implementation of legislation to regulate the exercise of political rights in terms of section 19.⁶⁵ It reasoned that any objection against the current system should be taken up with the legislature.⁶⁶ Furthermore, since the legislature is contemplating a review of the electoral system in light of the High-Level Panel Report, the Court did not find it appropriate to interfere with parliamentary processes.⁶⁷

it does not allow independent candidates to contest elections. The court dismissed the application, holding that s 19(3)(b) does not award citizens this right.

- 61 The applicants relied on *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17 para 29, where Mogoeng CJ stated that the right to ‘stand for public office’ in s 19(3) is not limited to elections for local government. By not limiting the application of this right to local government, where independent candidates can contest elections, Mogoeng CJ explicitly makes the point that ‘every adult citizen may in terms of the Constitution stand as an independent candidate to be elected to municipalities, Provincial Legislatures or the National Assembly.’ This appears to be contradictory to the statement of the Constitutional Court in *Ramakatsa and Others v Magashule and Others* [2012] ZACC 31 para 68. However, according to Jafta J in [2020] ZACC 11 at paras 193–194, ‘this contradiction is more apparent than real’ as *Ramakatsa* concerned ‘the question of voting in a system involving political parties’ and not the right of independents to run for office.
- 62 *Appellants Heads of Argument for New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27 para 7.
- 63 *Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZAWCHC.
- 64 *Ramakatsa* (n 59) para 68 [own emphasis]. The High Court does not explain its preference of the *obiter* remark made in *Ramakatsa* over that made in *My Vote Counts*.
- 65 *ibid* para 30.
- 66 *ibid* para 10. The court made it clear earlier in the judgment that it is not to consider whether a better electoral system should be implemented.
- 67 Kgalema Motlanthe, *Report of the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 526. The panel recommended that parliament consider amending the Electoral Act ‘to provide for an electoral system that makes Member of Parliament accountable to defined constituencies on a proportional representation and constituency system for national elections.’

The New Nation Movement lodged an urgent appeal to the Constitutional Court six days before the 2019 national elections were to be held. The Constitutional Court postponed the application for direct appeal as it was not satisfied that it had to hear the merits of the case on the grounds of urgency.⁶⁸ The matter was eventually heard on 15 August 2019 and judgment was handed down on 11 June 2020.

The Court ultimately declared the Electoral Act invalid insofar as it does not allow for independent candidates to contest national and provincial elections. The finding of unconstitutionality was based on section 19(3)(b), read with section 18, the right to freedom of association. Concerning the section 19(3)(b) violation, the Court reasoned that section 19 must be read as a whole. Section 19(1) of the Constitution protects the freedom to make political choices. That freedom is not limited to choices regarding political parties; it is but an example of a political choice guaranteed by the section. Section 19(1) therefore protects both the choice to join or form a political party *and* the choice not to do so. If the law requires a person to exercise the right in section 19(3)(b) through a political party, the choice guaranteed by section 19(1) is denied.

Support for this interpretation is also found in the harmonious interpretation between section 19(3)(b) and section 18.⁶⁹ The Court explained that if section 19(3)(b) is interpreted to mean that a citizen can only exercise their right to stand for and hold public office through a political party, section 18 may be implicated if it is found that section 18 protects both the right to form or join a political party and the right not to do so. According to the Court, the traditional protection offered by the right to freedom of association is a positive one, namely the individual's freedom to choose with whomever they want to associate for whatever lawful reason or purpose.⁷⁰ Therefore, '[t]he protection of the right is about giving associations, whatever their size, room to achieve the objective for which they exist.'⁷¹

The novel question is whether section 18 also protects the right not to be forced to associate. By relying on section 39(1)(b), the Court drew from jurisprudence of the European Court of Human Rights where it was held that Article 11 of the European Convention on Human Rights and Fundamental Freedoms⁷² protects a negative right not to associate.⁷³ Furthermore, in *Tanganyika Law Society v United Republic of Tanzania; Mtikila v United Republic of Tanzania (Tanganyika)*,⁷⁴ the African Court on Human and Peoples' Rights (African Court) accepted that the right to freedom of

68 *NNM* appeal (n 63) para 31.

69 With reference to *Doctors for Life* (n 12) para 41.

70 *NNM* (CC) (n 2) para 22.

71 *ibid* para 26.

72 [1984] ETS 9.

73 See *Young, James and Webster v UK* (1981) Series A no 44; *Sigurdur A Sigurjónsson v Iceland* (1993) Series A no 264; *Chassagnou and Others v France* ECHR 1999-III discussed at paras 30–37.

74 (merits) (2013) 1 AfCLR 34.

association in Article 10 of the African Charter on Human and Peoples' Rights (African Charter) also protects the right not to be part of an association.⁷⁵ By relying on international law, the Court accepted that the right to freedom of association includes the right not to form an association, even in cases where the constitutional protection does not explicitly provide for such protection. Based on this reasoning, the Court found that as the Electoral Act prevents an independent candidate to stand for and hold public office in the national and provincial legislature, it violates section 19(3)(b), read with section 18 of the Constitution. The Court suspended the declaration of invalidity for twenty-four months, allowing the legislature a reasonable opportunity to amend the legislation to allow independent candidates to contest election at national and provincial level.

Interpreting Section 19(3)(b) as Allowing Independent Candidates in *New Nation Movement*: Guidance from Regional International Law

Since 1994, South Africa's general elections have been declared as free and fair. Considering the discussion under 'South Africa's Electoral System: Representative Democracy and Political Parties' above, the South African electoral system seems to be administratively efficient. However, as illustrated under 'Problematism of the Electoral System: Overview of the 2019-Elections', there has been a drastic decrease in voter participation since the first elections in 1994. Following the *NNM* judgment, the legislature *must* amend the Electoral Act to allow independent candidates to contest elections. Although the judgment should be celebrated, there are two related points of criticism that deserve consideration: (i) the absence of a detailed discussion on the content of section 19(3)(b); and (ii) the sparse references made to the African Charter and the African Court's judgment in *Tanganyika*, a regional matter with largely identical facts.

As indicated under 'Claims for Reform and the Right of Independent Candidates to Contest Elections' above, the Constitutional Court's judgment focused primarily on how the right to freedom of association informs the right to stand for public office as an independent candidate, and that the right to form or join a political party includes the right not to do so. In this discussion, aspects of political rights were only touched upon.

Speaking to the constitutional value of accountability and democratic governance, the Court recognised that being a member of a political party places constraints on the individual, who is answerable to the party. In contrast, running for office as an independent candidate allows the individual to be directly responsible to those they represent.⁷⁶ Citing its judgment in *United Democratic Movement v Speaker of the National Assembly*, the Court reiterated the notion of free and fair elections, holding that

75 [1986] OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

76 *NNM* (CC) (n 2) para 53.

members of parliament are allowed to vote by secret ballot to elect the President of the National Assembly.⁷⁷ Like citizens in general elections, members of parliament should also be allowed to ‘exercise their vote freely and effectively, in accordance with the conscience of each, without undue influence, intimidation or fear of disapproval by others.’⁷⁸ Moreover, the Court drew attention to the historical disenfranchisement of the majority of the population and the negative impact of the current political parties’ requirement on political rights. The historical context of political rights is crucial to the understanding of these rights.⁷⁹

The Court’s engagement with section 19(3)(b) was limited because it was considered in the context of the right to freedom of association. In comparison to the majority judgment, Jafta J dealt directly with this provision in his concurring opinion. Determining a violation of section 19(3)(b) requires first establishing whether there does indeed exist a right for independent candidates to run for office. If such a right exists, it needs to be considered whether the legislature’s failure to provide for this in the Electoral Act is inconsistent with the Constitution.⁸⁰ In this regard, the limitation test set out in section 36 must be applied.

According to Jafta J, ascertaining whether section 19(3)(b) enshrines a right for citizens to stand for office as independent candidates requires the application of four general interpretative guidelines. First, section 19 should be interpreted in its historical context.⁸¹ Second, it should be accorded a generous and purposive interpretation that aims ‘to give every citizen the fullest protection afforded by the section.’⁸² Third, international law must be taken into consideration, as indicated by section 39(1) of the Constitution.⁸³ Finally, the relevant underlying values of the Constitution should inform our understanding of section 19. Here, universal adult suffrage and a multi-party system of democratic governance are relevant.⁸⁴

Considering the plain language of section 19(3)(b), Jafta J stated that it unequivocally confers a right on *every* adult citizen ‘to stand for public office and, if elected, to hold office.’⁸⁵ That the right is conferred on every adult citizen indicates that it has an explicit individual dimension. To hold office, one must be elected, and to be elected requires that the names of individual citizens appear on the ballot paper.⁸⁶ Although it is possible to get elected through a political party, a ‘nomination by a political party which contests

77 [2017] ZACC 21 paras 73–74.

78 *NNM* (CC) (n 2) para 52.

79 *ibid* para 106.

80 *ibid* para 138.

81 paras 141–143.

82 *ibid* para 144.

83 *ibid* para 145.

84 *ibid* para 148.

85 *ibid* para 160.

86 *ibid* para 171.

elections in its own name does not constitute the exercise of that right by a citizen.⁸⁷ Moreover, political parties themselves decide who to nominate and where individuals are placed on the party list. Ultimately, ‘requiring citizens to contest elections and hold office through political parties only subverts section 19(3)(b) ... because the section confers the right on adult citizens and not political parties.’⁸⁸ As a result, the legislature cannot decide not to give effect to this right. It therefore follows that the Electoral Act is unconstitutional insofar as it does not provide for independent candidates.⁸⁹

Jafta J’s discussion, although more detailed on the content of section 19(3)(b), still leaves much to be desired. Despite recognising interpretive guidelines, it can be argued that the attention afforded to these were inadequate. Notwithstanding the reference to the section 39(1) requirement that recourse be had to international law, Jafta J still only briefly considered Article 25 of the International Covenant on Civil and Political Rights,⁹⁰ whereby every citizen has the right to vote and be elected.

The fleeting reference to *Tanganyika* in the majority judgment, and the lack of any discussion on the African Charter by Jafta J are somewhat alarming. This is because the facts and conclusion of *NNM* are largely identical to *Tanganyika*. Moreover, the conclusion of the Constitutional Court in *NNM* is similar to that of the African Court in *Tanganyika*. The question arises why the Constitutional Court preferred guidance from the European and North American courts over the African Court, which represents the African region which South Africa is part of.⁹¹

Tanganyika concerned an application declaring that amendments to the Constitution of the United Republic of Tanzania violate the rights to non-discrimination,⁹² freedom of association, and political participation⁹³ under the African Charter insofar as it ‘bar[s] independent candidates to stand for the Presidential, Parliamentary and Local Government elections’ by requiring that ‘candidates have to belong to or be sponsored

87 *ibid* para 171.

88 *ibid* para 157.

89 *ibid* para 160.

90 [1966] A/RES/2200.

91 South Africa ratified the African Charter on 9 July 1993. Although it has not been enacted into domestic law s 39(1)(b) provides that courts must take international law into account when giving content to the Bill of Rights. Section 233 further requires that an interpretation of legislation ‘consistent with international law [should be preferred] over any alternative interpretation that is inconsistent with international law.’ Courts must prefer an interpretation that is in line with the African Charter over one that is not. See Anonymous, ‘State Parties to the African Charter’ (*African Commission*) <<https://www.achpr.org/statepartiestotheafricancharter>> accessed 14 December 2019; *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19 para 26; Richard Gittleman, ‘The African Charter on Human and Peoples’ Rights: A Legal Analysis’ (1982) 22 Va J Intl L 688.

92 Article 2 of the African Charter.

93 Article 13(1).

by a registered political party.’⁹⁴ Besides the non-discrimination claim, the facts are similar to *NNM*.

Like section 19 of the Constitution, Article 13 of the African Charter provides for political rights. The wording of Article 13(1) is more explicit than section 19(3)(b) in that it guarantees every citizen ‘the right to participate freely in the government of his country, either *directly* or through freely chosen representatives in accordance with the provisions of the law [own emphasis].’⁹⁵ Comparable to the political rights under the Constitution, the motivation behind including Article 13 under the African Charter was the human rights violations that occurred on the African continent as a result of poor governance.⁹⁶ The drafters envisaged moving towards democratic regimes where governance is in the hands of the people to promote the protection of human rights.⁹⁷ This is in line with their overarching intention to ‘make the masses of non-independent Africa aware of their rights ... thereby giving impetus to their aspirations to free themselves.’⁹⁸

In considering the alleged violation of the right to political participation, the African Court stated that:

[T]he rights guaranteed under the Charter as stated in Article 13(1) are individual rights. They are not meant to be enjoyed only in association with some other individuals or group of individuals such as political parties. Therefore, in an application such as the instant one, what is of paramount significance is whether or not an *individual right* has been placed into jeopardy, or otherwise violated, not whether or not groups may enjoy the particular right [own emphasis].⁹⁹

In his concurring opinion, Jafta J made a similar statement as to the individual dimension of section 19(3)(b) and the importance of giving effect thereto.

In determining whether political participation rights were violated, the African Court explained that individual rights and freedoms have to be exercised considering the ‘rights of others, collective security, morality and common interest.’¹⁰⁰ Individual rights

94 *Tanganyika* (n 74) para 78.

95 For a general discussion on Art 13(1) see Rachel Murray, *The African Charter on Human and Peoples’ Rights: A Commentary* (Oxford University Press 2019) 348–360.

96 Morris Kiwinda Mbondenyi, ‘The Right to Participate in the Government of One’s Country: An Analysis of Article 13 of the African Charter on Human and Peoples’ Rights in light of Kenya’s 2007 Political Crisis’ (2009) 9 AHRLJ 187.

97 *ibid* 187.

98 Gittleman (n 91) 671.

99 *Tanganyika* (n 74) para 98.

100 Article 27(2) of the African Charter.

can, therefore, be limited ‘[t]o preserve and strengthen social and national solidarity, particularly when the latter is threatened.’¹⁰¹

A restriction will be valid where it is in terms of a ‘law of general application’, ‘necessary in a democratic society’ and ‘reasonably proportionate to the legitimate aim pursued.’ Determining whether the restriction is proportional requires balancing the ‘impact, nature and extent of the limitation against the legitimate state interest.’ A legitimate State interest must be ‘absolutely necessary for the advantages which are obtained.’¹⁰² Again, Jafta J’s opinion comes to mind. However, despite mentioning the need to determine whether the legislature’s failure to provide for independent candidates to contest elections, the analysis was somewhat vague.

In *Tanganyika*, the respondent State contended that the bar on independent candidates is reasonable and justifiable considering the purpose of Article 13(1) of promoting unity and multi-party democracy.¹⁰³ Furthermore, they argued that the law merely provides the ‘minimum obligations one has to discharge’ for the enjoyment of the right to political participation.¹⁰⁴ However, the African Court held that the respondent State failed to show that the limitation on the political rights of individuals falls within the purview of the restrictions allowed under the African Charter.¹⁰⁵ As a result, it was found that there was an unjustifiable limitation of Article 13(1). Here, the African Court’s approach could have provided insight into two aspects of the *NNM* judgment. First, in relation to considering the underlying value of a multi-party system of democratic governance. Second, by affording section 19(3)(b) a generous and purposive interpretation that aims to provide full protection to the rights enshrined in the Constitution.

The respondents also alleged that their right to freedom of association was violated as a result of the bar on independent candidates. This argument was based on the importance of freedom of association in holding the State accountable,¹⁰⁶ and on the basis that ‘no one may be compelled to join an association.’¹⁰⁷ The African Court held that compelling individuals ‘to join or form an association before seeking these elective positions’¹⁰⁸ negates the right to freedom of association because ‘freedom of association implies freedom to associate and freedom not to associate.’¹⁰⁹ It is this part of the *Tanganyika* judgment that the Constitutional Court in *NNM* referred to in support of their decision

101 Article 29(4).

102 *Tanganyika* (n 74) paras 106.1 and 107.1.

103 *ibid* para 104.

104 *ibid* para 102.

105 *ibid* para 107.2.

106 *ibid* para 112.

107 Article 10(2) of the African Charter.

108 *Tanganyika* (n 74) para 114.

109 *ibid* para 113.

that not allowing independent candidates to contest elections infringes on their right to freedom of association read with section 19(3)(b). Ultimately, the African Court held that the respondent State could not show that their goal of ‘a gradual construction of a pluralistic democracy in unity’ justifies the limitation of the right to political participation and freedom of association.¹¹⁰

In light of this discussion, it is clear that *Tanganyika* had great potential for offering interpretive guidance to the Constitutional Court in *NNM*. In taking to account the African Court’s statement concerning the individuality of political rights, a more in-depth analysis of *Tanganyika* would have provided a richer understanding of section 19(3)(b) and the political rights of citizens more broadly. Unpacking the right to stand for and hold public office in section 19(3)(b) as an individual right of citizens may also go some way in signalling the importance of political rights and specifically the right to vote, which may in turn motivate the participation of the broader citizenry in the political processes.

Conclusion

This article has set out the importance of the right to vote in light of the disenfranchisement of black South Africans during colonialism and apartheid. It was found that section 19, which contains the right to vote, is important to ensure the dignity of all South Africans. However, even though all South African citizens older than eighteen years of age are entitled to register and vote, statistics indicate a marked reduction in voter turnout. Various reasons, such as socioeconomic disparities, contribute towards this apathy. As a result, there have been calls for the reform of the electoral system to allow for independent candidates to contest elections at the national and provincial level. In the Constitutional Court’s recent judgment in *NNM*, it was held that section 19(3)(b) does indeed confer this right on individuals. Interestingly, the judgment did not focus on section 19(3)(b), but rather on the right to freedom of association and its negative counterpart—the freedom not to associate. However, the criticism of the judgment is the lack of consideration of *Tanganyika*, a judgment similar in facts and decision. It shows a preference to European and North American law over decisions closer to home. Considering the decreasing voter turnout during elections and the reasons behind it, the impact this judgment will have on a change in the electoral system is to be welcomed. Although the majority of the Court stopped short of providing a richer understanding of the right to stand for public office in section 19(3)(b), the expectation is that, at the very least, it can address decreasing voter participation and may encourage elected officials to be more accountable to the electorate.

110 *ibid* para 119.

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