

## Be careful what you wish for

22 June 2020

A huge amount of false hope was generated last week when the Constitutional Court ruled that the Electoral Act must be amended to allow independents to stand in elections. Various lobby groups and commentators were excited by the prospect that constituencies will now be introduced in South Africa and that parliamentarians will then be held more accountable. This is vastly premature. Even a cursory reading of the judgement makes it clear that this is not necessarily the case.

Currently South Africans can only vote for a party and the parties then appoint candidates to the National and Provincial Parliaments. The result is that a person not belonging to a political party cannot get into Parliament and cannot serve. This is known as the list system or system of proportional representation.

### What has the court decided and what not?

The court ruled that an adult South African citizen who is not a member of a political party can run in elections for the National and Provincial Parliaments and, if elected, can serve. It has given Parliament two years to change the Electoral Act to provide for that. And that is all.

The court did not find that constituencies must be introduced. Neither has the court made a finding on which system - a list system or constituencies - 'affords the electorate better accountability'. The court specifically declined to consider the merits of a constituency-based system versus a proportional representation system. The verdict was quite explicit: 'That is territory this judgement will not venture into.' (Paragraph 15).

All the court required was that the Electoral Act must be changed to allow independents to stand... and that is it. When making this change Parliament may, in its wisdom and discretion, decide to introduce constituencies into our electoral system. That is possible, but it is not required by the judgement. Parliament can, for example, decide to simply allow independents to stand on the list system. If they can then get the minimum number of votes to get into Parliament (in 2019 that was about 32 000 votes) the independent goes off to Parliament.

### Why then the excitement?

South Africans are frustrated by their perceived inability to hold public representatives accountable. Dysfunctional municipalities, sloppy or non-existent service delivery, and the failure of Parliament to stop the rot of the Zuma years are all contributing to a deep frustration among ordinary citizens on how to hold elected officials to account. Constituencies are perceived to be the panacea. However, evidence does not support that notion.

In the UK constituencies who voted clearly against Brexit in the referendum but elected a Tory MP in the election had to watch as their MPs voted the Tory party line on Brexit. Those MPs who refused were simply kicked out by Boris Johnson. Constituency representatives stand under the whip of the party and the party can force them to take positions irrespective of how their constituent feels. There is a reason why the term 'whip' and the phrase 'a three-line whip' exist in parliamentary parlance... with a three-line whip a MP definitely does not cross the party line!

In municipal elections in South Africa every voter has two votes: one for the ward where he or she lives (a constituency really) and one for a political party (a proportional or list system). There is no evidence that ward councillors are more efficient or accountable than list councillors. In fact, at a local government level (with constituencies) there is arguably less efficiency and accountability than at national government level (with a proportional or list system).

## Be careful what you wish for

Those who long for constituencies must be careful what they wish for. The biggest negative of a constituency system is that it often leads to undemocratic outcomes.

In the UK in December 2019 the Conservatives captured 43,6% of the popular vote but got 56,2% of the seats in Parliament. The parties against Brexit or in favour of a second referendum actually got more than 50% of the votes, yet combined they ended as a minority in Parliament – a thoroughly undemocratic outcome.

In 2016 Donald Trump lost the election against Hillary Clinton by 3 million votes, but still became president because a majority of state delegates in the electoral college elected him as president. (The US president is not elected by popular vote but by an electoral college in which representatives of the 50 states sit – a variant of a constituency system.) It also happened in 2008 when George W Bush got half a million fewer votes than Al Gore, but still became president. The Economist recently estimated that Trump has an 11% chance of winning re-election while again polling a minority of votes.

In 1948 the National Party (NP) in South Africa got 37% of the votes cast against the governing party's 49%. Yet the NP got a majority of five seats in Parliament. This disproportionality of votes to parliamentary seats continued for a long time, with the NP getting on average 50% of the votes but as much as 75% of seats in Parliament. Imagine where South Africa could have been if, in 1948, the country had a proportional system and not a constituency system. Constituencies breed disproportionality.

### Discrimination based on geography

There are several reasons for this disproportionality between election results and parliamentary representation:

- Firstly, in a geography-based system (ie constituencies or municipal wards) the winner takes all. The votes of people who voted for a second or third candidate are simply lost.
- Secondly, the size of a majority does not matter – one winner, one seat, whether the seat was won by one vote or ten thousand votes. (And the reverse applies too: whether a candidate lost by one vote or ten thousand votes, the losers' votes do not count.)
- Thirdly, constituencies do not have the same number of voters. Rural constituencies and states typically have fewer voters than urban constituencies or states, particularly in the US. Parties also gerrymander borders so that they can lock in majorities in artificially drawn constituencies.

The combined result is that some people's votes count more than others. As Judge Froneman pronounced: '... never again must some people's voices count more than others in our representative democracy'.

Having some votes count more than others is discrimination based on geography. In electoral systems we have overcome discrimination based on gender and race, but not yet geography.

None of these disadvantages apply in a proportional system. Proportionality guarantees that every vote counts equally, whether one votes in Richards Bay or in Saldanha Bay, whether one votes for a winner or a loser, and all votes for a party countrywide are added together for the party's representation. It clearly benefits minority parties and prevents parties from getting more seats than they got votes for.

If we duplicate the UK election numbers of 2019 (12,6% difference between votes and seats) or the NP numbers of 1948 (12% difference) it is very conceivable that a party with 55% of the vote in South Africa could, in a constituency system, win 67% of the seats in Parliament.

Fortunately, the South African Constitution requires that Parliament must be elected in a system that 'results, in general, in proportional representation'. This applies to all three levels of government.

### Proportionality and constituencies

Germany also requires proportionality in its Parliament, but it also runs a constituency system. There are 299 constituencies, and 299 members are elected from a proportional list, resulting in a Parliament of at least 598 members. Additional seats are then allocated to parties to make sure that they end up with their proportion of votes collected. The current Bundestag consists of 709 members – 111 additional seats had to be allocated to balance the numbers between the parties. Looks like an expensive system. Another outcome is that Germany is almost always ruled by a coalition – no one party obtains a sufficient majority to rule on its own.

### Structure or culture?

Does accountability flow from structure or from attitude and critical mindset? Zimbabwe has a constituency-based system, yet one does not get the impression that there is a lot of accountability. In South Africa, activism has reversed the government's policy on HIV/AIDS, led to the defeat of the Secrecy Bill, resulted in various commissions of inquiry into corruption and state capture, fed millions of people during lockdown, and in general gave us a more responsive government. I would put my money on culture and mindset.

## So what?

- The Electoral Act must be changed to allow independents to run for office.
- Parliament has two years to effect this change. It will be at Parliament's discretion to decide if it wishes to institute constituencies as well.
- The South African Constitution binds us to a proportional system at all three levels of government.
- There is lots of rhetoric but not much evidence that constituency-based representatives are more accountable or efficient.
- We must take care not to go down the road of disproportionality, which will generate fundamentally undemocratic outcomes as it has in our past.