Commission for Gender Equality
A society free from gender oppression and inequality

SUBMISSION TO PORTFOLIO COMMITTEE ON HOME AFFAIRS ON ELECTORAL AMENDMENT BILL [B22-2013]

06 SEPTEMBER 2013

1. Introduction

The Commission for Gender Equality (CGE) is a Chapter 9 Institution and in terms of it's constitutional mandate obliged to promote respect for gender equality, and the protection, development and attainment of gender equality. The legal mandate in terms of Section 11 (1) (c) mandates the CGE to evaluate any law being proposed by Parliament that is likely to affect gender equality or the status of women and make recommendations to Parliament thereto.

2. International Obligations

2.1 In terms of Article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women

" States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and shall ensure to women, on equal terms with men, the right :

(a) to vote in all elections and public referenda and to be eligible for election to all public bodies;

(b) to participate in the formulation of government policy and the implementation thereof to hold public office and perform public functions at all levels of government.

The above places an obligation on the South African government to ensure that women are not only accorded an equal right to cast their votes but to also enjoy equal opportunity in holding public offices as well as the performance of public functions. This right has not been fully achieved despite being articulated by the abovementioned article which is amplified by Section 9 in the Constitution of the Republic of South Africa.

3. Contextualization of the Electoral Amendment Bill [B 22-2013]

South Africa has a clear commitment to achieving substantive gender equality during its democratic consolidation. The Constitution calls for positive action to attain gender equality throughout society. The Promotion of Equality and Prevention of Unfair Discrimination Act similarly calls for positive action to promote equality by state and non-state actors, including clubs and associations. Numerous international instruments call for the advancement of women's equality specifically through achieving proportionate gender representation in decision-making structures. Women's substantive equality must be attained in political decision-making structures. The Commission for Gender Equality submits that South Africa's Constitution, and the country's international obligations flowing from relevant treaties and conventions compel the state to legislate on a 50/50 quota within the electoral legislative framework. The CGE's submission therefore recommends to Parliament that such provisions be incorporated with the Electoral Act, and outlines proposed mechanisms and amendments to the Electoral Act. This proposal was deliberated on and endorsed at a public dialogue on 8 March 2012 convened by the CGE, and was developed with research support from the Women's Legal Centre.[1] .

4. Would 50/50 legislation be supported by the existing South African legal framework?

The South African legal framework, consisting of local, regional and international obligations, would comfortably support and accommodate 50/50 legislation. South African law would not only defend such a law as a valid form of affirmative action, the law may also impose positive duties on political parties to promote equality.

[1] As researched, drafted and presented for discussion by the Women's Legal Centre, a 50/50 campaign partner. The Women's Legal Centre is an independently funded law firm that seeks to advance the rights of women through strategic public interest and impact litigation, and advocacy.

2.1 The Constitution

Equality forms a central pillar of the new South African legal order.[2] First, equality is a *foundational value* of the South African Constitution.[3] Furthermore, Section 9 of the Constitution guarantees equality before the law and equal protection and benefit of the law and outlaws "unfair" discrimination.[4] Under section 9(2), "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken" in order "[t]o promote the achievement of equality." Section 9(4) explicitly prohibits discrimination by any person and requires national legislation to give effect to the right to equality. Essentially, section 9 of the Constitution "guarantees the achievement of substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian and non-sexist society is available to all, including those who have been subjected to unfair discrimination in the past."[5]

The South African conception of equality must thus be interpreted and applied in light of past and continuing patterns of disadvantage. The Constitutional Court has observed that:

> "[p]articularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely."[6]

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[2] For Constitutional Court decisions highlighting the role of equality, *see, e.g.*, Fraser v. Children's Court, Pretoria North 1997 (2) BCLR 153 (CC), 1997 (2) SA 261 (CC) para 20 ("There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised."); President of the Republic of South Africa v. Hugo 1997 (6) BCLR 708 (CC), 1997 (4) SA 1 (CC) para 74("[I]n the light of our own particular history, and our vision of the future, a Constitution was written with equality at its centre.").

[3] Section 1(a) states that the South African state is "founded" on certain values, including "the achievement of equality." Section 7(1), the first provision of the Bill of Rights, also states that the Bill of Rights affirms the "democratic value of equality."

[4] See next section for discussion of 'fair' and 'unfair' discrimination.

[5] Bhe and Others v Magistrate, Khayelitsha and Others 2005 (1) BCLR 1 (CC) at para 50 (Lange J).

[6] National Coalition for Gay & Lesbian Equality v. Minister of Justice 1999 (1) SA 6 (CC) at para 15.

Accordingly, the primary purpose of the equality provision is to eradicate past patterns of disadvantage. Under this structure and understanding of equality, legislation mandating women's equal representation in decision-making structures would be constitutional, even though it may technically constitute discrimination.

2.2.1 "Fair" versus "Unfair" Discrimination

Substantive equality requires "discrimination to be understood in the context of the experience of those on whom it impacts."[7] Section 9(3) of the Constitution recognizes this, and thus prohibits only "unfair" discrimination while section 9(2) allows "fair" discrimination, *i.e.*, actions "designed to protect or advance persons or categories of persons [previously] disadvantaged by unfair discrimination."[8] The primary constitutional concern is therefore the impact of a discriminatory measure rather than whether there is similar treatment between groups of people.[9] Thus, in Hugo, Justice Goldstone held:

> "[w]e need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."[10]

As a consequence of this asymmetrical understanding of substantive equality, not all differentiations or discriminatory measures on the listed or unlisted grounds are problematic. What matters is whether the alleged discrimination is designed to remedy past wrongs (constituting "fair" discrimination) or to perpetuate inequality (constituting "unfair" discrimination). This model recognizes that certain groups, white men for example, do not

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[7] Id. at para 35.
[8] Constitution section 9(2). Such measures are popularly known as "affirmative action" measures.
[9] Saras Jagwanth, *Affirmative Action in a Transformative Context: the South African Experience*, 36 Conn. L. Rev. 725, 727 (2004).
[10] Hugo at para 41.

suffer from structural disadvantage and patterns of discrimination the same as other groups, black women for example.

The Constitutional Court articulated the test to determine whether a measure constitutes unfair discrimination in *Harksen v Lane*.[11] First, if a provision differentiates between people or groups, the court determines whether "the differentiation bears a rational connection to a legitimate government purpose."[12] If no rational connection can be found, the differentiation violates section 9. Even if the differentiation does bear a rational connection to a legitimate government purpose, it may still constitute discrimination if based a specified ground listed in section 9(3) of the Constitution or if based on a ground which has "the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner."[13]

The court must next determine whether the discrimination is "fair." If the discrimination is based on one of the listed or unlisted grounds, unfairness is presumed. However, to determine whether such discrimination, even on a listed ground is unfair, "various factors must be considered" including "the position of the complainants in society and whether they have suffered" from past discrimination, "the nature of the provision or power and the purpose sought to be achieved by it," as well as "any other relevant factors."[14]

This contextual fair/unfair discrimination analysis recognizes that while unfair discrimination is unconstitutional, affirmative action and other remedial initiatives are, under section 9(2)[15] of the Constitution, a means of promoting and achieving equality, *i.e.*, fair discrimination. Thus, if a measure allegedly violates the right to equality, the body seeking to uphold it can defend the measure by showing that it is designed to protect and advance persons or groups previously disadvantaged by unfair discrimination, *i.e.*, that it is a valid affirmative action measure. Such measures constitute fair discrimination and are constitutional.

2.2.2 50/50 Legislation Constitutes "Fair" Discrimination

[11] 1997 (11) BCLR 1489 (CC) at paras. 42-53.
[12] Id.
[13] Id. This is also called an "analogous ground."
[14] Id.
[15] Section 9(2): "To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

Under this fair/unfair discrimination analysis, legislation mandating 50/50 gender representation for decision-making bodies would constitute fair discrimination and would thus be constitutional.

As an initial matter, legislation mandating 50/50 representation may be constructed in gender-neutral terms, so that, for example neither gender should occupy more than 60% and no less than 40% of the seats. This setting of both a maximum and minimum for both genders may escape challenge as discrimination against men. However, even assuming legislation is written in terms that differentiate between genders, in the case of 50/50 legislation, there is a rational relationship between the differentiation and a legitimate government purpose, namely increasing women's representation in the public sphere and thereby promoting equality.

Next, because any differentiation necessary for 50/50 legislation would differentiate on the basis of gender, a listed ground of section 9(3), the legislation may still constitute discrimination. Thus, argument must be made that such differentiation is fair. This is the contextual portion of the analysis which must consider "various factors" including "the position of the complainants in society and whether they have suffered" from past discrimination, "the nature of the provision or power and the purpose sought to be achieved by it," as well as "any other relevant factors."[16] Because 50/50 legislation is designed to protect and advance women, a group of persons historically disadvantaged by unfair discrimination, the legislation will constitute fair discrimination because it seeks to promote equality as mandated by section 9 of the Constitution through an affirmative action measure. Thus, such 50/50 legislation is constitutional.

2.2.3 How would "quotas" contribute to substantive equality?

If legislation were put in place that increased the number of women in political decision-making structures to 50%, this would amount to putting in place a "quota" system. There are many arguments against quota systems - most notably that simply increasing numbers is an exercise in formal equality, and will not ensure better outcomes, or substantive equality, for women.

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[16] Harksen v Lane at para 52.

In reality, quotas for women compensate in many ways for the barriers faced by women in accessing political decision-making positions. An increased number of women in decision-making positions would, over time, change the institutional culture of the hitherto male-dominated political environments in parties and government. Bringing more women into the political environment means bringing more women's experiences into the political environment, thereby improving policy and other decision-making. Increased numbers of women will also embolden and reduce the pressure on individual women who currently serve in political decision-making structures as "token" women. Women will be able to focus on their performance, instead of addressing gender barriers in addition to performing their duties, thereby facilitating better performance and growth.

Due to the proportional representation system of South Africa, quotas cannot damage voters' rights, as it is in fact primarily our political parties that determine individual nominations through the party list system, and not voters. Under the circumstances, quotas can in fact contribute to a process of democratisation by making the nomination process more transparent and formalised

2.2 The Promotion of Equality and Prevention of Unfair Discrimination Act

Not only can proponents of 50/50 legislation successfully defend such legislation as fair discrimination designed to advance women, they may also use other legislative tools to *demand* the implementation of 50/50 legislation. Like the positive action to achieve equality mandated by section 9 of the Constitution, the Promotion of Equality and Prevention of Unfair Discrimination Act ("PEPUDA")[17] calls for the same positive action.

The goal of PEPUDA is extremely ambitious, aimed at "the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people."[18] PEPUDA hopes to achieve this aim by (1) prohibiting unfair discrimination; (2) providing remedies for the victims of unfair discrimination; and (3) by promoting the achievement of substantive equality. Most pertinent to the issue of 50/50 legislation is the third objective, promotion of the achievement of substantive equality.

[17] Act 4 of 2000.
[18] Preamble to the Act.

PEPUDA contains obligations for both state and non-state actors to promote equality.[19] The state must develop action plans, enact further equality legislation, develop codes of practice and guidelines, provide assistance, advice and training on equality issues, and develop appropriate internal mechanisms to deal with complaints. All government departments must prepare and implement equality plans, which must include a time-frame for implementation. Additionally, persons[20] operating in the public domain must promote equality by adopting and monitoring "equality plans, codes, regulatory mechanisms, and other appropriate measures"[21] and all persons must have a "social commitment" to promote equality.[22] Furthermore, regulations may be developed which require "companies, closed corporations, partnerships, clubs, sports organizations, corporate entities and associations...to prepare equity plans" or abide by codes of practice. Finally, the act requires "special measures to promote equality with regard to race, gender and disability."[23]

Thus, under PEPUDA, all persons, including both state and non-state actors, must or may be made to promote substantive equality. Furthermore, PEPUDA, like the Employment Equity Act,[24] provides a right to affirmative action for certain groups and individuals and allows them to argue that they are *entitled* to preferential treatment and to challenge the absence of such treatment as a violation of their equality rights.

Such positive duties to promote equality should not be confused with anti-discrimination laws. Claims of discrimination require an individual complainant to show she was treated differently and the remedy she may receive addresses her individual situation. Positive duties, on the other hand, require those charged with a duty to "proactively identify patterns of inequality and initiate steps to address it, rather than simply refrain from discriminating."[25] Positive duties to promote equality are *proactive* rather than reactive and

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[19] Whether political parties are considered 'state' or 'non-state' actors is debatable and may be irrelevant to the outcome. Elected members of political parties make up Parliament, and Parliament is certainly a 'state' actor. The political parties prior to the point at which individual members become Members of Parliament (MPs), are certainly 'non-state' actors. Regardless of the distinction, the constitutionality of a legislated 50/50 representation remains the same because both state and non-state actors have the duty to promote equality.
[20] Per section 1(1)(xviii), "'person' includes a juristic person, a non-juristic entity, a group or a category of persons."
[21] Section 26.
[22] Section 27.
[23] Section 28.
[24] Act 55 of 1998.
[25] Jagwanth, *supra* at 741.

thus recognize that discrimination and inequality are structural rather than the result of individual acts of prejudice.[26]

Political parties surely cannot escape the ambit of PEPUDA. Indeed, as an illustrative example, the Act states that "failure to promote diversity in selection of representative 'teams'" is a sanctionable unfair practice for "clubs, sport and associations."[27] Through PEPUDA, the state is called upon to pass legislation and other measures to address such unfair practices.[28] In keeping with the goals of PEPUDA and the South African Constitution, the legislature must pass legislation calling for 50/50 gender representation.

2.3 International Law

The foregoing legal arguments supporting the constitutionality of and right to 50/50 legislation are also supported by international law and coalitions including:

a. The Convention for the Elimination of All Forms of Discrimination Against Women ("CEDAW");
b. The Beijing Platform for Action;
c. The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ("Women's Protocol");
d. The South African Development Community's Declaration on Gender and Development.

The equal participation of women in public life is a cornerstone of CEDAW and as a signatory South Africa is bound to take steps to promote women's participation in decision making and leadership positions.[29] Article 7 requires signatories to enact measures to promote political equality:

> "States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular,

[26] Sandra Freedman, Discrimination Law 176 (2002).
[27] Schedule 1, §10(c)
[28] Section 29(2).
[29] South Africa signed CEDAW on 29 January 1993 and subsequently ratified it on 15 December 1995 without reservation and is thus bound to put the provisions of CEDAW into practice. See http://www.un.org/womenwatch/daw/cedaw/states.htm. South Africa also ratified the Optional Protocol on 18 October 2005.

shall ensure to women, on equal terms with men, the right: ... (b) to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government"

At the Fourth World Conference on Women, held in Beijing in 1995, this position was reaffirmed and quotas were considered the key remedy for electoral gender inequality by empowering women in political systems. The Beijing Platform for Action, endorsed by 189 United Nations member states, in section 190 called on governments to:

"(a) Commit themselves to establishing the goal of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary, including, *inter alia*, setting specific targets and implementing measures to substantially increase the number of women with a view to achieving equal representation of women and men, if necessary through positive action, in all governmental and public administration positions; and

(b) Take measures, including, where appropriate, in electoral systems that encourage political parties to integrate women in elective and non-elective public positions in the same proportion and at the same levels as men."

In section 191, the Beijing Platform also called on political parties to:

"(a) Consider examining party structures and procedures to remove all barriers that directly or indirectly discriminate against the participation of women;

(b) Consider developing initiatives that allow women to participate fully in all internal policy-making structures and appointive and electoral nominating processes; and

(c) Consider incorporating gender issues in their political agenda, taking measures to ensure that women can participate in the leadership of political parties on an equal basis with men."[30]

[30] Fourth World Conference on Women, Beijing, Platform for Action, *available at* http://www.un.org/womenwatch/daw/beijing/platform/ (1995).

The African Union ("AU") has also endorsed gender equity through equal representation of women in decision-making bodies. The Women's Protocol to the African Charter on Human and People's Rights was adopted by the AU in 2003 and it came into application on 25 November 2005. Article 9 of the Women's Protocol, "Right to Participation in the Political and Decision Making Process," sets targets for achieving gender equality in the electoral process and to participate in politics without discrimination.

Finally, The South African Development Community Declaration on Gender Development committed South Africa to:

> "Ensuring the equal representation of women and men in the decision-making of member states and SADC structures at all levels, and the achievement of at least thirty percent target of women in political and decision-making structures by year 2005;"

The subsequent draft Protocol for Gender Development states as follows:

> "Article 12:
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> 1. State Parties shall endeavour that by 2015, fifty percent of decision-making positions in the public and private sectors are held by women including through the use of affirmative action measures as provided for in Article 5.
>
> 2. State Parties shall ensure that all legislative and other measures are accompanied by public awareness campaigns which demonstrate the vital link between the equal representation and participation of women and men in decision making positions democracy, good governance and citizen participation are put in place at all levels."

These instruments display an overriding international consensus and commitment that women's presence in decision-making structures must be increased and enhanced. South Africa's endorsement and ratification of these instruments further compels it to take positive action to follow through with a commitment to gender equality throughout all of its decision-making structures.

5. Proposed legislative amendments

In order to achieve 50% representation of women at all level of government decision-making in South Africa, it is suggested that the following amendment be enacted within the Electoral Act, to provide for:

- Establishment of a quota system
- Mechanisms for dealing with non-compliance

The express aim of such proposed amendments would be:

"To provide for 50% representation of women at national and provincial legislatures, to amend the Electoral Act, 1998 accordingly; and to provide for matters connected therewith."

Amendments to the Electoral Act 73 of 1998

In order to establish a quota system, it is suggested that the number of women and men on each party list may not differ by more than one, and that the names of the women and men on each party list shall alternate, so that each group of two candidates as they appear on the list contains one man and one woman.

In order to establish a quota system, it is suggested that the following subsection be inserted as Section 27(1)(A) in the Electoral Act:

(1)(A) The lists referred to in subsection (1) shall be comprised as follows:

(a) The number of women and men on each party list may not differ by more than one;

(b) The names of the women and men on each party list shall alternate, so that each group of two candidates as they appear on the list contains one man and one woman.

The mechanism to enforce compliance should be clear and effective, without being unduly harsh or unrealistic. Sanctions for non-compliance are of particular importance when dealing with quotas. The possibilities are that the political seats remain vacant, that parties are penalised in relation to funding, or that parties are required to pay fines. These are a few suggested penalties that could be considered by Parliament to address any non-compliance.

The CGE is of the view that the most effective manner in which to address non-compliance would be to empower the Independent Electoral Commission (IEC) to include this as a party requirement in the existing party candidate list compilation and submission process. Should a party fail to apply the principle of 50/50 to their party candidate list compilation, the IEC would note such non-compliance and provide the non-complying party an opportunity to correct their list accordingly, failing which the IEC would have the power to disqualify the party from participating in the election.

To achieve this, it is suggested that the following subsection is inserted as Section 28 (4) of the Electoral Act:

> (4) Where a party has failed to comply with Section 27(1)(A), the Chief Electoral Officer of the Independent Electoral Commission shall return that party's candidate list for correction, failing which the Independent Electoral Commission is duly empowered to disqualify that party from participating in the election.

In addition, the CGE suggests that party members and the general public should be able to lodge a complaint of non-compliance, through a provision enabling any person to object to the compilation of any party's list on the grounds that it does not comply with the 50/50 principle. Such objection could be lodged with the Chief Electoral Officer of the IEC for investigation, and also served on the registered party against which the objection is made.

To this end, it is suggested that the following subsections are inserted as Section 30 (1)(A) and 30(2) of the Electoral Act:

> "30 (1) (A) Any person, including the chief electoral officer, may object to the compilation of any party's list on the grounds that it does not comply with Section 27(1)(A)."
>
> " 30 (2) The objection must be made to the Commission in the prescribed manner by not later than the relevant date stated in the election timetable, and must be served on the registered party against which the objection is made, or which nominated the candidate."

6. Conclusion

South Africa has clearly made its commitment to achieving substantive gender equality through numerous measures taken during its transition to democracy. The Constitution calls for positive action to reach gender equality throughout society. PEPUDA similarly calls for positive action to promote equality by state and non-state actors, including clubs and associations. Numerous international instruments call for the advancement of women's equality specifically through achieving proportionate gender representation in decision-making structures. The CGE is of the opinion that the Legislature is obliged to make legislative provision for the attainment of 50/50, and that the current vehicle of the Electoral Amendment Bill provides such an opportunity. The CGE will further engage with Parliament with regard to proposed amendments to the Local Government: Municipal Structures Act, 1998 and the Local Government Municipal Electoral Act, 2000, to embed the quota system seamlessly within the South African electoral legislative framework.

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