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LEGAL OPINION

[Confidential]

TO : Mr BA Mnguni and Adv SP Holomisa
Co-Chairpersons of the Constitutional Review
Committee

COPY : Acting Secretary to Parliament

DATE : 17 October 2012

SUBJECT : Constitutional Review of section 47(3)(c) of the
Constitution

LEGAL ADVISER : P Ngema

REFERENCE NUMBER : 199 / 2012 (CR 17/12)



LEGAL OPINION
[Confidential]

TO : Mr BA Mnguni, MP and Adv. SP Holomisa, MP
Co-Chairpersons of the Constitutional Review Committee

COPY : Acting Secretary to Parliament

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COMMITTEE REF : CR 17 / 12

REFERENCE : 199 / 12

DATE : 17 October 2012

SUBJECT : REQUEST TO REVIEW SECTION 47(3)(C) OF THE CONSTITUTION

1. Our Office was requested to advise the Constitutional Review Committee on the submission from Adv. Johan Kruger of the Centre for Constitutional Rights: FW de Klerk Foundation for the review of section 47(3)(c) of the Constitution.
2. The submission makes out detailed arguments for proposing change to the electoral system and the review of section 47(3)(c) so that members of the National Assembly are not only accountable to the party bosses at the expense of neglecting the electorate's views and electorate mandate.
3. In summary, Adv. Kruger submits that section 47(3)(c) has a negative bearing on Parliament's ability to effectively exercise its duties, amongst which he singles out, the duty to:
 - detect and prevent abuse of power and illegal unconstitutional conduct by the National Executive;
 - protect the rights and liberties of citizens; and
 - make government operations more transparent to increase public trust and hold government accountable in its usage of tax monies.
4. He states that section 47(3)(c):

- limits accountability, responsiveness and openness which are the cornerstone constitutional values of democracy;
 - effectively limits the freedom of individual members of the National Assembly (NA) to follow the dictates of personal conscience and moral conviction;
 - prevents the NA from being the envisaged effective nation's "Committee of Grievances" and "Congress of Opinions";
 - renders members of the NA accountable to their parties first, rather than to the voters who theoretically elected them;
 - reduces openness where members of Parliament and the National Executive do not feel obliged to explain their actions or inactions or decisions to voters; and
 - diminishes the right to freedom of association for the members of NA.
5. Adv. Kruger concludes his views by stating that the resultant effect of section 47(3)(c) is a severe restriction in the fulfilment of the constitutional mandate of the NA. He observes that the eventual consequence of section 47(3)(c) is to promote party mandates above personal convictions and electorate mandates.
6. He further adds that the current choice of the electoral system has a significant impact on the degree to which the electorate is able to participate in a constitutional democracy. Thus he recommends a need for reflection on the current electoral system which he proposes should be conducted concurrently with efforts to address the shortcomings of section 47(3)(c) of the Constitution. He points out that the closed party lists and proportional representation electoral system is not promoting government by the people but is very restrictive. Adv. Kruger recommends a revision of the electoral system in line with the proposals of the Electoral Task Team established by Cabinet in March 2002.
7. A number of constitutional provisions support the contentions made by Adv. Kruger. As a way of outline with reference to the Constitution, the following provisions are crucial:
- Parliament is a forum for debate on important issues, see section 42(3)and(4) of the Constitution;

- Parliament must hold the executive organs of state in the national sphere of government accountable and exercise an oversight function over the exercise of national authority, see section 55(2) and 92(2);
8. To achieve some of the above-mentioned Parliament's functions, Parliament organises its members into committees with different portfolios. Other arguments Adv. Kruger advances are echoed by a number of constitutional experts¹. Amongst others, the constitutional experts contend that Parliament must act in a manner appropriate for a participatory democracy in which the legislative authority derives its legitimacy not only from the regular elections, but also from continuous consultations with the electorate and civil society. The committees of Parliament thus play a pivotal role in the implementation and fulfilment of such constitutional obligations. It is thus worth mentioning that Parliament works effectively to fulfil its constitutional obligations and functions both through plenary and its committees.
 9. The electoral system is prescribed in terms of national legislation as envisaged in terms of section 47(4) of the Constitution. The current electoral national legislation includes the Electoral Commission Act, 1996 (Act No. 51 of 1996) and the South African Electoral Act, 1998 (Act No. 73 of 1998).
 10. South Africa chose the system of proportional representation over the constituency system, where the free mandate notion does not exist but the imperative mandate². Free mandate notion means that elected representatives are not bound by outside directives but are guided by their own conscience to act in the national interest. Free mandate notion seems to be what Adv. Kruger is supporting. An imperative mandate means that elected representatives are bound by the orders of the party under the banner which they were elected. The current multi-party democracy system is aligned with the imperative mandate.
 11. The Court in *United Democratic Movement v President of the RSA and Others (1) 2002 (11) BCLR 1179 (CC)* found that the exclusion or inclusion of floor-crossing or defection / anti-defection provision is not unconstitutional. It confirmed that a decision which electoral system is followed is a matter of political choice. The Constitution only

¹ Iain Currie, John de Waal, Pierre de Vos, Karthy Govender and Heinz Klug, *The New Constitutional and Administrative Law*, Volume (1), pages 159 to 160.

² See IM Rautenbach and EFJ Malherbe, *Constitutional Law*, Third Edition at page 141 to 142.

requires a multi-party democracy which results in a political order permissible to different political groups organising, promoting their views through public debate and participating in free and fair elections.³

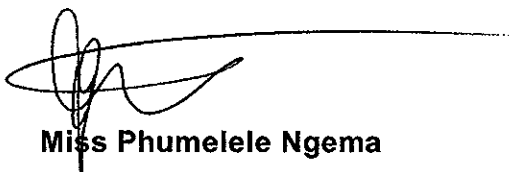
12. In *Re: Certification of the Constitution of the RSA, 1996* 1996 (10) BCLR 1253 (CC) the Court at paragraph 185 had this to say about anti-defection clause:

...An anti-defection clause can act as an additional check on legislators who become accountable, not only to the electorate and the legislature, but also to their party. It is the party that faces the voters during the succeeding election and has to justify its acts in the previous legislative period. If members wish to be re-elected they need to bear in mind party discipline. This does not amount to a reduction in accountability to the electorate.

13. In the preceding quoted paragraph the Court clearly appreciated that the anti-defection clause is capable to take any variance. The variance can either be in favour that members become party bound and susceptible to party discipline or be bound to the electorate. In other words there is no correct approach, whichever method is opted for there will be causalities resulting from the choice.

14. In our view section 47(3)(c) provides one method in which membership to the NA ceases however, with a provision that if a member defect to a represented party in the NA such membership will not cease. Hence, defection is permitted and to some degree personal conscience and party preferences are allowed to play a role in decision making by each member.

15. In line with the direction from the current jurisprudence, the court refused to enter this political realm and policy development. We are of the view that a review of the electoral system as well as section 47(3)(c) of the Constitution is a policy consideration aligned with a political decision.



Miss Phumelele Ngema
Parliamentary Legal Adviser

³ See paragraphs 26, 32-35 of the UDM judgment.

CR 12-17



Centre for
**CONSTITUTIONAL
RIGHTS**

CENTRE FOR CONSTITUTIONAL RIGHTS

Upholding South Africa's Constitutional Accord

Patron: The Hon Mr Justice Ian G Farlam

The Honourable Adv S.P. Holomisa, MP and Mr B.A. Mnguni, MP

Co-chairpersons

Joint Committee on Constitutional Review

Parliament of the Republic of South Africa

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Attention: Ms Pat Jayiya

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Per fax: 021 403 2808 and 086 696 5384

20 July 2012

Dear Adv Holomisa and Mr Mnguni

CONCISE SUBMISSION TO THE JOINT COMMITTEE ON CONSTITUTIONAL REVIEW IN TERMS OF SECTION 45(1)(c) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 – RECOMMENDED REVIEW OF SECTION 47(3)(c)

Introduction

1. The Centre for Constitutional Rights (CFCR) is a unit of the FW de Klerk Foundation – a non-profit organisation dedicated to upholding the *Constitution of the Republic of South Africa, 1996* (the Constitution). To this end, the Centre seeks to promote the values, rights and principles provided for in the Constitution, to monitor developments including policy and draft legislation that might affect the Constitution and the values, rights or principles provided therein, to inform people and organisations of their constitutional rights and to assist them in claiming their rights.

A UNIT OF THE FW DE KLERK FOUNDATION

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Adv Johan Kruger (Director)

Panel of Advisors

FW de Klerk (Chairperson), Dave Steward (Executive Director), The Hon Mr Justice Ian Farlam (Patron), Adv Nicola de Havilland, Adv Paul Hoffman SC, Dr Anthea Jeffery, Adv Johan Kruger SC, Dr Penuell Maduna, Johann Marais, Prof Francois Venter, Prof David Welsh, Prof Marinus Wiechers

2. With reference to section 45(1)(c) of the Constitution and your call for submissions as published on www.parliament.gov.za, CFCR welcomes the opportunity to make concise submissions to the Committee on certain sections of the Constitution that we believe require revision.
3. Accordingly, CFCR recommends that section 47(3)(c) of the Constitution be reviewed for the reasons as discussed hereunder.
4. It is not the purpose or intention of this submission to provide a comprehensive legal analysis of the aforementioned section, but rather to draw attention to key concerns in relation to the effect thereof on accountability and parliamentary oversight as required in terms of section 42(3) of the Constitution.

The Constitution and a multi-party system of democratic governance

5. The Preamble of the Constitution determines that "*Government must be based on the will of the people*".
6. In terms of section 1 of the Constitution, South Africa is a sovereign and democratic state founded on specific values, including those of "*universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness*."
7. In *United Democratic Movement v President of the Republic of South Africa & Others* (hereinafter referred to as the *UDM-case*), the Constitutional Court interpreted a "multi-party system" as a system in which different political groups could organise, promote their views through public debate and participate in free and fair elections.¹ Conversely, "democracy" is understood as "*a commitment to limitation on ordinary power*"² and the notion that government can only be justifiable if it was based on the "*consent of the governed*".³ Democratic government is therefore understood as government which does not only formulate the will of the people, but which also continuously responds to the will of the people in a manner that is accountable, responsive and open.
8. "Democratic government" and "democracy" as envisioned by the Constitution are, however, not one-dimensional concepts, but should be construed as a combination of *representative, participatory and direct* democracy or democratic government:⁴
 - a. *Direct* democracy is enshrined in those provisions that allow the people to engage government directly – for instance through rights such as the right to assemble, demonstrate, picket and petition in terms of section 17.⁵

¹ *United Democratic Movement v President of the Republic of South Africa & Others* No 2 2002 11 BCLR 1179.

² Greenberg D & Katz SN (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World: The American Council of Learned Societies Comparative Constitutionalism* (Oxford Press Oxford 1993).

³ Currie I & De Waal J *The Bill of Rights Handbook* 5th Edition (Juta Cape Town 2006).

⁴ *Ibid.*

⁵ *Ibid.*

- b. *Representative* democracy is premised in political rights including the right to vote as provided for in section 19. The right to choose representatives should thus result in the people governing themselves through duly elected representatives. The right to vote and to elect representatives is arguably the most basic political right in a democracy, but simultaneously also one of the most important cornerstones as it gives rise to civic responsibilities for both the electorate and the elected.⁶ On the one hand, the act of voting is a clear reminder to those elected that their positions were based on the will of the people, that those positions remained subject to the will of the people and that the elected have a continuous responsibility towards the electorate. On the other hand, voters have a duty to continuously engage and demand accountability, responsiveness and openness from their elected representatives.⁷
- c. *Participatory* democracy has at its core the prerequisite that the people must be able to continuously participate in decisions and actions that affect their lives. The elected representatives through Parliament and its National Assembly must give life to participatory democracy by not only representing the people, but by also providing a platform for continuous engagement with the people. In *Doctors for Life International v Speaker of the National Assembly & Others* (hereinafter referred to as *Doctors for Life*-case), the Constitutional Court asserted that the commitment to accountability, responsiveness and openness as constitutional values ensured that our constitutional democracy was not only based on representation, but also on participation.⁸ In that instance, the Court held that the combination of representative and participatory democracy was a defining feature of a democracy contemplated by the Constitution:

"...one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process...Therefore our democracy includes, as one of its basic and fundamental principles, the principle of participatory democracy."⁹

9. Section 1 accordingly enshrines a system of democratic governance based on constitutional jurisprudence and limited government comprising multiple political parties.¹⁰ Evidently, the Constitution, through a multi-party system of democratic government and enshrined fundamental rights (including the right to vote, right to freedom of speech and the right to association), gives – at least in theory – effect to the dictum that "the people shall govern".
10. Section 1, however, qualifies a "*multi-party system of democratic government*" by requiring such a system to result in "*accountability, responsiveness and openness*". This, in principle, means that the Government, its officials and its institutions must be able to explain and justify its decisions, actions and laws to the people; respond to and be accessible to the people; and conduct its business of governance

⁶ *Richter v The Minister for Home Affairs & Others* 2009 5 BCLR 448 (CC).

⁷ *Ibid.*

⁸ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC).

⁹ *Ibid.*

¹⁰ Devenish DE *The South African Constitution* (LexisNexis Butterworths Durban 2005).

in an open and transparent manner.¹¹ In explaining the importance of accountability, responsiveness and openness, Mureinik referred to these values as the foundation of a "culture of justification" – a culture in which "leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command".¹² In such a culture, a government justifies its use of power and where it fails to do so, the electorate has a duty to hold its representatives accountable. The Supreme Court of Appeal adopted a similar view in *Democratic Alliance v President of the Republic of South Africa & Others* (hereinafter referred to as the *DA-case*) where it reaffirmed that both Parliament and the National Executive were bound by legal prescripts, including accountability, responsiveness and openness as constitutional "watchwords".¹³ In *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* (hereinafter referred to as the *Metrorail-case*), the Constitutional Court held that *accountability*, especially in relation to Government and organs of State, was "an important principle that bears on the construction of constitutional and statutory obligations".¹⁴ In addition, in *Matatiele Municipality & Others v President of the RSA & Others* (hereinafter referred to as the *Matatiele-case*), the latter Court was of the opinion that *openness* – especially in Parliament – strengthened both the *Rule of Law* and *accountability* as distinct, yet overlapping foundational values by promoting "the rationality that the rule of law requires and the accountability that multi-party democracy demands".¹⁵

11. In giving effect to *representative* and *participatory* democracy, the Constitution in section 42(3) determines that the National Assembly "is elected to represent the people and to ensure government by the people under the Constitution". Hence, in order to ensure government by the people, section 42(3) also mandates the National Assembly to choose the President, to provide a national forum for public consideration of issues, to pass legislation and to scrutinise and oversee executive action.
12. Moreover, section 55(2)(a) requires the National Assembly to provide for mechanisms to ensure that all executive organs of state are accountable, whereas section 55(2)(b) demand from it to "maintain oversight of the exercise of national executive authority, the implementation of legislation and any organ of state".
13. Section 59(1)(a) in turn determines that the National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees.
14. Parliament clearly has a constitutional responsibility to promote both *representative* and *participatory* democracy – in particular by being the nation's "Committee of Grievances, and its Congress of Opinions"¹⁶ and by pursuing "full liberty of censure on every public officer, and on every public act or measure".¹⁷ Parliament and its National Assembly must – in a manner that is both reasonable and

¹¹ Hoffman RP *Access to Information Unpacked* http://www.ifaisa.org/Access_to_Information.html [accessed on 22 February 2012].

¹² Mureinik E "A Bridge to Where? Introducing the Bill of rights" 1994 10 SAJHR 31.

¹³ *Democratic Alliance v President of the Republic of South Africa & Others* 2012 (1) SA 417 (SCA).

¹⁴ *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC).

¹⁵ *Matatiele Municipality & Others v President of the RSA & Others* 2006 5 SA 47 (CC).

¹⁶ Mills JS *Representative Government* (The University of Adelaide Library Kindle Edition 2009).

¹⁷ *Ibid.*

rational – provide a platform for public audience and debate and must hold, on behalf of the electorate, the National Executive accountable for its decision, actions and inactions.¹⁸

15. In terms of section 44(4) read with section 43, Members of Parliament, when exercising its national legislative authority (including the authority to scrutinise and oversee executive action), are bound only by the Constitution and must act in accordance with and within the limits of the Constitution. In fact, section 48 obliges Members of the National Assembly, at the inception of their term of office, to swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with the provisions of Schedule 2.
16. Section 46(1) and section 105(1)(d) read with section 19(3)(a) provide for the composition and manner in which members of the National Assembly, National Council of Provinces and provincial legislatures must be elected whilst section 47 – apart from prescribing eligibility for membership of the National Assembly – determines how a person loses his or her membership of the National Assembly. In this regard, section 47(3)(c) determines that:

"A person loses membership of the National Assembly if that person –

(a) ...

(b) ...

(c) ceases to be a member of the party that nominated that person as a member of the Assembly."

Section 47(3)(c) and current electoral system limiting accountability, responsiveness and openness

Section 47(3)(c)

17. Section 47(3)(c) in its current outline originated from Item 13 of Annexure A of the now repealed Schedule 6 and is the result of two previous constitutional amendments. The first amendment amended the original so-called "anti-defection"-provision in order to allow for changing of political party allegiance without losing membership of the National Assembly (in terms of now repealed Schedule 6A of the Constitution).¹⁹ The second amendment again abolished the right of members of the National Assembly and provincial legislatures to change political party membership whilst retaining membership of the National Assembly or provincial legislature.²⁰ Section 47(3)(c) consequently prevented defections from one party to another by making retention of party membership a prerequisite to retention of membership of the National Assembly.
18. The Constitutional Court in certifying the Constitution, endorsed the retention of the original anti-defection provision, but did not deem it a constitutional prerequisite.²¹ In that regard, the Court asserted that the electoral system and elections provided the "*most important check on the Legislature and its members*" and that an anti-defection clause could serve as "*an additional check on legislators who*

¹⁸ *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 5 SA 171 (CC).

¹⁹ *Constitution Tenth Amendment Act of 2003*.

²⁰ *Constitution Fifteenth Amendment Act of 2008* – although indirectly by the *Constitution Fourteenth Amendment Act of 2008*.

²¹ *In re Certification of the Constitution of the RSA, 1996 1996 4 SA 744 (CC)*.

become accountable, not only to the electorate and the Legislature, but also to their party." The Court also argued that under a list system of proportional representation where parties (instead of individual elected representatives) would be accountable to the electorate, those parties would be losing future elections should they abandon their manifestos. As such, it held, an anti-defection clause would not be "inappropriate to ensure that the will of the electorate was honoured". However, the Court's subsequent assertion, that under such a system "[a]n individual member remains free to follow the dictates of personal conscience", may in hindsight have been – as will be argued hereunder – an over-optimistic vote of confidence in party leaders.

19. In the *UDM*-case, the Constitutional Court again reflected on the anti-defection clause and held that a proportional representation system without an anti-defection clause was not inconsistent with democracy since an anti-defection clause "though possibly desirable, is not an essential component of multi-party democracy, and cannot be implied as a necessary adjunct to a proportional representation system".²² The Court further asserted that although political representatives may act inconsistently with their mandates and leave voters with no control over their actions between elections, the electorate's remedy would come at the next election when they decided how to cast their vote. The Court therefore found that the defection of representatives from a party did not necessarily undermine multi-party democracy as section 1(d) did not prescribe a particular kind of electoral system (providing that it resulted in proportional representation).
20. In the aforementioned *Certification*-judgement, the Court held that an anti-defection clause would not be inappropriate, whilst in the *UDM*-case it found that the absence of such clause was not inconsistent with democracy. The Court found in both judgements that neither the inclusion nor the exclusion of an anti-defection clause would be inconsistent with the Constitution. More importantly, the Court held that – as with the decision regarding an electoral system – the resolution to include or exclude an anti-defection clause was a political and legislative prerogative rather than a constitutional requirement. In addition, the Constitutional Court in both instances based its findings on the need to honour and promote the will of the electorate.
21. Although section 47(3)(c) and corresponding preceding provisions may have indeed been politically justifiable in ensuring political certainty and parliamentary stability during the first few years of democracy in South Africa, it is submitted that this section has served its intended purpose and has, moreover, resulted in an unintended, yet detrimental consequence.
22. Apart from preventing floor-crossing by making retention of membership of Parliament subject to retention of political party membership, section 47(3)(c) also makes retention of party membership a prerequisite for security of tenure and a continuing parliamentary career. Since maintaining membership of the political party which nominated a Member to serve in the National Assembly is required to continue serving as a parliamentarian, Members tend to vehemently obey the instructions of their parties – sometimes to the detriment of accountability, responsiveness and openness.

²² *United Democratic Movement v President of the Republic of South Africa & Others op. cit.*

23. Section 47(3)(c) consequently indirectly impedes the right to freedom of expression and association of Members of the National Assembly and it limits accountability, responsiveness and openness as it prevents a free mandate. Moreover, it effectively albeit indirectly, infringes upon the principle of separation of powers since Parliament and its National Assembly – as will be argued hereunder – no longer effectively hold the National Executive accountable for its decisions and actions. Hence, since parliamentary priorities are set by party leaders and the National Executive, Parliament and its National Assembly tend to become nothing more than a rubber stamp for priorities of the ruling party.
24. Parliament and its National Assembly have a constitutional duty to engage in debate on matters important to the electorate, call the National Executive to account and criticise the National Executive in the execution of their responsibilities.²³ Parliamentary priorities and the degree of vigour with regard to oversight are, however, determined by the leadership of the ruling party and do not necessarily correspond with the will of the broader electorate.
25. Parliament rightfully contends that the true test of democracy is "*the extent to which Parliament can ensure that government remains answerable to the people*".²⁴ Parliament also describes its duties as to detect and prevent abuse of power and illegal or unconstitutional conduct by the National Executive; protect the rights and liberties of citizens and hold the Government answerable for how tax money is spent; and make government operations more transparent in order to increase public trust in the Government.²⁵ Whether it is, however, maintaining effective oversight of Government actions and whether it is indeed able and willing to ensure that service delivery is taking place, is certainly questionable.²⁶
26. It is submitted that section 47(3)(c) has a negative bearing on the ability of Parliament to effect its aforementioned duties. Section 47(3)(c) indirectly limits accountability, responsiveness and openness – especially in relation to the constitutional duty of Parliament to hold the National Executive accountable and to provide a platform for the people to be heard. Mills asserted that the greatest positive perils to the effective functioning of a Parliament could be reduced to two concepts: first, general ignorance, incapacity or incompetence of representatives, especially within the ruling majority; and secondly, the danger of representatives and Parliament itself "*being under the influence of interests not identical with the general welfare of the community*" leading to class legislation and decisions on the part of the numerical majority.²⁷
27. In its current form, section 47(3)(c), unlike envisaged by the Constitutional Court in the *Certification*-judgement, effectively limits the freedom of individual members to follow the dictates of personal conscience and moral conviction. It prevents the National Assembly from being the nation's "*Committee of Grievances*" and "*Congress of Opinions*" as Members fear being disciplined and dismissed by their

²³ *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others op. cit.*

²⁴ *What Parliament Does: Oversight* http://www.parliament.gov.za/live/content.php?Category_ID=20 [accessed on 31 May 2012].

²⁵ *What Parliament Does: Oversight op. cit.*

²⁶ Editorial "MPs warn on service protests" *News 24* 9 May 2012 <http://www.news24.com/SouthAfrica/Politics/MPs-warn-on-service-protests-20120509> [accessed on 15 May 2012].

²⁷ Mills *op. cit.*

party leadership (thus effectively ending their parliamentary careers) should they speak out or refuse to support the party position on any particular matter. It also results in Members of the National Assembly seeing themselves as party members accountable to their parties first, rather than to the voters who have theoretically elected them. This leaves the National Assembly severely restricted in fulfilling its constitutional mandate. It is barely providing a national forum for public deliberation of matters important to the voters and is rarely effectively holding the national executive accountable for its actions and inactions. Parliamentary office bearers and committee chairpersons dictate the agenda based on priorities set by and in favour of ruling party leadership. Consequently, Members of both the National Executive as well as the National Assembly are no longer accountable or responding to the voters, but rather to party leaders.

28. Section 47(3)(c) results in a party mandate above personal conviction. Devenish and Mangu respectively asserted that this unintended effect resulted in a serious erosion of freedom of expression and negation of the practice of a free mandate of representation. Mangu argued that by "enslaving" a Member of Parliament to a specific political party without allowing such a member to decide upon matters according to the dictates of his or her conscience, to join another party or even become independent, does not serve or promote a free and democratic society.²⁸ Devenish, arguing along the same line, contended that democratic government as well as political realignment were repressed by an anti-defection clause since such provision placed an "unacceptable restriction on freedom of expression in and out of parliament by preventing MPs from speaking and acting boldly for fear of expulsion from their parties and consequently loss of parliamentary office".²⁹
29. It stands to reason that if section 47(3)(c) is indeed limiting expression based on personal conscience and moral conviction of representatives, it is also disregarding the letter and spirit of the Constitution by restricting *accountability, responsiveness and openness*.
- a. It restricts *accountability* of the National Executive since Members of Parliament are unlikely to criticise or hold senior members and the leadership of their party (who may also serve in the National Executive) accountable out of fear for disciplinary action or relegation by their party bosses. It restricts accountability of Members of Parliament since elected representatives view themselves answerable only to the party bosses who afforded them their position in the National Assembly in the first instance, rather than to the people who have no influence over individual selection of representatives to Parliament. Individual Members of Parliament are completely discouraged from holding a view on any matter beyond party parameters for the fear of being castigated. Since the electorate has little leverage or means to directly reprimand or even recall their unresponsive representatives, the electorate is unable to hold their representatives accountable.³⁰

²⁸ Mangu AMB "Who Really Governs in South Africa's Constitutional Democracy: Parties or 'We, the People'?" 2003 *Codicillus* XLIV No 22 – 23.

²⁹ Devenish *op. cit.*

³⁰ Mkhwanazi S "Sisulu wants more accountability" *The New Age* 30 May 2012 http://thenewage.co.za/52223-1007-53-Sisulu_wants_more_accountability [accessed on 1 June 2012].

- b. Section 47(3)(c) hampers *responsiveness* as Members of the National Assembly and the National Executive tend to respond to the electorate when and how they see fit, if at all.³¹ In March 2010 following the absence of a number of Ministers during Parliamentary Questions, the leader of Government Business stated in the National Assembly that it was "up to this House to discuss the matter and to decide if they want to institute any sanctions against Cabinet Ministers who do not answer a Parliamentary Question."³² Parliament took no action. This was also evident from the forced vote in the National Assembly on the contentious *Protection of State Information Bill* – clearly in defiance of national sentiment and the will of the people.³³
- c. Section 47(3)(c) also reduces *openness* since Members of Parliament and the National Executive do not feel obliged to explain their actions, inactions or decisions to the voters.³⁴ This is pointing to a developing mentality of "government knows best" and "an increased tendency by ministers to refuse to answer parliamentary questions on the grounds of national and personal security".³⁵ Such a posture was heavily criticised and frowned upon by the Constitutional Court in the *Matatiele*-case.³⁶
30. Section 47(3)(c) clearly diminishes the *right to freedom of expression* and the *right to freedom of association*, as enshrined in the Bill of Rights, of Members of Parliament by:
- Restricting Members of the National Assembly in their pronouncements, inside and out of Parliament, out of fear for reprimand, disciplinary action or even dismissal by their party bosses – thus potentially compromising their parliamentary career; and
 - Limiting such Members from talking meaningful action by becoming independent, or even joining another party, without standing to lose membership of the National Assembly where, based on conviction and sound judgement, Members felt that they could not support the position of their party on any particular matter or no longer associate with the party altogether.
31. The recent case of Ben Turok and Gloria Borman – both Members of the National Assembly representing the African National Congress (ANC) – who decided to abstain from voting rather than to vote for the *Protection of State Information Bill* (Turok was absent during the voting and Borman was abstained from voting in the National Assembly) is a case in point. Both were facing disciplinary action from the ANC for defying an ANC three-whip order that all its Members should vote in favour of this contentious Bill. Commentators contended that the latter occurrence was a typical result of a ruling party

³¹ *Ibid.* and Editorial "A Strong Case for Electoral Reform" *Business Day* 30 December 2011.

³² Maseko T *Attendance of Ministers for Parliamentary Questions* (Statement by Government Communication and Information System issued on 10 September 2010) <http://www.gcis.gov.za/content/newsroom/media-releases/media-releases/attendance-ministers-parliamentary-questions> [accessed on 1 June 2012].

³³ Hartley W "Secrecy Bill' Passed in Parliament" *Business Day* 22 November 2011 <http://www.businessday.co.za/articles/Content.aspx?id=159336> [accessed on 14 May 2012].

³⁴ Vecchiato P "Parliament Keeps Arms Deal Report under Wraps" *Business Live* 7 March 2012 <http://www.businesslive.co.za/southafrica/2012/03/07/parliament-keeps-arms-deal-report-under-wraps> [accessed on 29 May 2012] and Donnelly L "High-flyers among Travelgate MPs" *Mail & Guardian* 12 August 2012 <http://mg.co.za/article/2011-08-12-high-flyers-among-travelgate-mps/> [accessed 30 May 2012].

³⁵ Editorial "A Strong Case for Electoral Reform" *op. cit.* and Lekota M "Parliament for the Party, Not for the People" *Mail & Guardian* 21 June 2012 <http://mg.co.za/article/2012-06-21-for-the-party-not-for-the-people> [accessed 21 June 2012].

³⁶ *Matatiele Municipality & Others v President of the RSA & Others op. cit.*

pursuing legislation in Parliament where national consensus was clearly absent on the matter.³⁷ Aggrieved Members could not speak out against the proposed legislation and failed to represent the views of concerned constituencies.³⁸

32. If Parliament and its National Assembly are not providing a platform for grievances of the electorate and an assembly for debating matters of national concern, Parliament and its National Assembly are failing the people in favour of the party bosses who instead would determine what not to discuss, who not to criticise and which agenda to pursue.
33. Devenish rightfully contended that our constitutional democracy should be "*defended against the predations of all those in the new body politic and society who prove to be power-hungry, unscrupulous, uncaring and avaricious*".³⁹ Unless representatives continuously reflect the views of all concerned constituencies, Parliament and the National Executive will become institutions of privilege and inequality in favour of certain parties and party bosses – thus, in essence, resulting in a minority of the majority governing as they see fit. This in turn will result in our multi-party democracy not attaining its perceived constitutional objective of government by the people, but rather government by a handful of party leaders.

Current electoral system

34. The choice of electoral system has a significant impact on the degree to which the people are able to participate in a constitutional democracy. Therefore, in addressing the shortcomings of section 47(3)(c), it is also necessary to briefly reflect on the current electoral system of closed party lists and proportional representation in so far as the electoral system itself is limiting government by the people.
35. It is contended that although a multi-party system and regular elections are fundamental to our constitutional democracy, those fundamental principles on their own are not enough to ensure accountability, responsiveness and openness. A government will only remain fully accountable, responsive and open when the electorate is able to actually participate in decisions and actions affecting their lives. Hence, apart from the right to be heard, the electorate must also be able to hold their elected representatives accountable and expect from those elected representatives to, in turn, hold the National Executive accountable. Justice Sachs in the *Doctors for Life*-case stated that an active and continuous public involvement in government was indeed a constitutional obligation and not just "*a matter of legislative etiquette or good governmental manners*". The learned judge contended that although elections were inherently periodical, constitutional values including accountability, responsiveness and openness, were "*by their very nature ubiquitous and timeless*";

³⁷ Grootes S "Disobedient' MPs put ANC in a difficult position" *Business Day* 4 May 2012 <http://www.businessday.co.za/article/Content.aspx?id=171024> [accessed on 30 May 2012].

³⁸ The ANC Veterans League subsequently complained that ANC leaders were running the party "*like a private company*" and officials were "*trigger happy*" in taking disciplinary action. Editorial "Veterans warn ANC on Turok discipline" *Business Day* 12 April 2012 <http://www.businessday.co.za/articles/Content.aspx?id=169373>.

³⁹ Devenish GE "Political Musical Chairs – The Saga of Floor-crossing and the Constitution" *Stellenbosch Law Review* 1 2004 52 – 65.

"They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government. Thus it would be a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years."⁴⁰

36. The Constitution does not impose any specific electoral system, but in terms of section 46(1)(a) determined that national legislation must prescribe an electoral system which shall result in proportional representation. The latter is entrenched in sections 46(1)(d), 105(1)(d) and 157(3) and reaffirmed by the Constitutional Court in the *UDM*-case. The choice of electoral system is therefore undoubtedly a political and legislative matter providing that, in terms of current constitutional provisions, the preferred system resulted in proportional representation.
37. The Constitution did, however, in terms of Item 6(3) of the now repealed Schedule 6 determine that a list system of proportional representation was to be followed during the 1999-elections.
38. The closed party lists system, in principle, requires the electorate to exercise their political rights in terms of section 19 by voting for particular political parties (instead of individual candidates). Political parties in turn compose party lists comprising their respective individual candidates selected from among party members. Depending on the percentage of votes received during an election, a party would accordingly be allocated a proportional number of seats in the National Assembly upon which a party would, based on the proportional number of allocated seats, allocate the seats to party members listed on the party's list. The individual representatives (on behalf of the party who appointed them in terms of their party list) then indirectly represent the people in the National Assembly. A similar process was followed to elect representatives in provincial legislatures.
39. Although the provisions of Item 6(3) were only applicable to the 1999-elections, the current political and electoral arrangement is a result of those provisions subsequently being adopted and enacted in the current *Electoral Act*, therefore maintaining an electoral system of closed party lists resulting in proportional representation.⁴¹
40. In March 2002, the Cabinet established an Electoral Task Team to be chaired by Dr Frederik van Zyl Slabbert and mandated to draft the new electoral legislation required by the Constitution. It was also requested to formulate the parameters of (at that time) new electoral legislation. In its final report published in 2003, the Electoral Task Team found that the current electoral system did not lend itself to participation by the electorate in the selection of candidates – an inherent weakness in closed candidate list systems.⁴² Scholars such as Venter & Faure similarly argued that the closed party lists systems of proportional representation supported party bureaucracies, strengthened the hands of party bosses and fell short of providing sufficient accountability to the electorate.⁴³

⁴⁰ *Doctors for Life International v Speaker of the National Assembly & Others op. cit.*

⁴¹ *Electoral Act 73 of 1998.*

⁴² *Report of the Electoral Task Team* (Government Printer Cape Town 2003) <http://www.elections.org.za/content/WorkArea/DownloadAsset.aspx?id=918> [accessed on 1 June 2012].

⁴³ Faure AM & Venter AJ "Electoral Systems and Accountability: A Proposal for Electoral Reform in South Africa" in Kotzé HJ & Rasch BE (eds.) *Elections and Democracy in Southern Africa*, Norwegian Institute of Human Rights conference proceedings 2001 Oslo.

41. In proposing an electoral system that would make some contribution towards political accountability in a demonstrable and effective manner, the Electoral Task Team recommended a system of "fairness, inclusiveness, simplicity and accountability" that could evolve towards a larger multi-membership constituency system with a compensatory national list.⁴⁴ This proposed electoral system envisioned voters electing 300 Members of the National Assembly through a constituency system and the remaining 100 representatives to be drawn from national party lists. The proposed electoral system would still result in proportional representation, but would also include a true constituency-based component – providing voters with the opportunity to directly elect 100 representatives from specific constituencies.
42. It is asserted that the current electoral system as implemented has effectively alienated voters from their representatives. Representatives in the National Assembly (unlike Members of the National Council of Provinces who, arguably, were representing provinces as larger constituencies) are in reality neither accountable to any specific constituency nor representing the views of any particular constituency. Even though Members of the National Assembly may be referring to their "constituencies" and constituency engagement, the fact of the matter is that representatives are not elected by any constituency and cannot individually be recalled or voted out by a particular constituency, should they fail those "constituencies".
43. Apart from the abovementioned limitations of a closed party lists system, this system also gave rise to a further anomaly – arguably inconsistent with a constitutional democracy. Neither the Constitution nor relevant legislation requires of political parties to adhere to internal democratic processes – especially in relation to the compilation of party lists. Thus, despite our constitutional democracy being founded on the principle of government by the people, the people actually have no guaranteed say in who represents them in Parliament.⁴⁵ The current electoral system of closed party lists, as well as the practice of arbitrary compilation of party lists, resulted in the people being distanced from their representatives. If political parties are the means through which the people must express their right to representation, those parties are fundamental to a functioning multi-party democracy and surely then, those political party structures – including processes for compiling party lists – must be democratic in order to serve democracy.⁴⁶ If political parties, without justification, deviate from democratic principles in the compilation of party lists, it stands to reason that party leaders – and not the people – decide who governs and how they govern.
44. In fact, even where political parties seemed to be compiling party lists democratically and do consult with their supporters as to the preference, suitability or ranking of possible candidates, final decisions were ultimately reserved for party leaders.⁴⁷ Albeit party leadership may be elected democratically, compilation of lists of parliamentary representatives remain a prerogative of, and arbitrary decision by,

⁴⁴ *Report of the Electoral Task Team op. cit.*

⁴⁵ De Vos P "How can We Solve Problems with Our Electoral System?" *Constitutionally Speaking* 19 March 2012 <http://constitutionallyspeaking.co.za/2012/03/19/> [accessed on 28 May 2012].

⁴⁶ Currie & De Waal *op. cit.*

⁴⁷ Article 12.2(k) of the Constitution of the African National Congress (as amended and adopted by the 52nd National Conference in 2007) determines that the National Executive Committee (NEC) shall appoint a National List Committee "for the selection and adoption of candidates for the national Parliament...The NEC shall draw up regulations for the procedures to be followed in such a selection" <http://www.anc.org.za/show.php?id=207> [accessed on 2 June 2012]. Also see De Vos *op. cit.*

party leaders, clearly leading to weaknesses and inadequacy in the relation between voters and individual representatives.⁴⁸

45. Voters are subsequently left with no right to recall or future reprieve should individual parliamentary representatives fail to perform satisfactorily, blindly toe the party line, misrepresent the views of the electorate or blatantly ignore the will of the people. Representatives are hence left with but a single concern – to please party leaders rather than the voters. Aggrieved voters are accordingly left with little choice but to vote for another party or abstain from voting altogether during the following election.
46. Supporters of the closed party list system argue that the electorate bestows respective parties with mandates to act on behalf of the electorate and were thus representing the views of the voters. This may have been true if political parties did not act beyond their original mandate which theoretically was based on the leadership, party list, policies and manifestos at the time of the election. Where parties, in between elections, recall and replace representatives, change leadership (as was the case with the ANC National Conference in Polokwane held in 2007 which resulted in key changes in the National Executive, including the Office of the President) and depart from policies as propagated at the time of the previous election, it can certainly be argued that those representatives are no longer acting within the original mandate provided by the electorate at the time of the last elections.
47. Section 47(3)(c), together with the current electoral system, results in the people not being able to hold individual Members of Parliament responsible for failure or incompetence. It results in individual Members of the National Assembly toeing the party line rather than be overlooked for higher office, continuing parliamentary duty or other career opportunities. Mangu argued in this regard that *"despite the words people and democracy being cherished by politicians and embedded in the Constitution, the parties govern and not necessarily the people"*.⁴⁹ The result thereof, he contended, was that *"the 'sovereign people' who allegedly govern have turned out to be the 'subjects' of parties and are regularly instrumentalised by them to access or preserve power"*.⁵⁰ Ultimately, the current electoral system tends to favour a government of parties.

Recommendations

48. Freedom of expression – as a fundamental right enshrined in our Constitution – is one of the cornerstones of a constitutional democracy. Nowhere is this right more important than in Parliament and its National Assembly where it is this institution's constitutional duty to represent the people and to ensure government by the people under the Constitution.
49. It is therefore strongly contended that it is in the best interest of our constitutional democracy to amend section 47(3)(c) in order to allow for a free mandate for members of the National Assembly thus giving

⁴⁸ ANC Press Statement *Election Candidate List* 4 May 1999 <http://www.anc.org.za/show.php?id=8728> [accessed on 1 June 2012]. Seepe J "ANC to Draw up List for Elections" *City Press* 6 July 2003 <http://152.111.1.87/argief/berigte/citypress/2003/07/06/C1/2-1/05.html> [accessed on 1 June 2012] and Du Toit P "Zille interfered in SA List" *News24* 27 January 2009 <http://www.news24.com/SouthAfrica/Politics/Zille-interfered-in-DA-list-claim-20090126> [accessed 1 June 2012].

⁴⁹ Mangu *op. cit.*

⁵⁰ Mangu *op. cit.*

effect to constitutional values and principles. A free mandate is indeed compatible with the spirit of a free and open society and will "loosen the grip of party bosses on the conscience of representatives" thus giving rise to individual representatives articulating actual issues and opinions of constituencies in a more realistic and accurate manner.⁵¹ It will also allow Members of the National Assembly to raise concerns based on their conscience and conviction and could ultimately also provide individual representatives with the opportunity to remain in the National Assembly as an independent representative should such a representative be relieved of party membership for not blindly following party instructions.

50. It is furthermore recommended that, in considering recommendations in relation to section 47(3)(c) as proposed in this submission, the recommendations of the Electoral Task Team as expressed in its final report are also considered. In this regard, the Electoral Task Team recommended a revision of the current electoral system in order to provide for a multi-membership constituency combined with compensatory national list. Venter & Faure argued for a similar revised system of mixed-member proportional representation together with single-member constituencies. It is contended that such proposed hybrid electoral system would be fully compliant with the constitutional prerequisite of proportional representation and would not only improve accessibility and responsiveness between the electorate and representatives, but would also significantly increase the responsibility of individual representatives towards their constituents. The latter would make Members of Parliament altogether more accountable to the electorate – rather than to their parties and party bosses.

Conclusion

51. A multi-party system of democratic government gives effect to the right to be represented, the right to choose such representatives and the right to be governed by the chosen representatives in a manner that is accountable, responsive and open. South Africa advanced from an authoritarian system where the Government served only the interests of a minority, to a democratic government based on the will of the people. It evolved from a parliamentary system which provided no safeguards against the abuse of power, to a system based on separation of powers where Parliament must hold the National Executive and all organs of State accountable.
52. However, it is submitted that section 47(3)(c), together with the current electoral system, indirectly result in an unintended transfer of power to a minority of the majority – the party bosses – and thus also a minority of the electorate. This section, together with the closed party lists electoral system, create an environment conducive to political careers rather than to accountability, responsiveness and openness. The latter results in the will of the voters not necessarily at all times being reflected in the National Assembly. It consequently also infringes upon the principle of separation of powers as it results in the National Executive not effectively being held accountable, potentially leading to "endless variety of unjust privileges, sometimes benefiting their pockets at the expense of the people".⁵² The significance of the latter is that the leadership of the ruling party (and in some instances also the National Executive)

⁵¹ Faure & Venter *op. cit.*

⁵² Mills *op. cit.*

effectively determines priorities on behalf of the National Assembly, leading, for all intents and purposes, to government of political ambitions and ultimately, democracy to be transformed into a "partyocracy".⁵³

53. The inability of Members of the National Assembly to act in terms of a free mandate (along with an electoral system which denies the electorate the ability to hold individual representatives accountable) flouts the constitutional requirement that "*Government must be based on the will of the people*" and arguably weakens our constitutional democracy.
54. The importance of maintaining the electorate's confidence in a multi-party democracy cannot be overemphasised. It is hence crucial for individual representatives to be allowed to maintain close association with voters and to be seen to be truly representing the diverse and multiple views and interests of various constituencies. Once the people have lost confidence in a political system which has created distance and even detachment between the voters and representatives, it will be very difficult to restore that confidence so as to avoid cynicism, apathy or conceivably even outright revolt by alienated voters.
55. CFCR would like to contribute positively to the promotion and protection of our constitutional democracy by ensuring that the people – and not a minority of the majority – indeed govern. In this regard and if required, CFCR will be available to engage in oral submissions to the Committee in order to elaborate on this submission, whether during the public hearings or at any such time as the Committee may see it fit.
56. We trust that our submission will be of assistance in guiding the Committee's deliberations on reviewing the Constitution aimed at strengthening our constitutional democracy.

Yours sincerely



Adv Johan Kruger
Director

⁵³ Mangu *op. cit.*

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