



PRESS STATEMENT

CENTRE FOR HUMAN RIGHTS CALLS FOR JUDICIAL DIALOGUE WITH AFRICAN UNION COURT AND CITIZEN INCLUSION IN ELECTORAL REFORMS FOLLOWING CONSTITUTIONAL COURT JUDGMENT

16 June 2020

The South African Constitutional Court's recent judgment requiring Parliament to amend the Electoral Act is remarkable for two reasons. In this judgment, the Court for the first time ever placed reliance on a judgment of the African Court on Human and Peoples' Rights. This hopefully marks the beginning of a continuous dialogue between the highest South African and African Union courts. Through this judgment, the Court has set a process in motion that would see the end of the closed party-list proportional representation to the national and provincial legislatures. This is a welcome development, and provides an opportunity not only to expand citizen participation in the electoral process, but also in the drafting of the new Electoral Act.

The Constitutional Court's decision

The Constitutional Court on 11 June 2020 declared unconstitutional the requirement in the Electoral Act 73 of 1998 that adult citizens may be elected to the National Assembly and Provincial Legislatures only through their membership of political parties. Because the Court suspended the practical effect of its order for 24 months, the duty to work out the details of this amendment now falls on Parliament.

The South African electoral system at the provincial and national level is based on a closed-party proportional system, which is achieved through party lists (effectively prohibiting individual candidates from running for public offices). The Constitutional Court found that this provision is inconsistent with section 19(3)(b) of the Constitution, which stipulates: "Every adult citizen has the right to stand for public office and, if elected, to hold office."

The Constitutional Court observed that the interpretation of section 19(3)(b) of the Constitution in the context of the case impacts on the right to freedom of association, freedom of conscience and the right to dignity. The Court accepted that while the right to freedom of association can be restricted by the workings of the society in pursuit of the common interest, being coerced to join a political party is an issue that goes to one's conscience and in effect violates section 15(1) of the South African Constitution. The Constitutional Court further extended its interpretation of section 18 to include the right to dignity guaranteed under section 10 of the South African Constitution. The Court stated that "who one associates with or whether one associates at all are so close to the inner self that it is an affront to who one truly is and, indeed, an assault on one's dignity, to be told who to associate with or to associate when you do not want to." The Constitutional Court asserted that because of South Africa's political history, it is imperative to generously interpret the provisions of section 19 of the Constitution that borders on political rights.

Having found that this aspect of the Electoral Act limits the rights guaranteed by section 19(3)(b) of the Constitution, the Court then proceeded to find that the limitation imposed on the rights guaranteed in section 19 is not reasonable and justifiable under section 36(1) of the South African Constitution. The court therefore held that, "insofar as the Electoral Act makes it impossible for candidates to stand for political office without being members of political parties, it is unconstitutional."

First reliance by South African Constitutional Court on African Court judgment

This judgment is a landmark because the Constitutional Court for the first time placed reliance on a decision of the African Court on Human and Peoples' Rights. The African Court is the AU's only judicial organ. It is based in Arusha, Tanzania, and adjudicates cases of alleged human rights violations. Although South Africa has accepted the Court's jurisdiction, no case on the merits against South Africa has yet reached the Court.

In its judgment, the Constitutional Court relied on the interpretation of the African Court in the case of [*Tanganyika Law Society v United Republic of Tanzania; Mtikila v United Republic of Tanzania*](#) (No 9/2011, ACHPR 2011) to guide its reasoning in the interpretation of section 18 of the South African Constitution. The Constitutional Court quoted the African Court's statement that "freedom of association is negated if an individual is forced to associate with others" and that "freedom of association is also negated if other people are forced to join up with the individual ... freedom of association implies freedom to associate and freedom not to associate."

However, it should be noted that the Court placed significant reliance on the decisions of the European Court of Human Rights. It premised its reliance on the decisions of the European Court on

the similarities between section 18 of the South African Constitution and article 11 of the European Convention on Human Rights. Both section 18 of the South African Constitution and article 11 of the European Convention make no express provision for the negative obligation of states regarding the right to freedom of association, which prohibits states from compelling an individual to join an association. Even though the provisions of section 18 of the South African Constitution and article 11 of the European Convention on Human Rights are quite similar to article 10 of the African Charter in guaranteeing the freedom of association, article 10(2) of the African Charter expressly prohibits states from compelling a person to join an association. Despite this difference, the Constitutional Court relied on the decision of the African Court in interpreting section 18 of the South African Constitution.

This acknowledgement of the African Court's authority comes at a time when the Court's legitimacy has come under pressure, spurred by four out of ten states having reversed their initial acceptance of the Court's competence to hear cases submitted to it directly ([see previous Centre statement](#)). By placing reliance on the continental Court at this time, the South African Court has given a boost to its legitimacy and authority. It now only remains for South Africa to make the declaration under article 34(6) of the African Court's Protocol to allow individuals and NGOs direct access to the African Court.

Court's judgment enhances a higher level of participatory democracy

The Constitutional Court's decision is a welcome development that will enhance a higher level of participatory democracy. Effectively, the Court puts an end to the exclusive system of party-based proportional representation that has been the sole route to public office in South Africa. This new interpretation takes democracy out of the exclusive hands of party-planning commissions, who erode the democratic rights of the electorate by imposing a restricted number of candidates on voters. In effect, these commissions have over the years had the final say over who gets sent to the National Assembly and provincial legislatures. Voters are forced to either accept what the political parties offer them, or form a new party and vie for office through its structures.

This Constitutional Court decision obliges Parliament to transform this system and specifically to allow independent candidates to contest national and provincial elections. For the first time in South Africa's history, individual citizens can stand for public office, and if elected, secure a seat in the legislature. This could have enormous implications for the national and provincial elections set to take place in 2024.

Electoral reforms beyond normative standards

In the Centre's view, there is still a need to expand the territory of South Africa's participatory democracy further. As previously noted by the Centre, ["issues such as the democratic and inclusive](#)

culture within the political parties, and the transparency of funding to political parties, need to be more closely scrutinized and reformed.”

There is also the need for “proper civil participation in the elections, extensive voter education, civil education and the meaningful inclusion of the Constitution in the basic educational syllabus.” Undoubtedly, the law cannot be relied upon as an exclusive instrument of social reform. The focus of electoral reforms should be on the empowerment of citizens, not political parties or the government. There is a need for a bigger focus on the empowerment of people and the significance of the electoral process must be truly known by the people. There is also the need for people to understand that the electoral process is a viable tool for holding governments accountable.

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