

# **A CRITICAL ANALYSIS OF SOUTH AFRICA'S SYSTEM OF GOVERNMENT: FROM A DISJUNCTIVE SYSTEM TO A SYNERGISTIC SYSTEM OF GOVERNMENT**

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## **SUMMARY**

The right to vote in South Africa is one of the fundamental rights recognised by the Constitution. South Africa ran its sixth election on 8 May 2019. Since the birth of democracy in 1994, it has had four presidents, two of whom did not serve their full term in office. Former President Thabo Mbeki resigned after he was recalled for using the country's law enforcement system to undermine Jacob Zuma's chances of succeeding him. He resigned with nine months to go in his second term in office. Mbeki's successor, former President Jacob Zuma, also resigned from office during his second term with 14 months to go. Several stinging criticisms were levelled against him. For example, he was accused of tribalism and being a "ruralitarian" who lacked urban sophistication to understand and lead a large economy such as South Africa. He was also accused of benefiting his family through creating business opportunities for them and directing development projects to his home village. Furthermore, his government was accused of being weak on corruption, and being easily influenced by the communists.

In light of the above, the question that begs for an answer is: does the current South African system of government and electoral system provide for high-level political accountability? In answering this question, further ancillary questions are posed throughout the article. What informed the drafters of the Electoral Amendment Act 73 of 1998 to choose the current electoral system? Is it time for South Africa to review its electoral system? How can South Africa increase the level of political accountability of the President?

## **1 INTRODUCTION**

Democracy is a form of government that allows citizens to participate in the affairs of their country. South Africa attained democracy in 1994, and has since undergone many political changes. Most of these changes were ushered in by the Interim Constitution, which introduced a new system of

government and new institutions.<sup>1</sup> The overall functioning of a country's systems and institutional qualities depend on cooperation and consensus between government and citizenry.<sup>2</sup> Therefore, both government and citizenry play an important role in ensuring the smooth running of the country, and must work in harmony for the benefit of the country as a whole. The President of South Africa is the head of state and the head of the national executive.<sup>3</sup>

The electoral system of any country determines how leaders are brought into power, and the choice of the preferred legal system should be based on what the nation at large wants to achieve.<sup>4</sup> The election of a president is one of the most important procedures of a democratic state since the president is required to display the highest degree of integrity when performing his or her duties.<sup>5</sup> With democracy for South Africa came, *inter alia*, a new electoral system managed by the Independent Electoral Commission (IEC).<sup>6</sup>

In light of the above, the question is: does the current process for electing the president in South Africa safeguard political accountability? This article interrogates the shortcomings of the current system of government and the electoral system. First, it contextualises the right to vote as well as its scope and application. This is done by giving the historical background to this right, which in turn shows that the right to vote has undergone much change and development in general. The article then gives an overview of the South African 7 of government, before providing a comparative overview of the presidential system in Botswana.<sup>7</sup> The article moves on to deal with the South African electoral system and the parliamentary system of government along with the current procedure for electing the president. Finally, the article proposes a new process for electing the president.

## 2 THE RIGHT TO VOTE UNDER THE FINAL CONSTITUTION

During the pre-1994 era, the majority of South Africans were prohibited from voting in general elections based on their race.<sup>8</sup> The oppressive and undemocratic apartheid regime curtailed much extra-parliamentary political activity and, as such, the majority of South Africans were excluded from

<sup>1</sup> SAHO "South Africa: First 20 Years of Democracy 1994–2014" (14 January 2014) <https://www.sahistory.org.za/article/south-africa-first-20-years-democracy-1994-2014> (accessed 2018-06-14).

<sup>2</sup> United Nations Development Programme "Governance Principles, Institutional Capacity and Quality" in *Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty* (2015) [http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/Towards%20Human%20Resilience/Towards\\_SustainingMDGProgress\\_Ch8.pdf](http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/Towards%20Human%20Resilience/Towards_SustainingMDGProgress_Ch8.pdf) (accessed 2018-04-19).

<sup>3</sup> S 83 of the Constitution of South Africa, 1996 (the Constitution).

<sup>4</sup> Phirinyane *Election and the Management of Diversity in Botswana* (2013) 49.

<sup>5</sup> *United Democratic Movement v Speaker of the National Assembly* 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) par 9. If the president is found to be guilty of gross misconduct or to have violated the Constitution, such president may be removed from office in terms of s 89 of the Constitution. See also s 1(d) and 57 of the Constitution.

<sup>6</sup> The IEC was established in 1996 by the Electoral Commission Amendment Act 14 of 2004.

<sup>7</sup> The reasons for choosing Botswana for the study are dealt with in detail in heading 7 below.

<sup>8</sup> Currie and De Waal *The Bill of Rights Handbook* 6ed (2013) 421.

voting. The apartheid government had laws that applied to white people and laws that applied to black people. One change that came with the advent of democracy was the adoption of a new electoral system, one of the fundamental components of the process of democratic consolidation. Justice Langa in a lecture delivered at Stellenbosch University opined that the Constitution is a transformative document, one that seeks to move the country from a discriminatory past to a future based on the triplet of human dignity, equality and freedom.<sup>9</sup>

The Constitution came with an array of human rights. Section 19(1)(b) of the Constitution states that every citizen is free to make political choices, which includes, *inter alia*, a right to participate in the activities of a political party. In terms of this provision, every citizen has a right to participate in the activities of political parties, and one of those activities is appointing the leader of such political party. Section 19(3)(a) of the Constitution grants every citizen a right to vote. In terms of section 6 of the Electoral Act,<sup>10</sup> any South African citizen who is at least 18 years of age may vote. The Constitution does not expressly require membership of a political party to participate in the election of leaders of political parties.

The right to vote is directly linked to the right to freedom of expression that is afforded to everyone in terms of section 16 of the Constitution. When citizens vote, they directly present their personal views and/or expression with regard to whom they want as a leader of the country. Section 19, therefore, indirectly guarantees every citizen the freedom to express their political aspirations.

In *Ramakatsa v Magashule*,<sup>11</sup> the court affirmed that political rights are important because they aim to give effect to a system of representative democracy.<sup>12</sup> Furthermore, the court in *August v Electoral Commission*<sup>13</sup> addressed political rights of prisoners. In this regard, the court highlighted the right to vote and its nexus with the value of human dignity.<sup>14</sup> It held:

“[T]he right to vote of each and every citizen is a badge of dignity and of personhood”.<sup>15</sup>

In *Richer v Minister of Home Affairs*,<sup>16</sup> the court recognised the importance of citizens exercising the right to vote as an essential working component of

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<sup>9</sup> Langa “Transformative Constitutionalism” 2006 3 *Stellenbosch Law Review* 352.

<sup>10</sup> 73 of 1998.

<sup>11</sup> [2012] ZACC 31.

<sup>12</sup> In this case, the court held that “in the apartheid era the majority of the people in the country were denied political rights that were enjoyed by the minority. The majority of black people could not form or join political parties of their choices. Nor could they vote for those who were eligible to be members of parliament. They were not only disenfranchised but were also excluded from all decision-making processes undertaken by the government, including those affecting them”.

<sup>13</sup> [1999] ZACC 3.

<sup>14</sup> *August v Minister of Home Affairs* [2018] ZAECMHC 12. See also *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* [2004] ZACC 10.

<sup>15</sup> *Ibid.*

<sup>16</sup> 2009 (3) SA 615 (CC).

democracy.<sup>17</sup> The court further held that, when a citizen marks their ballot [paper], they remind those who are or will be elected that their position is based on the will of the people and will remain subject to that will. In *New National Party of South Africa v Government of South Africa*,<sup>18</sup> the court held that the right to vote is fundamental to a democracy and there can never be democracy without the right to vote.<sup>19</sup> Furthermore, the court held that a citizen's right to vote clearly places a duty on the legislature and the executive to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised.<sup>20</sup>

### 3 SOUTH AFRICA'S INTERNATIONAL OBLIGATIONS IN RELATION TO POLITICAL RIGHTS

The obligation of states to provide citizens with the right to vote is also contained in international agreements and declarations adopted by international organisations such as the United Nations and the African Union and Southern African Development Community (SADC). For example, Article 21 of the Universal Declaration of Human Rights<sup>21</sup> recognises the right of citizens to participate in the activities of government.<sup>22</sup> Article 25 of the International Covenant on Civil and Political Rights (ICCPR)<sup>23</sup> provides for a right to participate in the public affairs of states, which also includes a right to vote.<sup>24</sup> Article 2.1 of the SADC Principles of Guidelines Governing Democratic Elections<sup>25</sup> requires member states to hold regular free and fair, transparent, credible and peaceful democratic elections to institutionalise legitimate authority of representative government. Article 2 of the African Charter on Democracy, Elections and Governance<sup>26</sup> provides that all member states must "[p]romote the holding of regular free and fair elections to institutionalise legitimate authority of representative government as well as democratic change of governments".

<sup>17</sup> *Richer v Minister of Home Affairs supra* 36.

<sup>18</sup> 1999 (3) SA 191 (CC).

<sup>19</sup> *New National Party of South Africa v Government of South Africa supra* 11.

<sup>20</sup> *Ibid.*

<sup>21</sup> Universal Declaration of Human Rights, 1948.

<sup>22</sup> This provision states: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

<sup>23</sup> International Covenant on Civil and Political Rights, 1966.

<sup>24</sup> This provision states: "Every citizen shall have a right and opportunity to ... (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".

<sup>25</sup> SADC Principles of Guidelines Governing Democratic Elections, 2015.

<sup>26</sup> African Charter on Democracy, Elections and Governance, 2007.

#### 4 AN OVERVIEW OF SOUTH AFRICA'S ELECTORAL SYSTEM

Constitutions are skeletal in nature. Quite often further legislation is required to bring constitutional provisions into practice. South Africa similarly needed to introduce an electoral system through the enactment of legislation.<sup>27</sup> To achieve this, the government assigned the Electoral Task Team (ETT) with the task of drafting an Electoral System Act that would regulate elections in South Africa in terms of the Constitution. The ETT was, therefore, guided by the Constitution in drafting the proposed electoral system. The ETT was chaired by Dr F Van Zyl Slabbert and comprised 13 members.<sup>28</sup>

The ETT was required to draft fair, inclusive, and simple legislation, which would also ensure greater accountability in South African politics.<sup>29</sup> When the ETT commenced its investigation, South Africa had already had two democratic elections in 1994 and 1999.<sup>30</sup> Therefore, the main aim of the ETT was to investigate whether the 1994 electoral system (used in the 1994 and 1999 elections) was suitable for the envisaged democratic South Africa. The ETT used the 1994 electoral system as the basis on which to establish the extent to which the electorate identified and understood the 1994 electoral system.

The question for the ETT was how it could determine the “appropriate” electoral system for South Africa? The ETT had to answer the following two questions: first, would the advantages of adjusting the 1994 electoral system outweigh the concomitant disadvantages?<sup>31</sup> Secondly, would the advantages of preserving the 1994 electoral system outweigh the concomitant disadvantages?<sup>32</sup> However, the ETT members agreed that its purpose was not to amend the Constitution, but to enact a piece of legislation that would be in line with the Constitution.<sup>33</sup> When drafting amendments to the electoral system, the ETT considered *inter alia* sections 1(d), 19, 46(1), 60, 61, 62 and 105 of the Constitution. Furthermore, the ETT agreed that the advantages and disadvantages of the electoral system applicable in the 1994 and 1999 elections had to be thoroughly investigated before it could decide to change or do away with it.<sup>34</sup> The challenge was to

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<sup>27</sup> The 1994 electoral system was designed to apply only to the 1994 and 1999 elections. Therefore, the Electoral Task Team (ETT) had to draft legislation that would regulate elections in South Africa moving forward. For the sake of clarity, the Electoral Act that applied during the 1994 and 1999 elections is referred to as the proposed Electoral Act and the electoral system that applied in 1994 and 1999 election is referred to as the proposed electoral system.

<sup>28</sup> The Electoral Task Team Report, 2003 (ETTR).

<sup>29</sup> ETTR 16–19. The ETT regarded these as the “[c]ore values/principles for judging an electoral system”.

<sup>30</sup> The 1994 electoral system was carried over to the 1999 national and provincial elections by means of items 6(3)(a) and 11(1)(a) of Schedule 6 of the Constitution.

<sup>31</sup> ETTR 12.

<sup>32</sup> *Ibid.*

<sup>33</sup> ETTR 13.

<sup>34</sup> ETTR 1.

draft a suitable electoral system for a highly divided and unequal society in the process of delicate transition.<sup>35</sup>

This was a difficult task indeed for the ETT members. The ETT had to consider the “most appropriate” electoral system against a background of “the salient and relevant aspects of the South African context”.<sup>36</sup> After vigorous debate, the ETT agreed that the electoral system should be judged on the basis of fairness, inclusiveness, simplicity and accountability, being the core values and principles of a democratic electoral system.<sup>37</sup> The ETT agreed on a number of aspects with regard to these principles.

Firstly, fairness means that every eligible member of the electorate should be afforded an opportunity to vote, and all votes should carry equal weight.<sup>38</sup> This is in line with the proportionality principle as required by the Constitution. In terms of this principle, political parties gain seats in Parliament in proportion to the number of votes they received.

Secondly, inclusiveness entails taking into account the given demographic, ethnic, racial and religious diversity of the South African voting population, and making an effort to allow the widest possible degree of participation.<sup>39</sup>

Thirdly, simplicity means that the electoral system should be practically accessible and easily understandable.<sup>40</sup>

Lastly, the ETT identified a lack of political accountability in the 1994 electoral system. Collective accountability was insufficient and the proposed electoral system should have some form of individual accountability.<sup>41</sup>

The ETT had to reconcile two schools of thought that emerged out of its deliberations: one school thought that the current system should remain unchanged; and the other, that a larger constituency representation should be built into the system.<sup>42</sup> The ETT failed to reach a consensus on these two points of view. As a result, the two contrasting groups each drafted and signed their own set of recommendations, with the current system winning the majority vote.<sup>43</sup>

The results of the research were as follows: 74 per cent of respondents were satisfied with the 1994 electoral system;<sup>44</sup> 72 per cent felt that the 1994 electoral system was fair to all parties; 81 per cent felt that it allowed for different voices in Parliament;<sup>45</sup> 78 per cent felt that it allowed them to

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<sup>35</sup> Low “The South African Electoral System” (20 March 2014) <https://hsf.org.za/publications/hsf-briefs/the-south-african-electoral-system> (accessed 2018-11-11).

<sup>36</sup> ETTR 19.

<sup>37</sup> ETTR 16–20.

<sup>38</sup> ETTR 16.

<sup>39</sup> *Ibid.*

<sup>40</sup> ETTR 17.

<sup>41</sup> ETTR 18–19.

<sup>42</sup> ETTR 12.

<sup>43</sup> The ETTR contains both majority recommendations (in chapter four) and minority recommendations in chapter five.

<sup>44</sup> ETTR 8.

<sup>45</sup> *Ibid.*

change the political party in power;<sup>46</sup> and 68 per cent felt that it ensured political parties could be held accountable for their actions.<sup>47</sup>

The ETT should be commended for attempting to create an electoral system that would be fair, inclusive and simple. The current electoral system can be easily understood by both literate and illiterate people in South Africa. Although not a principle that formed the basis of the ETT investigation, the current system also makes provisions for openness, in that the results are broadcasted live as and when they become available.

The 1994 electoral system had an advantage, however, in that it was the first electoral system to be used post-apartheid. South Africans had nothing with which to compare the 1994 electoral system, since the apartheid electoral system was discriminatory in nature. It is submitted that South Africans were looking for the bare minimum from the 1994 and 1999 elections; for a nation that had been oppressed for so long, a bare minimum offered by democracy was better than what the apartheid regime had offered.

The current electoral system has been tried and tested in the last six democratic elections since 1994.<sup>48</sup> The question is whether it is time to increase the level of accountability of South Africa's president, given the experience of fraud and maladministration in the past 25 years? The current system has not been without flaws and is capable of improvement.

First, the political accountability<sup>49</sup> of the President is unclear under the prevailing regime. The leader of a political party is individually accountable to his or her political party but this does not amount to public accountability. With regard to collective accountability, a political party as an organisation is accountable to the public and to Parliament. Chapter 4, part 6 of the Electoral Act 73 of 1998 was amended in 2003 to include the current electoral system.

Secondly, once a person ascends to the office of president, it is difficult to remove such person from office. This was evident from the *Economic Freedom Fighters v Speaker of the National Assembly*<sup>50</sup> case. Although the court found that former President Zuma had failed as the President of South Africa to "uphold, defend and respect the Constitution as the supreme law of the land", it also did not order the removal of Zuma from office.<sup>51</sup> This is because the powers to remove a president vest in the National Assembly (NA) in terms of section 89(1) of the Constitution, and such an order would thus have been *ultra vires*. If the President is among the majority of members of the NA, who are also from one party, those members are likely to vote against the removal of such president.

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<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> The ETT did not introduce a new electoral system; it only worked on improving the system that was used in 1994.

<sup>49</sup> Hoque and Pearson *Accountability Reform, Parliamentary Oversight and the Role of Performance Audit in Australia* (2018) 176.

<sup>50</sup> (CCT76/17) [2017] ZACC 42.

<sup>51</sup> *Economic Freedom Fighters v Speaker of the National Assembly supra* 5.

Lastly, certain political rights are afforded only to members of political parties<sup>52</sup> even though section 19 of the Constitution includes “every citizen”.<sup>53</sup> Therefore, even though the right to vote is enshrined by the Constitution, and is afforded to every citizen, in practical terms, only members of a political party can actively and directly take part in electing the President. All other voters have an indirect say in the election of the President through their support of the party of their choice in national elections.

## 5 THE PROCESS FOR ELECTING THE PRESIDENT OF SOUTH AFRICA

South Africa has a bicameral parliament and, as such, comprises two houses of parliament – namely, the NA and the National Council of Provinces (NCoP).<sup>54</sup> These two houses represent the public at the national and provincial level. South Africa follows the proportional representation system of government<sup>55</sup> in terms of which every vote counts; and the total number of votes for a party determines the number of seats it gets in Parliament.<sup>56</sup> This is called party-list proportional representation because parties are represented in proportion to their electoral support. The NA operates at the national level and has 400 seats comprising members of political parties; one of its functions is to elect the President.<sup>57</sup> The NA is required to elect the President at its first sitting after national elections or whenever necessary.<sup>58</sup>

Before a candidate can be president in South Africa, the various political parties must contest a national general election. The Electoral Act details the process for such contestation. Section 26 of the Electoral Act provides that a political party may contest an election if such party is registered and has submitted a list of candidates. Section 27 of the Electoral Act provides that a registered political party that intends to contest an election must nominate candidates and submit a list of those candidates for election to the chief electoral officer. Regulation 2(a) of the same Act requires the lists of nominated candidates to be signed by the authorised representative of the political party.<sup>59</sup> This emphasises the rule that only members of the political party can be nominated and consequently elected as president of the country. Practically speaking, when a person is still running or campaigning

<sup>52</sup> Achury and Scarrow “The Consequences of Membership Incentives: Do Greater Political Benefits Attract Different Kinds of Members?” 2020 26 *Party Politics* 58.

<sup>53</sup> S 19 of the Constitution.

<sup>54</sup> De Vos *South African Constitutional Law in Context* 2ed (2015) 108.

<sup>55</sup> Parliament of the Republic of South Africa “How Parliament Is Structured” <https://www.parliament.gov.za/how-parliament-is-structured> (accessed 2018-06-18).

<sup>56</sup> IEC “Electoral Commission South Africa 2016” in *Municipal Elections Handbook* (2016) 13.

<sup>57</sup> Parliament of the Republic of South Africa <https://www.parliament.gov.za/how-parliament-is-structured>.

<sup>58</sup> Once elected, the President becomes Head of State and head of the national executive.

<sup>59</sup> *Electoral Commission v Inkatha Freedom Party* [2011] ZACC 7; see generally Dube and Machaya “The Application of the Doctrine of *Res Judicata* in Political Rights Cases: *National Freedom Party v Electoral Commission and Others*” 2016 20 *Law Democracy and Development* 192–199.



to be leader of a political party, such person represents a political party, but once elected as a leader of a political party, he or she represents the public.

Section 38 of the Electoral Act contains the procedure for voting during elections. The procedure to vote is as follows: the voter is handed a ballot paper; enters the voting compartment; chooses a political party or candidate by marking the ballot paper accordingly and places the ballot paper in the ballot box.

The process of electing a president in South Africa is contained in section 86 and Part A of Schedule 3 of the Constitution. The Chief Justice or a designated judge calls for the nominations, makes rules for the proceedings, and presides over such proceedings.<sup>60</sup> There are a number of steps in the procedure for electing a president in terms of Schedule 3.

Firstly, the Chief Justice makes a call for the nomination through a nomination form. The nomination form must be signed by two members of the NA.<sup>61</sup> A candidate has to be nominated by a province to make it onto the ballot, but may also be nominated from the floor by 25 per cent of voting delegates at the national conference.<sup>62</sup>

Secondly, a person who is nominated must accept the nomination by signing either the nomination form or any other form of written confirmation.<sup>63</sup>

Thirdly, the Chief Justice or his/her delegate presiding over the meeting must announce the names of the persons who have been nominated as candidates. Debates are not permitted at this stage.<sup>64</sup> If only one candidate is nominated, the person presiding over the proceedings must declare that candidate elected as the President.<sup>65</sup>

Fourthly, if more than one candidate is nominated, a vote must be taken at the meeting by secret ballot, and each member is entitled to one vote.<sup>66</sup> Lastly, the Chief Justice or his/her delegate presiding over the proceedings must declare the candidate who receives the majority votes as the President.<sup>67</sup>

## 6 CRITICAL ANALYSIS OF SOUTH AFRICA'S SYSTEM OF GOVERNMENT

South Africa has a hybrid system of government with two formal legal systems.<sup>68</sup> In other words, South Africa follows both a presidential and a parliamentary system of government. Under this hybrid system, political

<sup>60</sup> Schedule 3, Part A, s 2 of the Constitution.

<sup>61</sup> Schedule 3, Part A, s 3(2)(a) of the Constitution.

<sup>62</sup> *Ibid.*

<sup>63</sup> Schedule 3, Part A, s 3(3) of the Constitution.

<sup>64</sup> Schedule 3, Part A, s 4 of the Constitution.

<sup>65</sup> Schedule 3, Part A, s 5 of the Constitution.

<sup>66</sup> Schedule 3, Part A, s 6 of the Constitution.

<sup>67</sup> Schedule 3, Part A, s 7 of the Constitution.

<sup>68</sup> Schwella "Federalism in South Africa: A Complex Context and Continued Challenges" 2016 *Aufsatz/Enthaltenes Werk* 85–86.

parties have a decisive influence on the way in which government is composed and the executive power rests in the President and the Cabinet.<sup>69</sup> A number of characteristics are typical of a parliamentary system of government.

First, there is a strict demarcation between the powers of the executive and those of the legislature known as separation of powers. In this system, the Speaker of Parliament plays a vital role.<sup>70</sup> This provides checks and balances between all spheres of government. This way they can raise their voice against any kind of partiality and the misuse of powers by the governing body.

Secondly, Parliament must approve executive decisions before they are taken. This allows for members of parliament to challenge the rules and decisions tabled in Parliament by the government.

Thirdly, Parliament is elected for a certain period of time.<sup>71</sup> Since the parliamentary system is democratic in nature, elections can be called and held at any time, if the need arises.<sup>72</sup>

Lastly, the President may be removed via the approval of a vote of no confidence.<sup>73</sup> When such votes are passed, either a new government is formed or, in case this is not possible, new elections are held.<sup>74</sup>

In South Africa, legislative powers rest in both houses of parliament. The NA is generally a constitutionally and politically dominant house.<sup>75</sup> In the NA, political parties are the democratic link between the electorate and the legislature. Generally, a person cannot become a member of parliament unless also a member of a political party.<sup>76</sup> Therefore, the Constitution established is not only a parliamentary system of government in which the majority party in the NA forms a government, but also a system of party government.<sup>77</sup>

However, the parliamentary system is not without its disadvantages. First, the majority party in the NA has decisive power on matters tabled before Parliament.<sup>78</sup> More power may be distributed and/or misused. As a result, corruption can easily spread throughout all spheres of government. The problem that this presents is that if one party is in the majority, it can implement and approve bills and decisions, and the views and opinions of the opposition will not have an effect.<sup>79</sup> This represents a challenge since the

<sup>69</sup> S 83 of the Constitution.

<sup>70</sup> Parliament of the Republic of South Africa "The Speaker" <https://www.parliament.gov.za/na-presiding-officers> (accessed 2018-06-18).

<sup>71</sup> S 49(1) of the Constitution.

<sup>72</sup> S 50(1) of the Constitution.

<sup>73</sup> S 89 of the Constitution.

<sup>74</sup> S 50(2) of the Constitution.

<sup>75</sup> Parliament of the Republic of South Africa <https://www.parliament.gov.za/how-parliament-is-structured>.

<sup>76</sup> De Vos *South Africa Constitutional Law* 109.

<sup>77</sup> *Ibid.*

<sup>78</sup> Constitutionally Speaking "How Can We Solve the Problem With Our Electoral System" (12 March 2012) <https://constitutionallyspeaking.co.za/how-can-we-solve-problems-with-our-electoral-system/> (accessed 2018-06-18).

<sup>79</sup> *Ibid.*

decision of a party with most votes may not necessarily reflect the views of the public. This was evident when the former President Jacob Zuma's competence to lead the country was challenged throughout his term in office. Molomo argues that since the President enjoys extensive executive powers, the votes must come directly from the people.<sup>80</sup>

Secondly, the parliamentary system is ineffective when it comes to ensuring individual political accountability that is directly linked to the populace.<sup>81</sup> This is because, in the parliamentary system of government, the President is only indirectly accountable to the voters.<sup>82</sup> For example, the parliamentary system of government in South Africa came under attack when two African National Congress (ANC) members of parliament, Ben Turok and Gloria Borman, abstained from voting for the Protection of State Information Bill in 2012.<sup>83</sup> Turok and Borman were summoned to appear before the ANC's national disciplinary committee, but the proceedings were postponed indefinitely.<sup>84</sup> The problem here is that members of parliament are answerable not to the populace, but to the leader of their political parties. After all, a member of parliament is not removed from his or her seat by the electorate, but by the political parties.

The importance of political accountability has been highlighted in *McBride v Minister of Police*, where the court held that accountability is one of the important values enshrined in the Constitution and it is a basic tenet for good governance.<sup>85</sup>

Thirdly, South Africa uses a closed-list proportional representation system.<sup>86</sup> In this system, political parties submit a list of individuals to be elected as members of national and provincial legislatures.<sup>87</sup> The electorate does not have the power or right to determine party lists, but instead votes for political parties, regardless of any disinclination towards certain individuals on the party lists.<sup>88</sup>

Lastly, even though political parties lie at the heart of South Africa's constitutional democracy, the Constitution does not regulate the internal affairs of political parties, nor does it contain extensive provisions on the appropriate constitutional relationship between political parties and the constitutional structures such as the legislature and the executive.<sup>89</sup> For example, the Constitution does not regulate how the leaders of political parties should be elected or the manner in which their members should be

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<sup>80</sup> Molomo "Democracy Under Siege: The Presidency and Executive Power in Botswana" 2000 14 *Botswana Journal of African Studies* 106.

<sup>81</sup> Strom "Delegation and Accountability in Parliamentary Democracies" 2000 *European Journal of Political Research* 1. See also Persson, Roland and Tabellini "Separation of Powers and Political Accountability" 1997 122 *The Quarterly Journal of Economics* 1197.

<sup>82</sup> *Ibid.*

<sup>83</sup> Sibalukhulu "SA's Electoral System Fails the People" (20 April 2012) <https://mg.co.za/article/2012-04-20-sas-electoral-system-fails-the-people> (accessed 2018-07-23).

<sup>84</sup> *Ibid.*

<sup>85</sup> *McBride v Minister of Police* (CCT255/15) [2016] ZACC 30.

<sup>86</sup> S 27 of the Electoral Act.

<sup>87</sup> S 86 of the Constitution.

<sup>88</sup> Sibalukhulu <https://mg.co.za/article/2012-04-20-sas-electoral-system-fails-the-people>.

<sup>89</sup> De Vos *South African Constitutional Law* 562.

disciplined for misconduct. The required standard of conduct of members of political parties is based on agreement among themselves. The Constitution thus does not spell out how members of political parties should exercise their right to participate in the activities of such political parties. However, the Constitution does require political parties to act in accordance with its prescripts. So far, the only political party that has been forthcoming about the procedure for the election of a leader within its ranks is the ANC.<sup>90</sup> It is currently not clear how the other political parties elect or appoint their leaders.

## 7 THE PARLIAMENTARY SYSTEM OF GOVERNMENT AND THE RIGHT TO VOTE IN BOTSWANA – A COMPARATIVE OVERVIEW

Botswana is a front-runner in politics in the African region.<sup>91</sup> It gained independence from Great Britain in 1966.<sup>92</sup> The reason Botswana was chosen for comparison in this article is that first, like South Africa, Botswana has a diverse social composition<sup>93</sup> and has more than 15 different ethnic groups.<sup>94</sup> Secondly, Botswana is a modern constitutional democracy, with the Constitution having been mandated by Great Britain when it gained its independence in 1966.<sup>95</sup> Thirdly, although the Constitution of Botswana does not assert its own supremacy, it is regarded by all citizens as the supreme law of the land. Fourthly, it provides for a separation of powers between the legislature, judiciary and executive.<sup>96</sup> However, because the ruling party dominates both the executive and the legislature, the separation of powers only exists in theory. Botswana follows the Westminster parliamentary system where 40 members are elected, and become representatives of the government.<sup>97</sup> Lastly, Botswana is a multi-party democracy and the President is the head of state<sup>98</sup> and head of the executive.<sup>99</sup>

With its independence, Botswana adopted the direct electoral system also known as the first-past-the-post (FPTP) system or the winner-takes-all.<sup>100</sup> The system contains a single party cabinet, which runs the government. Under this system of government, the presidential candidate who wins the

<sup>90</sup> ANC ANC 54<sup>th</sup> National Conference Nomination Process (2017) 1.

<sup>91</sup> Molomo 2000 *Botswana Journal of African Studies* 95.

<sup>92</sup> Phirinyane *Election and the Management of Diversity in Botswana* 2.

<sup>93</sup> Botswana divides tribes and language grouping into majority (being the eight Setswana speaking tribes) and the minority (being the seven Setswana-non speaking tribes). Some of the ethnic groups in Botswana are Tswana, Koena, Balete, Kalanga, Mangwato, Yeyi, Lozi and Herero. Consequently, the linguistic and political marginalisation of minority groups may affect their legal standing.

<sup>94</sup> Taylor and Good "Botswana: A Minimalist Democracy" 2008 15 *Taylor and Francis Online* 1.

<sup>95</sup> Phirinyane *Election and the Management of Diversity in Botswana* 2.

<sup>96</sup> *Ibid.*

<sup>97</sup> Bothale and Lotshwao "The Uneasy Relationship Between Parliament and the Executive in Botswana" 2013 45 *The Botswana Society* 46.

<sup>98</sup> S 30 of the Constitution of Botswana.

<sup>99</sup> S 47(1) of the Constitution of Botswana.

<sup>100</sup> Somolekae *Political Parties in Botswana* 2ed (2006) 24.

majority of votes in the NA automatically becomes president.<sup>101</sup> The procedure for electing a president is contained in section 32 of the Constitution of Botswana.

The right to vote for members of parliament in Botswana is afforded to all citizens who are above the age of 18. However, citizens do not have a right to vote for the President since presidential elections are conducted by Parliament.<sup>102</sup> Part VI of the Electoral Act<sup>103</sup> (Electoral Act of Botswana) deals with the election. Section 31 of this Act affords citizens who are registered as voters a right to vote. Section 35 of the same Act gives guidance on nominations for parliamentary and local government candidates and makes provision for individuals to stand for election as independent candidates. Before national general elections, the President must sign a writ of election.<sup>104</sup>

First, the presidential nominations must be delivered to the returning officer,<sup>105</sup> and an aspiring presidential candidate must be supported by 1 000 votes.

Secondly, a person nominated as a parliamentary candidate must declare which of the presidential candidates he or she supports.<sup>106</sup> Where the parliamentary election is contested in any constituency, a poll is taken at which the votes are governed by ballot.<sup>107</sup> The Constitution requires that any parliamentary candidate who declared support for a particular presidential candidate is required to use the same voting colour and symbol, if any, allocated to that presidential candidate for the purposes of the presidential election.<sup>108</sup>

Lastly, the winning presidential candidate is declared by the returning officer if supported by more than half of the total seats in the NA.

This election process has characteristics of both direct and indirect election of a president – direct, in that the initial nominations must be supported by at least 1 000 votes from the public, and thereafter, indirect, in the process where the parliamentary nominees in the NA accept the nominations, and at the same time nominate a presidential candidate they wish to support. The parliamentary and presidential elections are done simultaneously, where a nominated parliamentary candidate in his or her nomination is also required to nominate the presidential candidate he or she supports. In Botswana, as in South Africa, there is no vote of investiture and

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<sup>101</sup> *Ibid.*

<sup>102</sup> Polity “The Right to Vote: Where Do Citizens in the Diaspora Stand? Part 2” (8 April 2013) <http://www.polity.org.za/article/the-right-to-vote-where-do-citizens-in-the-diaspora-stand---part-2-2013-04-08> (accessed 2018-08-20).

<sup>103</sup> 38 of 1968 of Botswana.

<sup>104</sup> S 34 of the Electoral Act of Botswana.

<sup>105</sup> S 32(2) of the Constitution of Botswana.

<sup>106</sup> S 32(3)(a) of the Constitution of Botswana.

<sup>107</sup> S 32(3)(c) of the Constitution of Botswana.

<sup>108</sup> *Ibid.*

the designation of a president is based on the partisan distribution of elected seats rather than an actual vote of the elected MPs.<sup>109</sup>

However, it is not clear whether the electorate in Botswana votes for individuals or for political parties. Somolekae argues that Botswana has a free mandate system, which means that the electorate votes for individuals and not political parties.<sup>110</sup> As such, elected candidates can defect to other parties and still retain their seats.<sup>111</sup> Contrary to this view, Molomo opines that the electorate in Botswana votes for the party and not an individual.<sup>112</sup>

The FPTP electoral system in Botswana has been criticised for its tendency to distort a party's popular support in relation to seats won, and thus promotes a dominant party system. Furthermore, this electoral system is also criticised for being incapable of presenting a true reflection of the interest of the electorate and for being unable to provide for minority groups in the NA.<sup>113</sup> It is also criticised for being unresponsive to changes in public opinion and being open to manipulation of electoral boundaries.<sup>114</sup>

## 8 A PROPOSED SYNERGISTIC SYSTEM OF GOVERNMENT

The structure of an electoral system is central to the nature of a country's politics. It secures a link between the preferences of citizens, the preferences of elected officials and the government's policy direction.<sup>115</sup> Presidential elections form an important part of the liberal democratic framework.<sup>116</sup> There is no "perfect" system of government and thus both the parliamentary and presidential systems of government are flawed, as seen in South Africa and Botswana. The method of electing a president is directly linked to how a government responds and accounts to the people that it represents. The current electoral system in South Africa is set up in such a way that citizens are forced to vote for a political party, and indirectly vote for a candidate who has already been chosen to be the leader of a political party without citizens' participation. This tampers with the principle of good governance as required by the Constitution, which mandates that citizens should have a voice at the national level.

A key question is whether South Africa should do away with the parliamentary system and adopt a presidential system in which the President is directly elected by the public? Although this option appears attractive at first glance, it is not clear that such a change would necessarily have a positive effect in a country like South Africa. Some critics of the parliamentary system argue that we should do away with the closed-list proportional representation system in favour of a FPTP system in which we

<sup>109</sup> Poteete "Electoral Competition, Factionalism, and Persistent Party Dominance in Botswana" 2012 1 *Cambridge Journal* 81.

<sup>110</sup> Somolekae *Political Parties in Botswana* 6.

<sup>111</sup> *Ibid.*

<sup>112</sup> Molomo 2000 *Botswana Journal of African Studies* 106.

<sup>113</sup> *Ibid.*

<sup>114</sup> Phirinyane *Election and the Management of Diversity in Botswana* 44.

<sup>115</sup> Louw <https://hsf.org.za/publications/hsf-briefs/the-south-african-electoral-system>.

<sup>116</sup> Molomo 2000 *Botswana Journal of African Studies* 95.

elect the representative who obtains the most votes in each constituency.<sup>117</sup> They further argue that the direct election of a president provides the highest degree of accountability.<sup>118</sup> If members of parliament were to be elected directly by the electorate in constituencies, those members would be far more responsive to the needs of the electorate in the constituencies, and would be far more willing to ensure that the hopes and dreams of their constituents find expression in our legislature.<sup>119</sup>

In both presidential and parliamentary systems of government, the public may vote for a particular political party based on the popularity of that political party rather than the individual leader. As such, voters who vote for the ANC may vote for the ANC regardless of the face on the ballot paper. For example, in Botswana, the political behaviour of people in the Central District is influenced by the fact that one of the founding members, Seretse Khama, comes from there.<sup>120</sup> Therefore, whether the President is elected by Parliament or directly by the electorate, there is no guarantee that the electorate will change its electoral behaviour based on how much voters like or respect the person who is the face of a political party. Other factors that may influence the political behaviour of people are religious, ethnic and linguistic identity. Voters may be inclined to support a political leader who is from the same religious, ethnic and linguistic group as them.<sup>121</sup>

De Vos argues that, on paper, the NA is more powerful than the President because the NA has the power not only to elect the President, but also to remove him or her from office. However, in practice, the President has more power until he or she loses the support of the majority party in the NA.<sup>122</sup>

The system of government should, mainly, provide for the highest degree of both individual and collective political accountability because this has the potential to curb corruption within government.<sup>123</sup> Free and fair elections tend to advance competition among political leaders, which in turn provides for a “built-in” form of accountability. As such, it may limit party domination over a long period.<sup>124</sup> Although the Constitution promotes a high level of accountability, one cannot ignore the fact that a culture of unaccountability prevails in the South African government. Section 1(d) of the Constitution recognises South Africa as a democratic state that embraces “universal adult suffrage, a national common voters roll, regular elections and a multi-

<sup>117</sup> Constitutionally Speaking <https://constitutionallyspeaking.co.za/how-can-we-solve-problems-with-our-electoral-system/>.

<sup>118</sup> *Ibid.*

<sup>119</sup> Constitutionally Speaking “Is It Time to Elect South Africa’s President Directly?” (17 January 2017) <https://constitutionallyspeaking.co.za/is-it-time-to-elect-south-africas-president-directly/> (accessed 2018-07-20).

<sup>120</sup> Phirinyane *Election and the Management of Diversity in Botswana* 8.

<sup>121</sup> Phirinyane *Election and the Management of Diversity in Botswana* 8. See also Beyers “Religion as Political Instrument: The Case of Japan and South Africa” 2015 28 *Journal of the Study of Religion* 154–155. For example, the values of the ANC when it was first founded were based on Christian and religious principles. The ANC anthem, *Nkosi Sikelel’ iAfrica*, was originally intended as a hymn written by a lay preacher, Enoch Sontonga.

<sup>122</sup> De Vos *South Africa Constitutional Law* 174.

<sup>123</sup> Chun and Luna-Reyes “Social Media in Government - Selections from the 12th Annual International Conference on Digital Government Research” 2012 29 *Government Information Quarterly* 337.

<sup>124</sup> *Ibid.*

party system of democratic government, to ensure accountability, responsiveness and openness".<sup>125</sup> The ultimate form of political accountability is at the ballot box.<sup>126</sup>

South Africa needs a system of government that will ensure that the President is not only directly accountable to Parliament, but also to the public. Therefore, the President needs to be horizontally and vertically accountable to both citizens and Parliament. Vertical accountability provides a nexus between government and citizens through elections. When citizens vote, they demonstrate their political will and choices, which in turn holds the government indirectly accountable. Horizontal accountability ensures that the President is accountable to Parliament. As a result, it ensures that there is a close connection between voters and their representatives based on geographical accountability.<sup>127</sup>

Moving forward, it may be best for South Africa to consider both a direct and indirect election of president by the public. To achieve this, the author proposes a "synergistic system of government" encompassing three steps for presidential election.

Step 1 would be the nomination stage and would entail participation by the electorate in the nomination of presidential candidates. The procedure for nominations would be similar to the procedure for voting at elections and should be as follows: the voter is handed a nomination form; enters the nomination compartment; chooses a presidential candidate by writing the nominee's name on the nomination form and places it in the nomination box. For easier access, there should be nomination boxes at all nomination stations throughout the country. The electorate would be afforded an opportunity to nominate directly any members of a particular political party with the minimum requirements to hold the office of president.

Step 2 would be the acceptance-of-nomination stage. In this stage, a person who is nominated must accept the nomination either by signing the nomination form or by any other form of written confirmation.<sup>128</sup> At least 1 000 votes of the electorate must support the nominee.<sup>129</sup>

Step 3 would be the pre-voting stage. In this stage, all nominees in their respective political parties should be selected. This stage will commence with the political party's internal election for their respective leaders in terms of the party's constitution. At this stage, the current processes for the election of political parties' leaders would be retained so as to safeguard parties' prerogative to determine their own internal processes, except that this prerogative would be limited in that nominations would be made directly by the electorate. The nominees would then compete to be leader of their

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<sup>125</sup> S 1 of the Constitution.

<sup>126</sup> Constitutionally Speaking "What We Talk About When We Talk About Accountability" (24 March 2010) <https://constitutionallyspeaking.co.za/what-we-talk-about-when-we-talk-about-accountability/> (accessed 2018-07-20).

<sup>127</sup> Phirinyane *Election and the Management of Diversity in Botswana* 8.

<sup>128</sup> These first two steps would require the amendment of Ch 3, Part 3 of the Electoral Act. However, the amendment of legislation is beyond the scope of this article.

<sup>129</sup> This threshold is similar to the one followed in Botswana. See s 32(2) of the Constitution of Botswana.



respective political parties.<sup>130</sup> The candidate with more than 51 per cent percent of support would then be leader of his or her political party. Such candidate's name should be submitted to the chief electoral officer in terms of Regulation 2(a) of the Electoral Act.

Step 4 would be the election process and would require the procedure as contained in Chapter 4, Part 1 of the Electoral Act to continue. The current election process in terms of section 26 of the Electoral Act (the procedure for contesting an election by political parties) would be retained, as would the procedure in section 38 of the same Act (the procedure for voting at voting stations).<sup>131</sup> At this stage, the public would confirm the nominations by voting for a political party of their choice. The public would be given an opportunity to vote for a candidate who is going to be president by indirectly voting for a political party of their choice. At the end of the process, the political party with the majority of votes would win the election.<sup>132</sup>

Step 5 would retain the process for the election of the President in terms of section 86 of the Constitution.<sup>133</sup>

Direct elections would ensure that the electorate is afforded an opportunity to nominate a presidential candidate in the first two steps of the proposed process. Indirect elections would continue from step 3 after the nominations. In step 4, the electorate would confirm their political choices by voting for the party with the preferred leader. This would ensure that South African citizens were part of the election process right from the beginning. As a result, political power would flow democratically from the populace as a political unit. According to Peonidis, the confluence of democracy and popular sovereignty gives priority to decision-making procedures that engage the totality of citizens.<sup>134</sup> The participants at the International Conference on Popular Participation in the Recovery and Development Process in Africa supported the participation of citizens in political decisions at all levels. They asserted:

"We believe strongly that popular participation is, in essence, the empowerment of the people to effectively involve themselves in creating the structures and in designing policies and programs that serve the interest of all as well as to effectively contribute to the development process and share equitably in its benefits. Therefore, there must be an opening up of political process to accommodate freedom of opinions, tolerate differences, accept consensus on issues as well as ensure the effective participation of the people and their organizations and associations."<sup>135</sup>

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<sup>130</sup> The process for counting the votes in Ch 4, Part 2 and 3 of the Electoral Act should be followed.

<sup>131</sup> These procedures are discussed under heading 3 above and will not be repeated in this section.

<sup>132</sup> These processes may require an amendment of the Constitution and the Electoral Act. However, these amendments are beyond the scope of this article.

<sup>133</sup> This process has already been dealt with under heading 3 and will not be repeated in this section.

<sup>134</sup> Peonidis *Democracy as Popular Sovereignty* (2013) 23.

<sup>135</sup> United Nations. Economic Commission for Africa (Governance and Public Administration Division) *The Role of Parliament in Promoting Good Governance* (2013) 19.

## **9 CONCLUSION**

South Africa has come a long way since the advent of democracy. The current South African electoral system espouses and supports democratic values of fairness and inclusivity as envisaged by the Constitution. However, it may be time to revisit some aspects of the electoral system to assess whether they promote democracy as envisaged by the Constitution. However, a change in the electoral system and system of government alone may not be sufficient. Changing the behaviour of the electorate requires more than a change in these systems. Furthermore, both forms of government have advantages and disadvantages. The nature of South Africa with nine provinces, different religions, different cultures and eleven official languages (and several undocumented non-official languages, like *lobedu*) requires a diverse approach. However, the process above may increase the level of vertical accountability of the President. If presidential and parliamentary systems of government are intertwined, such accountability will increase.