



FREE AND FAIR ELECTIONS?

1. Introduction

Democracy relies on the premise of regular elections that are conducted in a free and fair manner. "The minimal definition of democracy suggests that such a regime has at least: universal, adult suffrage; recurring, free, competitive and fair elections; more than one political party; and more than one source of information."¹ In a country like South Africa, a new democracy facing various challenges, the importance of election integrity is immeasurable; in this respect, the recent general election was another learning curve. Though the ANC still enjoys a majority in Parliament following its victory in the polls, this was arguably the most contested election since 1994, and the campaign environment was rigorous as political parties fought to find favour with the electorate. But did all aspects of this environment justify the official declaration that the election as a whole was free and fair? Without suggesting that there is any reason to reject this finding, this paper will nevertheless examine a few concerns that should not be overlooked in the generally congratulatory atmosphere.²

2. Free and Fair Elections – Statutory Provisions

In South Africa, elections are conducted every five years for different spheres of government, and generally provide the main channel of citizens' participation in the political process. Thus, conducting elections in a free and fair manner is of critical importance. The freedom and fairness of the electoral process depends on the environment in which the election takes place; the kind of information that voters can access; and the ability of political parties to campaign freely. The Bill of Rights proclaims that every citizen must be allowed to make political choices including voting,

forming political parties and standing for office³. This sets the tone for our political freedoms and further emphasises the freedom and fairness that should be expected in elections.

The Electoral Act 73 of 1998 establishes requirements for the conduct of elections, ranging from registration of voters, preparation for an election, the actual voting, and counting of the votes, to the general administration of elections. Both citizens and political parties are bound by the Act. The Act protects citizens from unwarranted influence on their voting choices, and from being physically hindered from voting; it also provides that reasonable access to voters by political parties and campaigners must not be prohibited.⁴

3. The Electoral Process

The African Union Election Observer Mission found that the recent election was free and fair and showed a high level of political tolerance amongst rival parties. It also praised the professionalism of the Independent Electoral Commission (IEC) and how political parties conducted themselves in accordance with electoral law⁵. This is a widely shared view and should be celebrated, as should the fact that all political parties accepted the result and attested to its credibility.

However, the electoral process does not begin on Election Day, or even in the few months before an election. The IEC is active year in and year out, planning and preparing for major elections, but also conducting by-elections on a regular basis in municipalities. A general election itself is an enormous logistical undertaking, with over 21 000 voting stations scattered all over the country, often in difficult and under-resourced places. In this year's election, for the first time, the

credibility of the IEC was brought into question, to the extent that some opposition parties even called for its Chairperson, Adv Pansy Tlakula, to resign after a “forensic investigation by auditors Price Waterhouse Coopers, on behalf of the National Treasury, on the procurement of the IEC’s Riverside Office Park building in Centurion, Pretoria found that the process was neither fair, transparent, or cost effective⁶.” The opposition’s concern was that these findings reflected badly on the integrity of the chairperson and create a fear of political influence in the IEC.

It is quite understandable that these opposition parties felt the need to raise this issue, but it is questionable whether the complaint really helped to preserve the freedom and fairness of elections. Prof Steven Friedman has argued that such calls were irresponsible before the elections because “elections are often not about what is fair, but about what is seen to be fair⁷.” From this line of argument, calling for the IEC chairperson to resign was a way of discrediting the institution itself, thereby creating a negative impression which could influence what people might accept from the IEC in terms of the results.⁸

Fortunately, a great deal of openness and transparency is built into the electoral system. For example, through the inclusion of different political parties as observers in each voting station, they are able to monitor the complete voting process, through to the final counting of votes. This makes it easier for improper behaviour to be seen quickly and dealt with accordingly. During these elections there were some incidents which prompted questions about fairness, particularly the way in which some polling stations in mainly poorer areas were reported to have opened late, to have run out of ballots or ballot boxes, not to have sufficient staff, or to have had long queues of people waiting to vote. Such problems of access are important, since an election cannot be fair if some people need to jump through hoops just to exercise their democratic right.

According to Rev Courtney Sampson, the Western Cape highlights the way in which social inequalities affect fairness, in the sense that those areas which have highly-developed infrastructure tend to experience fewer logistical problems than less developed areas do. He also pointed out, however, that voters do not necessarily vote in their designated voting stations, which creates problems with voting material and gives an impression that the IEC is not well prepared. Being

allowed to vote at any voting station in one’s province (upon signing a form) does give greater freedom for the electorate, but it also creates challenges for the voting process.

Another question is whether or not registration is a form of hindrance in the voting process. This relates to the requirement of visiting a registration station in person, and applying for registration well in advance of an election. One argument is that such processes deprive unregistered voters of their rights, should they decide to vote at the last minute. Indeed, the fact that there is a registration process at all creates another level of administration and this step alone may make it difficult for some individuals to vote. Steven Friedman strongly believes that voter registration excludes some people from the electoral process.⁹ He notes how, in some other countries, poor people have been effectively deprived of the right to vote by having registration venues open only in office hours (when they find it hard to take time off work) or, in some US states, by requiring driver’s licence identification (when many poorer citizens don’t drive). On the other hand, the registration requirement serves important purposes, especially regarding election planning and preparation; it gives the IEC a reasonably accurate idea of how many voters to expect in any given district. It would also be difficult (though not impossible) to have a full national voters’ roll at each polling station.

4. Media Conduct

Another point of debate during the period leading up to the election was the conduct of the public broadcaster, the SABC; specifically, what some people saw as its bias towards the governing party. During campaign periods the public broadcaster gives airtime to the different political parties, as well as coverage of rallies and other campaign events. However there are usually allegations of unfairness, where it is claimed that the ANC gets more airtime than the other parties. In addition, this time the SABC refused to screen particular television advertisements of two political parties, the DA and the EFF, stating that they ‘promoted violence’. According to Media Monitoring Africa, this raises issues of concern for all South Africans. The content of the advertisements was public knowledge, and the reasons given by the SABC for banning these adverts did not hold water; the only problematic statement was the EFF’s message at the end of its advert stating that it would “destroy e-tolls

physically¹⁰.” The conduct of the SABC in these cases raises the question of who benefits from such censoring: certainly not the voters at whom these messages were directed. The voters were not given the chance to decide for themselves the meaning of the advertisements.

Fortunately, our media in general has a great deal of freedom in its political reporting. The Media Monitoring Africa report on the media coverage of the 2014 national and provincial elections suggests that the media was generally fair in its coverage of different political parties. This was so even for the SABC,¹¹ despite popular beliefs and accusations by different opposition parties. However, according to the report, the media did not adequately address policy issues in its coverage, which defeated the purpose of informing voters on important election issues. William Bird of Media Monitoring Africa argues that our media needs a ‘citizen centred approach’ in reporting, which asks how election coverage will contribute to creating an informed electorate. As he sees it now, political parties set the media agenda which is not necessarily fair to the electorate. In addition to this, a number of the political parties that competed in the elections were new and largely unknown, and the media did not do a good job in bringing these to the public’s attention.

5. ‘No-go’ Areas and Misuse of States Resources

According to the Electoral Act all political parties have to sign a code of conduct promising to behave in a tolerant manner. To a large extent there was a tolerant atmosphere, but this does not mean that some parties, and particularly groups of their supporters, did not try to push the boundaries. Several parties complained of their posters being removed and about interference in political events. The controversial DA march that was violently disrupted by ANC supporters was one example. It is vital for the freedom and fairness of elections that opposing views are able to exist in the same space. The right to have and to express different opinions is central to a democracy, and when this is lacking in the electoral environment, the freedom and fairness of the elections is compromised.

There were also a few allegations of misuse of state resources. The Department of Social Development, in particular, was accused of distributing food parcels and blankets to voters to entice them to vote for the ANC; the DA is taking

the ANC and the SA Social Security Agency to court over this. In general, however, it seems that this was not a serious issue in this year’s election.

6. Political Party Funding

“To function properly, democracies require strong, independent political parties operating in an open and truly competitive political system. Parties, in turn, need money in order for them to adequately fulfil their role. Similarly, a well-informed electorate that can exercise equal influence over the decision-making processes is a condition for genuine participatory democracy.”¹²

Political party funding became a point of contestation in the country’s political landscape way before the 2014 general election, but it was recently brought back into the spotlight by the EFF’s complaint about the public funding of parties. Currently, “a political party is entitled to an allocation from the Represented Political Parties’ Fund for any financial year that it is represented in the National Assembly or in any provincial legislature, or both in the National Assembly and in any provincial legislature.¹³” The EFF argues that this system gives bigger and more established political parties an advantage over smaller and newer parties, especially considering the large amounts of money required to register for competing in an election. According to the Public Funding of Represented Political Parties Act 103 of 1997, monies allocated from public funds are to be given in proportion to the number of seats a party has in the relevant legislatures (nationally and/or provincially)¹⁴. In one way, this is reasonable, as it prevents political parties from popping up at election time simply to access public funds, and then disappearing from the scene.

However, it can also operate as a way of excluding smaller and newer political parties from the electoral process. Certainly, the whole idea of a multiparty democracy is premised on the inclusion and representation of all segments of society. If minority parties are effectively being excluded (should they fail to acquire private funding), while bigger and more established parties enjoy sufficient funding from the state, that would impact negatively on the fairness of the electoral environment. This situation is exacerbated by the requirement that parties pay a sizeable deposit in order to contest national and provincial polls.¹⁵ Again, it is reasonable to require a deposit in order to discourage fly-by-night parties, and to keep the numbers appearing on the

ballot manageable. However, making the amounts involved unaffordable, especially for parties representing poor constituencies, could limit voters' choices and constitute electoral unfairness. At present, private funding of political parties is unregulated. Though this may not directly affect the electoral campaign environment, it remains a matter of much public debate. The larger parties agree that private donors' names should not be made public, but this has been criticised as a failure of openness and transparency¹⁶. Voters surely have the right to know where the parties get their funds from, in order to judge whether a given party might be unduly influenced by a major donor, or might feel that it has to 'return the favour' by favouring the donor in the allocation of state business, for example. That donors do influence party political decisions is clear: for instance, DA leader Helen Zille admitted that, although her motivations for trying to bring Mamphela Ramphele into the DA fold were not directly influenced by any donor, "many wanted to know why we don't get together with Ramphele... [donors] were asking why we were different parties."¹⁷ Speculation regarding donors and the influence they have on political parties raises issues beyond electioneering environment, but the lack of transparency involved impacts on the power that voters have over their elected representatives.

7. Conclusion

The IEC is seen as a model institution with the credibility and reliability to conduct free and fair elections. Our Constitution and the various statutes that govern our electoral processes provide the legal basis for a proper exercise of voters' rights. And, indeed, over the last 20 years there have been very few significant allegations of electoral impropriety. However, the issue of free and fair does not only lie with the IEC and the law; the whole environment in which elections take place plays an important role. Likewise, other institutions, such as the media, and the political parties themselves, all contribute to an atmosphere that either promotes or undermines electoral freedom and fairness. The attitudes of individual members of parties also matter – it is they who choose to tolerate other's views and opinions, or to shout them down; to accept free campaigning or to declare 'no-go' areas. Nothing, in this regard can be taken for granted; the electoral environment needs to be carefully observed in order to safeguard our democracy.

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¹ Leonardo Morlino. What is a "Good" Democracy? Theory and Empirical Analysis. From: http://ies.berkeley.edu/research/files/CP02/CP02-What_is_Good_Democracy.pdf

² The paper is partly based on the inputs at a roundtable discussion hosted by CPLO and the Hanns Seidel Foundation on June 17th. The meeting was addressed by Rev Courtney Sampson, Provincial Electoral Officer for the Western Cape, and Mr William Bird, Director of Media Monitoring Africa.

³ Constitution of the Republic of South Africa, 1996. Chapter 2: Bill of Rights, s 19.

⁴ Electoral Act 73 of 1998. Chapter 7: General Provisions, s 87.

⁵ AU: Statement by the African Union Election Observer Mission on South Africa's May 7th general elections (09/05/2014). From: <http://www.polity.org.za/article/au-statement-by-the-african-union-election-observer-mission-on-south-africas-may-7th-general-elections-09052014-2014-05-09>

⁶ City Press_April 17, 2014. *Opposition parties want court to force Pansy Tlakula to resign*. <http://www.citypress.co.za/politics/opposition-parties-want-court-force-pansy-tlakula-resign/>

⁷ Steven Friedman. April 9, 2014. *Election's credibility lies in being seen to be fair*. From: <http://www.bdlive.co.za/opinion/columnists/2014/04/09/elections-credibility-lies-in-being-seen-to-be-fair>

⁸ It is interesting that the largest opposition party, the DA, chose not to ally itself with the other parties, arguing that the timing of the challenge threatened to disrupt the elections. It must also be noted that, in the end, the Electoral Court upheld the opposition parties' argument, and that it has recommended that Adv Tlakula be removed from her post.

⁹ Business Day Live_November 13, 2013. *Voter registration can work against democracy*. From: <http://www.bdlive.co.za/opinion/columnists/2013/11/13/voter-registration-can-work-against-democracy>

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- ¹⁰ Media Monitoring Africa. April 22, 2014. *Election adverts clearly not good enough for the SABC!* From: http://www.mediamonitoringafrica.org/index.php/news/entry/election_adverts_clearly_not_good_enough_for_the_sabc/
- ¹¹ <http://elections2014.mediamonitoringafrica.org/>
- ¹² Judith February. 2003. *Cheque book politics erodes ballot.* From: http://www.idasa.org/our_products/resources/output/cheque_book_politics_erodes/?pid=private_funding_for_political
- ¹³ <http://www.elections.org.za/content/Parties/Party-funding/>
- ¹⁴ Public Funding of Represented Political Parties Act 103 of 1997. Section 5 (2) a (i) *aa-cc*.
- ¹⁵ A party must deposit R200 000 to contest for the National Assembly, and a further R45 000 for each province in which it wishes to stand. A countrywide presence on the ballot would therefore cost R605 000.
- ¹⁶ Bekezela Phakathi. 2014. *Secret party funding fuels electorate's suspicion* from: <http://www.bdlive.co.za/national/politics/2014/03/18/secret-party-funding-fuels-electorates-suspicion>
- ¹⁷ Times Live_ February 4, 2014. *Many donors wanted Agang SA, DA merger: Zille.* From: <http://www.timeslive.co.za/politics/2014/02/04/many-donors-wanted-agang-sa-da-merger-zille>

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