

THE VIABILITY OF FREE AND FAIR ELECTIONS IN THE CONTEXT OF CORONAVIRUS PANDEMIC IN SOUTH AFRICA: A SUBMISSION TO MOSENEKE INQUIRY **

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1. INTRODUCTION

The outbreak of coronavirus throughout the world has caused untold disruption in life. Virtually no facet of life – public or private – has been spared. The pandemic has rattled economies, ransacked health systems, annihilated education and learning, hurt sport, to mention but only a few. Similarly, democracy in general and electoral democracy in particular, has not been saved from this roller-coaster. Countries throughout the world have had to grapple with incessant questions relating to the health of democracies in the context of the pandemic. The pandemic has put many democracies on the slippery slope, thereby emboldening despots and sceptics of democracy worldwide. Moreover, it has provided a convenient space for suspension of constitutional obligations of states and human rights of citizens.

Elections as the most prominent signpost of democracy have been brought into questions. They have immediately been dubbed "super-spreaders" of the pandemic, thereby portraying that elections, like the rest of the human rights that have taken a knock under the pandemic, must be suspended. Where there is an urge to proceed

** The submission is made under the auspices of *Universities South Africa*, the views and contained herein are those of the author. While every effort has been made to provide the best submission possible within the time constraints, and the author is wholly responsible for any inaccuracies may still remain. The author feels that making these submissions, there is no need for making oral presentation. But if the Inquiry feels there is need for further engagement, the author is ready.

with elections, questions have been raised about whether such elections would be free and fair. The questions about the free and fair elections have hinged on three main stages in the electoral cycle: registration of voters, voter mobilisation(campaigns) and the actual voting on the election day. The main question relating to the registration of voters and voter mobilisation is whether these crucial electoral stages can happen without super spreading the pandemic. There are still concerns about super-spreading in relation to the voting day, but the question that looms large orbits around voter turnout. There are concerns that voter turnout will plummet significantly to the extent of affecting the very legitimacy of the election.¹

There is no gainsaying that in a pandemic-induced emergency, a raft of political rights is limited. These political rights are the bedrock of elections to the extent it is sometimes inconceivable how an election can be legitimate without these other political rights.²

However, the animation question is whether an election can be delayed or cancelled because of these otherwise legitimate concerns. In a nascent democracy like South Africa, this question is not only legal; it is also meta-legal. It does not only ask questions related to what the law says – which is evident in this particular case³ – but it always teases out an awkward question of whether the country is prepared to disrupt the regularity of the election. The cost of disrupting the regularity of an election to democracy is very high.

The purpose of this submission is to grapple, albeit briefly, with these questions. In particular, it makes submissions on the specific questions that the inquiry has invited view on such as, but not necessarily limited to, whether the current conditions under the COVID-19 pandemic are conducive or not to the holding of free and fair local

¹ Vázquez Carrero, Miguel, et al. "Empirical evidence of the effects of COVID-19 on voter turnout." *Covid Economics Vetted and Real-Time Papers* (2020).

² Section 19 (1) of the Constitution provides that:

Every citizen is free to make political choices, which includes the right— (a) to form a political party; (b) to participate in the activities of, or recruit members for, a political party; and (c) to campaign for a political party or cause. (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution. (3) Every adult citizen has the right— (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and (b) to stand for public office and, if elected, to hold office.

³ The Constitution provides for the intervals of five years for national, provincial and local government elections must be held. See section 49(1), 108(1) and 159(1) of the Constitution.

government elections during October 2021; the risk that might be posed to the lives and health of people in South Africa if the local government elections were to proceed in October 2021; any additional measures that may be taken to reduce the risk posed to the lives and health of people in South Africa in the event that the local government elections were to take place during October 2021.⁴

2. THE CONTESTED NOTION OF A FREE AND FAIR ELECTION

The Constitution of South Africa grants citizens a right right to free, fair and regular elections. Like most constructs in constitutional and political studies, the definition of free and fair elections is not yet settled.⁵ Even a cursory look at the decisions of the Constitutional Court of South Africa on the subject evinces the fact that the notion is not settled both in constitutional and political theories.⁶ In most of the Constitutional Court decisions, the notion is applied to resolve specific cases. For instance, in the *New National Party of South Africa v Government of the RSA and Others*,⁷ the Court was dealing with a challenge on the constitutionality of the provisions of the Electoral Act requiring a bar-coded identity document as a prerequisite for registration as a voter and for voting. The Court reaffirmed the centrality of the notion of free and fair elections to democracy in general, and electoral democracy in particular, within the South African context as thus:

The right to vote is ... indispensable to, and empty without, the right to free and fair elections; the latter gives content and meaning to the former. The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised.⁸

⁴ These are the issues articulated in the letter of the 1 June 2021 by Chairperson of the Inquiry, Justice Mosenke soliciting submissions on the matter.

⁵ Elkjaer, Jørgen and Palle Svensson. "The rise of election monitoring: What makes elections free and fair?." *Journal of Democracy* (8) 3 (1997): 32-46.

⁶ Goodwin-Gill, Guy S. *Free and fair elections*. Inter-Parliamentary Union, 2006.

⁷ 1999 (5) BCLR 489 (CC).

⁸ Para [12].

In *Kham and others v Electoral Commission of South Africa and another*,⁹ the Court attempted, without much success, to provide some guidelines about what free and fair elections means. The facts of this case are a bit intriguing because they are closer to the situation confronting South Africa today. The Constitutional Court invalidated local by-elections on the basis that they were not free and fair. Eight by-elections were held in various wards in the Tlokwe Municipality between August and December 2013. Before the elections, the applicants, multiple candidates who were subsequently unsuccessful in the elections, lodged objections with the Electoral Commission regarding voter registrations in the wards in which they were standing. A complaint was that the segments of the national voters' roll to be used for the by-elections lacked residential addresses of voters, making it difficult, if not impossible, for candidates to find, visit and canvass voters.

The Court was confronted with the vexed question of whether, if those irregularities are proven, are they capable of rendering an election invalid for violation of the constitutional right to "free and fair elections". Before attempting to lay the guideline for free and fair elections, the Court started with a candid admission that: "[t]here is no internationally accepted definition of the term "free and fair elections. Whether any election can be so characterised must always be assessed in context".¹⁰ The Court went further and said:

The following elements can be distilled as being of fundamental importance to the conduct of free and fair elections. **First**, every person who is entitled to vote should, if possible, be registered to do so. **Second**, no one who is not entitled to vote should be permitted to do so. **Third**, insofar as elections have a territorial component, as is the case with municipal elections where candidates are in the first instance elected to represent particular wards, the registration of voters must be undertaken in such a way as to ensure that only

⁹ 2016 (2) BCLR 157 (CC).

¹⁰ Para [34]. To this end, the court is in the safe company of politica scientsts Jørgen Elklit (bio) and Palle Svensson (bio) who also contend that: Although criteria for declaring an election "free and fair" have been developed in various contexts, translating such theoretical concepts into a comprehensive list of factors to consider has proved difficult. Equally daunting are the methodological problems of determining whether a particular electoral process meets the established criteria and combining the different "measurements" on various dimensions into a single score.

voters in that particular area (ward) are registered and permitted to vote.

Fourth, the Constitution protects not only the act of voting and the outcome of elections, but also the right to participate in elections as a candidate and to seek public office.¹¹(Emphasis is not original)

Despite this spirited attempt by the Court to lay some guidelines for free and fair elections, the concept remains open-ended, context-based and sometimes based on value judgement. As Elklit and Svensson poignantly state, the best approach is to closely study the various aspects of the electoral process, such as the electoral system, the voter-registration system, media access, campaign rules and ballot counting.¹² It is not given that an election held within the pandemic context will automatically not be free and fair.

3. TO POSTPONE OR NOT TO POSTPONE: IS FREE AND FAIR ELECTION FEASIBLE UNDER THE CURRENT(PANDEMIC) CIRCUMSTANCES?

The question of whether to postpone an election is certainly not a light one. Since the advent of the pandemic in the year 2020, several countries have had to grapple with this question. Countries across the globe have had to engage in a sensitive balance between human security (saving lives) and the right to vote, which is so integral to the health of democracies.¹³ This is the balancing exercise that South Africa must embark upon. The experiences drawn from countries in the world is that majority of countries have pressed ahead with the election despite the prevalence of the pandemic.¹⁴ In some situations, countries postponed elections briefly to allow the

¹¹ Para [34].

¹² Elklit, Jørgen and Palle Svensson. "The rise of election monitoring: What makes elections free and fair?." *Journal of Democracy* (8) 3 (1997): 32-46 at 34.

¹³ Matlosa, Khabele. "Elections in Africa During Covid-19: The Tenuous Balance Between Democracy and Human Security." *Politikon* (48)2 (2021): 159-173.

¹⁴ International Idea, *Global overview of COVID-19: Impact on elections*, <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections> (Accessed on 13 June 2021). It is reported therein that since February 2020 until June 2021:

At least 78 countries and territories across the globe have decided to postpone national and subnational elections due to COVID-19, out of which at least 41 countries and territories have decided to postpone national elections and referendums; at least 122 countries and territories have decided to hold national or subnational elections despite concerns related to COVID-19 of which at least 101 have held national elections or referendums; at least, 53 countries and territories have

election management body(EMB) to adapt to the "new normal" and thereafter proceed with elections on the new dates. The South African case of municipal by-elections is an immediate case in point. The reasons to proceed with elections, notwithstanding the pandemic situation, have come under three main heads. The first one is the cost to democracy in general that postponement cause. While it is admitted that it cannot undoubtedly be business as usual, the advantages of proceeding with an election outweigh the disadvantages. The postponements of elections have disrupted the democratic and political ecosystems—the most undesirable consequence of postponing elections political instability. The situations in Ethiopia and Somalia bear testimony.

The second one is the uncertainty regarding future dates for postponed elections. The postponement of elections usually is not accompanied by a definite new date. This is because it is n easily predictable when the country will be completely free from the pandemic. In South Africa, there are sentiments that the October 2021 election be synchronised with the national elections. This argument conflates two distinct issues. First, the synchronisation of a local, provincial and national election is a question clearly separate from postponing an election because of the Covid-19 pandemic. Second, suppose the country postpones the local government elections today because of the pandemic; there is no guarantee that the country will be free from the pandemic on that date to which the election is postponed. The most plausible thing will be an indefinite postponement, which the country can hardly afford.

The third reason is that it is impossible to hold elections under pandemic circumstances, even a free and fair one, during the pandemic. Election Management bodies have, with relative ease, adapted to the management of elections under pandemic circumstances. It is incontrovertible that the management of elections under pandemic circumstances has additional budgetary implications and logistical complications. However, "calling off an election would be the ultimate disenfranchisement".¹⁵

held elections that were initially postponed due to concerns related to COVID-19 of which at least 28 have held national elections or referendums.

¹⁵ Orr, Graeme. "Polling in a pandemic: Electoral dynamics, administration and law." *Australasian Parliamentary Review* 34.2 (2019): 54, at t 65.

4. MEASURES TO ENSURE HUMAN SAFETY BALANCED WITH THE CREDIBILITY OF ELECTIONS

If the question is no longer *whether* but *how*, the stakeholders have to ponder on the measures that can be put in place to make elections credible. A cursory look of data from countries that have held elections in the pandemic shows that there is no one blueprint. There is huge diversity based on each country's resources, democratic culture and the nature of elections (whether by-elections, general elections or local elections). The most common thread, though, is that the countries have been *innovative* about the measures to put in place to deliver elections during the pandemic. The countries have adopted a mixed approach – combining physical activities with virtual (technological activities).

For instance, processes such as the registration of voters can easily be done online. It may be expected that the registration online will certainly not stoke an interest comparable to physical registration. However, with sufficient campaign by IEC and the media, the registration can still be a success. Another vital stage in the elections process is the political campaign. The traditional campaign activities such as, but not to campaign rallies, door-to-door campaigns, town hall meetings are very risky during the pandemic and may be restricted. Political parties may have to use an alternative and, by far, the less expensive measures such as the internet as a platform to campaign and mobilise voters. Available and already very politically influential platforms like Facebook, WhatsApp, and Twitter may come in handy. As Ijon and Bingab contend: "[t]hese platforms will offer candidates the opportunity to engage with the voters and making it possible for the voters to share their problems with the candidates".¹⁶ Physical meetings may still be permitted within the established health protocols and restrictions.

One other critical stage in the electoral cycle is the actual voting on voting day. The actual voting is known to attract long queues and, therefore, risky. The IEC may

¹⁶ Ijon, Frank Bitafir, and B Bingab. "COVID-19 Pandemic and the 2020 Elections in Ghana." *Journal of Scientific Research and Reports* (2020): 94-102, at 99.

consider innovative approaches and combine traditional(physical) voting methods with alternative voting methods. Alternative voting methods include, but not necessarily limited to, online voting, postal voting. The IEC may also introduce early voting to spread the risk.

5. CONCLUSION

The mainstay of this submission is that it is incontrovertible that the pandemic poses a formidable challenge to electoral democracy. At first blush, it inspires the immediate suspension to the election based on two reasons – that the electoral activities will be a super-spreader and that the people may be scared to participate in the election in election, thereby affecting the legitimacy of such election. However, a must broader view suggests the contrary. The postponement of an election is not only the ultimate form of disenfranchisement; it also has far-reaching implications on the stability of the political ecosystem.

The charge that the election held under the pandemic circumstances will not be free and fair is not tenable. It is based on the supposition that there is a blueprint for a free and fair election. Conversely, the notion of free and fair elections, as democratic above, is context-based, open-ended and based on value judgement. Hence, the pandemic creates unprecedented circumstances for democracies worldwide. This is the context within which elections, like all aspects of public life, must be assessed.

The stakeholders - the IEC, political parties and voters – must adapt the electoral activities to the circumstances of the pandemic. As the leader in the election milieu, the IEC must introduce innovative means of delivering election, such as but not necessarily limited to hybrid approaches (virtual and physical), online registration and voting and internet-based methods of voter mobilisation.