

SUBMISSION TO THE ELECTORAL REFORM CONSULTATION PANEL

INSTITUTE OF RACE RELATIONS

30 SEPTEMBER 2024

The case for a new electoral system in South Africa

Electoral reform is an issue which is gaining traction in South Africa. Although our current system has a number of advantages, it also has a number of significant flaws, which have led to calls for it to be reformed.

There has been some tinkering with the South African electoral system in recent years, but these reforms are muddled and do not go far enough.

This submission will provide some background, lay out some of the problems with the revised system, and provide two potential avenues for reform.

Background

South Africa's electoral system is a closed-list proportional representation system. One of the significant advantages of this system is that there is a very close correlation between the proportion of the vote that each party receives and the proportion of seats that it is awarded in Parliament (according to the [Gallagher Index](#), which measures how proportionate an electoral system, South Africa's electoral system is the best in the world when it comes to matching actual votes cast to seats awarded in Parliament). Voters also do not select individuals but rather vote for parties. Before every election, each party presents a list of its candidates for Parliament to the Independent Electoral Commission. The lists are 'closed' – meaning that the public has no influence over them (although they are published before elections for voters to scrutinise). Some countries use an open list system, where voters have some influence over where candidates are placed on the list at elections.

The electoral system that South Africa adopted in 1994 was only intended to be an interim electoral system. It was introduced at the time as a system suitable for 'democracies with deep social divisions' as South Africa was (and still is). It was also selected for its 'inclusiveness, its simplicity, and its tendency to encourage coalition government'.ⁱ

Initially, the ANC opposed a system of proportional representation (PR). Having initially favoured a more traditional first-past-the-post system, the party subsequently decided to support a PR system after all, partly because it became clear in the early 1990s that the ANC would win an election fairly easily, no matter what electoral system was in place. In addition, closed-list PR 'would also help party elites maintain discipline over backbenchers'.ⁱⁱ

The system South Africa adopted in 1994 had no legal threshold of entry to Parliament. (Most countries which use PR require parties to gain a certain level of support, commonly 5% or even higher.) The lack of a threshold would ensure that parties at the extremes secured parliamentary representation. The thinking was that given their involvement in parliamentary democracy, they would moderate their more extreme views. By way of illustration of the low threshold, consider the example of Al Jama-ah, an Islamic fundamentalist party. It entered Parliament for the first time in 2019 after winning 31 468 votes (or 0.18%) out of over 17 million cast. Of the fourteen parties that won seats in Parliament in 2019, this was the lowest number of votes that any single party won while still securing a parliamentary seat.

However, despite the high fidelity of proportional representation, the system also displays a number of flaws. MPs are not elected from geographical constituencies but are rather sent to Parliament depending on how high they are on a party's list of candidates. These lists are controlled by the leadership of the various parties, meaning that MPs are often reluctant to go against the party line. As flagged above, this is often to the detriment of voters. An example that comes to mind is how few

MPs representing the African National Congress (ANC) spoke out against former President Jacob Zuma's excesses.

The lack of a link between geographical constituencies and MPs also has implications for the legitimacy of democracy. With no geographical constituencies for MPs to answer to, voters often feel that MPs do not represent them or their specific interests. There have been attempts by parties to assign constituencies to MPs, but these have generally not been successful in creating a pseudo-constituency system.

Independents were prevented from standing for Parliament until the recent amendments made to the Electoral Act. However, independents are still at a significant advantage compared to candidates standing for political parties (this will be discussed in more detail below).

While it is generally rare for independents to be elected to a legislature abroad they often play an important role and can make neglected communities feel heard. An example is that of Dr Richard Taylor in the UK. In 2001 he decided to run for Westminster on a single issue. In his constituency of Wyre Forest, it had been decided in 2000 to close the casualty ward of the Kidderminster hospital, to the dismay of many local residents. Although he ran as the candidate of the Independent Kidderminster Hospital and Health Concern, he was effectively an independent. He successfully won the seat and retained it until losing it in the 2010 election. Taylor played an important role in making the issues in his local community gain prominence, something that may not have happened if independents could not stand.

The current system also appears to encourage voter apathy. In each election, the number of people simply opting to stay away from the ballot box increases, as voters likely feel that their voices are not being heard. The 2024 national election had the lowest voter turnout yet recorded in post-apartheid South Africa for a national election. Just under two-thirds of registered voters made their way to the ballot box in May of that year. This was the first time that fewer than 60% of registered voters turned out. In 1999, nearly 90% of voters had turned out. However, these proportions are even lower when we consider the percentage of voters who turned out compared to all those who were eligible but not registered to vote. Only 39.1% of all those who were eligible to vote did so last year, the second time that less than 50% of all eligible voters turned out. Furthermore, in 2024 only 23.3% of registered voters cast a ballot for the ANC (against the 40% of the vote it won in the 2024 election).ⁱⁱⁱ These numbers have serious implications for the legitimacy of future elections and governments. Tweaking the electoral system may help make voters feel that they actually have a say, that their vote makes a difference and that their voice is being heard.

The weaknesses in the current system have been recognised for some time. What is often forgotten is that the current electoral system was never envisaged as being South Africa's permanent electoral system. Shortly after the 1994 elections, there was already talk of a revised electoral system, incorporating some constituency elements, with nearly all political parties represented in Parliament at the time, including the ANC, saying that this was desirable. There was a general expectation that the electoral system would be reformed by the 2004 election.^{iv} In 2002 the government decided to look at a new electoral system in earnest. A commission headed by the late Frederik van Zyl Slabbert (who had briefly been the leader of the opposition in the whites-only Parliament in the 1980s) was appointed. The findings of the Van Zyl Slabbert Commission are provided in some detail below.

Despite its recommendation that the system be changed, a decision was made to retain the current system – this being the minority opinion of the commission. In 2017, former president Kgalema Motlanthe also called for electoral reform. Motlanthe had chaired a 'high-level panel' which had

looked at the efficacy of post-apartheid legislation. The High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (to give it its full name) raised questions about the effectiveness of Parliament and found a lack of accountability to the public. In its report, the panel called for electoral reform: it said that it 'recommends that Parliament amends the Electoral Act to provide for an electoral system that makes MPs accountable to defined constituencies in a proportional representation and constituency system for national elections.'^v However, in June 2018 the weaknesses in the current electoral system were once again brought to the fore when Chief Justice Mogoeng Mogoeng noted that independents should be allowed to stand for Parliament or provincial legislatures, but that this was not possible given our electoral system. The enjoyment of this right had not been proscribed by the Constitution. It was just not facilitated by legislation, said Mogoeng at the time. Another court challenge was brought in April 2019 in the Western Cape High Court, shortly before the May general elections. The case was brought by, amongst others, the New Nation Movement and a person claiming to be a Khoi leader, Chantall Revell, the latter wanting to stand as an independent parliamentary candidate. The applicants had approached the courts because they claimed that electoral laws were invalid. The basis of their argument was that although the Constitution stated that 'every citizen has the right to stand for public office and if elected, to hold office', one had to be a member of a political party to do so. The applicants argued that this right was limited because individuals had to be a member of a political party to be a candidate for Parliament or a provincial legislature.^{vi}

The electoral system, which was adopted following the Constitutional Court ruling in 2020 which compelled Parliament to change the Electoral Act to allow independents to stand may have met the letter of the order, but not the spirit. While independents could stand in elections, they had effectively been shoehorned into a party-list proportional system, a logical absurdity.

In addition, independents generally do well when they stand in a constituency on a local issue, as the above example of Richard Taylor attests. It is unlikely that in any kind of nation-wide ballot Taylor would have done well enough to be elected to Westminster.

Problems with the amended Electoral Act

The Electoral Act was amended, as per the order from the Constitutional Court, in 2023, to allow for independents to stand for Parliament. However, it is clear that there are significant flaws with the Act and the electoral system which it prescribes. Ideally this will be the only election where the system is used and an amended electoral system is ready for the next election in 2029.

It is evident from the debate in the National Assembly, and from several other public statements, that many MPs did not have a good understanding of the actual effects of the Act, or why civil society has the temerity to oppose what Parliament has decided. It is almost as though the court leaving the "details" of how to remedy the constitutional defect of the Electoral Act to Parliament gave carte-blanche to create any system that MPs feel like. Of course, the irony is missed, that we are here precisely because civil society took to the court a complaint about the Electoral Act previously passed by Parliament. In that case, the court concurred, and required a change.

Put simply, the Act is premised on the idea that individuals can be included alongside political parties on the existing proportional representation ballots. Effectively the existing electoral system was retained while allowing for independent candidates to stand. It is a breathtakingly absurd proposition that attracted little or no comment. Having individuals on a proportional representation ballot is a contradiction in terms precisely because an individual is limited to occupying a single seat, irrespective of the number of votes obtained. There is no polite way to express this. From the outset,

there was never any other possible outcome, except that this results in numeric distortions that make a mockery of the constitutional requirement that our electoral system results, in general, in proportional representation. And if the patterns of results arising from seat allocation calculations are thus distorted, then it is also logically inevitable that the election cannot be fair. Logically, it is false to describe the system as the "retention" of the existing system. As soon as some participants in the election cannot be "rewarded" in proportion to the votes received, this becomes a new system, where some mechanism must be found to deal with either the votes that cannot be used, or the excess seats that cannot be awarded to independent candidates.

Quite simply, as is explained below, it is not possible to include individuals (independent candidates) in a proportional representation system without having some form of constituency election, balanced by a separate proportional representation system. It is a moot point as to whether the question of requiring constituencies would have had any logical impact on the arguments before, and deliberations of the court. However, it most certainly does have an impact on what follows.

The Act also sets very high barriers to entry for independent candidates contesting the National Assembly election. For example, the threshold of votes (quota) required by independents to gain a seat range from about 68 000 in the Northern Cape to about 92 000 in Gauteng (based on voting data from the 2019 national election). The effective number of votes required by political parties per seat is about 44 000 in terms of the 2019 results. The reason for this is that only 200 seats are contested by independent candidates, with the full complement of votes, inherently raising the quota.

The proportional representation calculations for seats in the National Assembly uses the regional ballots (with votes for independent candidates removed) added to the proportional representation ballots. The numerical distortions inherent in the regional ballots are then partially carried over into the PR calculations, effectively giving some bonus seats to the largest parties, at the expense of the smallest parties. Although a similar calculation is carried out with the proportional representation calculations in local government elections, the other differences between the systems mean that this does not translate well to the National Assembly.

The inclusion of independent candidates alongside political parties on a single ballot for provincial legislatures creates an inherent distortion to proportionality. The recalculation mechanism used to adjust seats has an in-built numerical bias that favours the largest party or parties. It is an inescapable fact that, if an independent candidate gains votes equalling any multiple of the quota of votes for a seat, then the effect of each ballot cast in favour of that independent candidate is inversely distorted. Thus, if the candidate wins twice as many votes as required for a seat, then only half of each of those ballots contributes towards the election of the candidate, while the other half effectively contributes towards seats gained by the largest parties.

Another issue is that because independent candidates are allowed to contest more than one regional election for the National Assembly, as well as a single province, then their voters in all but one of those elections are effectively disenfranchised. To spell it out, if a prominent candidate wins seats in more than one election and can obviously only take up only one of those seats, then the voters in the other elections have been stripped of their votes. They are literally removed from calculations, and the place is filled in a recalculation that is biased in favour of the largest parties. The key is that if voters in the election where they do not take up a seat knew that they could or would be elected elsewhere, then they may have supported another independent candidate or party that would then have gained a seat that they now do not get.

The recalculation used for filling vacancies arising from an independent vacating their seats in a legislature is numerically biased in favour of the largest party or parties.

In the 2024 elections independents did poorly, cumulatively winning just under 20 000 votes on the regional ballot (the only ballot of the two national ballots where voters could vote for independents). This equated to 0.12% of the vote. The best performance by an independent was in KwaZulu-Natal, where Thanasagren Moodley, managed 0.35% on the provincial ballot, a better performance than established parties such as the ACDP, ActionSA, and Freedom Front Plus. This gives further credence to the assertion that independents do better when they are closer to the communities which they are seeking to represent.

It is clear that the current system is simply not fit for purpose, and South Africa needs a different electoral system.

What is the solution? What electoral system should be implemented which will meet the constitutional requirement of being “broadly proportional” as well as adhering to the other guiding principles of “inclusivity, fairness, accountability, simplicity, electoral manageability, and transparency”.

Proposed solutions

Mixed-member proportional

The first system that should be considered is the mixed-member proportional (MMP) system.

It is one that is fairly simple to understand and is already used at municipal level in South Africa. It is also used in a number of countries around the world, including Germany, New Zealand, and the country which South Africa territorially envelops, Lesotho. In this system the relevant entity (country, province, or municipality and so on) is divided into single-member geographical constituencies. Voters receive two ballots – one to elect an individual to represent their geographical constituency and another to vote for a particular party. The number of seats in the legislature will normally be split evenly, with half being elected from the geographical constituencies and the other half allocated from the second ballot to ensure proportionality. In this way the geographical link between voters and their representative is maintained, while also ensuring that the makeup of the legislature is proportional to the overall election result.

To illustrate how such a system works in practice, let’s consider the 2016 municipal election result in the Nelson Mandela Bay Municipality (NMBM), the municipality which includes Port Elizabeth and Uitenhage. That city is divided into 60 geographic wards, with another 60 allocated on the basis of proportional representation, to ensure proportionality in the composition of the city council. In 2016 the ANC won just over 40% of the ward ballot, with the DA securing nearly 47% of the vote. Despite the ANC winning almost ten percentage points less of the ward vote than the DA, this was still enough for them to be the biggest party in 35 of the city’s 60 geographic wards. The DA was the largest party in 24 wards, with the EFF being victorious in one. This was likely due to the ANC’s support being spread over more wards, while support for the DA, while higher, was more concentrated. If the municipal council was simply determined by which was the largest party in each ward, then the ANC would have easily been the largest party, even though it won the votes of only four-in-ten residents. However, the top-up system of awarding an additional sixty seats to ensure proportionality led to a very different result. The DA’s final tally of seats on the 120-member council was 57, after it was awarded an additional 33 PR seats to ensure proportionality. The ANC was awarded an additional 15 PR seats to give it 50 seats. The EFF gained five additional PR seats to give

it six seats. Six other parties won seats. The United Democratic Movement won two seats with 1.9% of the vote, with the African Independent Congress, United Front, Congress of the People, African Christian Democratic Party, and Patriotic Alliance each winning one seat. The Patriotic Alliance secured a seat with as little as 0.3% of the vote.

This indicates how a link between a representative and a geographical constituency is maintained, while ensuring that proportionality is also secured, with none of the distortions common in first-past-the-post systems.

New Zealand's experience is also illuminating in this regard. That country had a FPTP system until the early 1990s, when it changed to an MMP system, following a referendum in 1993. In the last election held under the FPTP system, the two largest parties – the National Party and the Labour Party – won 95 of the 99 available seats, despite winning less than a combined 70% of the vote. Two other parties won two seats each, with the Alliance needing nearly 20% of the vote for its two seats, and New Zealand First securing nearly 10% of the vote to be awarded two seats. In the next election, held three years later, 65 seats were awarded through geographical constituencies and 55 through party lists to ensure proportionality. The result saw the National Party win a third of the vote, and 30 of the constituencies. It was also awarded 14 additional PR seats to give it 44 seats in the country's parliament, much closer to its overall electoral result. Its closest rival was the Labour Party, with 28% of the vote, 26 constituency seats and 11 PR seats. NZ First and the Alliance both made it back into Parliament with NZ First gaining 17 seats (six constituency seats and 11 PR seats) with 13.4% of the vote. The Alliance secured 13 seats (one constituency seat and 12 awarded through PR) with ten percent of the vote. Two other parties also made it to parliament: ACT New Zealand won eight seats (one constituency seat) with six percent of the vote and United New Zealand one seat on 0.9% of the poll.

Currently 71 members are elected from constituencies and 49 seats are retained to ensure proportionality. Since 1993 neither of the two major parties – National or Labour – have governed alone, always having been forced to do so in a coalition, with the exception of 2020, when Labour won a majority. Currently the National Party governs in a coalition with ACT and NZ First, following an election held last year.

To fit this system for South Africa there are a number of options. We could firstly simply split the 400 seats in the National Assembly into 200 constituency seats and 200 PR seats. If we consider that just over 16 million people voted in the last general election, in 2019, then each constituency seat would represent approximately 80 000 voters. The actual number of constituents would be slightly higher, as everybody resident in a particular constituency would still be a constituent even if they didn't vote. This would situate South Africa approximately at the midpoint between two other MMP candidates when determining the average number of voters in a constituency. In New Zealand there are almost 40 000 voters for each constituency while in Germany there are over 150 000. South Africa could also opt to increase the number of constituency seats to, say, 250 and have 150 seats to ensure proportionality. Another option is to increase the number of seats in the National Assembly. Currently the number of seats is constitutionally limited to no less than 350 and no more than 400, but there is no reason why the number of seats could not be increased. That said, 400 National Assembly seats may be enough for the foreseeable future to ensure that South Africans are well served by their representatives.

Another advantage of the MMP system (apart from its constituency link and the fact that legislature seats reflect the wishes of the voters to a large degree) is that it is a fairly simple system to

understand. Calculating seats is also not overly complicated. In addition, it would simply be a scaling-up of the system South Africa uses at municipal level, which also makes it attractive.

Van Zyl Slabbert recommendations

In 2002 the government decided to appoint a commission to investigate whether South Africa needed a new electoral system. The pure party-list proportional system used since 1994 had initially been envisaged only for the first election following the adoption of the final Constitution in 1996. Frederik van Zyl Slabbert, erstwhile leader of the opposition in the apartheid Parliament (who left organised white parliamentary politics in the mid-1980s due to frustration with the system), was appointed to chair the Electoral Task Team (ETT) which would investigate a new electoral system for the country. The ETT released a majority report which proposed dividing the country into 69 multi-member constituencies. Each constituency would consist of between three and seven members, and 300 MPs would be elected from these multi-member constituencies. At the same time, 100 MPs would be allocated via party lists to ensure proportionality. For example, in the proposed system Ekurhuleni would be divided into five constituencies, with two constituencies having three seats and three constituencies having four seats. Cape Town would also be split into five constituencies, but each would return four members to Parliament. By contrast, the much less densely populated southern Free State (including Bloemfontein/Mangaung) would consist of one constituency with seven representatives.

The ETT also considered that the individuals elected from the multi-member constituencies be put forward through an 'open list' process. This would mean, for example, that parties would put forward their seven candidates for a particular constituency. Voters would then have the option of ranking the various candidates, from their most-favoured candidate to represent them in Parliament, to least-favoured. Voters would not be restricted by party. In a three-member constituency, a voter could select a DA candidate, an ANC candidate, and an independent as their three preferred representatives in Parliament. However, the ETT also warned that, given South Africa's 'present' levels of literacy, an open-list method of electing candidates would not be feasible in the short to medium term. However, since South Africa achieved close to full literacy (97.1% of adults were literate) in 2018, it is not clear that this is still a valid concern, or whether it ever was.^{vii} The ETT recommended instead that a voter simply vote for a party, effectively accepting their candidate slate for a particular constituency wholesale (which is essentially what happens in our current system).

However, for the system to have maximum efficacy an open-list system (where voters can rank various candidates rather than just have to accept a party's slate) would be preferable.

In an open-list system, voters are given influence over how high candidates are on a list by being allowed to select individuals. They would not simply have to accept a slate provided by the party. This could be modified slightly for the Van Zyl Slabbert system. The Van Zyl Slabbert proposal is made up of multi-member constituencies, ranging from between three and seven members. Having an open-list system in practice could work in the following way. In a four-member constituency, each party could put forward no more than four candidates, with independents being allowed to stand. Each voter would be provided with two ballots, on one of which they could select a political party (as is currently done in provincial and national elections). The second ballot would show the various parties' lists of candidates, as well as any independents standing in the constituency. In our hypothetical four-member constituency, a voter would mark the four names of those that they would like to see represent their constituency in Parliament. A voter's selection could all be from the same party or they could, for example, select two ANC candidates, a DA candidate, and an independent candidate. This would relieve voters of being beholden to a political party's slate and have – at least

some – control over who would represent them in Parliament, while also allowing independents to stand. The other party ballot would be used to help determine the other 100 MPs, who would be elected through a party list to help ensure general overall proportionality.

In the final proposal, the country would elect 300 members from 69 multi-member constituencies on closed lists and an additional 100 from another closed national list, to ensure proportionality. The ETT also suggested a similar system to elect provincial legislatures. Each province would have a number of multi-member constituencies alongside closed party lists to ensure proportionality. For example, Gauteng would have 16 multi-member constituencies, returning 48 members in its provincial legislature, with an additional 25 seats being awarded on a proportional basis. Other provinces would have their legislatures split similarly. However, the closed-list proposal by ETT does not make any provision for independents to stand, as voters would still vote for a party, rather than individuals, to represent them. Conversely, if an open list system was adopted then this problem would be solved. Instead of simply endorsing a party's slate, voters could select the individuals that they would like to represent them in Parliament and could also vote for individuals from different parties. It should also be noted that the Van Zyl Slabbert Commission considered the MMP system but decided it would not be suitable.^{viii}

Conclusion

South Africa's current electoral system is unnecessarily unwieldy, with the way independents have been bolted onto a party-list PR system. But much of the thinking around better electoral systems has already been done, as one can see from the above.

Both systems proposed in this submission would satisfy various requirements for electoral systems that apply in the South African context. They are reasonably easy to understand. They introduce a constituency element which allows independents to stand, dilutes the power of party bosses, and introduces a form of direct accountability for elected politicians that is currently lacking. At the same time, both systems would retain an element of proportional representation, as required by the South African Constitution.

Of course, none of these changes would be the silver bullet that magically introduces accountability to our politics. Achieving that important goal requires a change in our political culture too. Our culture needs to become one that does not tolerate cabinet ministers ignoring parliamentary questions or treating them as a nuisance, or the President of the Republic declining to take questions from journalists, but instead addressing the nation like a headmaster talking to a bunch of schoolchildren.

Nevertheless, giving voters more control over who they elect to the National Assembly and the provincial legislatures would be an important first step in ensuring greater accountability. In addition, having MPs who represent geographical constituencies will make it easier for voters to hold MPs to account, especially when they act in a way that violates their constituents' trust. A new electoral system that increases responsiveness and accountability is long overdue in South Africa. It will not necessarily be the elixir that restores our flailing democracy, but it is a start.

Voting directly for MPs would remind South Africans that their future is in their hands. Using the power of the vote gives people some control over their lives and ensures that those in power are reminded that they are servants of the people, not their masters.

ⁱ 'The South African Electoral System,' Helen Suzman Foundation Brief, 20 March 2014, <https://hsf.org.za/publications/hsf-briefs/thesouth-african-electoral-system>

ii Ibid

iii *Macro Review: South Africa's Next transition*, Centre for Risk Analysis, June 2024, available at: https://cra-sa.com/products/macro-review/2024/south-africas-next-transition/file/14_june_2024_cra_macro_review_may_14-06-2024_.pdf

iv 'Electoral Systems and Accountability: A proposal for electoral reform in South Africa,' Murray Faure and Albert Venter, Electoral Institute of Southern Africa, 2001, <https://www.eisa.org.za/pdf/faure.pdf>

v 'Motlanthe's panel calls for electoral reform,' Andisiwe Makinana, City Press, 3 December 2017, <https://www.news24.com/news24/southafrica/news/motlanthes-panel-calls-for-electoral-reform-20171203-2>

vi 'Court bid to allow independent candidates in 2019 fails,' Polity, 18 April 2019, <https://www.polity.org.za/article/court-bid-to-allow-independent-candidates-in-2019-elections-fails-2019-04-18>

vii *South Africa Survey*, 2020, p439

viii 'Report of the Electoral Task Team,' Van Zyl Slabbert Report, 2003, pp19 and 20, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/Van-Zyl-Slabbert-Commission-on-Electoral-Reform-Report-2003.pdf>