



My Vote Counts

Submission to the Ministerial Advisory Committee on the Electoral System 30 April 2021

Presented by:

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1. Introduction

My Vote Counts (MVC) is a non-profit company founded in 2012 to improve the accountability, transparency and inclusiveness of elections and politics in the Republic of South Africa. We work to ensure that the political and electoral systems are open, fair and accountable to the public and that they remain relevant in the changing South African socio-political context.

MVC aims to achieve its objectives through systemic and structural change by campaigning for the amendment or introduction of legislation and other regulatory measures; creating platforms that unite citizens and organisations in finding democratic solutions to the challenges of our time, with a particular focus on civic, legal and political education; and serve as an information-sharing platform to allow for the public to make political choices from a more informed position.

The Constitutional Court's judgment in the New Nation Movement case requires a legislative change to provide for independent candidates to contest elections at the national and provincial level but also provides an opportunity to consider other ways that our system may need to be reformed to reflect our current needs.

This proposal makes suggestions and considerations in developing a new electoral system for South Africa. MVC is grateful for the opportunity to make a written submission to the Ministerial Advisory Committee and is also requesting the opportunity to present our proposal in the form of an oral submission.



2. Historical background

South Africa's first democratic elections were held in 1994, under an interim Constitution and transitional legislation. The elections were held under the Proportional Representation (PR) electoral system, a system that was regarded as fair, simple and would make every vote count while balancing the need for national healing and reconciliation. The 1999 elections were held under similar provisions of the 1996 Constitution with slight modifications reflected in items 6(3) (a) and 11 (1) (a) of Schedule 6 of the Constitution.

2.1. Electoral Task Team

The Electoral Task Team (ETT) was set up to draft new electoral laws ahead of the 2004 general elections. The team was headed by Frederik Van Zyl Slabbert, and its function was to recommend a new electoral system resulting in proportionality. This move towards electoral reform was based on the fact that the closed-list PR system used in national and provincial elections had resulted in a lack of accountability. The ETT produced a report known as the Van Zyl Slabbert Report. The majority of the task team recommended a mixed multi-member constituency system and the minority recommended that the electoral system remain as is. However, the recommendations proposed by the majority were rejected and no element from the Van Zyl Slabbert report was ever implemented.

2.2. Other Electoral Reform Discussions

The electoral reform discussion has continued over the years. Most recently, these discussions have been reintroduced to the mainstream through the Democratic Alliance's Private Members Bill in 2013, the High-Level Panel on the Assessment of Key Legislation and Acceleration of Fundamental Change in 2017, the Notice of Intention to introduce a Private Members Bill for an Electoral Amendment Bill in 2019, and the New Nation Movement vs Others court case in 2019, which won the Constitutional Court challenge on the unconstitutionality of the Electoral Act in 2020.

3. Constitutional Principles

As a starting point, South Africa's electoral system must uphold and reflect the constitutional principles of fairness, simplicity, inclusiveness and accountability. It also



needs to, based on our Constitution per Section 46 (1)(d) for the national legislature and 105 (1)(d) for provincial legislatures, result, 'in general, in proportional representation'.

3.1. **Fairness**

All citizens have the right to free, fair, and regular elections. All citizens eligible to vote have the right to vote. All votes should be equal. The process must provide equal treatment and opportunity to all participants. All political parties and candidates must be treated equally without discrimination or favourable treatment. They should have equal access to information. This reflects the proportionality principle as required by the Constitution.

3.2. **Simplicity**

A simple electoral system is essential to fulfilling the right to vote enshrined in the constitution. The process should be practically accessible and easily understandable. The electoral system should be simple for voters, parties, candidates, and election management and administration. It should be simple for voters and in the process of voter registration, voting, and counting.

3.3. **Inclusiveness**

The electoral system should take into account the demographic, ethnic, racial, class and religious diversity of the voting population, and make an effort to allow the widest possible degree of participation. Inclusivity should encompass the inclusion of women and minorities in the legislatures.

3.4. **Accountability**

The electoral system should ensure a government that is accountable to the citizens and responds to the needs of the people. The electoral system should result in a government that is responsible as well as responsive to its citizens. Voters should be able to influence the shape of the government.

While it is generally accepted that our electoral system at a provincial and national level does result in a process that is fair, simple, and inclusive, it has for many years been critiqued for a deficit in accountability.



With the current closed-list system, those who represent the people in our legislatures are often more loyal and beholden to party bosses than to the electorate. This was perhaps most evident during the Arms Deal where members of the ruling party sided with their party over accountability to the country and its people. Similarly, and stemming from the same issue of party loyalty over duty, the Constitutional Court judgment in the Nkandla matter found that:

... the failure by the National Assembly to hold the President accountable by ensuring that he complies with the remedial action taken against him, is inconsistent with its obligations to scrutinise and oversee executive action and to maintain oversight of the exercise of executive powers by the President.

Voters have no direct say in who represents them, and political parties hold all the power in determining who of their members will serve as representatives. Because representatives are then allocated to a constituency that they do not generally live in or are familiar with, they do often not have a connection to the area, its people and its specific needs and challenges. Because their political life is essentially at the mercy of their political party, MPs and MPLs are far more likely to tow the party line and to serve the interests of the party over those of the people.

Many previous assessments of our electoral system and our changing political needs have concluded that to address this clear problem, we need to amend it to deepen accountability and oversight. MVC shares this position and in the following sections, we provide a set of proposals and considerations towards this end.

As the Van Zyl Slabbert reported:

... a recurring theme was that an electoral system could at least put a face to a party, somebody who has representative responsibility for a designated area, somebody who is identifiable and accessible in the period between elections. Collective accountability at periodic intervals was seen as insufficient. Some form of individual accountability had to be provided by an electoral system.



4. Case studies: Lesotho and Kenya

4.1. Lesotho

Lesotho gained independence in 1966. Like South Africa, the elected parliament makes and passes legislation. Like South Africa, in Lesotho, a lack of accountable public institutions has undermined democracy and socio-economic issues like inequality, poverty and high unemployment are prevalent.

Lesotho changed its electoral system from First Past the Post (FPTP) to Mixed Member Proportional Representation (MMPR) in 2002. The National Assembly remained at 120 seats, but in which 80 members were elected through Single Member constituencies and the other 40 members by PR.

FPTP was criticised for allocating seats disproportionately from the overall percentage of the vote (Dyer, 2003). The system excluded minority votes from being represented in parliament (Mahao, 1997; Matlosa, 2008). MMPR became problematic when the 2012 elections produced inconclusive results and resulted in a coalition government. The coalition collapsed in 2014. The MMPR is criticised for affording smaller parties a platform in parliament and government through the formation of mostly unstable coalition governments (Dyer, 2003; Motsamai, 2018).

4.2. Kenya

Kenya gained independence in 1963. Like South Africa, Kenya experienced the weakening of separation of powers and removal of checks and balances. In 2010 Kenya went through an electoral system change to restore public trust.

In 2010 Kenya adopted a new constitution and changed its electoral system to multi-party democracy and a presidential system from an FPTP for Parliamentary elections and a run-off system for Presidential elections. The president, Senate and National Assembly are directly elected by voters. The president is elected according to the two-round system. To win the first round, a candidate is required to receive over 50% of the vote, as well as 25% of the vote in at least 24 counties.

The National Assembly has 350 members, of which 290 are elected in Single Member constituencies and 47 are reserved for women and are elected from Single Member



constituencies based on the 47 counties according to FPTP. The remaining seats include 12 nominated by political parties based on their number of seats and a Speaker.

The Senate has 68 seats, of which 47 are elected from Single Member constituencies based on the counties using FPTP, and the remaining 21 are appointed: 16 women based on party's seat numbers, two representing disabled groups and two representing youth (both of which must consist of a male and female nominee) and one elected Speaker.

The FPTP for parliamentary elections and the run-off system for presidential elections was criticised for centralising power in the presidency (Runji, 2014). Checks and balances were removed and the doctrine of separation of powers weakened so the government could have control over the political process. Corruption was common. Tribalism was used as a tool to garner support from tribesmen to politicise ethnicity in Kenya.

4.3. **Lessons from Lesotho and Kenya**

These comparisons are important because, in addition to the social, economic and political similarities, Lesotho and Kenya have changed their electoral systems. In both cases, voters have two votes: one for a candidate and one for a party. However, in both cases, there are single-member constituencies that differ from the multi-member proposal by the ETT. In both cases, the number of constituency seats is more than the number of PR seats. Kenya is a useful example of how minority groups can be represented in parliament by requiring that a portion of the seats belong to women, people with disability and youth. However, Lesotho's case shows how a dual system can cause political instability because it affords smaller parties a platform in parliament and government through the formation of a coalition that is mostly unstable.

Essentially, Single Member and multi-member options have overlapping advantages and disadvantages. Single Member districts strengthen the relationship between representatives and constituents, the accountability of representatives to the voters, and constituency service. While multi-member, which is suggested by the ETT, results in more balanced representation, both for certain groups traditionally under-represented, such as women and minorities and for political parties. It is for this reason that MVC has considered two systems, one with single-member and the other multi-members.



5. Proposals towards an alternative Electoral System

This proposal is based on the Van Zyl Slabbert Report compiled by the ETT but does have deviations. The Report proposed creating 69 multi-member constituencies of between 3 and 7 representatives in each. However, this was based on a closed-list system where voters would still only vote for the political party in their constituency. MVC proposes that voters should be able to vote for individuals in their respective constituency. More than likely most of these candidates will still be from a political party, but voters should be able to determine the individuals they want to represent them, rather than just political parties.

5.1. 300 multi-member constituency seats in the National Assembly

MVC proposes that the National Assembly should continue to consist of 400 representatives. Of these, 300 seats should be elected from multi-member constituencies. Candidates who receive the greatest number of votes in each constituency will win a seat. Under this system, there is a greater chance that there will be a diversity of representation and a likelihood that more of the votes cast will be reflected in the eventual winners.

The other 100 seats for the National Assembly will be made up from a national closed-list and be allocated according to the current PR system to ensure that the element of proportionality is maintained. To ensure that these 100 seats are reflective of the society in which we live, parties may need to institute gender, age and other quotas in their lists.

At the national level, there will therefore be two votes on the ballot - one for a representative in your constituency and one for a political party.

Similarly, at the provincial level, a voter would also vote for a provincial constituency representative as well as for a political party. The size of legislatures will remain the same, but the number of seats in each will be divided in the same ratio as for national - 75% of seats will be allocated through a constituency vote and the remaining 25% based on a PR vote.



While the Constitutional Court did not prescribe an electoral system for South Africa, the Court said that the chosen system must ensure that independent candidates stand a fair chance to win. Having multi-member constituencies also provides a more realistic potential for independent candidates to win an election.

5.2. Open list ranked voting approach

MVC proposes an open list ranked voting approach for the election of the 300 constituency seats. While there are many types of ranked voting systems, the Single Transferable Vote (STV) is an attractive option. In each constituency, voters will be able to attribute a rank to the candidates that they are supporting.

Voters would be able to indicate a preference for as many candidates as they wish running in their constituency. This means that in a 3-seat constituency, they can rank more than 3 candidates.

A quota is determined and any candidate who achieves this percentage of the overall vote automatically wins a seat. Thereafter, through a series of removing candidates who received the fewest votes and/or transferring votes that successful candidates received over the quota to other candidates who did not reach the quota but who received more than those who received the fewest votes, the remaining seats are filled.

There are different ways of establishing winning candidates through the STV vote, but a major benefit of this system is that voters are given a great deal of power to determine exactly who represents them. This approach also results in a degree of proportionality and votes are not wasted as they are in FPTP.

Critics of this system point out that it is more complex for the electorate and requires greater levels of literacy and numeracy. Depending on the size of the vote, tabulation may become difficult and require the use of computer systems. However, with public awareness, mass voter education programmes, and available technology these are surmountable challenges.

5.3. Single-member constituencies

MVC believes that there is value in single-member constituencies. It is attractive because constituencies will be divided into much smaller, more manageable sizes. It will



also potentially deepen accountability, as a single member will not be able to pass the buck for poor performance. However, drawbacks are that this will require a First Past the Post approach could mean that candidates who receive far less than a majority of the votes are elected. Alternatively, it could require that a majority of the vote is needed to secure a seat, but this may require run-off elections that are costly and take time.

5.4. Characteristics of the electoral system

The constituencies will be broken up in the following way:

- The 52 constituencies in the country, which are made up of 44 districts and 8 municipalities will form constituencies.
- The number of members in each constituency should be between 3 and 7, as proposed by the ETT.
- Constituency boundaries will correspond with municipal/district councils and constituency boundaries for provincial and national will be the same.

Additionally, the system will have the following principles:

- Overall proportionality will be achieved
- The system is inclusive
- The system is fair
- Constituency representatives will be more accountable to the electorate
- The system will address apartheid spatial planning issues related to voting, that exist at the local government level.

While the system may be more complex for management, administration, and tabulation of the vote, as well as more difficult at first for the electorate to use, its benefits outweigh these issues and with time and education, can certainly be overcome.

6. Additional consideration: The right to recall

To further strengthen the accountability of constituency-based representatives the introduction of the right to recall these representatives should be considered. The right to recall is the right of citizens to recall a representative. The right to recall is seen as a way to make elected representatives more responsive. This would only apply to those



elected through constituencies because for seats won through the closed-list PR system, this provision would remain with the party to recall their members.

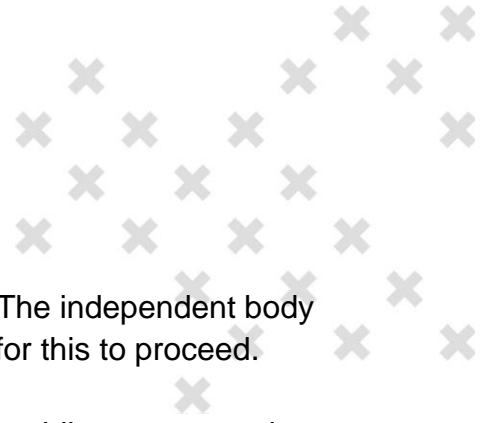
A major criticism of our current system is that unless an elected representative commits a crime or falls out of favour with their political party, they are likely to serve their full term regardless of their performance or decisions. It creates an environment in which the electorate is largely powerless to hold individual representatives to account for elections. Even when we do vote every 5 years, we do not have the power to sanction a specific representative because of the closed-list PR system.

Introducing a mechanism to recall representatives will place far more power in the hands of the people. It will also encourage or pressure representatives to perform and keep their promises for fear that they may be removed if they do not.

There are various types of systems used to recall representatives. MVC proposes, as is used in many jurisdictions, that for there to be a vote to determine whether someone should be recalled or not, the first hurdle to be determined is a percentage of voters (based on the number of voters in the most recent election) in that constituency needs to sign a petition to initiate the process. For example, if there are 50,000 voters in a constituency, it may be that there is a threshold of 10% required to initiate a vote. If this number is not reached and there is insufficient support for such a process, there will be no vote to recall. If this number is reached, then a vote to recall is held and all voters in that constituency are eligible to participate.

Given our fractured and contentious political environment, we need to be wary of this provision being abused by political opponents or external private interests. For example, an industry may be unhappy with a specific representative for their stance on environmental policies and may use their power to bankroll a campaign to recall. This may be to get rid of opponents or to tie them up in a process that will take them away from their work.

To avoid such abuse, it will be necessary to stipulate under what circumstances someone may be recalled. It would not be appropriate for such a process to take place simply because someone may be unpopular. This would require an independent body to assess if there are grounds for a recall. For example, if there is a call for a representative to be removed, it would need to be on a particular stated basis - such as



malfeasance or ineffective decision making or poor performance. The independent body would then decide as to whether there are indeed grounds or not for this to proceed.

Recognising that having an independent body decide whether the public can proceed with a recall process is somewhat problematic, there does need to be a way to mitigate the potential for abuse. However, this is seen as more beneficial overall because there must be a way for people to remove representatives between elections.

We also recognise that this will create two types of representatives - those who can be recalled by the people and those who cannot. Parties always could recall poorly performing members, but in practice, this is extremely rare. To address this imbalance, it will be incumbent on citizens to push for reforms in the ways that political parties operate towards greater intra-party democracy. This could be done through lobbying of political parties, but also more directly through sanctioning at the ballot box.

7. Conclusion

Changing the electoral system does not automatically guarantee greater accountability. The root causes of South Africa's accountability issues are complex and go beyond the electoral system. However, ensuring an electoral system is one that allows the electorate to directly elect candidates, whether they are from a political party or independent, will play a role in ensuring that the electorate is empowered to hold their representatives to account. Fundamentally, a reform of the system must give more power to the electorate.



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