

RESEARCH REPORT

ELECTORAL REFORM

OUTA

ORGANISATION UNDOING TAX ABUSE

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ELECTORAL REFORM IN SOUTH AFRICA

REPORT PREPARED FOR THE ORGANISATION UNDOING TAX ABUSE (OUTA) & MY VOTE
COUNTS (MVC)

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1. INTRODUCTION

On 11 June 2020, the Constitutional Court ordered Parliament to amend the Electoral Act to enable an individual to run for elected office without joining a political party. The New Nation Movement convinced South Africa's apex court that the Electoral Act (73 of 1998) is unconstitutional in so far as it restricts contestation in National and Provincial elections to political parties. The Constitutional Court gave Parliament 24 months to amend the Electoral Act to allow individuals to contest elections.

This research report focuses on how the electoral reform process has proceeded since 2020. The document is divided into the following sections:

- The first section summarises the New Nation case and the Constitutional Court's judgement.
- The second section provides an overview of different electoral systems and their advantages and disadvantages.
- The third section discusses South Africa's electoral system by first recounting the history of how the current system was chosen, explaining how the system is currently structured and outlines previous attempts to initiate electoral reform particularly the Electoral Task Team (ETT) Report of 2003.
- The fourth section discusses the report of the Ministerial Advisory Committee on Electoral Reform and the two options for reform that it presented to Minister Aaron Motsoaledi.
- The fifth section discusses the Electoral Amendment Bill [B1 – 2022] and the deliberations of the Portfolio Committee on Home Affairs.
- The report ends with some recommendations for civil society mobilisation.

2. NEW NATION MOVEMENT JUDGEMENT¹

On 11 June 2020, in *New Nation Movement NPC and Others v President of the Republic of South Africa and Others*, the CC ruled that the Electoral Act was unconstitutional to the extent that it prevents individuals from contesting national and provincial elections. The case was an appeal from the Western Cape High Court brought by the NNM, Chantal Dawn Revell, GRO and Indigenous First Nation Advocacy SA PBO. These entities instituted an urgent application at the High Court in late 2018.² They motivated that the Electoral Act was unconstitutional because it unjustifiably limits the right conferred by section 19(3)(b) of the Constitution – namely that ‘every adult citizen has the right...to stand for public office and, if elected, to hold office’ – by limiting the contesting of elections to political parties. In addition, some applicants argued that the Act violated their right to freedom of association as set out in section 18 of the Constitution.

The NNM describes itself as ‘a non-partisan, all-inclusive People’s Movement’ that is ‘not a political party’, but rather ‘a network of like-minded South Africans’. This ‘network of like-minded South Africans’ joined forces with Ms Chantal Dawn Revell, a princess of the Korana Royal Household, a part of the Khoi people. She is a long-time activist for the recognition of First Nation Peoples in South Africa ‘as the original stewards of the land’.³

The Western Cape High Court dismissed the application on the grounds that section 19(3)(b) of the Constitution did not specify that ‘standing for public office must include standing...as an “independent candidate’ as opposed to member of a political party’.⁴ In addition, the High Court ruled that section 1(d) referred to a ‘multi-party system’, which indicates that the drafters of the Constitution anticipated political parties rather than individuals to contest elections. As Justice Madlanga expressed in the majority judgment of the CC, the High Court

¹ Much of this section is taken from Mbete, Sithembile and Vasu Reddy, ‘Reconsidering South Africa’s electoral system: what are the alternatives?’ in *Ethics, Politics, Inequality: New directions*, eds. Narnia Bohler-Muller, Crain Soudien and Vasu Reddy (Cape Town: HSRC Press, 2021)

² See <https://newnation.org.za/>.

³ Etheridge J, Court hears application regarding independent candidates is an ‘extraordinary attempt to imperil the elections’, News24, 27 March 2019. Accessed August 2020, <https://www.news24.com/news24/southafrica/news/court-hears-application-regarding-independent-candidates-is-an-extraordinary-attempt-to-imperil-the-elections-20190327>

⁴ *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* (17223/18) [2019] ZAWCHC 43; 2019 (5) SA 533 (WCC) (17 April 2019).

judgment can be summarised as follows:

The nuts and bolts require that one must stand for public office through political parties. And they make no provision for independent candidates. Whether there should be a framework that caters for the participation of independent candidates is best left to Parliament, something that Parliament is currently seized with.⁵

The latter is a reference to the report of the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, which was submitted to Parliament in November 2017 and which recommended that Parliament initiate discussion on the ETT's report.⁶

As indicated, the NNM and others lodged an urgent appeal in the CC in April 2019, with the apparent intention of changing the electoral system before the May 2019 elections. The CC dismissed the claim of urgency and postponed the hearing of leave to appeal to 15 August 2019. In its judgment, dated June 2020, the CC granted leave to appeal, upheld the appeal and set aside the order of the Western Cape High Court. There were three judgments delivered in respect of this case: the majority judgment, written by Justice Madlanga; a concurring judgment written by Justice Jaftha, which makes additional arguments on section 18; and a dissenting judgment by Justice Froneman, who was the only dissenting judge in the decision.

The majority judgment, by Justice Madlanga, argues that although the founding provisions of the Constitution call for 'a multi-party system of democratic government', this does not indicate that the Constitution requires 'an exclusively party based proportional representation system'. According to Madlanga, the reference to multi-party democracy should be interpreted as an injunction that South Africa should never become a one-party state. It should not be interpreted as an exclusion of individual candidates from contesting elections. The majority of the CC argued that the rights in section 19 of the Constitution,

⁵ *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2020] ZACC 11.

⁶ HLP (High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change) (2017) *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change*. November 2017. Accessed 10 October 2020, <https://www.parliament.gov.za/high-level-panel>

headed 'Political Rights', are 'so interconnected that they have to be read together'. With regards to section 19(1), the majority maintained that the right not to form or join a political party 'is as much a political choice as is the choice to form or join a political party; and it must equally be deserving of protection'. Therefore, forcing an adult citizen to exercise their right to contest for public office in section 19(3)(b) by joining a political party violates the choice guaranteed in section 19(1) not to form or join a political party. Moreover, section 18, which states that 'everyone has the right to freedom of association', also includes the right of an individual not to associate. Adult citizens should therefore not be forced to join a political party in order to exercise their constitutional right to stand for public office in national and provincial elections.

Justice Madlanga highlighted the situation of Ms Revell, the second applicant in the case, who claimed that she was averse to forming or joining a political party because of her position 'as a representative and leader of the Korana nation, a section of the Khoi and San people'. As a leader of her nation, she is reluctant to be 'constrained by that kind of partisanship that comes with being a member of a political party' because it makes one answerable to the party. According to Madlanga, 'being free of those shackles will make Ms Revell directly answerable to her nation, not to a political party'. He recalled the case of *United Democratic Movement v Speaker of the National Assembly and Others*, which ruled that individual members of the National Assembly could vote in a secret ballot in the motion of no confidence against former President Jacob Zuma.⁷ Madlanga contended that 'if all members of the National Assembly were free to vote as they pleased regardless of how politically sensitive an issue might be and without any risk of reprisals from their political parties, litigation on this issue would not have been necessary'. It was therefore reasonable for Ms Revell to want to be an MP without the pressure and constraints of party politics.

Importantly, the CC gave Parliament until 10 June 2022 to amend the Electoral Act to allow individuals to contest the next national and provincial elections, due to be held in 2024. By this time the President should have signed the amended Act into law. The 24-month deadline

⁷ *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21

was intended to provide the Electoral Commission of South Africa (IEC) with sufficient time to update its processes and systems for the new electoral system. It usually takes the IEC between 18 and 24 months to organise an election. In its court papers, the IEC had argued that it would need even more time if there was a fundamental change to the electoral system (such as new electoral boundary demarcations) but the Constitutional Court ruled that 24 months would be sufficient.

In keeping with sections 46(2) and 105(1)(a) of the Constitution, which grant discretionary powers to Parliament to prescribe electoral systems, the CC did not specify which system Parliament must choose. In paragraph 15 of the majority judgement Malanga J writes: ‘let me mention that a lot was said about which electoral system is better, which system affords the electorate accountability, etc. That is territory this judgement will not venture into. The pros and cons of this or the other system are best left to Parliament which — in terms of sections 46(1)(a) and 105(1)(a) of the Constitution — has the mandate to prescribe an electoral system. This Court’s concern is whether the chosen system is compliant with the Constitution’.⁸ This emphasis on Parliament’s responsibility for making electoral legislation is important to remember when assessing what the National Assembly has (and has not done) since 2020.

3. UNDERSTANDING ELECTORAL SYSTEMS

Before going into the detail of the history of electoral reform in South Africa and the current options on the table to implement the New Nation judgement, it is necessary to provide a basic overview of the different types of electoral systems and how they work. While ‘the choice of an electoral system is one of the most important institutional decisions for any democracy’, the technical complexities of understanding different systems can be alienating to non-specialists and make it difficult for stakeholders to make an informed choice.⁹ This section begins by introducing a framework with which to compare electoral systems and discusses why electoral systems matter. It then presents the three main family types of electoral systems and the different sub-types within them.

⁸ New Nation Movement [2020], para 15

⁹ International Institute for Democracy and Electoral Assistance (IDEA), *Electoral System Design: The New International IDEA Handbook* (Stockholm: IDEA, 2005), 1

3.1. Defining electoral systems

An electoral system is defined as the way in which votes cast in an election are translated into seats won by parties and candidates. The choice of an electoral system is inherently political requiring the consideration and balancing of many competing interests. The IDEA handbook on electoral system design states the following: ‘the consideration of political advantage is almost always a factor in the choice of electoral systems - sometimes it is the *only* consideration - while the menu of available electoral system choices is often in reality a relatively constrained one’.¹⁰

Electoral systems have several characteristics that inform the functioning and outcomes of democracy:

- Electoral systems shape the political party system. Different electoral systems produce variations in the number, size, organisational structure, campaigning strategy and power relationships between parties and candidates. Selecting an electoral system entails making choices about the kind of political party system that is the foundation of a democracy. In theory, plurality-majority systems tend to result in a party system with fewer parties because voters will consolidate support in a small number of parties that they feel have a realistic chance of winning power. The UK is the classic case of this, with its party system dominated by the Tory and Labour parties. There are exceptions to this: Canada and India have a proliferation of parties that contest elections. Proportional representation tends to encourage a diversity of parties and yield coalition governments. This is evident in India and Israel. SA does have many parties contesting elections (48 in the 2019 national elections) but our electoral system has yielded a dominant party regime.
- An electoral system serves as a tool for conflict management among political competitors by creating a structure for electoral competition. An electoral system can prevent or exacerbate existing political conflicts. South Africa’s electoral system must be understood within the context of the country’s position as a post-conflict democracy that experienced a negotiated transition from Apartheid to democratic rule. One of the central questions discussed at the constitutional negotiations

¹⁰ IDEA, Electoral System Design, 2

between 1992 and 1994 was how to create an inclusive and widely representative political system for a divided society. The drafters of the interim constitution agreed that a closed-list proportional representation system would result in a parliament that mirrored the electorate and allowed a diversity of political groups to be represented.¹¹

- Electoral systems influence how citizens participate in electoral politics and their attitudes to voting. FPTP systems discourage voters who want to support a small party because only one candidate can be elected in a single-member district. So voters will often abstain or vote ‘strategically’ to avoid wasting their vote. Proportional representation should encourage electoral participation because all parties have a chance of getting representation in the legislature.¹² However, in SA there has been a decline in electoral participation over the years as voters think political representatives are more accountable to their parties than to voters.
- Electoral systems influence the development of policy by determining who gets elected and who does not. For example, in the 2016 US election Donald Trump won 46.4 per cent of votes compared to Hillary Clinton’s 48.5 per cent, which may have given Clinton the presidency in some plurality systems. However, the US has the additional layer of electoral college votes which are meant to correct for regional representation. Because of the regional distribution of Trump’s popular support, he won 306 electoral college votes compared to Clinton’s 232.¹³

Electoral systems can be compared using three variables:

Variable	Description
Ballot Structure	Does a voter vote for a candidate or a party? Does a voter make one choice or express a series of preferences?
District Structure	How many districts/constituencies are there? How many representatives to the legislature does a district elect?
Electoral Formula	Is the system plurality/majority, proportional, mixed? What mathematical formula is used to calculate seat allocation?

¹¹ Lodge, Tom, ‘How the South African Electoral System was negotiated’, *Journal of African Elections*, 2, no.1 (2003)

¹² IDEA, *Electoral System Design*

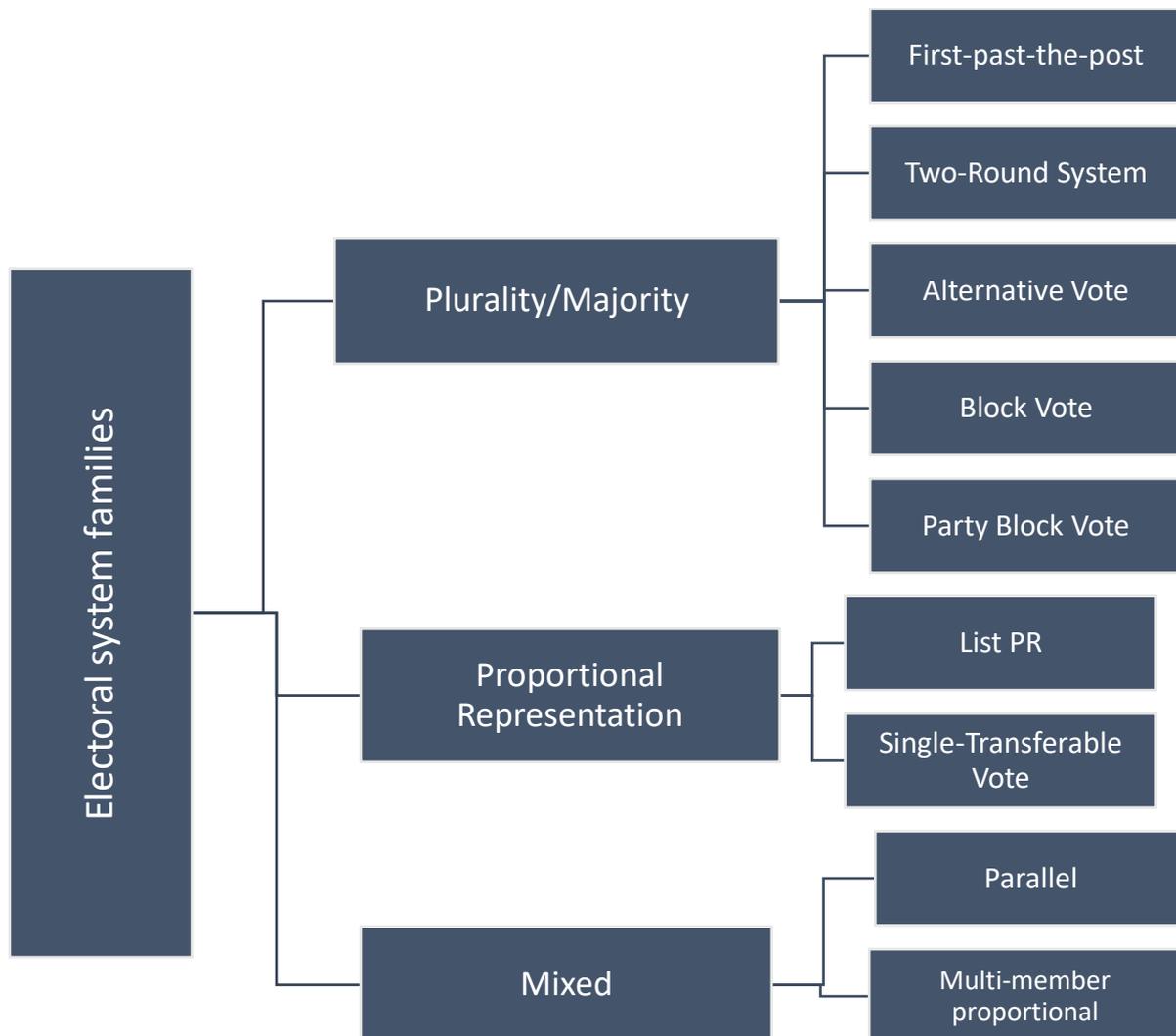
¹³ Forum for Public Dialogue, *Electoral Systems and Accountability: Challenges and Considerations for South Africa*, (Sandton: KMM Review Publishing Company, 2017)

3.2. Electoral system types

Electoral systems are general classified into three main family types ¹⁴:

- Plurality – Majority
- Proportional Representation (PR)
- Mixed

Within these broad families, there are several sub-families. The figure below illustrates these families:



¹⁴ Drawn from IDEA, Electoral Systems Design and 'Electoral Systems', ACE Electoral Knowledge Network, accessed 15 April 2022, <https://aceproject.org/ace-en/topics/es/default>

3.2.1. Plurality - Majority systems:

In these systems the candidates or parties with the most votes are declared the winners of an election.

Plurality Systems

First-past-the-post

The most common plurality system is the first-past-the-post system (FPTP) which is also known as the single-member district system because each district represents a legislative seat and the candidate with the most votes wins the seat. The winner does not need an absolute majority. FPTP is a system inherited from the Anglo-American tradition and is used in countries such as the United Kingdom, India and Canada. This is a system utilised in most SADC countries such as Botswana, Malawi, Tanzania, Zambia and Zimbabwe¹⁵.

The main advantage of this system is that it promotes direct accountability because there is a direct link between constituencies and representatives. It also allows for independent candidates to be elected.

The greatest disadvantage is that it is possible for a minority party to win the majority of seats in the government because the threshold is a simple majority. So it is possible for a party that does not represent the majority of voters to win the most number of seats in parliament and therefore lead government. This is how the National Party came into power in 1948 despite only winning 37% of the total vote, compared to the 49% won by the governing party at the time¹⁶.

Block Vote (BV)

BV is the use of FPTP in multi-member districts. Each voter is given as many votes as there are seats to be filled in their district. They are free to vote for individual candidates regardless of

¹⁵ Kadima, D, 'Choosing an Electoral system: Alternatives for the Post-War Democratic Republic of Congo', *Journal of African elections*, 2, no. 1 (2003)

¹⁶ Southern N, 'The Government of National Unity and the demise of the National Party in post-settlement South Africa', *Politikon* 42, no. 2 (2015)

party affiliation. Voters can use as many or as few votes as they wish. This system is usually used in countries with non-existent or weak political party systems. It has been used in Fiji, Thailand and the Palestinian authority.

Its main advantage is that it allows for voters to elect individual candidates while also increasing the role of parties. Its disadvantage is that the results can be unpredictable and have undesirable effects on the result. For example, in Mauritius in 1982 the winning party won every seat in the legislature with only 64% of the vote. BV can also lead to fragmentation of the party system and increase internal party factionalism because voters can vote for candidates from more than one party in the same district thus encouraging members of the same party to compete against each other for support.

Party Block Vote (PBV)

PBV is a variation of BV in which voters in multi-member districts have a single vote and choose between party lists of candidates rather than between individuals. Each party draws up a list of candidates for all the seats in the district and voters vote for the party they choose. The party which wins most votes takes all the seats in the district and its entire list of candidates is elected. As with FPTP the winner does not require an absolute majority of the votes.

Its advantage is that it can ensure balanced ethnic representation because it allows parties to put up ethnically diverse lists of candidates for election and it encourages strong parties. Djibouti and Singapore both use this system and have legislated requirements for parties to present ethnically diverse lists. The disadvantages are the same as FPTP and BV. PBV can produce highly disproportional results leaving losing parties with no representation in the legislature. Singapore uses 'best loser' seats for opposition candidates in some circumstances to mitigate this disproportionality.

Majority systems

Two-Round System (TRS)

TRS is the most well-known majoritarian system in which a single election takes place over two rounds, a week or two apart. The first round is conducted in the same way as FPTP or BV.

A candidate that receives an absolute majority of valid votes cast, wins. If none of the candidates receives an absolute majority, then a second round of voting is held and the winner of the second round is elected. The second round can be conducted in a variety of ways. Most commonly, the second round is a run-off contest between the two candidates who win the most votes in the first round. One of the two will necessarily receive an absolute majority and is declared the winner.

The advantages of TRS are that it allows voters to have a second chance to vote for their preferred candidate or to change their minds between the first and second round. It can also encourage consensus and compromise by having diverse interests coalesce behind the most successful candidates in the first round. The disadvantages are that it places pressure on the election management body which is forced to organise two elections within a short period of time. It also places a burden on voters to turnout for two elections which is why voter turnout often declines between the first and second round. Like FPTP TRS tends to produce highly disproportional results and can lead to conflict in deeply divided societies.

Alternative Vote (AV)

Under Alternative Vote (AV) elections are held in single-member districts like FPTP. However, voters rank their preferred candidates in order of their choice by marking "1" for their favourite, "2" for their second choice, "3" for their third choice, and so on. This system is also known as preferential voting. When results are calculated, the candidate with the lowest number of first preferences is eliminated and the other votes are assigned to the remaining candidates in the order marked on the ballot. The process is repeated until one candidate gets an absolute majority of votes. This system is used in Australia.

3.2.2. Proportional Representation (PR)

List PR

PR systems are intended to distribute seats in proportion to the support a party receives in the polls. This system is based on an idea of representation that the legislature must reflect the composition of society. PR is usually based on party lists. There are two kinds of party list systems: closed list and open list.

Closed list systems are the simplest type of PR in which political parties compile a list of candidates in order of preference and voters choose the party they want. At the top of the party list will be the candidate that will be first to be allocated a seat and the process goes down the list until all seats won have been assigned. Voters cannot indicate their preferences within the list but must accept the party list as it is. This is the system used in South Africa.

Open list systems allow voters to choose their preferred party *and* their preferred candidate within that party's list. Candidates that receive the most preference votes can win a seat even if they are relatively low on the party's list. Some countries like Iceland and Norway set a high threshold of votes for a candidate to be able to move up a party list. This limits voters' ability to alter party lists. Other countries like the Netherlands and Indonesia have lower thresholds which make it easier for a popular but low-ranked candidate on a party list to be elected over the party's other candidates who are higher on the list.

There are different ways of calculating the allocation of seats after votes have been counted. The choice of formula can change the results of an election. The two main ones are Largest Remainder formulas and Highest Average formulas:

The Largest Remainder formulas are intended to minimise wastage of votes cast. It is favourable to smaller parties which are able to win a seat even if they don't meet the full quota of votes. The first step is to establish the quota of votes that a party requires to win a seat. A party is allocated as many seats as it has quotas of votes; unallocated seats are given to parties with the largest number of unused votes (i.e. remainders). South Africa uses a largest remainder model called the Droop quota. This quota is derived by dividing the total number of votes by the number of seats plus one. The denominator is the number of seats plus one¹⁷.

- Example of Droop quota in an eight-member district with four parties¹⁸:

$$\text{Droop quota} = 100,000 \text{ votes} / (8 + 1) \text{ seats} = 11,111 \text{ votes} = 1 \text{ seat}$$

¹⁷ Provisional Legislative Council Secretariat. Information Note: Proportional Representation Electoral Systems https://www.legco.gov.hk/yr97-98/english/sec/library/in1_plc.pdf

¹⁸ Ibid, 5

Party	Votes	Droop quotas	Full quota seats	Remainder	Remaining seats	Total seats
A	41 000	3.69	3	0.69	1	4
B	29 000	2.61	2	0.61	0	2
C	17 000	1.53	1	0.53	0	1
D	13 000	1.17	1	0.17	0	1
Total	100 000	9.00	7	--	1	8

In the **Highest Average method** available seats are allocated one at a time to the party with the highest average number of votes per seat. The average is the quotient obtained by dividing the number of votes a party wins by the number of seats it has plus a certain integer (whole number), depending on the method used. Each time a party is allocated a seat, the denominator for the party increases which reduces its average. The first seat is awarded to the party with the highest absolute number of votes. One type of highest average formula is the d'Hondt formula which uses the whole numbers 1, 2, 3, 4 and so on to calculate the denominator.¹⁹ The table on the next page illustrates how this works:

- The first seat (indicated by the number in brackets) goes to the largest party, party A, whose votes are then divided by 2. The second seat is given to party B, because its 'average' (29,000 votes, its original vote total) is higher than C's and D's and also higher than A's votes divided by 2. The third seat goes to A because its vote divided by 2 is higher than B's vote divided by 2 and higher than C's and D's votes. The fourth seat goes to C because its average (17 000 divided by 1) is higher than A's votes divided by 3, B's votes divided by 2 and D's votes divided by 1. The fifth vote goes to B because its vote divided by 2 is higher than A's vote divided by 3, C's vote divided by 2 and D's vote divided by 1. The sixth seat is allocated to A because its votes divided by 3 is higher than B's votes divided by 3, C's votes divided by 2 and D's votes divided by 1. The seats allocation to parties A, B, C, and D is 3, 2, 1, and 0 respectively.
- Example of the d'Hondt formula in a six-member district with four parties²⁰ (on the next page).

¹⁹ Ibid, 7

²⁰ Ibid, 8

Party	Votes (V)	V/1	V/2	V/3	Total seats
A	41 000	41 000 (1)	20 500 (3)	13 667 (6)	3
B	29 000	29 000 (2)	14 500 (5)	9 667	2
C	17 000	17 000 (4)	8 500		1
D	13 000	13 000			0
Total	100 000				6

Another consideration in List PR systems is whether there is a formal threshold for participating in the legislature. Turkey has a high threshold of ten percent which excludes smaller parties from being represented in the legislature. Israel has a low threshold of 1.5 percent. South Africa has no formal threshold and technically a party could receive a seat with as little of 0.25 percent of the total vote.

Advantages: The PR list is the most suitable system of representation as far as the fair representation of majorities and minorities is concerned.²¹ In addition, when well designed, PR can be effective in nation building efforts as it tends to encourage political parties to present diverse lists of candidates and it enables the election of minority representatives. It also makes it more likely for women to be elected because parties can prioritise gender parity in their lists. Recent elections in SADC countries have shown that women are better represented in PR systems.²² South Africa ranks highly in terms of the number of women represented in national parliament but has fewer women representatives at local government level.²³ Women make up 45 percent of MPs in the Sixth Parliament elected in the May 2019 elections.²⁴ At local government level where there is a mixed system - half of the seats in any municipality are made up of proportional representation from political parties' closed lists and the other half of the seats are made up of ward councillors who are elected directly in their wards – the majority of ward councillors are men. Women made up 33 per

²¹ Kadima, 2003

²² GenderLinks (2018) *50/50 Policy brief: Madagascar*. Johannesburg: GenderLinks

²³ Makhunga L (2016) *Elite patriarchal bargaining in post-genocide Rwanda and post-apartheid South Africa: Women political elites and post-transition African parliaments*. PhD thesis, University of the Witwatersrand

²⁴ Media Hack, South Africa's Leadership in Numbers, Accessed 11 August 2020, <http://mediahack.co.za/sa-politics-numbers/>

cent of ward councillors elected in the 2016 local government elections while women made up 48 per cent of PR councillors because some political parties have quotas for their party lists.²⁵ PR faithfully translates votes into seats won so there are few wasted votes, which should encourage voter turnout. One of the benefits of PR for divided societies is that it encourages power sharing between majority and minority groups in a society.

Disadvantages: The primary disadvantage of PR systems is that they tend to lead to coalition governments which can be unstable and can undermine governance. PR list systems are also criticised for weakening the link between MPs and their constituents as voters are unable to decide who represents their particular district. In a PR system it can be very difficult to remove a fairly large party from power because their share of the vote will likely always be enough to keep them in a coalition.

Single Transferable Vote (STV)

A Single Transferable Vote system has been favoured by political scientists, but it has only been applied in a few countries including the Republic of Ireland and Malta. It allows voters to rank-order candidates in multi-member constituencies. Voters rank candidates in order of preference on the ballot paper (similar to AV). Voters are not required to rank-order all the candidates; they can choose to mark only one. After all the first-preference votes are counted, a 'quota' of votes required for the election of a single candidate is established. The first count determines the number of first-preference votes for each candidate. Any candidate whose first preference votes are greater or equal to the quota is immediately elected. If no one achieves the quota the candidate with the least amount of first preferences is eliminated from the race and their second preference votes are distributed to the other candidates left in the race. The second preference votes of elected candidates are redistributed in the second and subsequent counts. To ensure fairness, the candidate's ballot papers are redistributed by a fractional percentage of one vote so that the total redistributed vote equals the candidate's surplus. For example, if a candidate had 100 votes and their surplus was 10 votes then each

²⁵ Sadie Y (2017) Women, the Electoral System and Political Parties. In Thuynsma H (ed.) *Political Parties in South Africa: Do they Undermine or Underpin Democracy*. Pretoria: African Institute of South Africa

ballot paper would be worth 1/10th of the vote. The process continues until all the seats are filled.

STV has similar advantages as PR. Additionally, it allows for a choice between parties and between candidates within parties while maintaining a high degree of proportionality. In most MMP systems the district sizes are quite small which allows for a geographical link between the voters and their representatives. Independent candidates have a better chance of election under STV than List PR because voters are choosing between candidates and not between parties.

The main disadvantage of STV is that it is unfamiliar to most voters and difficult to explain. It requires voters with a fair degree of literacy and numeracy to understand. The complexity of the STV count can also undermine the credibility of an election. Estonia used the system in its first democratic election then abandoned it because of questions about election integrity. Like BV, STV can cause internal party fragmentation and factionalism because candidates from the same party are encouraged to compete against each other.

3.2.3. Mixed Systems

Multi-Member Proportional (MMP)

Mixed Multi-Member Proportional (MMP) systems combine plurality-majority and PR systems. A portion of the legislature is elected in single-member districts in FPTP or majoritarian contests and the remainder is elected by PR lists. The PR votes are used to compensate for any disproportionality that is produced by the district seat votes. For example, if one party wins five percent of the national vote but no district seats then they would be awarded enough seats from the PR lists to give them five percent of the seats in parliament. This is the system used in South Africa's local government elections. The advantage of this system is that it combines proportionality with direct geographical representation. The disadvantage is that the vote for the direct representative counts less than the PR vote in determining the overall composition of the legislature. This creates two classes of representatives with the PR representatives holding greater influence in practice.

Parallel System

Parallel systems use elements of both PR and plurality/majority running independently of each other. Unlike MMP systems the PR lists do not compensate for disproportionality within the FPTP or majoritarian contests. Voters may receive a single ballot to vote for both the candidate and their party or two separate ballot papers - one for FPTP and the other for the PR vote. There are variations in the balance between the PR and plurality-majority seats. The advantage of parallel systems is that in respect of proportionality they fall somewhere in between plurality-majority and PR systems. They are also more inclusive than plurality-majority systems because small parties can win representation in legislatures through the PR ballot. The main disadvantage of parallel systems is that they don't guarantee overall proportionality and some parties may still not be represented in legislatures despite winning a significant share of the vote. Parallel have similar disadvantages to MMP in that they risk creating two classes of representatives with unequal influence over decision-making. In addition, parallel systems can be quite complex and leave voters confused about the election results.

4. SOUTH AFRICA'S ELECTORAL SYSTEM

South Africa's electoral system must be understood within the context of the country's position as a post-conflict democracy that experienced a negotiated transition from apartheid to democratic rule.²⁶

The drafters of the Interim Constitution agreed that a closed-list PR system would result in a parliament that mirrored the electorate, allowing a diversity of political groups to be represented. The Interim Constitution also provided for a governance system with regional or federal characteristics, which appealed to the Zulu-nationalist Inkatha Freedom Party (IFP) and the Afrikaner right, who wanted to ensure the protection of their group rights in a democratic system. A way to ensure this was the proposal of a list-based PR system with both national and regional party lists to ensure proportional representation of regions in Parliament. The electoral arrangements in the Interim Constitution were meant to be

²⁶ Matlosa, K, 'Electoral systems, constitutionalism and conflict management in southern Africa', *Journal of Conflict Resolution* 4, no. 2 (2004)

temporary and were only to have been applied to the 1994 election. The constitutional negotiations were meant to have yielded decisions for a more permanent electoral system.²⁷

The final Constitution of 1996 postponed the decision on a permanent electoral system and instead retained the electoral system used in 1994 for the 1999 election as a transitional measure until the National Assembly passed an electoral act with an electoral system to be used in the long-term. Schedule 6 of the Constitution, headed 'Transitional Arrangements', stipulates that the election procedures set out in the Interim Constitution apply to 'the first election of the National Assembly under the new Constitution'. This suggests that the drafters of the Constitution did not expect it to be a permanent choice and merely postponed the finalisation of the electoral system until after the 1999 election. In his address at the final sitting of the first democratically elected Parliament on 26 March 1999, former President Nelson Mandela implied as such when he said:

Look at the record of our Parliament during these first years of freedom... Look at the one hundred laws on average that have been passed by this legislature each year... They have created a framework for the revolutionary transformation of society and of government itself, so that the legacy of our past can be undone and put right. It was here that the possibility was created of improving the lives and working conditions of millions.

Look at the work of the committees that have scrutinised legislation and improved it, posed difficult questions of the executive and given the public insight and oversight of government as never before...This is a record in which we can take pride.²⁸

But even as we do so, we do need to ask whether we need to re-examine our electoral system, so as to improve the nature of our relationship, as public representatives, with the voters! (emphasis mine)

Any electoral system in South Africa must fit the following binding constitutional constraints:

1. Multiparty system: Section 1 (d) of the founding provisions of the Constitution of the Republic of South Africa (1996) includes, among the Republic's founding values, 'a multi-party system of democratic government'. This means that different groups must be allowed to compete for political power and the Republic must never become a one-party state. Malanga J emphasised that the reference to a multi-party system 'in no way excludes the participation of independent candidates in the regular

²⁷ Hamilton, L, *Are South Africans free?* (London: Bloomsbury, 2014)

²⁸ Mandela, N. 'Address by Nelson Mandela at final sitting of first democratically elected Parliament, Cape Town' (26 March 1999). Accessed 24 October 2022
http://www.mandela.gov.za/mandela_speeches/1999/990326_parlfinal.htm

elections envisaged in section 1(d)' (para 71).

2. **Parliamentary system:** South Africa has a parliamentary or Westminster democracy. In this system the executive comes to power through the legislature. This is different to a presidential system where the head of government is elected directly by the citizens. In SA the head of government (referred to as the president) is elected indirectly by MPs who have been elected into parliament. This is stipulated in Section 86(1) of the Constitution. The same applies to the election of the Premier of a province (see Section 128(1). Introducing direct presidential elections would require amendment of these sections of the Constitution.
3. **Proportional Representation:** The main constraint, for whatever system is chosen, is that it 'results, in general, in proportional representation'. This is set out in the three sections in the Constitution which deal with the election of members of legislatures: 46(d) on the election of the National Assembly, Section 105(d) on the election of provincial legislatures and Section 156 (3) on the election of municipal councils. This constitutional requirement precludes the adoption of a plurality-majority electoral system.

The structure of the electoral system is:

Ballot structure: Voters vote for a political party and not for individual candidates. The ballot paper contains the party names, logos and a photograph of the party leader. If they are voting within the province they are registered in, voters receive two ballot papers, one for the national assembly and the other for the provincial legislature. Those who are voting from outside their resident province or from outside the country are only permitted to vote in the national ballot.

District structure: South Africa has one national district and nine provincial districts. A political party may contest an election if it is registered and has submitted a list of candidates. Parties may choose whether to register for national or provincial elections or both. They can also choose which provincial ballots to contest. According to the electoral act parties must pay a deposit fee to contest elections but the amount to be deposited for a party contesting a provincial election must be less than that of the National Assembly election.

Electoral formula: Votes are converted to seats through the Droop quota formula that allocates seats to each party in proportion to its share of the vote. Any party that wins 0.25 per cent of the vote can be represented in the National Assembly. This is the lowest entry threshold of any PR system.

There have been several unsuccessful attempts to initiate electoral reform since 1994 including the 2003 report of the Electoral Task Team chaired by former MP Dr Frederick van Zyl Slabbert, a 2013 Private Members Bill introduced by the Democratic Alliance (DA) proposing electoral reform, the 2017 report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (Motlanthe report) and a Private Members Bill introduced by Cope Leader Mosiua Lekota in 2020.

The Van Zyl Slabbert Commission was a watershed moment in electoral reform and is discussed in detail below.

4.1. Van Zyl Slabbert Commission

In March 2002, Cabinet established an Electoral Task Team (ETT) to ‘draft the new electoral legislation required by the Constitution’. The ETT was chaired by Dr Frederick van Zyl Slabbert. It was formally launched by the then Minister of Home Affairs, Dr Mangosuthu Buthelezi on 9 May 2002. The ETT was mandated to ‘formulate the parameters of new electoral legislation and draft it in order to prepare for the scheduled National and Provincial elections of 2004 or any earlier election, should the need arise’.²⁹

After extensive consultations with political parties and civil society, the ETT reached two different views on whether the electoral system should be changed. The minority view was that the current system of closed-list PR be retained unchanged, and the majority view was that the system should be amended to allow for a greater measure of constituency representation. Both views were presented in the final report. The crux of the ETT’s disagreement was the question of whether the advantages of changing the system outweighed the disadvantages of maintaining it and vice versa. The majority recommended a

²⁹ ETT (Electoral Task Team, *Report of the Electoral Task Team*, (January 2003): 1

mixed member proportional representation system. Using the three dimensions of electoral systems, the proposal was as follows:

District Structure: The proposal was based on the idea that the current electoral system is already a mixed proportional system because half the representatives in the National Assembly are elected from nine regions (provinces). These regions can be considered constituencies with clearly defined geographical territories. According to the ETT majority ‘the provinces are, to all intents and purposes, multi-member constituencies with representatives elected from separate regional lists and with a separate quota applying in each case. The remaining 200 representatives are allocated from compensatory national lists (with a quota which is different from any of those used to determine regional/constituency representation) with a view to restoring overall proportionality’.³⁰

The majority thus argued that because the principle of multi-member constituencies was ‘already embedded in the current electoral system’, it could form the foundation of an electoral system of multi-member constituencies, electing 300 members of the National Assembly with a compensatory closed national list to elect the remaining 100 members and restoring overall proportionality.

Specifically, the majority proposed expanding the number of multi-member constituencies from the current nine (regions/provinces) to 69, based on the population distribution in municipalities. Constituencies would be divided along the boundaries of district councils and metropolitan councils. The boundaries would be the same for national, provincial and municipal elections, which means there would be no possibility of constituency boundaries going over provincial boundaries. The number of representatives per constituency would vary according to registered voters from three to seven for a national election.

Ballot structure: As stated earlier, all members of the ETT agreed on the main principles of the electoral system: simplicity, fairness, inclusiveness and accountability. In order to uphold

³⁰ Ibid, 21

the principle of simplicity, the majority argued that the ballot structure in an amended system could remain simple and easy to use for voters.

If 300 of the 400 members were elected from closed constituency lists and the remaining 100 was elected from a closed party list, then it would be possible to combine them and use one ballot paper only, like the current system. Ballot papers would bear the parties' names, emblems and the leaders' photographs. This would remove risk of confusion about voting procedures. Even if the constituency and national ballots were separated, voters would be familiar with multiple ballots from municipal elections.

Electoral formula: The ETT proposed a mixed-member proportional system that would retain the benefits of PR while providing for constituency representation.

The report was presented to cabinet in January 2003. However, the ETT's recommendations were not implemented and the report was shelved without public discussion of its findings.

5. MINISTERIAL ADVISORY COMMITTEE ON THE ELECTORAL SYSTEM

Although the Constitutional Court emphasised Parliament's responsibility to amend the Electoral Act by 10 June 2020, the Electoral Amendment Bill (1 of 2022) was only introduced to the National Assembly on 10 January 2022. In 2020 and 2021, the Portfolio Committee on Home Affairs only discussed the Electoral Act amendment on six occasions - three meetings in 2020 and three meetings in 2021. This demonstrates how the official response to the task of electoral reform has been characterised: by a lack of urgency and a lack of political will to implement substantive change. In its application to the Constitutional Court to extend the deadline for completion of the Bill, Parliament indicated that it had submitted letters to the Minister in January 2021, August 2021, September 2021, and November 2021 'requesting an urgent indication as to when the Bill would be introduced. The Minister failed to respond'.³¹ It appears Parliament did not do anything else to expedite the process.

³¹ Speaker of the National Assembly and Another v New Nation Movement NPC and Others [2022] ZACC 24, para 30

In February 2021 the Minister of Home Affairs, Aaron Motsoaledi established the Ministerial Advisory Committee (MAC) to help him develop policy options to amend the Electoral Act to enable individuals to contest for national and provincial elections. The Committee was composed of three former election management officials, a former Minister, two political scientists, an advocate of the high court, and a current IEC commissioner. The MAC was chaired by Mr Valli Moosa, former Minister of Constitutional Affairs and had seven other members:

- Advocate Pansy Tlakula – the former Chairperson of the Electoral Commission of South Africa (IEC).
- Advocate Vincent Maleka – a Senior Counsel.
- Dr Michael Sutcliffe – former member of the Municipal Demarcation Board (MDB) and former Ethekewini Municipal Manager.
- Dr Nomsa Masuku – Commissioner of the Electoral Commission of South Africa (IEC).
- Dr Sithembile Mbete – Senior Lecturer: Department of Political Sciences at the University of Pretoria.
- Mr Norman du Plessis – former IEC Deputy Chief Elections Officer.
- Prof Daryl Glaser – Head of Department: Political Studies at Wits University.

The MAC met regularly between March and June 2021 to complete its work. It held two online stakeholder consultations on 30 March and 14 April 2021 respectively. From the outset, one of the debates in the MAC was about whether to advise for fundamental or minimalist change of the system. The two options presented in the MAC report reflect this debate.

Taking inspiration from the Van Zyl Slabbert Commission, the MAC identified principles or values to guide its work. These were based on the four principles identified by the Van Zyl Slabbert Commission but were updated to fit the context of inclusion of independent candidates.

These principles were:

- **Inclusiveness (national unity):** This is one of the central values enshrined in the South African Constitution. South Africa's electoral system should yield a broad representation of the South African population's demographic, ethnic, racial, and religious diversity. This remains a significant value, 27 years after Apartheid. The demarcation of constituencies must not reinforce Apartheid spatial patterns.
- **Fairness:** The system must provide for one person one vote of equal value.
- **Simplicity:** A balloting procedure that must be understandable and reduce incidents of spoilt ballots and should also contribute to the credibility of the elections.
- **Accountability:** Accountability can be defined as 'the obligation of those with power or authority to explain their performance or justify their decisions. Accountability is linked to responsiveness; that government officials will listen to the grievances of the people and respond effectively. It is an essential aspect of the social contract between the people and their representatives. Essentially, an accountable government is one that fully expresses the will of the people and has built-in mechanisms to prevent attempts to usurp the will of the people. Over the years, one of the prime criticisms of South Africa's ruling elite is that they are not accountable to citizens.
- **Gender Equality:** Section 1 of the Constitution enshrines equality and non-sexism as two of the founding values of the Republic. Section 9 of the Constitution enshrines the right to equality. The MAC should avoid selecting a system that will result in a reversal in gender equality.
- **Proportionality:** Whatever system is chosen must 'result, in general, in proportional representation' (section 46(1)(d) and 105(1)(d) of the Constitution).
- **Effective participation of independents:** In the New Nation judgement, the Constitutional Court ruled that the Electoral Act should be amended to enable adult citizens to exercise their constitutional rights to stand for public office in national and provincial elections *without* joining a political party. Any system recommended by the MAC must enable the substantive participation of independent candidates.
- **Genuine choice:** Pursuant to the spirit of the Constitutional Court judgement, the electoral system should provide the voters with the chance to select not only among

political parties and lists but also among individual candidates.

- **Effectiveness:** Given the likelihood of a high number of independent candidates both for the national and provincial levels, the electoral system should have the ability to generate a manageable number of candidates through an in-built threshold for candidate nomination.
- **Legitimacy:** the electoral system should reflect (similarly to the Constitution) genuine national consensus and not be seen by significant sectors of the population as flawed and unfair.

The main area of disagreement among committee members was whether it was necessary to introduce a constituency-based system for the Constitutional Court's judgement to be implemented. Some members of the Committee argued that the Constitutional Court's judgement was only about allowing individuals to contest for elections, and it wasn't concerned with creating a constituency system. They pointed out that the word 'constituency' appears once in the majority judgement (in a footnote) and twice in the minority judgement to explain how a constituency system enabled the National Party to take power in 1948 despite losing the popular vote. Allowing individuals to contest elections could be done without creating constituencies at national and provincial level.

Other committee members argued that although the Court didn't refer to constituencies directly, the parts of its judgement referring to direct representation clearly implied constituency representation. Paragraphs 52 to 58 of Madlanga's judgement address the issue of the second applicant, Ms Chantal Revell, who is a leader of the Korana nation of the Khoi people. She explained that she did not want to have to be forced to form or join a political party to be able to represent her people in the National Assembly. The partisanship inherent in party membership would make her 'ultimately answerable to the party' instead of her nation. The Court accepted Ms Revell's reasoning and ruled that by forcing an individual to join a political party in order to run for office the Electoral Act violates the right not to associate. By accepting the importance of Ms Revell representing and answering to her nation, the Court implicitly acknowledged the nation as her constituency.

5.1. Stakeholder consultations

The MAC held two stakeholder consultations where it heard the views of approximately twenty organisations. These consultations were not exhaustive or comprehensive because the expectation was that Parliament would undertake a broader public consultation process as required by the constitution. The changes proposed by stakeholders included:

- Applying the local government electoral system to national and provincial elections by having single-member constituencies with compensatory PR, similar to the local government elections.
- Some variant of the Van Zyl Slabbert model of multi-member constituencies. In these models 300 National Assembly seats would be allocated from constituencies and the other 100 from compensatory PR lists. Questions to be resolved related to the size and demarcation of constituencies and how to incorporate independent candidates.
- A full overhaul of the political system to enable direct election of the President.
- The introduction of single-member constituencies combined with open-list PR and a single transferable vote system to enable voters to transfer their votes to other independent candidates.
- Introduction of electronic voting to reduce the costs of elections and increase participation.
- A minimally disruptive approach that implements the Constitutional Court judgement but preserves PR as much as possible.

5.2. MAC Report

The MAC considered all of these proposals. Ultimately the MAC was unable to reach agreement on a single proposal to amend the electoral act. On 9 June 2021, the MAC presented a report with two options for electoral reform to the Minister of Home Affairs.³² These have come to be referred to as the minority and majority reports.

³² Ministerial Advisory Committee on Electoral Reform. 2021. Report of the Ministerial Advisory Committee on Electoral Systems Reform, 9 June 2021 https://pmg.org.za/files/211207Letter_from_Minister_of_Home_Affairs_MAC_report_and_Electoral_Amendment_Bill.pdf

5.2.1. Majority report: The mixed-member model incorporating single-member constituencies (Modified LGE system).

This option was supported by: Mr Valli Moosa, Professor Daryl Glaser, Dr Sithembile Mbete, Advocate Vincent Maleka.

This option entails combining the first-past-the-post and proportional representation, making it a mixed-member proportional (MMP) system, which resembles the current local government electoral system. The features of this system are that:

- It involves voters electing MPs from 200 single-member constituencies and the remainder from a single national multi-member constituency.
- Voters would vote for a single MP to represent them in single-member constituencies (their first vote) and for a party to represent them in the single national multi-member constituency based on competing for closed party lists (their second vote).
- Ballot structure: Voters would get four ballots on election day. Two ballots for NA elections (single-member constituency and PR list) and two ballots for provincial legislature. The single-member constituency ballots would have the names of individuals while the PR ballots would have the names of parties.
- District structure: Constituencies would be demarcated by combining local government wards.
- Electoral formula: There are two possibilities for single-member constituencies - FPTP which is the system used at local government level or Alternative Vote (AV) where voters select first and second preference candidates in their constituency. If the first preference votes fail to yield a candidate with 50 per cent plus one then the second preference votes will be counted. This ensures that MPs have a majority in their constituencies. The PR votes would be used to allocate the 200 PR seats.
- Recall provision: A proportion of registered voters in their constituency could recall a constituency MP/MPL once during an election term which would trigger a by-election.
- Vacancies for constituency seats would be filled through by-elections in the respective constituency and vacancies in elected party-list representatives would be filled by the next person on the party list filling the vacancy.
- This option does not interfere with the constitutionally required general

proportionality and is the best option for ensuring inclusiveness, gender representation, simplicity and fairness for independents.

5.2.2. Minority Report: A modified multi-member constituency (MMC) system to accommodate independent candidates

This option was supported by: Advocate Pansy Tlakula, Mr Norman Du Plessis, and Dr Michael Sutcliffe.

This option makes relatively minimal changes to the Electoral Act because it inserts independents into the existing PR list system by enabling independents to compete with political parties for votes. The features of this system are:

- Amending the definition of 'party' in the Electoral Commission Act (No 51 of 1996) so that 'party' refers to a registered political party *and* an independent candidate contesting elections.
- Retaining the current composition of seats in the NA and the PLs. The NA would comprise of 200 regional seats and 200 compensatory seats (allocated from closed party lists).
- Ballot structure: The voters would receive two ballot papers – one ballot paper for the National Assembly and another one for the Provincial Legislature. Parties and independent candidates will appear on the same ballot.
- District structure: Considering the provinces as nine constituencies (i.e. regions) for the proportionally represented within the National Assembly through 200 regional seats. The IEC would determine the number of representatives for each region before an election on a proportional basis based on the number of registered voters in each region. In the case of PLs there would be no constituencies so the election would be a straight PR election - like the current system.
- Electoral formula: An independent candidate would only be able to be allocated one regional seat. Instead of using the Droop formula, a highest average formula would be used. Using the Droop formula with independents presents the risk of a smaller party winning seats with a smaller number of votes than an independent. Parties are allocated regional seats for each region in proportion to the votes they received in that region. Votes cast in one region cannot be considered in another region.

- Independents are only able to contest in the province in which they reside ('the constituency').
- Vacancies for independents would be filled by recalculating the result of the election disregarding the votes for the independent candidate. Vacancies for party representatives would be filled by the net person on the party list.

6. ELECTORAL AMENDMENT BILL³³

The Electoral Amendment Bill (B1 -2022) was introduced to Parliament on 10 January 2022.³⁴ It is based on the minority report presented by the Ministerial Advisory Committee. It makes minimal changes to the Electoral Act by applying the closed-list PR system to parties and individuals. Provinces are treated as distinct constituencies (called regions). The National Assembly is divided into 200 regional seats and 200 compensatory seats drawn from PR lists. Independent candidates can only compete for regional seats.

The main features of the Amendment Bill as introduced to Parliament were:

- Change of definitions to allow individuals to contest elections in the National Assembly and provincial legislatures;
- Provides for the nomination of independent candidates to contest elections and provides for the requirements, which persons who wish to be registered as independent candidates must meet;
- Provides that a registered party must submit a declaration confirming that all its candidates are registered to vote in the region or province where an election will take place;
- Provide the procedure to follow for a non-compliant nomination of an independent candidate;
- Provide for the inspection of copies of lists of independent candidates and accompanying documents;
- Provide for objections to independent candidates;

³³ The information in this section is taken from the Parliamentary Monitoring Group (PMG)'s reports on the meetings of the Portfolio Committee on Home Affairs, <https://pmg.org.za/committee/110/>

³⁴Electoral Amendment Bill [B1 – 2020] <https://pmg.org.za/bill/1054/>

- Provide for the inclusion of a list of independent candidates entitled to contest elections;
- Provide that independent candidates are bound by the Electoral Code of Conduct;
- Provide for the return of a deposit to independent candidates in certain circumstances;
- Amend Schedule 1 by setting out the new electoral formula for allocation of seats. Unlike the MAC minority report, the Bill continues with the largest remainder system. However, the formula used to calculate the quota for allocating seats is different for independents than for parties. Regional seats are allocated in three rounds with independent candidates being allocated seats in the first two rounds and parties allocated seats in the third round:
 - i. In round one, a quota of votes per seat is determined for each region by dividing the total number of votes cast in a region by the total number of seats allocated to that region. Each independent candidate who receives enough votes to meet the first quota is awarded a seat.
 - ii. In round two, a second quota of votes is determined in each region by subtracting the votes cast for independents who were allocated a seat in the first round from the total number of votes cast in the region to calculate the numerator. Then it is necessary to subtract the seats won by independent candidates in the first round from the total number of seats allocated to the region to calculate the denominator. After which it is necessary to divide the remaining number of votes cast in a region by the remaining number of seats allocated to that region to determine the second quota of votes per seat. Each remaining independent candidate who receives enough votes to meet the second quota is awarded a seat.
 - iii. In round three, a third quota of votes in each region is used to allocate seats to political parties. This quota is determined using the Droop formula. All votes cast for independent candidates in a region are subtracted from the total votes cast in the region and all the seats won by independents are subtracted from the total seats allocated to that region. The third quota is calculated by dividing the remaining number of votes cast in a region by the remaining number of

seats allocated to that region, plus one.

- The Bill was tagged as a Section 76 bill which is an ordinary bill that affects the provinces (and therefore must be considered by both the National Assembly and the National Council of Provinces). The memorandum on the Bill states: ‘the purpose and effect of the Bill in a substantial measure affects the interests, concerns and capacities of the provinces’.³⁵

On 21 January 2022 Parliament opened a call for public submissions on the Electoral Amendment Bill with 21 February 2022 as the deadline for submissions. Parliament held public hearings on 1 and 2 March 2022 at which some organisations and individuals were allowed to present their views. The main criticisms of the Bill were:

- It creates unequal competition between independents and parties in the NA elections because independents can only contest 200 seats and seats for independents are calculated using a different electoral formula to seats for parties. The three round allocation system would result in the quota used for political parties (third round) being smaller than that used for independents (first and second round).
- It distorts proportional representation because of the high number of wasted votes.
- It limits constituency accountability because the regions are so big.
- It undermines substantive participation of independents because of the entry requirements and the inequality in calculating election results.
- Public consultations were limited and the delay in introducing the Bill to Parliament caused artificial urgency.

In response to the criticism about the lack of consultation, the Portfolio Committee hurriedly

³⁵ Tagging refers to the classification of a bill into its appropriate legislative category. In terms of the Constitution, different bills follow different processes within Parliament, depending on their content. here are four main categories: 1. ordinary Bills that do not affect the provinces (section 75 of the Constitution); 2. ordinary Bills that affect the provinces (section 76 of the Constitution); 3. Money Bills (section 77 of the Constitution); and 4. Bills amending the Constitution (section 74 of the Constitution)

organised provincial public hearings on the Bill in all provinces from 7 to 23 March. These consultations were also criticised because they only dealt with the Amendment Bill and no other reform options were considered.

On 26 April 2022, Parliament filed papers with the Constitutional Court requesting a six-month extension of the deadline for the finalisation of the amendment of the Electoral Act. The extension was granted on 10 June and the new deadline is 10 December 2022.

On 25 August 2022 the Portfolio Committee adopted the A list of the Electoral Amendment Bill which set out all of the proposed amendments to the Bill. The Committee also broadened the subject of the Bill.³⁶ The proposed amendments included:

- **Tagging:** The Bill was now tagged as a Section 75 Bill, which is an ordinary bill that does not affect the provinces. The explanation for this is unclear and seems strange considering the Bill concerns both national and provincial elections.
- **Definitions:** The Bill amends section 1 of the Act to include definitions of 'person' to mean 'a natural person' and the deletion of the term 'party liaison committee' to be replaced by 'political liaison committee which means 'a committee established in terms of the Regulations on Political Liaison Committees published in terms of the Electoral Commission Act, 1996 (Act No. 51 of 1996) ('Electoral Commission Act').
- **Requirements for independent candidates to contest elections:** The original Amendment Bill stated that a person could contest an election as an independent candidate in the NA or for a provincial legislature, only if they reside in the region or province concerned and are registered as a voter on the segment of the voters roll for the region or province concerned. In the public participation process, many criticised this as unfair because it restricts independent candidates to contesting for only the seats for their region, which was fewer than 200. The Committee has subsequently revised the Bill to enable a qualifying independent candidate to contest more than one region for a seat in the NA. Independent candidates contesting more than one region cannot aggregate their votes.

³⁶ <https://pmg.org.za/committee-meeting/35387/>

- **Nomination of an independent candidate:** Inclusion of a provision that an independent candidate must complete a prescribed form confirming that the candidate has submitted names, identity numbers and signatures of voters who support the candidate, totalling **at least thirty percent** of the quota for a seat. This means that if the requirement for a seat in the NA is 45 000 votes, then an independent candidate must submit 13 500 signatures to be able to contest the election.
- **Cooling off period:** Removing the requirement of a cooling off period before a former member of a political party can run as an independent candidate.
- Amending Schedule 1A as follows:
 - i. **Electoral formula:** The amendment scraps the three round electoral formula. The Bill has now been amended to retain the seat allocation system currently provided for in the Electoral Act but expands on it to include independent candidates and uses a highest remainder system so independents and political parties will be allocated seats using the Droop quota.
 - ii. **Ballot Papers:** For national assembly elections the original Amendment Bill provides for ‘nine different ballot papers - distinct for each region to include independent candidates for that region’ and each province would have its own ballot paper including the parties and independent candidates contesting that province. Voters would get two ballot papers - one for the national assembly and one for the provincial legislature. However, on the advice of the IEC, the Committee has now made provision for there to be nine regional ballots and a national ballot. Hence, voters will receive three ballot papers - one for regional seats in national assembly, one for national seats in national assembly and one for the province. Parties’ list of candidates must consist of a regional list for each region and a national list in order of preference. A party candidate’s name may be on both regional and national lists but may not appear in two different regional lists. Parties must prove that regional candidates are registered in the regions in which they are listed.
 - iii. **Filling of vacancies:** The original Amendment Bill provides for parties to fill vacancies by nominating someone from their lists. It did not provide for the

replacement of an independent candidate. Instead, if there was a vacancy for an independent's seat, then it would remain vacant until next elections. This was rejected in the public participation process. Now the Amendment Bill includes a provision to fill vacancies for independent candidates through recalculation of the election results.

- iv. The original Amendment Bill provided a very complex way of calculating the seat allocation using three separate rounds, This was rejected in the public participation process.

Because the amendments included concepts and clauses that didn't appear in the original Bill drafted by the Executive, Parliament's legal advisors recommended that the Committee request permission from the National Assembly to extend the scope of the revised Bill. This would then require further public consultations on the new amendments. The National Assembly granted permission for the extension of the scope, so Home Affairs Portfolio Committee readvertised the Bill and made a public call for written submissions on the additional definitions and clauses in the Bill. The call for submission was limited to the specific amendments in the Bill. It stated: Please note that submissions must be limited to the abovementioned proposed amendments, and the Committee would not consider issues raised beyond this. Submissions closed on 16 September 2022.

The Committee received a total of 256 submissions from several individuals and organisations.³⁷ Most submissions related to the signature requirement percentage, the deposit amount, aggregation of votes and the recalculation method used in the case of vacancies:

- **Signature requirement percentage:** Many submissions argued that the 30% of the quota for a seat in the previous election is too high and amounts to unfair discrimination of independent candidates.
- **Deposit amount:** The submissions also took issue with the deposits outlined in Section 31B(3)(b). They requested that the Bill state the amount of the deposits to be paid, or that the payment of deposits be abolished. The Bill allows the Commission to

³⁷ <https://pmg.org.za/committee-meeting/35676/>

determine the amount of the deposits to be paid.

- **Recalculation method:** Many submissions criticised the recalculation method in the event of a vacancy because it violates the electorate's right of choice and favours larger political parties. The submissions called for an option of a running mate system where an independent candidate (IC) can nominate a potential replacement before the election.
- **Aggregation of votes:** Submissions argued that preventing independents from aggregating their votes across regions is unconstitutional as it prevents them from meeting the required vote threshold to obtain a seat. Political parties are awarded seats based on all votes received but not independent candidates. What is the purpose behind preventing an IC from aggregating its votes? Why would an IC be allowed to contest more than one region for an NA seat, but only the votes of one region meeting the threshold are considered for a seat and not the votes obtained in the other regions?

The Portfolio Committee on Home Affairs finalised its work on the Bill on 7 and 12 October 2022. These meetings were attended by MPs from the ANC (6), DA (2) and EFF (2). While the DA and the EFF supported some parts of the Electoral Amendment Bill, both parties objected to the adoption of the Bill as well as the Report of the Portfolio Committee on Home Affairs on the Electoral Amendment Bill. However, because of the ANC majority, the Committee adopted both the Bill and the Report.

The final version of the Electoral Amendment Bill made several amendments based on the public submissions received in September, including:

- Changing definition of 'candidate' and 'independent candidate': The definition of "candidate" has been amended to "a South African citizen contesting an election, or a South African citizen nominated on a list of a party contesting an election, as the context requires". The definition of "independent candidate" has been amended to "a South African citizen contesting an election and who is not nominated on a list of a party".
- Reducing the signature requirement to **20 per cent**. This means an independent

candidate requires 9327 signatures (20 per cent of the 2019 quota of 46 634 votes) to run for national election in 2024.

- Making provision for independent candidates and parties to pay different amounts as deposits to contest the election: Section 31B (6) states ‘the amount to be deposited by an independent candidate contesting an election of a provincial legislature, must be less than the amount for contesting an election of the National Assembly, and such deposits may also be different to the deposits paid by registered parties’.

The DA and EFF had the following objections to the Bill:

- DA:
 - Section 31A (1): the party objected to an independent candidate being able to contest in multiple regions. The DA view was that, like party candidates, independent candidates should choose a region to represent and only stand in that one region.
 - Amendment of section 58 of Act 73 of 1998 regarding ‘appointment of [party] agents’: section 58 (1)(a) of the Electoral Act sets a minimum requirement of two-party agents for each voting station. The amendment of this section removes the minimum number and simply states: ‘every registered party or independent candidate contesting an election may appoint such number of agents as may be prescribed for each voting station’. The DA argued that there should be a minimum number of two-party agents at each voting station of which one should be an opposition party agent. There shouldn’t be zero party agents at any voting station as this was a risk to the integrity of an election.
 - Schedule 1A: the party was also concerned with using recalculation of results to fill a vacancy because it could lead to a situation where every time one does a recalculation to fill a seat, the seat goes to the biggest political party. The party opposed this because after an election, the results should be closed. It proposed that when a vacancy occurred, the seat be filled by the next party or candidate who would have received the seat.
- EFF:

- Section 31A (1): the party disagreed with setting the number of signatures at 20 percent of the quota of the previous election. On 7 October they proposed that the number of signatures should be a fixed amount of 20 000. However, on 12 October they stated that the party position was that there needed to be at least a 30% threshold.
- Section 31B (6): They also disagreed with the Bill's provision that independent candidates pay a lower deposit than political parties. The EFF believe that independent candidates and political parties must pay the same deposit.

The National Assembly passed the Electoral Amendment Bill [B1B – 2022] 20 October 2022 by 232 votes to 98. The Bill was supported by the ANC, EFF, PAC and NFP. Despite objecting to the Bill in the Home Affairs Committee, the EFF came out in support of the Bill at the National Assembly vote. The DA, UDM, ATM and GOOD party voted against it.³⁸ Following this, the NCOP invited public commentary on the Bill, with the submission deadline being 9 November 2022. That leaves one month left before the extended deadline of 10 December 2022.

7. REMAINING PROBLEMS WITH THE BILL

The current Bill is woefully inadequate and does not address any of the fundamental issues raised by civil society during the public participation process. There is a major risk that the Bill creates more constitutional issues and inhibits meaningful participation of independent candidates.

- The biggest flaw of the Bill is that it forces single individuals to contest against organisations, made up of many individuals, in elections. As multi-member organisations, parties are inherently able to stand for election in multiple regions and the votes they receive across regions can be aggregated for them to win seats for multiple individuals to hold office. Even if an independent candidate stands for election and wins support in multiple regions, they can only occupy one seat. All the

³⁸ Ferraira, Emsie, 'National Assembly passes controversial electoral amendment bill amid protests from opposition parties', Mail & Guardian (20 October 2022) Accessed 24 October 2022 <https://mg.co.za/politics/2022-10-20-national-assembly-passes-controversial-electoral-amendment-bill-amid-protests-from-opposition-parties/>

big points of contention in the Bill – independent candidates only being able to contest 200 of the 400 seats, the wastage of votes of independent candidates who win more than the quota to get a seat, the need for recalculation of the results in the case of a vacancy – are a direct result of forcing a competition between unlike units.

- A fair system of competition would be for individuals representing political parties to contest against individual independent candidates for a specific seat in a National Assembly or Provincial Legislature. It would then make sense to limit candidates to contesting in the area in which they live and in which they are registered to vote. The wasted votes of party candidates and independent candidates would be treated the same way and vacancies could be filled without requiring recalculation of the election results. A party's support would be aggregated as the votes for all of its individual representatives.
- The Home Affairs Committee never grappled with the mathematical consequences of the system set out in the Electoral Amendment Bill. Applying the Droop quota formula to calculate the seat allocation of both parties and individuals in the same election produces unsound results. Elections are all about numbers – how to convert votes into seats – and insufficient consideration has been given to the numerical consequences of the amendments made. If the calculations aren't credible, it poses a threat to the credibility of an entire election.
- The tagging of the Bill as under Section 75 instead of 76 is questionable. This Bill relates to the election of Provincial Legislatures so it does have a material effect on provinces. Because the Bill has been tagged as a Section 75, if the NCOP rejects the Bill or proposes its own amendments, the Bill will be returned to the NA. The NA can pass the Bill with or without considering the NCOP amendments or it can reject the Bill. Given the urgency of meeting the 10 December 2022 deadline set by the Constitutional Court it is likely that the NCOP won't amend the Bill.
- The Bill does not ameliorate the problem of a lack of direct accountability. That was the primary motivation of the New Nation Movement's case to the Constitutional Court. With a whole province as a constituency and the high wastage of votes, voting for an independent candidate will yield little accountability. Party representatives will remain more accountable to their parties than to voters.

8. RECOMMENDATIONS

As a way forward:

- SA needs an active large scale civic movement on electoral reform. We must see this Bill as the beginning of the process rather than the end. Recent elections in Lesotho, which underwent an extensive process of electoral reform, demonstrate how changing the electoral system can strengthen citizens' agency. One of the first tasks is to undertake a survey on citizen attitudes about the electoral system. The Van Zyl Slabbert Commission commissioned a study on this in 2002 but there hasn't been a similar survey done since then.³⁹
- Academics need to think creatively about how to comprehensively redesign our electoral system for the long term. There are legitimate concerns about the challenges of demarcating national constituencies in South Africa, which is geographically large but has high population density in certain parts of the country and has a racially defined settlement. The demarcation of constituencies must be approached carefully to prevent distortion of electoral results. There has also been too little exploration of the different mathematical formulas available to calculate results and the impact of these calculations on the system. We need researchers to engage with these questions.
- Any effort to reform the electoral system must have people under 35 at its centre as these changes will affect them the most. South Africa is a young country with 20 580 million people between the ages of 15 and 34⁴⁰. This demographic is also the most disillusioned with electoral politics.⁴¹ They must have the greatest say in designing SA's future electoral system.

³⁹ Roger Southall and Robert Mattes. 2002. Popular Attitudes towards the South African Electoral System. CSSR Working Paper No. 16

⁴⁰ Statista, online. Available: <https://www.statista.com/statistics/1116077/total-population-of-south-africa-by-age-group/>

⁴¹ See Collette Schulz-Herzenberg. 2020. The South African non-voter: An analysis. The Midpoint Paper Series No 2 December 2020, Tracey, L (2016) *Do you want my vote? Understanding the factors that influence voting among young South Africans*. ISS Monograph Number 193