



PROPOSED ELECTORAL MODEL FOR SOUTH AFRICA

*A response to the Constitutional Court judgement
declaring the current electoral legislation unconstitutional*



**INCLUSIVE SOCIETY
INSTITUTE**

Copyright © 2021

Inclusive Society Institute

132 Adderley Street

Cape Town, 8000

South Africa

Registration: 235-515 NPO

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means without permission in writing from the Inclusive Society Institute



DISCLAIMER

Views expressed in this report do not necessarily represent the views of the Inclusive Society Institute or those of their respective Board or Council members.

Date: February 2021

Cover photograph: www.briefly.co.za

SETTING THE SCENE

In the light of the recent Constitutional Court judgement declaring the current Electoral Act unconstitutional, the Inclusive Society Institute (ISI) embarked on a process to design a potential new electoral model for South Africa.

The institute appointed an expert panel, convened by Mr. Roelf Meyer, to undertake the work and mandated the panel to design an electoral model that will meaningfully give effect to the judgement, respect the boundaries set out in the Constitution, retain proportionality as a basis for representation in that it best promotes inclusivity, and which enhances representativity, accountability, and transparency.

The court has given the legislature 24 months to introduce new legislation that will enable independent candidates to stand for election in the national and provincial spheres of government. The institute has prioritised the development of proposals in this regard so as to, in an effort to enrich the public dialogue, timeously provide its findings to the political stakeholders and public policymakers, of potential solutions. This report will also form the basis of the institute's own advocacy in the legislative process that lies ahead.

The institute wishes to acknowledge the work of the panel and thanks its members who generously gave of their time and expertise. The members were:

- Mr. Roelf Meyer: In Transformation Initiative. Chief Government negotiator during the democratic transition in South Africa, former Minister of Constitutional Development, and currently a director of In Transformation Initiative.
- Ms. Deyana Isaacs: University of Stellenbosch. Researcher and lecturer in Political Governance at the School of Public Leadership, University of Stellenbosch.
- Prof. Dirk Kotze: University of South Africa. Professor in Political Sciences at the University of South Africa (UNISA), a Vice President of the International Political Science Association and National Secretary of the South African Association of Political Studies.
- Prof. William Gumede: University of the Witwatersrand & Democracy Works. Professor at the University of the Witwatersrand School of Governance and Chairperson of Democracy Works Foundation.
- Mr. Ebrahim Fakir: Auwal Socio-Economic Research Institute. Political commentator and Director of Programmes at Auwal Socio-Economic Research Institute. Former head of political parties and parliamentary programme at the Electoral Institute of Southern Africa (EISA), researcher at the Institute for Democracy in South Africa (IDASA) and the Centre for Policy Studies (CPS). Visiting fellow at the Institute for Development Studies at the University of Sussex for 2006 and visiting Draper Hills Summer Fellow at Stanford University for 2011.
- Ms. Dren Nupen: The Elexions Agency. Former Executive Director of the Electoral Institute of Southern Africa and former Regional Director for Africa at the Open Society Initiative. She brings extensive election experience to the dialogue.
- Prof. Firoz Cachalia: University of the Witwatersrand. Professor at the Law School at the University of the Witwatersrand.



- Professor emeritus Jørgen Elklit: Aarhus University, Denmark. Member of the South African 1994 IEC and of the 2002-2003 Electoral Task Team (aka the van Zyl Slabbert Commission). 1996-2009, a member of the board of directors of EISA. Secretary to the 2008 Independent Review Commission in Kenya. 2013 recipient of IFES' Joe Baxter Award.
- Prof. Cherrel Africa: (Flexi-member) University of the Western Cape. Formerly at the Institute for Democracy in South Africa, election analyst for the SABC and ENCA and currently associate professor and chair for political sciences, University of the Western Cape.
- Prof. Rassie Malherbe: University of Cape Town. Currently offers an extra-curricular programme in the drafting of legislation at the University of Cape Town. Former professor of public law and Head of the Department of Public Law at the University of Johannesburg.
- Mr. Grant Masterson: Programme Manager: Africa Peer Review Mechanism at the Electoral Institute of Southern Africa. He has lectured at the University of Witwatersrand on international relations and the international political economy.
- Mr. Daryl Swanepoel: Chief Executive Officer of the Inclusive Society Institute and former Member of Parliament.

ACRONYMS AND ABBREVIATIONS

Acronym/abbreviation	Full description
CC	Constitutional Court
ETT	Electoral Task Team
FPTP	First past the post
MMC	Multi-member constituency
MMP	Mixed-Member Proportional (system)
NCOP	National Council of Provinces
IEC	Independent Electoral Commission
PR	Proportional representation

CONTENT

SETTING THE SCENE	3
ACRONYMS AND ABBREVIATIONS	5
CHAPTER 1: THE CONSTITUTIONAL COURT JUDGEMENT	7
1.1 Unpacking the Constitutional Court judgement declaring the Electoral Act unconstitutional	7
1.2 Discussion on the judgement and preferences related to new models that need to be developed	9
1.3 Assessing and determining the degree of electoral reform that is required	2
1.4 Conclusion	13
CHAPTER 2: INTERROGATING OPTIONS FOR A NEW SOUTH AFRICAN ELECTORAL SYSTEM	14
2.1 Introduction	14
2.2 Minimalist approach	14
2.3 Multiple modelling approaches regarding multi-member constituencies and PR balancing lists	15
2.4 Hybrid parallel electoral model combining majority 'first past the post' with closed list proportional representation	17
2.5 Additional points to be considered in developing a new electoral model	19
2.6 Conclusion	21
CHAPTER 3: A PROPOSED NEW ELECTORAL SYSTEM FOR SOUTH AFRICA	22
3.1 Introduction	22
3.2 Specifics of the proposed electoral system	23
3.3 Illustration of the outcome of proposed electoral model based on the 2019 national election	28
3.4 Ancillary matters to consider	31
3.5 Testing the new system against the guiding principles and criteria	32
3.6 Question and answer guide to understand the proposed system	33
REFERENCES	34
ANNEXURE A	35
1 INTRODUCTION	35
2 FINDINGS OF VAN ZYL SLABBERT COMMISSION & PRESENTATION ON THE DANISH ELECTORAL MODEL: PRESENTED BY PROF EMERITUS JØRGEN ELKLIT, AARHUS UNIVERSITY, DENMARK	36
2.1 The Van Zyl Slabbert Commission	36
2.2 Danish Electoral Model	37
3 GERMAN MIXED MEMBER PROPORTIONAL (MMP) SYSTEM: PRESENTED BY PROFESSOR MICHAEL KRENNERICH, UNIVERSITY OF ERLANGEN-NÜRNBERG	38
4 THE IRISH SYSTEM – PROPORTIONAL REPRESENTATION BY THE SINGLE TRANSFERABLE VOTE: PRESENTED BY PROFESSOR DAVID FARRELL, UNIVERSITY COLLEGE DUBLIN	40
5 SPANISH ELECTORAL MODEL: PRESENTED BY PROFESSOR IGNACIO LAGO, UNIVERSITAT POMPEU FABRA, BARCELONA	42
6 TURKISH ELECTORAL MODEL: PRESENTED BY PROFESSOR ALI ÇARKOĞLU, KOÇ UNIVERSITY, ISTANBUL TURKEY	44
.....	

CHAPTER 1: THE CONSTITUTIONAL COURT JUDGEMENT

1.1 Unpacking the Constitutional Court judgement declaring the Electoral Act unconstitutional

On 11 June 2020, the Constitutional Court declared the following:

"4. It is declared that the Electoral Act 73 of 1998 is unconstitutional to the extent that it requires that adult citizens may be elected to the National Assembly and Provincial Legislatures only through their membership of political parties. 5. The declaration of unconstitutionality referred to in paragraph 4 is prospective with effect from the date of this order, but its operation is suspended for 24 months to afford Parliament an opportunity to remedy the defect giving rise to the unconstitutionality."

Upon assessment, the judgement does not provide extensive guidance but is focused on the shortcomings or deficiency of the Electoral Act with regards to independent candidates. Moreover, the judgement also does not provide guidance as to how the act should or can be amended. The Electoral Act is subject to the Constitution, and therefore the task of the panel must be accomplished without breaching the constitutional boundaries relating to electoral systems.

The following provisions in the Constitution can be considered boundary posts regarding the amendments that can be made to the Electoral Act:

Section 1(d): Multi-Party democracy

Section 1 in the Constitution is the value clause that speaks of multi-party democracy. The Constitutional Court was requested to consider this clause in respect of independent candidacy in elections. Its view on the matter, however, is that independent candidates do not stand in the way of or impede on the functioning of multi-party democracies. This is considered a boundary post, as the amendments that give effect to the judgement may not undermine this value clause. It is also of importance since this value clause is in the Constitution to safeguard South Africa from becoming a one-party state.

Section 19(3)(a): Right to vote

This section is normally seen as comprising four aspects:

- General - For all who qualify according to the basic requirements to vote.
- Equal - To ensure that some votes do not weigh more or less than others, which has an implication for the type of electoral system that is established and how, in this case, independent candidates can be accommodated.
- Direct - Every vote has a direct influence on the outcome.
- Secret - Every voter votes voluntarily, without coercion, intimidation or duress and in secret.

Therefore, equality of the votes forms another boundary post that affects the amendment. An electoral system cannot be established where some votes outweigh others. Independent candidates cannot be accommodated in such a way that the votes brought out for them weigh more or less than for others.

Section 19(2):

Right to Free, Fair and Regular Elections is of importance as it is the basic political right contained in the Bill of Rights. Three aspects are contained in this section:

- Regular elections - Legislature has a fixed term, enforcing that there will be elections at regular intervals.
- Free - To participate without interference or coercion and to ensure that candidates and political parties must be able to participate.



- Fair - Equal opportunity for all parties or candidates to contest the elections.

These aspects will have a bearing on the type of amendments made to the electoral system.

Sections 46 and 105: Electoral system that results, in general, in proportional representation

Section 105 refers to the provinces.

Proportional Representation (PR) is not defined in the Constitution. However, it may include: Proportional Representation of political parties and Proportional Representation reflecting voter preference.

There are many PR systems that give effect to both PR for political parties and voter preference such as list systems, preferential systems, and combined systems. The current South African electoral system is based on party list proportional representation, which means that parties are represented in proportion to their electoral support. The preferential system entails that the voter can indicate preference for a party and candidates on the ballot. The ballot can list party representatives in order of preference and can also move over party lines in this system. The combined systems incorporate PR with constituencies.

Therefore, section 46 and 105 of the Constitution serves as another boundary post within which amendments to the system must be made. The system chosen must result, in general, in proportional representation. Additionally, within the Constitution and, consequently, because of the court judgement, Parliament assumes the responsibility to choose a particular electoral system. The particularities of the system are left to Parliament and it has some leeway on how to give effect to the judgement.

Section 19(3)(b): Right to stand for and if elected to hold public office

This is the provision that the Constitutional Court judgement focused on, and forms the main grounds for the Electoral Act being declared unconstitutional. Within the current electoral system, the exercising of the section 19(3)(b) right can only be channelled through political parties. Therefore, the act does not provide for candidates to participate in elections as individuals or independent candidates. This is the crux of the judgement and what the majority of the courts' ruling dealt with.

Furthermore, Justice Mandlanga added another aspect, which can also be considered a boundary post, namely: section 18, Freedom of Association. Justice Mandlanga's argument was that this also includes the freedom NOT to associate. Under the current Electoral Act, candidates are "forced" to join a political party in order to be a candidate and exercise their right under 19(3)(b), which negates the right NOT to associate while simultaneously seeking to stand for representative political office. Therefore, the Electoral Act violates this right.

Furthermore, the court also dealt with a number of other provisions that were put to the court, including:

- Sections 46(1)(a) AND 105(1)(a): The electoral system is prescribed by national legislation. The national legislature (Parliament) is subject to the Constitution, thus whatever the national legislature decides, its decisions are still subject to the Constitution.
- Sections 47(3)(c) AND 106(3)(c): Loss of membership of legislatures. The Constitutional Court said that this only applies to political parties and does not affect the issue of independent candidates.
- Sections 57(2), 70(2), 116(2), 178(1)(h), 193(5) AND 236: Participation by parties in legislatures.
- 57(2): Deals with the rules and orders of the National Assembly providing for minority parties to participate in the proceedings.
 - Section 70(2): Rules and orders of National Council of Provinces providing for participation.
 - Section 116(2): Rules and orders of provincial legislatures providing for participation.

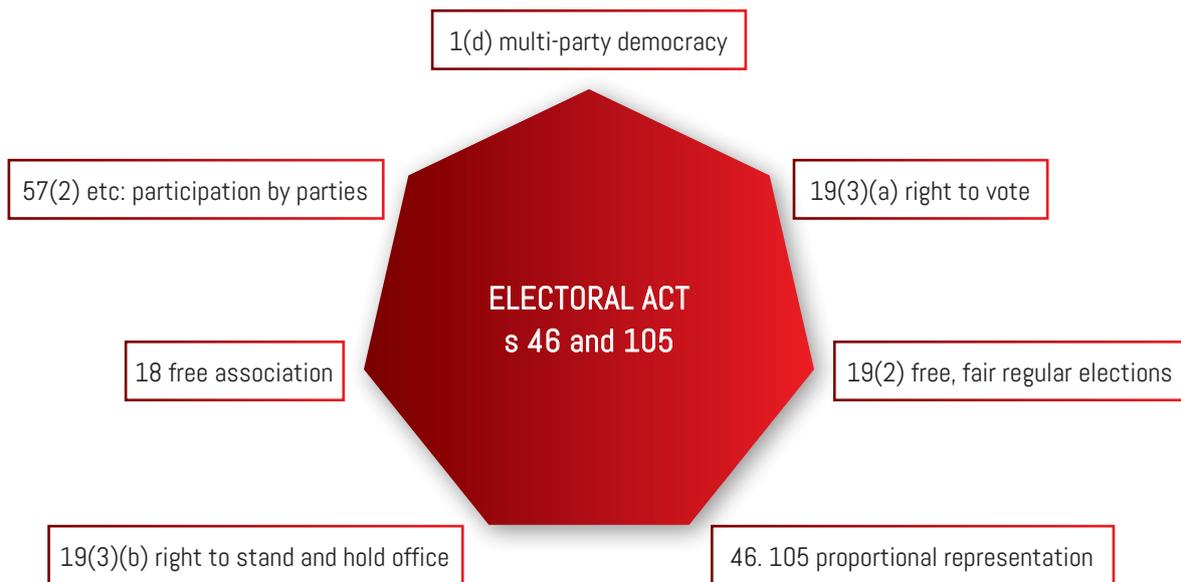


- Section 178 (1)(h): Participation of opposition or minority parties in the process for the appointment of members of the Judicial Service Commission.
- Section 193(5): Deals with chapter 9 institutions where minority parties will also participate.
- Section 236: Legislation to be made for the funding of political parties.

All these provisions are about political parties' participation in legislatures. The court found that these provisions strengthen multi-party democracy and do not prevent making provision for independent candidates to participate. These are boundaries which dictate that whatever amendments are to be made; they cannot undermine the participation of parties in the legislature.

- Section 157(2)(a): The municipal election system can either be a pure PR system according to the list system, where only parties are being presented on the ballot or a PR system combined with wards. This section does not affect the national and provincial spheres. Thus, this only affects the municipal level and does not prevent the court from declaring the Electoral Act unconstitutional.
- Section 6, Items 6(3)(a) and 11(1)(a): Nominations by Political Parties. This only refers to the first elections after the 1996 Constitution came into effect and is thus not applicable anymore and has no current influence.

In conclusion, all the above listed sections are boundary posts that the Constitution imposes on the Electoral Act and the amendments brought to the act. These can be viewed as the most important ones within which the amendment of the act must take place. Below is a diagramme representing the constitutional boundary posts.



1.2 Discussion on the judgement and preferences related to new models that need to be developed

“Proportional Representation (PR), in general” was an important point of discussion. The panel was of the view that “in general” was an important qualification that needed to be taken into account when considering how to give effect to the court ruling as it pertains to the inclusion of independent candidates. It was adamant that PR, as stipulated in the Constitution, must continue to remain a prominent feature of the new electoral system that will provide for the participation of independent candidates.

Absolute proportionality under any system does not exist. It is for this reason, the panel believes, that the term “in general” has been used. More often than not, political parties fall short of the votes to secure the next member to represent them in the legislature. The

surplus is then allocated elsewhere and, accordingly, the end result is not 100% proportional. That said, the panel noted that, currently, South Africa has the most proportional electoral system in the world, due to it not having an electoral threshold for a party to be represented in the legislature and due to the size of the National Assembly.

Proportional representation means that parties get a certain number of seats in the legislature in accordance with the percentage of votes that they received in an election. So, for example, if a party gets 15% of all the votes in the country, then it gets close to 15% of the seats in Parliament. In South Africa, there are 400 seats in the national parliament, so for every 0.25% of the vote a party gets, in principle, one seat.

Consequently, when independent candidates are incorporated into the new electoral system, the requirement pertaining to PR, should, as far as practically possible, be the same for them as for the political parties. If an independent candidate gets a sufficient number of votes to qualify for a seat in the National Assembly or Provincial Legislature, the candidate will be regarded as a “type of party” for purposes of distributing seats. The independent candidate will therefore require an equal number of votes as would a party for gaining a seat in the legislature. The challenge for independent candidates will be to mobilise the minimum number of votes needed to gain a seat in the legislature. Campaign rules must therefore also make provision for independent candidates to share in the public resources made available for purposes of gaining exposure.

The key point of PR is that the composition of the legislature must reflect, in a proportional manner, the preferences of the voters, as expressed in the number of votes cast in a particular election.

Regardless of the electoral system proposed by the panel, there were several issues that needed to be considered. South Africa's current electoral model, at the national level, results in the constitution of a National Assembly with 400 members. The National Assembly is one of the two houses of Parliament, the other being the National Council of Provinces (NCOP). When designing the new electoral system to give effect to the inclusion of independent candidates, the following will need to be considered:

Some of the necessary considerations when implementing a PR electoral system, where the size of Parliament is fixed and incorporating independent candidates includes the following:

- The size of the legislature is fixed.
- Should individual independent candidates or lists of independent candidates be allowed in both houses?
- Should the system allow voters to cast their votes for one (or more) individual candidates (so-called personal or preferential votes) or shall it only be possible to vote for the list as such?
- What will the ballot paper access requirements be pertaining to:
 - Parties elected in previous parliaments and still represented in Parliament? For example, direct access, a deposit, or a certain number of seconding voters.
 - New parties: Payment of deposit or a certain number of seconding voters?
 - Independent candidates (or lists of independent candidates, if allowed): Payment of a deposit or a certain number of seconding voters?
- Will electoral thresholds be different or the same for parties and individual independent candidates, for example, based on a certain percentage of the vote, an absolute number of votes or some other criteria?

Consideration to these key decisions were given by the panel, the outcome of which will unfold later in the report.

And in addition to the procedures to elect representatives, the introduction of independent candidates may very well have consequential implications for a number of other pieces of legislation. For example, the argument has been made that if individual candidates are

.....



to be accommodated in the PR system, then apart from the Electoral Act having to change, the Political Party Funding Act has to be amended to also require independent candidates to disclose the funding and support they receive.

So too, the national and provincial legislatures may, as a consequence of the judgement, have to re-think how they function now that independent candidates may take up seats. The rules and procedures of the legislature may require amendments, as may the constitutional provisions providing for minority party participation in the business of the legislatures, which will have to be expanded to include independent candidates. For example, section 57.2 of the Constitution, which provides for the rules and procedures of the National Assembly to be made with due regard to the participation of minority parties. It will have to be expanded to include independent members. Similarly, section 61, dealing with the allocation of delegates to the National Council of Provinces, may have to provide for a formula broader than just parties in order to accommodate independent candidates.

To illustrate: the current rules of the National Assembly under section 57(2)(b) of the Constitution, indicate that the representation of political parties in the structures of the legislature, for example committees, must also accommodate minority parties. This is proving difficult in that it has not been possible to accommodate every political party represented in the legislature on every one of its committees. This will prove more difficult with the introduction of independent candidates. Moreover, the text on party representation as it now stands (minority parties), may in future not be adequate to provide for the participation of independent candidates.

In discussing the desired preferences and guiding principles that a new electoral model would need to aspire to, the panel articulated a number of core essentials that they sensed needed to be included in the new system. It should provide a greater ability for voters to directly elect candidates, and to exercise an influence over how party candidates are elected. The current system is lacking in this regard.

Likewise, the new electoral system should, in their view, continue to encourage diversity. Demographic, ethnic and religious diversity and inclusivity should be encouraged through promoting a diversity of candidates.

Other features, the panel believed necessary, were that the system should be relatively simple to administer and easy for the voter to understand. And there had to be a meaningful balance between accountability, responsiveness and representativity.

To achieve this, it will require bold and comprehensive reforms that are in the public interest, more so than in the interest of political parties or personalities. Therefore, the panel established the following principles that they considered necessary to guide the design of a new electoral system:

- Representation should be translated into legislative seats and needs to represent the expressed will of the voters. Representation can take the form of geographical representation, where the voters in each region, town, city, province or electoral district choose the candidates who will represent them, and to whom the candidates should ultimately be accountable. The national legislature should be a mirror of the nation and its ideological diversity. To achieve this, some form of link with a particular constituency needs to be established.
- Transparency should exist in both the process of electing the representatives as well as in the overall electoral system itself.
- Inclusiveness: The electoral system should enable as many voters as possible to participate in the voting process. Inclusion will be promoted through a system that is easy to understand and easily accessible to all voters.
- Accountability to the electorate is considered fundamental and needed to be improved. In the current system accountability to the voter was traded for party compliance.



1.3 Assessing and determining the degree of electoral reform that is required

In order to determine the degree of electoral reform that is desired, and the options that can be explored in considering aforementioned constitutional boundaries and guiding principles, the panel analysed the strengths and weaknesses of the current electoral system.

Strengths included the emphasis on promoting multi-party politics through the inclusion of as many political parties as possible. This provided wide-ranging diversity in terms of political ideology, demographics, ethnicity, religious beliefs, amongst others. This was important given the country's history and need for healing, reconciliation, and nation-building.

A further strength of the current system is that it provides the possibility for minority parties to secure seats, which is important to promote inclusion. Moreover, the system is relatively easy to administer and for voters to understand. And it is fair and just in that every vote carries equal power.

One weakness, some argue, is that voters are represented by parties and not individuals. This reduces the ability of the voter to hold individual representatives accountable. Moreover, since the current electoral system operates through a closed party list system, voters are unable to express their personal preferences regarding the candidates standing for election. Neither can they effectively influence these appointments, nor recall ineffective, or rogue representatives. Whilst the current system does allow voters to raise their complaints and concerns with party structures, to date this has proved to rarely influence action against non-performers.

Another weakness is that the voters do not have a direct influence over who will become their representatives in the legislatures. In fact, neither do they have a say as to the election of the president, as this is carried out by the National Assembly. The panel decided, however, that it would not explore the presidential aspects of electoral reform, since its focus was on giving effect to the Constitutional Court ruling.

That said, since the voter votes for a party and not an individual, the reality is that the electorate has no influence over which individuals will be appointed to the legislature. It is the domain of the party leadership and party organs.

It is the aforementioned, many argue, that has led to the ruling party appointing candidates in legislatures that rarely question the executive, lest they be removed or sanctioned by the party. As a consequence, the legislature risks becoming a lame-duck, which leads to a trust deficit and loss of public credibility. This compels extra-parliamentary politics, forcing, in a sense, civil society and the courts to become involved in what should rightfully be the domain of the legislature.

These challenges have resulted in large numbers of voters becoming disillusioned, with many citizens feeling politically disenfranchised, choosing rather not to participate in formal politics, but to engage in extra-parliamentary activism. This is particularly worrisome amongst the youth who have become disinterested in party politics and participation in the formal multi-party electoral processes.

In addition to the strengths and weaknesses analysis, the panel also considered some of the practical considerations that should guide their thinking regarding a new electoral system.

Considering that the designing of a new electoral system takes time to devise, the 24-month time limit stipulated by the court suggests that immediate electoral reform should focus mainly on giving effect to the requirement of accommodating independent candidates in the election processes. Wider and more far-reaching reform would require more time and should therefore be considered only in the longer term.

Another consideration must be cost. Far-reaching reform could potentially be complicated to administer, and difficult for the voter to



understand. This will require greater budgetary resources to implement and to carry out voter education. Recognising that by limiting the extent of reform, problems with the overall system would remain, the panel nevertheless felt it prudent to limit the current reform to creating room for independent candidates to participate. However, where consequential improvements could be made as a result of system changes needed to include independent candidates, they should be taken on board.

Thus, of the three reform options identified by the panel, the first two could be considered.

- *Option 1:* Make minimal technical adjustments to the current system only to allow for independent candidates to be added as candidates. This option would not address the weaknesses in the current system.
- *Option 2:* Make targeted design changes to the proportional representation system which will give effect to the court ruling and go some way in dealing with the weaknesses of the current system.
- *Option 3:* An entire overhaul of the electoral system.

The panel was of the view that a minimalistic change allowing only for independent candidates to be added to the ballot papers under the current system, would not be practical. Imagine adding say 100 independent candidates to the current 48 parties. That would mean an unwieldy ballot paper containing 148 options to vote for.

Accordingly, the panel opted for Option 2.

14 Conclusion

In designing a new electoral system to give effect to the Constitutional Court judgement requiring the Electoral Amendment Act to be amended to allow for independent candidates to stand for election at national and provincial level, the panel concluded that the new system should:

- Give effect to the Constitutional Court judgement
- Fit within the current boundaries prescribed by the Constitution
- Be guided by the principles of representativity, transparency, inclusiveness and accountability
- Be relatively easy to administer, and easily understood by the electorate.

The panel's deliberations to this point provided them with the necessary background and information to enable them to proceed to the next step – that is the design of the system.

But before they did so, they received several presentations on different electoral models from various jurisdictions, including Germany, Spain, Denmark, Ireland and Turkey. All of these models combine PR with the right of independent candidates to stand for election. They also received a presentation on the electoral models contained in the 2003 Van Zyl Slabbert Commission on Electoral Reform Report. A summary of these presentations are contained in Annexure A of this report.

Chapter 2 that follows, interrogates options for a new electoral system for South Africa, whilst Chapter 3 provides the panel's proposed model.



CHAPTER 2: INTERROGATING OPTIONS FOR A NEW SOUTH AFRICAN ELECTORAL SYSTEM

2.1 Introduction

During the next phase of the expert panel's deliberation, they started to conceptualise a unique South African electoral system that may give effect to the court judgement. Various panellists presented their initial thinking with regard to potential electoral models for South Africa. The merits and specifications of each of the proposed models were interrogated and discussed.

This chapter offers a summary of the various electoral models presented by the panellists, as well as additional issues identified during the dialogue.

2.2 Minimalist approach

A preliminary minimalist approach suggests that the current PR closed list system should be maintained, while independent candidates would be accommodated either individually or in a different form. Therefore, this model should remain within the current boundaries of the Constitution, not requiring any amendments.

It therefore satisfies the ruling of the Constitutional Court which requires provisions to be made within the electoral system, on both national and provincial level, to accommodate independent candidates. This model therefore calls for the most basic amendments to only make provision for independent candidates, without changing the electoral system in any extensive manner. The electoral system can in time be further improved to mitigate against the limitations and weaknesses of the current system, including issues such as a lack of accountability, representativity, weak parliamentary oversight and the effects and consequences of the closed list system. The PR closed list system will be used to accommodate the independent candidates, simply by amending the Electoral Act to include a provision for the participation of independent candidates. These candidates would, in a sense, be considered in the same manner as smaller political parties, with the same rules and processes applying. Consequently, the question of how to maintain overall proportionality, would be resolved.

It should be noted that there are, however, still a few issues relevant to this proposed model that will require attention. Firstly, due to the fractious nature of current South African politics, the possibility exists that an increased number of smaller parties and independent candidates resolve to contest elections. In order to manage this, a reasonable threshold for access to the ballot paper would have to be considered, and, in this regard, a 1% threshold of registered voters is the suggested approach.

Parties and independent candidates would therefore have to demonstrate that they have this level of support by providing a required number of verified signatures from voters. The required number of seconders will depend on whether parties and independent candidates are running in provincial or national elections, respectively. This, however, would place an additional administrative burden on the Electoral Commission of South Africa (IEC), who would be responsible for verifying seconding signatures and ensuring that there is no abuse of the system. An assessment will have to be made as to the capacity of the IEC to undertake this task and whether they would be able to adapt their systems accordingly. Concomitant additional resources may have to be allocated by Treasury. On the downside, the introduction of a threshold requirement may be interpreted as a way of undermining the constitutional value of inclusivity.

Secondly, the minimalist approach may be considered a more viable and implementable system over shorter a period. The danger of this approach is, however, that it could allow for too many parties and independent candidates and it may become too difficult and unwieldy a system to manage and control. With this in mind, a few minimal requirements should be set in order to limit the number of candidates on the ballot paper. Reaching agreement on these requirements could be complicated and time-consuming.

.....



On the upside is that the model suggests that it could be relatively easy to enforce gender parity by requiring parties to effect a quota within their lists. The same does however not hold true for independent candidates, as each candidate will only represent him- or herself.

2.3 Multiple modelling approaches regarding multi-member constituencies and PR balancing lists

During the panel's discussions, the multi-member constituency and PR compensatory/balancing list appeared to be a preferred model suggested by most individual panellists.

The Van Zyl Slabbert Commission on Electoral Reform (the Electoral Task Team [ETT]) reviewed the PR closed list system after the 1999 national and provincial elections. The report was published in January 2003 and proposed a number of electoral reforms and electoral models. This model is based on the ETT majority recommendations for a preferred electoral system for South Africa, with some adjustments made.

This model proposes that an electoral system should guard against excessive fragmentation as it could lead to difficulty in the composition of government and the functioning of Parliament. This model promotes accountability to the electorate as it pertains to the representation in national and provincial legislatures. Oversight will be improved, since MP's carry constituency mandates. And this model will not require significant constitutional amendments. In designing the model, consideration was also given to, amongst others, political party and independent candidate's threshold, registration qualification, distortion of proportionality, and prevention of candidates being elected without real support.

The electoral model proposes that the National Assembly consist of 300 representatives elected from multi-member constituencies (MMCs). A further 100 compensatory seats at national level will be used to ensure overall proportionality. The constituency or PR split can be adjusted slightly, nevertheless the overall number of seats should not exceed 400. The constituencies will need to coincide with metropolitan and district municipal borders. Small districts can be combined with neighbouring districts to ensure workable units. And metropolitan areas could be subdivided along sub-council or regional lines for similar purpose. The aim would be to have approximately 70 MMCs with three to seven seats in each MMC.

To ensure that parties or independent candidates with significant numbers of votes have a chance of winning a seat, each MMC must have at least three seats, but not more than seven. The number of seats will be based on the quota of registered voters in the particular MMC. The quota will be calculated according to the number of registered voters in the country, divided by 300 (the number of MMC seats nationally). As it stands, the number of current registered voters is 26 756 649, which divided by 300 seats, suggests the current quota to be 89 189. Therefore, an MMC will have approximately 270 000 to 624 000 voters, that is an MP to voter ratio of around 90 000.

Under this MMC system, the voter votes for either a candidate, through an open list, or the party as such. Consequently, voters only vote in the multi-member constituency. The political parties' overall share of all 400 seats will be calculated based on the total sum of votes received for all parties' candidates across all MMCs. Proportionality will be restored through the use of the PR lists.

Both independent candidates and candidates representing political parties can stand in constituencies. The IEC will be responsible for the preparation of ballot papers, which will be based on the list of names of candidates received for each MMC. To fill the political party's compensatory or national seats, a national list with up to 100 candidate names is required. Political parties may also nominate more than one candidate per constituency, provided that the number of candidates does not exceed the number of seats in that constituency plus one. This will allow for sufficient reserves, should vacancies need to be filled from the list.

With regard to the allocation of seats under this system, it is suggested that as an alternative to the quota system for allocation of

the MMC seats, the Sainte-Laguë divisor system be considered. Under this divisor system, the sum of votes for each party and the votes for independent candidates is divided first by 1, then 3, and finally 5 in a 3-seat MMC. The three highest quotients (in declining order) are allocated a seat each. In a 7-seat MMC, the divisors are again 1, 3, and 5 – and then 7, 9, 11, and 13. The Sainte-Laguë system is generally considered a very fair system, securing a high level of mathematical fairness as good quota systems also do. But the Sainte-Laguë system is less dependent on the comparison of decimals in determining the eventual allocation of seats.

In the MMC, a “natural” threshold is at play. In a 7-seat MMC, a party or a candidate with more than 7.15% of the vote is guaranteed a seat. In the 3-seat constituencies the natural threshold guaranteeing a seat is 16.67% (see explanation in Chapter 3). The actual thresholds might be lower than the percentages prearranged, depending on the actual vote distribution among parties and independent candidates, nonetheless the values mentioned will guarantee a seat. If an independent candidate obtains more votes than required for election, the surplus of votes is, however, discarded.

With regard to independent candidates accessing the ballot under an MMC system, candidates will be required to demonstrate that they have voter support in the chosen MMCs. This they do by submitting signatures and voter registration numbers of seconding individuals that are registered in the specific MMC. A threshold of 1% can be considered as a reasonable number. For example: in a 3-seat MMC the number of signatures might amount to between 2 500 and 3 000 signatures and in a 7-seat MMC the number will be between 5 000 and 6 000 signatures. It should be mentioned though that it may be much easier for independent candidates to qualify to participate in the election, than to actually win a seat.

Political parties elected in the previous election and which are still represented in the National Assembly, are automatically eligible to participate in the election. These parties may submit lists of names in a few or all MMCs and have their share of the 100 compensatory seats. Other (new) political parties may become eligible by submitting names and voter registration numbers of a substantial number of voters. Parties who are not able to collect substantial voter support (and thus demonstrate that they actually have support on the ground), should not be allowed to participate. The verified number of supporting voters should be equivalent to the valid votes in the previous election divided by the number of seats (400). That can be said to be the price of one seat, which is currently 43 591 signatures. Voters can only second one party (or one independent candidate) prior to each election. The IEC will have to verify the number of voters' support. A monetary fee should not be levied to qualify for electoral participation.

The use of only two ballot sheets is proposed. The first ballot sheet will be allocated for the constituency (MMC) list for the National Assembly, with the names of the political parties fielding candidates in the MMC as well as the independent candidates marked as such. The second ballot sheet will consist of the constituency (MMC) list of names for the Provincial Legislature.

Consequently, if this model is implemented, the following needs to be considered:

- All advantages and disadvantages of an open or closed list need to be measured. The question to be answered is whether the country is ready for an open list system. The possibility to continue with a closed list system for national and provincial elections and only move to an open list system at a later stage should also be considered.
- Should candidates be allowed to stand for election both in an MMC and be on the proportional list?
- What needs to be done if vacancies cannot be filled from the political party's candidates list?
- Should the quota system or Sainte-Laguë divisor system be used?
- The number of seconding signatures required for both political parties and independent candidates must be determined.
- If floor crossing is allowed, should it only be from a political party to independent candidate? And if so, what impact will it have on the composition of the National Assembly in terms of party proportionality? If yes, this may break the stranglehold that political parties have over the MPs, but it should eliminate opportunism. Similarly, an independent candidate may come to the conclusion that his or her views can best be promoted through joining one of the parties, but, again, this may promote opportunism.

2.4 Hybrid parallel electoral model combining majority 'first past the post' with closed list proportional representation

This proposal is made bearing in mind the need to overhaul South Africa's election system to improve representativity, oversight, accountability and responsiveness in the governance architecture.

The proposal recognises that each electoral system has distinct advantages and disadvantages. For instance, pure proportional representation systems account for every single vote in determining the outcome of an election, but do not embed the potential for closer constituency responsiveness and accountability. In addition, pure proportional systems often provide inordinate power to political party elites to determine policy.

Pure First-Past-the-Post systems (winner takes all), on the other hand, bear the potential for greater accountability to constituencies, allow ordinary members of political parties and back-bench legislators greater influence in policy by virtue of the constituencies they command, but are only rarely a fair reflection of the choices made by an electorate. In this system winners of an election by very slim margins take all the power, with all the other votes for candidates who might lose by small margins, being discarded.

Mixed systems may minimise disadvantages and maximise advantages, but depending on the mix used, can potentially create such overwhelming systemic complexities that they are rendered indecipherable to citizens. In addition, they create serious complications in the management and administration of elections as well as the tabulation of results. This can cast a pall of doubt on the credibility of electoral processes and consequently serve to delegitimise the electoral outcomes, as oversight over and transparency of the calculation and counting of outcomes are rendered ever more complicated. Simplicity of the electoral system should not be underestimated as a great virtue.

A hybridised parallel system envisages a simple First-Past-the-Post system requiring a 50% +1 majority to have won the seat for 350 or 400 seats in a 600-member Assembly. Alongside it, would be 250 or 200, closed party list PR seats. This would combine the benefits of Proportional Representation with single-member constituency representation.

This proposal is made, bearing in mind the principles of:

- Accountability, responsiveness and openness – Act 108 of 1996, 1(d)
- Human dignity, equality and freedom – Act 108 of 1996, 7(1)
- Effective Choices – Act 108 of 1996, 19(1), 19(1)(c), 19(3)(b)
- Maximising Representation. Preferably at its most basic and decentralised level – Act 108 of 1996, 42(3)
- Responsibility and Responsiveness
- Inclusivity, diversity and representativity
- Proportionality
- Oversight and Accountability (in executive) – legislative relations, between party representatives, party organs, leaders and members, and finally between elected public representatives and the voting public/communities/constituencies.
- Simplicity and Transparency for voters, parties, candidates, and election management and administration.

The model would necessitate that section 46(1) of the Constitution be amended to read "National Assembly consists of no fewer than 525 and no more than 600 women and men..." and there be an amendment to section 46(1)(d) to read: "reflects an element of proportional representation in its result".

It also envisages a unicameral Parliament with a single National Assembly and no second chamber. The NCOP would then disappear



and all constitutional references to it, including in the legislative process, would be amended accordingly. If it is to be retained, its size would need to be reduced dramatically to at least half.

The model envisages retaining the Provincial Legislatures in their current form, with reduced size and with the oversight powers maintained. Their legislative powers would largely remain intact, except to expand their scope with respect to the legislative process.

In orientation, the model seeks to harness the benefits of proportional representation without making it the primary feature of the system, and privileges would increase responsiveness, accountability and a closer fit between constituencies and elected representatives, while simultaneously sublimating the overweening and inordinate influence, extra ordinary power of political party elites and party bosses. While parties will no doubt remain hugely influential, as will party elites, this mode does provide greater leverage – even if only in theory – to voters in communities and constituencies.

In this hybrid parallel system proposed, of the 600 MPs, 400 would be elected from 400 single-member constituencies in a majoritarian First-Past-the-Post (FPTP) system, with a 50%+1 majority.

Constituencies would correspond to the current, approximately 234 municipalities and their municipal boundaries (excluded are the 44 district municipalities that don't exist as constituencies but as coordinating structures of two or three individual municipalities). These current municipal boundaries would then be reduced further, to enable the creation and delimitation of constituencies of a reasonable, meaningful and manageable size for effective representation. This delimitation and demarcation exercise would best be left to the Demarcation Board, using the Demarcation Act's current provisions to determine and delimit constituency sizes according to a balance between land mass, population density and concentration of services. This can be augmented if necessary. Of course, gerrymandering of boundaries may be an issue, but the oversight and transparency safeguards in the current act and in electoral administration with regard to inspection, and objections and remediation of delimitations are sufficiently robust.

This approach is premised on the idea that multi-member constituencies may still be too large and might fail to adequately address the element of responsiveness and to some extent accountability, since the constituencies would not only remain too large, but responsibility may be shirked, from among the multiple members in the multi-member constituencies.

The remaining 200 seats in the National Assembly would be elected from a Proportional List, with an appropriate number of PR seats to be allocated for election in each province, based on population size, as is the current practice. This would be implemented to establish a modest degree of proportionality, by electing 200 MPs from the existing PR list without it resulting "in general", in a proportional outcome for the whole election result.

For greater proportionality in the overall outcome, the system could be changed for a more balanced distribution, such as 350 MPs from constituencies and 250 from a PR list, to have greater proportional representation, bearing in mind that this then increases constituency sizes and therefore may affect responsiveness adversely.

It is also proposed that the model be replicated at Provincial Legislatures. It is recommended that the size of each Provincial Legislature be reduced by between 20% and 25%. That means each Provincial Legislature will be faced with a reduction of between three seats at the smallest and 16 at the largest, and it is estimated that on a combined 20% reduction across Provincial Legislature sizes, there will be at the least 80 seats reduced, available for absorption nationally.

The total seats to be elected in the Provincial Legislatures will be on the basis of 2/3rd of seats elected directly in constituencies, and 1/3rd off PR lists. The size of constituencies in the provinces combine two national constituencies into one, for Provincial Representation purposes in the Provincial Legislature.



Consequently, consideration would have to be given with respect to costs.

First, with no NCOP or second chamber, or at least drastically reduced second chamber, those costs would be allocated and absorbed in additional NA seats. Second, the Provincial Legislatures will be reduced by at least 80 seats nationally (based on a 20% reduction), which will also be absorbed nationally. Third, there is a definite need to moderate the remuneration, benefits and perks accruing to public representatives at national and provincial levels. Adjustments here should not be hard to deal with and should not prove unpopular with the public.

In this system, each voter would be given four ballots:

- One for the National Constituency Representative
- One for the National PR Representative
- One for the Provincial Constituency Representative
- One for the Provincial PR Representative

While this may prove administratively and logistically burdensome for Election Administration, it is not insurmountable with proper planning, supervision and management. Its greatest advantage is that it retains the elements of simplicity and trust in the system for voters and in the process of voter registration, voting, counting, tabulation, audit and verification processes.

This model consequently seeks to address the issue of inclusivity, by allowing independent candidates and to be elected from a mixed system, while addressing issues of accountability and responsiveness through maintaining the majority of political parties.

2.5 Additional points to be considered in developing a new electoral model

As mentioned previously, additional points for consideration were raised through individual contributions by members of the panel during the discussions on the initial proposals for electoral reform. The following are worth recording:

Some panellists emphasised that caution should be taken not to create new electoral challenges through amendments to the current system.

- Any new electoral model should be simple to administer and the principles of inclusion should be the central aim.
- It was also stressed that threshold changes should be considered attentively.
- Political parties play a crucial role in fostering accountability and accessibility for voters, therefore mechanisms to enhance internal democracy and the representative composition of parties should be addressed.
- These mechanisms should include opening the list process and requiring gender representation.
- Furthermore, improved access to the system could be established by introducing automatic registration when identity documents are applied for.

Reference was given to a report by Steven Friedman entitled: "The system's not to blame? Electoral systems, power and accountability". It deliberates the subject of the deficit of accountability in South Africa's electoral systems, which has been a significant point of discussion for the panel. The issue of accountability through geographical representation has been demonstrated at municipal level, where the electorate votes for a specific ward candidate. It has, in Friedman's view, not improved accountability. It is therefore questionable to assume that accountability will automatically prove more efficient at the provincial or national level when it fails at municipal level.



Nevertheless, the inadequate accountability of elected representatives is a widespread concern. Many attribute this to the current electoral system. But electoral reform on its own may not be sufficient to address the problem as it is embedded in other root causes as well. The suggestion that accountability could be enhanced purely by increasing the voters' capacity to choose and rank candidates is thus debatable. To the contrary, it may also serve to weaken political parties and legislatures, as well as to contribute to the fragmenting of the political system, which may open possibilities for more political corruption. This view was also held by Rosenbluth and Shapiro (2018) in their book: "Responsible Parties: Saving democracy from itself".

Consequently, whilst provision could be made for electing individual party candidates (from an open list), the extent to which they are accountable to the electorate versus their nominating parties will need to be considered. This will include the extent to which parties may sanction their members and the right for elected representatives to change party affiliation. However, this discussion is not new in South Africa.

A constant theme throughout the panel's deliberations has been the desirability to allow all political parties, including smaller parties, the possibility of having representatives elected to the national and provincial legislature. This despite the concern that a growing number of parties, and now including independent candidates, contesting the elections can present a logistical challenge for the IEC. It may also be frustrating for the voters. Nevertheless, in the panel's mind, smaller parties, in the South African context, cannot be excluded, as they have offered a political home to diverse segments of the electorate that do not feel accommodated within the bigger political parties. To address the divided society, South Africans should be offered a choice to vote for these smaller parties. In light of the aforementioned, it is recommended that the call for the introduction of a reasonable threshold be considered, that balances the aforementioned with the need to eliminate opportunistic parties and individuals that do not enjoy real support on the ground.

There was also a view that democracy works best with strong, disciplined and programmatic political parties, who are able to offer large groups of voters clear choices and incentives to coalesce. Political parties are essential vehicles for collective action and democratic accountability. Thus, the system should guard against over-fragmentation which undermines this. That said, mechanisms should be introduced to promote greater levels of democracy within the parties, as representatives should be empowered to exercise their conscience and be responsive to the electorate.

For this, transparency is key. And the closed list system inhibits transparency. Therefore, the candidate list should, ideally, be opened. Should the closed list system be adopted, however, the names of candidates must be well publicised so that the electorate know who will be representing them. And it empowers them to exercise sanction over non-performing or disreputable candidates. This is especially important in the MMCs and quite practical given the small number of candidates being put forward in each MMC. It is also suggested that political parties reveal their presidential and provincial premier candidates to the voters before the election, as opposed to announcing their decisions after the fact.

Additional proposals emanating from the discussions included the following:

- The Van Zyl Slabbert Commission on Electoral Reform (the Electoral Task Team [ETT]) report should be used as a baseline for developing a new electoral model.
- Specific affirmative proposals should be made to ensure gender representation, as the introduction of multi-member constituencies could potentially have an adverse effect on gender representation.
- The current closed list system does not necessarily have to be immediately abolished as political parties could in the interim choose to introduce a system of primaries for their own candidates. Once the electorate has become accustomed to the new system, further reform could allow for the opening up of the lists.



2.6 Conclusion

This chapter represents the collection of ideas for reforming the electoral system in South Africa, as introduced by the panellists. Whilst the main objective is to design a system that gives effect to the Constitutional Court's ruling to allow independent candidates to stand for election at national and provincial level, they recognised that such a step will require a new model. A minor tweaking of the current system will in all probability be too unwieldy; and may not give effect to the court's underlying intention for the system to provide a reasonable and fair chance for independent candidates to be elected.

In developing the new model, panellists considered it prudent to also use the opportunity to address some of the flaws in the current system, insufficient accountability, representativity, and transparency being key, amongst others.

In the next chapter, the panellists' combined thinking culminates in a proposed new electoral model for South Africa.



CHAPTER 3: A PROPOSED NEW ELECTORAL SYSTEM FOR SOUTH AFRICA

3.1. Introduction

This chapter contains the culmination of the panel’s thinking as informed by the discourse between the members of its expert panel and the presentations of the international contributors. The criteria set for the system’s design included that it:

- accommodates independent candidates
- adheres to the constitutional prescript requiring the composition of the legislature to reflect, in general, proportional representation
- requires no or minimalistic amendments to the constitution
- be simple for the Independent Electoral Commission to implement and for the voters to understand
- promotes gender parity within the legislature
- promotes demographic and geographic inclusiveness
- promotes representativity
- promotes, to a certain extent, accountability.

In essence, the panel needed to decide between three broad approaches:

- A winner take all, pure constituency approach
- A simplistic proportional representation model
- A hybrid model that accommodated constituencies together with a compensatory proportional list allowing for overall proportionality to be established

The pure constituency approach was rejected out of hand as its design would not make it possible to meet the constitutional prescript of the outcome to reflect, in general, proportionality. It would also not accommodate sufficient diversity within the legislature. The simplistic proportional representation model – a single proportional list at the national level and nine proportional lists at the provincial level – would be impractical to administer. Imagine the length of a ballot paper should, say 100 independent candidates wish to stand in addition to the 48 existing political parties. It would also not necessarily advance geographic representation and will do little to improve voter representativity and accountability to the voters.

Thus, the model being proposed in this report is a 400-seat National Assembly of which 75% (300) of the seats are allocated to multi-member constituencies (MMC) comprised of three to seven members per MMC. The constituencies will be supplemented by a proportional list of 25% (100 seats), which will be used to ensure overall proportionality, in general, in terms of the total number of votes cast for parties in the election.

The key tenets of the system are set out hereunder. For purposes of explanation, only the election to compose the National Assembly is described, although in reality nine provincial legislatures will be simultaneously composed. The elections for each of the provincial legislatures will, however, follow the same methodology.

Furthermore, the panel did not consider detailed structuring of the NCOP, suffice to agree that it should be retained and, in the main, retain its existing construct. It should be borne in mind that delegations in the NCOP represent provinces, not individual constituencies.

Accordingly, independent candidates will not be able to be elected to a permanent seat in the NCOP, as these representatives are



appointed by parties based on their relative strength in each of the provinces. Rules can, however, be provided for within the provincial legislatures to allow for some flexibility for independent members to be nominated as one of the special delegates deployed by the legislature in terms of Section 60 of the Constitution to deal with matters before the NCOP affecting the province.

3.2 Specifics of the proposed electoral system

3.2.1 Structure

There would be two components to the establishment of the legislature. The first would be representatives elected via MMCs to the legislature (with 66 MMCs of three to seven members each). The second component would comprise representatives elected via a compensatory PR list (which ensures that the political parties will be represented proportional to their share of the overall national vote).

3.2.2 Number of seats

There will be 400 seats, with 300 seats allocated to 66 MMCs and 100 compensatory seats, which will be used to ensure overall proportionality based on votes cast for each of the parties.

It is necessary to have at least three members per MMC to promote diversity within each of the MMCs. Too large a number would be counterproductive in terms of promoting geographic representativity, or for bringing the representatives closer to the electorate. Accountability is strengthened when the representatives are closer to the electorate. It should be borne in mind, however, that given the closed list system being proposed, the electorate will to a lesser extent be able to hold the candidates accountable than would be the case under an open list system. Nevertheless, knowing one's representative and thereby having accessibility to him or her, strengthens the voter/representative nexus. Thus, the maximum number of seats per MMC is suggested as seven.

MMCs are demarcated along the current district and metropolitan municipal lines. Where the number of voters within a district council border is too few to warrant at least three representatives, two or more district councils can be added together. Where the number of voters within a metropolitan council are too many, MMCs can be allocated along sub-council or metropolitan regional lines.

Each vote cast should carry, more or less, equal weight. Therefore, in determining the borders of the MMCs, the total number of registered voters will be divided by 300 (the number of MMC seats), which results in a quota per seat. In the 2019 general election, there were 26 756 649 registered voters, which, if divided by 300 seats would equate to a seat-quota of 89 189. Therefore, an MMC will have approximately 270 000 to 624 000 voters.

3.2.3 Ballot papers, candidates and seat allocation

For the national election, there will be one ballot paper in each MMC, comprising only the names of the parties (not the parties' individual candidates), followed by the names of the independent candidates.

Parties are permitted to nominate a number of candidates equal to the quota size of each MMC plus one. Therefore, parties will be able to nominate four candidates to a three-seat MMC, or eight candidates to a seven-seat MMC. The additional candidate is to provide for filling any vacancies that may occur over time.

The voter will cast a single vote for either the party or the independent candidate of his/her preference and seats will be allocated proportionally based on the number of votes received for each party or independent candidate.



INKATHA FREEDOM PARTY	 IFP	
VRYHEIDSFRONT	 VF	
AFRICAN NATIONAL CONGRESS	 ANC	
DEMOCRATIC ALLIANCE	 DA	
ECONOMIC FREEDOM FIGHTERS	 EFF	
BOTHA, PIETER	 INDEPENDENT	
MABASO, MARY	 INDEPENDENT	
REEVES, ANTHONY	 INDEPENDENT	

Should an independent candidate receive enough votes to be elected, he or she will be appointed to the legislature. Party candidates are allocated in order of their appearance on the closed list for the party in the particular MMC. For example, should a party receive enough votes for two candidates to qualify, the two candidates at the top of the party's MMC list will qualify. This is the so-called closed list system.

The electorate will know who the various party candidates are through voter education and information sessions organised in the run-up and during the course of the election campaign. This would include information on IEC-posters at the voting station and would also be available by means of media campaigns, party adverts, pamphlets, town hall meetings, etcetera.

The panel did consider the open list system, that is where voters select their specific candidate of choice, and the individual candidates (party or independent) who then receive the most votes qualify. However, this was an option the panel felt best be left until later when voters have become more accustomed to the new system. In the first instance, the closed list system would ensure procedural simplicity, and in the second instance, gender parity could be promoted by requiring parties to alternate their candidates based on gender, that is man followed by woman, or woman followed by man, on the MMC candidate list.

It must be mentioned, however, that it will be difficult to promote gender parity through the ballot paper amongst independent candidates, as each candidate represents only him- or herself.

The table below lists the pro and cons of the closed and open list systems:

Open list system		Closed list system	
Pros	Cons	Pros	Cons
Voters can vote for any candidate according to their personal preference			Voters have to rely on the parties for the ordering of candidates on the list
	More complex to understand as the voter has to choose amongst candidates from the same party – voters are not used to that	Easy to understand – voter votes for only the party (or independent candidate)	
Weakens parties' stronghold over candidates			Candidates more in touch with the voter than in the past, but parties still retain strong sanction over them
	More burdensome for IEC to administer and tabulate results	Less burdensome for IEC to administer than the open list system	
	Weakens ability to affirm gender parity through the ballot	Strong ability to affirm gender parity through the ballot	

In allocating the candidates to seats, either the quota system or Sainte-Laguë divisor system can be used. Whilst the panel prefers the Sainte-Laguë divisor system, it may be prudent to retain the quota system purely on the basis that it is known and trusted by the current political establishment. For academic purposes, an explanation of the two systems are outlined below.

In a divisor system, the sum of votes for parties (and their candidates), as well as the votes for each of the individual candidates, is successively divided by the divisors distinct to the specific divisor method. In the Sainte-Laguë method the string of divisors is: 1, 3, 5, 7, etc. The first seat in the MMC is allocated to the party with the largest quotient (will always be the largest party/independent candidate), while the next seat goes to the party/independent candidate with the second-largest quotient, etc. until all seats are allocated. The calculations are simple to conduct, and it, in particular, avoids the comparison of many decimal fractions, which is part of the quota method now used.

No threshold for a party to qualify to take up seats in the legislature is being proposed. This is because, as explained earlier, in the MMC a “natural” threshold is at play (as is also now the case in the election of the 400 members of the National Assembly). In a 7-seat MMC, a party or a candidate with more than 7.15% of the vote is guaranteed a seat. In the 3-seat constituencies the natural threshold guaranteeing a seat is 16.67%. The idea is that a small party (or independent candidate) cannot lose the last seat in the MMC to a big party winning all votes other than what the small party (independent candidate) wins, as long as the votes for the small party (v) is more than what the big party wins, divided by five (the divisor for the three seats). So, the small party’s vote share (v) must be bigger than $(100 - v)/5$ (which is $100/6$ or 16,666%). The actual thresholds might in some cases actually be lower than the percentages prearranged, depending on the actual vote distribution among parties and independent candidates. Nonetheless, the



values mentioned will guarantee a seat. Therefore, if independent candidates obtain more votes than required for election, the surplus of votes is discarded, in that a single (independent) individual cannot be more than a single individual.

Thus, only parties will compete for seats on the compensatory proportional lists. The combined number of votes received by a party, across all MMCs, determine its proportional share of the 400 seats in Parliament. This implies that parties receive an additional proportion of the excess votes forfeited by the independent candidates. For purposes of explanation, a hypothetical scenario is sketched below:

Using a 40-seat legislature as an example, 30 seats will be elected from say 10 MMCs of three seats each, with the remaining ten seats coming from the compensatory PR list. What happens in a situation where in a few MMC constituencies seats are won by independents, whilst the remaining constituency seats are won by two dominant parties from amongst four participating parties? The hypothetical seat calculation is set out below:

MMC	Seat allocation	Votes received	Independents	Party A	Party B	Party C	Party D
1	1 Independent candidate Joe	4500	4500	3333	2167	1000	100
	2 Party A	3333					
	3 Party B	2167					
	4 Party C	1000					
	5 Party D	100					
2	1 Party A	6666	6666	3334	1000	100	
	2 Party A						
	3 Party B	3334					
	4 Party C	1000					
	5 Party D	100					
3	1 Party A	6666	6666	3334	1000	100	
	2 Party A						
	3 Party B	3334					
	4 Party C	1000					
	5 Party D	100					
4	1 Party A	10000	10000		1000	100	
	2 Party A						
	3 Party A						
	4 Party C	1000					
	5 Party D	100					
5	1 Party B	10000	10000		1000	100	
	2 Party B						
	3 Party B						
	4 Party C	1000					
	5 Party D	100					
6	1 Party A	3333	3334	3333	3333	1000	100
	2 Party B	3333					
	3 Independent candidate Sophie	3334					
	4 Party C	1000					
	5 Party D	100					

7	1	Party A	3334		3334			
	2	Party B	6666			6666		
	3	Party B						
	4	Party C	1000			1000		
	5	Party D	100				100	
8	1	Party A	6666		6666			
	2	Party A						
	3	Party B	3334			3334		
	4	Party C	1000			1000		
	5	Party D	100				100	
9	1	Party A	3334		3334			
	2	Independent candidate Thabo	3333	3333				
	3	Party B	3333			3333		
	4	Party C	1000			1000		
	5	Party D	100				100	
10	1	Party A	6666		6666			
	2	Party A						
	3	Party B	3334			3334		
	4	Party C	1000			1000		
	5	Party D	100				100	
Total votes cast			111000	11167	49998	38835	10000	1000
% of total votes			100%	10,06%	45,04%	34,99%	9,01%	0,90%
% votes for parties (excluding the votes cast for the independent candidates)			99833 votes	n/a	50,08%	38,90%	10,02%	1,00%
40 seats distributed in proportion to the % of total votes			40	4	18	14	4	0
MMC seats won			30	3	15	12	0	0
Compensatory list entitlement			10	0	4	2	4	0
Final legislature size			40	3	19	14	4	0

The scenario shows that Party A, although it received only 45% of the total votes cast – suggesting 18 of the parliamentary seats – they would in fact receive one additional seat, that is 19 seats, because seats won by independent candidates are not included in the proportional allocation of seats to parties. In this example, Parties A-D have 37 seats to distribute among the four of them, and the quota method gives 19 to Party A, 14 to Party B and 4 to Party C. In this way, the relative strengths between the competing parties is maintained and the end result is – as required – in general, proportional.

This is justified, in that the Constitutional Court must have foreseen that absolute proportionality is not possible with the introduction of independent candidates, and thus a higher reliance would by necessity have to be placed on the notion general proportionality.



The aforementioned example shows that the proposed system does marginally advantage political parties. It does, however, not come at the expense of the independent candidates, in that, whilst the parties are advantaged, it does not diminish the legitimate claim that any one independent candidate may have, that is, him- or herself represented in Parliament. Furthermore, alternative remedies are available to independent candidates, as highlighted in the next paragraph, should they so choose.

Should the independent candidates wish to lay claim to the additional votes cast over and above that required to secure a single seat in the legislature, they should arrange themselves as a group, i.e., in reality a party, and register at the IEC as such. In such instance the same rules would apply to the group as it would to a party. An independent candidate cannot by definition choose to be a lone representative in Parliament but at the same time claim the benefits and rights of a party.

3.24 How do parties/independent candidates get ballot paper access?

The panel proposes that parties already in Parliament (and still represented when the election is called), automatically qualify with no further requirements.

For new parties, the panel considered a monetary fee or a certain number of seconding voters. It rejected the notion of a monetary fee, in that the system should not be weighted in favour of the well-resourced. Instead, it proposes a certain number of seconding voters, for example, votes in the previous election divided by 400, for automatic access to register candidates in all MMCs (with specific candidate lists for each MMC) and to have access to a share of the proportional seats, if eligible. The figure as it stands now, would be 43 591.

In MMCs, a local party should have access to register for running candidates in a particular MMC, if it has seconding voters equal to 1% of the registered voters in the MMC. For example, based on current registered voter numbers, in a three-seat MMC the number of signatures might be around 2 500 to 3 000 signatures, and in a seven-seat MMC the number will be between 5 000 and 6 000 signatures.

For individual candidates, the same rules apply as for new parties at the MMC level, given that independent candidates can only stand within a single MMC.

The requirement for independent candidates and new parties to obtain seconding voters will inevitably require additional procedures and resources for the IEC to administer. They will have to, for example, check that seconding voters are legitimate, registered in the MMC, and that they have personally agreed to the secondment. Nevertheless, the seconding route is preferred over a financial fee for the reason mentioned. The IEC is well-acquainted with the procedures, albeit currently at much lower intensity.

3.2.5 Threshold to qualify for representation in Parliament

As already alluded to, for tier one, no formal threshold is proposed, as is the current position. Also, for tier two, no formal threshold is proposed, in that the low number of seats in the MMCs (three to seven) provide for a high natural threshold at the MMC level.

3.3 Illustration of the outcome of proposed electoral model based on the 2019 national election

To understand the system being proposed, the panel modelled its proposal based on the results of the 2019 national election. The summary is shown below, with the available calculations accessible by using the link:

<https://www.dropbox.com/s/sqq0y547qyxxlfe/Electoral%20Reform%20Findings%20%28002%29.xlsx?dl=0>

ALLOCATION OF MULTI-MEMBER CONSTITUENCIES

Constituencies	Seats	ANC		DA		EFF		IFP		NFP		ACDP		AIC		ASC		ATM		AL-J		COPE		GOOD		PAC		SRWP		UDM		VF+		
		SL	Quota	SL	Quota	SL	Quota	SL	Quota	SL	Quota	SL	Quota	SL	Quota	SL	Quota	SL	Quota	SL	Quota	SL	Quota	SL	Quota	SL	Quota	SL	Quota	SL	Quota			
LIM331,2,3,4,5 Mopani	6	5	5	0	0	1	1	0	0	0	0																							
LIM341,3,4,5 Vhembe	43	7	7	0	0	0	0	0	0	0	0																							
LIM351,3,4,5 Capricorn	44	5	5	0	0	1	1	0	0	0	0																							
LIM361,2,6,7,8 Waterberg	45	4	3	0	0	1	1	0	0	0	0																							
LIM471,2,3,6 Sekhukhune	46	5	5	0	0	1	1	0	0	0	0																							
LIMPOPO	5	29	25	0	0	4	4	0	0	0	0																							
MP301,2,3,4,5,6,7 Gert Sibande	47	6	4	5	1	0	1	0	0	0	0																							
MP311,2,5,6 Nkangala	48	6	4	5	1	0	1	0	0	0	0																							
MP324,5 Ehlanzeni	49	5	5	0	0	0	0	0	0	0	0																							
MP313,4/MP321,6 Nkangala & Ehlanzeni	50	6	4	5	1	1	1	0	0	0	0																							
MPUMALANGA	4	23	17	20	3	1	3	2	0	0	0																							
NC061,2,4,5,6,7/NC071,2,3,4,5,6,7/NC082,4,5,6,7 Namakwa,																																		
Pitsole ka Sema & Siyanda	51	3	2	2	1	1	0	0	0	0	0																							
NC091,92,93,94/NC451,2,3 Frances Baard & John Taolo																																		
Geatsewe	52	4	2	3	1	1	1	0	0	0	0																							
NORTHERN CAPE	2	7	4	5	2	2	1	0	0	0	0																							
NW371,2 Bojanala (1)	53	4	3	3	0	0	1	1	0	0	0																							
NW373,4,5 Bojanala (2)	54	5	3	4	1	0	1	0	0	0	0																							
NW381,3,4,5 Ngaka Modiri Molema	55	4	3	3	0	0	1	1	0	0	0																							
NW392,3,4,6,7/NW382, Dr Ruth Mompoti & Tswaing	56	3	2	3	0	0	1	0	0	0	0																							
NW403,4,5 Dr Kenneth Kaunda	57	4	3	3	1	1	0	0	0	0	0																							
NORTHWEST	5	20	14	16	2	1	4	3	0	0	0																							
CPT - City of Cape Town 1, 2, 3, 7	58	4	1	1	3	3	0	0	0	0	0																							
CPT - City of Cape Town 4, 5, 6, 15	59	4	1	1	3	3	0	0	0	0	0																							
CPT - City of Cape Town 8, 21, 22	60	3	1	1	2	2	0	0	0	0	0																							
CPT - City of Cape Town 9, 10, 11, 12, 13, 14, 23, 24	61	7	3	3	4	4	0	0	0	0	0																							
CPT - City of Cape Town 16, 17, 18, 19, 20	62	4	1	1	3	3	0	0	0	0	0																							
WC011,2,3,4,5/ WC023 Swartland	63	4	1	1	3	3	0	0	0	0	0																							
WC022,4,5,6 Cape Winelands	64	3	1	1	2	2	0	0	0	0	0																							
WC031,2,3,4/ WC041,2,3 Overberg & Eden	65	3	1	1	2	2	0	0	0	0	0																							
WC044,5,7,8/ WC051,2,3 Eden & Central Karoo	66	3	1	1	2	2	0	0	0	0	0																							
WESTERN CAPE	9	35	11	11	24	24	0	0	0	0	0																							
Total MMC representatives	66	300	192	201	64	61	34	27	9	10	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0		
Total PR representatives		100	38	29	20	23	10	17	5	4	1	1	4	4	2	2	0	0	2	2	1	1	2	2	2	2	1	1	0	1	2	2		
TOTAL REPRESENTATIVES		400	230	230	84	84	44	44	14	14	2	2	4	4	2	2	0	0	2	2	1	1	2	2	2	1	1	0	1	2	2			
2019 National elections		400	230	230	84	84	44	44	14	14	2	2	4	4	2	2	0	0	2	2	1	1	2	2	2	1	1	0	1	2	2			
					84	84	44	44	14	14	2	2	4	4	2	2	0	0	2	2	1	1	2	2	2	1	1	0	1	2	2			

Note: SL = Sainte-Laguë

What the illustration highlights is that the proposed system does not negatively (or positively) impact any party. It shows that the existing power ratios between parties would be maintained in the new system. This is not at all surprising, as the overall distribution of the 400 seats is done according to the same procedures as are described in the Electoral Act. It also shows the geographic spread of seats, indicating that allocated seats continue to reflect, in an undistorted manner, the strongholds of the individual parties. For example, the DA's stronghold is clearly reflected in the Western Cape, as is the IFP's in KwaZulu-Natal.

34 Ancillary matters to consider

A number of further technical issues were considered:

34.1 What happens if a vacancy arises and the names on the MMC lists (and indeed compensatory PR lists) are exhausted?

It is proposed that the IEC, in such instance, allow parties to supplement their lists. The solution for filling vacant independent candidate seats is, however, somewhat more complex. The seat could either remain vacant, or some other mechanism and/or system of by-election will have to be considered.

34.2 Can a candidate stand in both an MMC and on the compensatory PR list?

It is argued that this is a matter for parties themselves to determine. Of course, independent candidates can only compete in the MMC, where they register for participation.

34.3 What about progressively advancing racial, ethnic, sexual orientation, etc, representation through the ballot?

This matter is an overly complex one and no precedence exists. It may also be too prescriptive. It is a matter best left for parties to decide. That said, in that independent candidates can stand for election, it opens the door for any orientation to make him/herself available to represent a specific cause in the legislature.

34.4 Should voter registration be compulsory and what role can the Department of Home Affairs play therein?

The panel flags this issue without making a recommendation thereon. It does however recognise that some 30% of potential voters remain outside of the electoral system and a concerted effort is required to motivate them to participate in future elections.

In the age of digitisation, there could be some synergy between the Department of Home Affairs and the IEC, where Home Affairs automatically funnels data to the IEC for inclusion into the IEC's voter register.

34.5 Can a candidate stand at both national and provincial level?

Party candidates, yes. Individual parties will however set their own internal rules as to how they wish to approach the matter. Although, whilst they can stand for election at both the national and provincial level, if elected to both positions, they will have to choose in which level they wish to serve. They can only take up one seat.

Independent candidates, no. An independent candidate will have to select whether he or she wishes to run for a seat at either provincial or national level. This is because no person may receive two salaries from the state, and it will not be in the voters best interest since he or she will not be able to devote sufficient attention to both positions.



3.5 Testing the new system against the guiding principles and criteria

This section aims to test the outcome of the new proposed system against the initial criteria accepted as the departure point. The table below illustrates the extent to which success has been achieved:

Accommodation of independent candidates	Yes, independents can stand without being affiliated to a political party.
Is in general proportionality achieved	Yes, in general, even though independent candidates do not share in the compensatory PR list, as compensatory seats can only go to parties. Excess votes for independent candidates are discarded (as votes for unrepresented parties are already). But it has no negative bearing on the independent candidate's required quota to be elected. It simply means that independent candidates cannot fill more than one seat.
No or minimalistic amendments to the Constitution	The boundaries as set out in the Constitution are respected.
Simple for IEC to administer and voter to understand	The closed list system is relatively simple for the IEC to administer, thereby maintaining ease of electoral management. Extra procedures will be required given that instead of the current single national ballot, there will be 66 individualised MMC ballots. Given the structure of the local government elections, the IEC is adequately equipped therefor. As far as the voter is concerned, they still only receive one ballot paper and still only vote for one party (or independent candidate).
Promotes gender parity within the legislature	Yes, as far as party representation goes. It is, however, not possible to enforce gender parity amongst independent candidates through the ballot.
Promotes demographic and geographic inclusiveness	Yes, MMCs are spread across the country and any number of parties representing any number of issues can stand for election (subject to receiving the required seconding votes to register for the election).
Promotes representativity and responsiveness	Yes, 66 MMCs are geographically spread across the whole country.
Promotes accountability	Yes, to a certain extent, in that there is a closer link between the voter and the candidates. Since the candidate names are attached to MMCs, the voter will know who his/her representative will be and able to access a representative attached to deal with issues in a particular constituency.
Promotes transparency	Yes, system transparency is promoted in that it is simple to understand. Transparency in substance is promoted in that the electorate knows who the candidates are / what they stand for. They know who to hold to account and what for.
Promotes inclusiveness	Yes, since there is no threshold for a party or person to take up seats in the legislature, except for the natural threshold to get elected, the widest possible range of interests and causes can be represented in the legislature. This is important in a diverse society that is still healing from past division.

3.6 Question and answer guide to understand the proposed system

Question 1: What are the changes being proposed?

The country will introduce 66 multi-member constituencies (MMC) based on district and metropolitan boundaries. In each MMC there would be between three and seven members, with a compensatory PR list used to ensure that general proportionality between the parties is maintained. 300 representatives will be elected via the MMCs and 100 via the compensatory PR list.

Question 2: Why is the change being proposed?

The change is being proposed to accommodate the Constitutional Court's ruling that independent candidates ought to be able to stand for election. The Constitution also prescribes that the composition of the legislature should be generally proportional in terms of party representation. A pure PR list would, in the first instance, be too unwieldy to manage, and would most probably also make it more difficult for independent candidates to get elected.

At the same time, the system being proposed by the panel improves the accountability of representatives towards their constituents in that they represent their local communities. And since the electorate now know who represents them, they are able to access a "local MP". The distance between the voter and MP is shortened. The system also ensures greater geographic representativity, in that there are MMCs spread across the length and breadth of the country.

Question 3: What would stay the same?

There would still be a maximum of 400 members of Parliament, and general proportionality will be maintained. The voter will still only have one ballot paper at the national level to complete and will still only vote for the party (or independent candidate) of choice.

Question 4: What would be the benefit of the proposed change?

It fulfils the requirement of the Constitutional Court judgement that compels the electoral system to enable independent candidates to stand for election in the national and provincial spheres of government. The system is simple to understand, easy to administer, promotes representativity and, to a certain extent, accountability towards the voter.

Question 5: How would the change work at the provincial level?

The same system is applied at provincial level. Here too the voting procedure will remain unchanged.

Question 6: What are the differences for the voter as they enter the ballot box?

Basically, there will be no change. The only difference will be that when voting, the voter will also be presented with the parties' list of candidates (or the list of independent candidates) which will represent his or her specific geographical area. The voter will thus, unlike in the current scenario, in future know who his or her local MPs will be.



REFERENCES

- Çarkoğlu, A. *Election System in Turkey Main Characteristics and Challenges*. Presentation to the Inclusive Society Dialogue on Electoral Reform, 25 August 2020.
- Electoral Task Team. 2003. *Report of the Electoral Task Team*. Pretoria: Electoral Task Team.
- Elklit, J. 2020. *The ETT Majority Model for a SA Electoral System & a Brief Comparison with the Danish Electoral System*. Presentation to the Inclusive Society Dialogue on Electoral Reform, 25 August 2020.
- Fakir, E. 2014. *The Electoral System: Is There Virtue or Vice in Reform?* Daily Maverick, 22 May.
- Fakir, E. 2020. *Constitutional Court hands MPs an electoral reform nettle to grasp. Parties won't want to vote for legislation that spells their own demise*. [Online] Available at: <https://www.timeslive.co.za/sunday-times/opinion-and-analysis/2020-06-14-constitutional-court-handsmps-an-electoral-reform-nettle-to-grasp/> [accessed: 14 August 2020].
- Fakir, E. 2020. *A referendum thorough-going system reform is the way to political rehabilitation*. [Online] Available at: <https://www.africanews24-7.co.za/index.php/southafricaforever/a-referendum-and-thorough-going-system-reform-is-the-way-topolitical-rehabilitation/> [accessed: 14 August 2020].
- Farrell, D. 2020. *The Irish system of Proportional Representation by the Single Transferable vote*. Presentation to the Inclusive Society Dialogue on Electoral Reform, 25 August 2020.
- Friedman, S. 2015. *THE SYSTEM'S NOT TO BLAME? Electoral Systems, Power and Accountability Report Commissioned by the Council for the Advancement of the South African Constitution (CASAC)*. [Online] Available at: <http://casac.org.za/wp-content/uploads/2020/05/Public-Accountability-and-Electoral-Systems-Report-edited.pdf> [accessed: September 2020].
- Gumede, W. 2020. *Electoral Reform presentation regarding the Challenges of the current electoral system*. Johannesburg: Democracy Works Foundation.
- Inclusive Society Institute. 2020. Electoral reform dialogue with expert panel, 20 July 2020.
- Inclusive Society Institute. 2020. Electoral reform dialogue with expert panel, 3 August 2020.
- Inclusive Society Institute. 2020. Electoral reform dialogue with expert panel, 25 August 2020.
- Inclusive Society Institute 2020. Electoral reform dialogue with expert panel, 7 September 2020.
- Inclusive Society Institute, 2020. Electoral reform dialogue with expert panel, 28 September 2020.
- Inclusive Society Institute, 2020. Electoral reform dialogue with expert panel, 16 November 2020.
- Krennerich, M. 2020. *The German Mixed Member Proportional System*. Presentation to the Inclusive Society Dialogue on Electoral Reform, 25 August 2020.
- Lago, I. 2020. *Designing electoral systems: Some reflections from Spain*. Presentation to the Inclusive Society Dialogue on Electoral Reform, 25 August 2020.
- Republic of South Africa (RSA). 1996. *Constitution of the Republic of South Africa, Act no. 108 of 1996*. Pretoria: Government Printer.
- Rosenbluth, F.M. & Shapiro, I. 2018. *Responsible Parties: Saving Democracy from Itself*. New Haven: Yale University Press.

Exploring alternative electoral systems that combine proportionality with the rights of independent candidates to contest in election

1 INTRODUCTION

The electoral reform expert panel's 3rd meeting on 25 August 2020 formed part of the process of developing new electoral models for South Africa. The preceding meetings aimed at garnering a clear understanding as the prescripts of the Constitutional Court's judgement; the electoral boundaries set by the Constitution; the extent that electoral reform should take; as well as how reform of the Electoral Act could possibly assist in improving oversight, accountability and representativity.

During this meeting of the panel, presentations were made by experts on electoral models in several jurisdictions that employ proportional representation electoral systems which also provide for the participation of independent candidates.

Presentations were made by:

- Professor emeritus Jørgen Elklit, Aarhus University, Denmark, on the findings of the Van Zyl Slabbert Commission on Electoral Reform in South Africa and the Danish model. Professor Elklit is also a member of the Inclusive Society Institute's expert panel on electoral reform
- Professor Michael Krennerich, University of Erlangen-Nürnberg, on the German electoral system
- Professor David Farrell, University College Dublin, on the Irish PR/STV system
- Professor Ignacio Lago, Universitat Pompeu Fabra, Barcelona, on the Spanish electoral system
- Professor Ali Çarkoglu, Koç University, Istanbul, on the Turkish electoral system

The main purpose of the meeting was to stimulate the panel's thinking as to what electoral model will be best suited for the South African environment. The following sections serve to present a summary of each of the aforementioned models as presented by the guest speakers.



2 FINDINGS OF VAN ZYL SLABBERT COMMISSION & PRESENTATION ON THE DANISH ELECTORAL MODEL: PRESENTED BY PROF EMERITUS JØRGEN ELKLIT, AARHUS UNIVERSITY, DENMARK

2.1 The Van Zyl Slabbert Commission

The Constitution of the Republic of South Africa, 1996, outlined the electoral system which would be used for elections in 1999; however, the system was not automatically extended beyond 1999. The aforementioned led to the establishment of a task team, referred to as the Electoral Task Team (ETT), that would propose legislation for an electoral system to be used in future elections. Dr Frederik van Zyl Slabbert was selected to be the Chairperson of the ETT, which is why the ETT is also known as the Van Zyl Slabbert Commission.

The core values of the ETT for judging an electoral system were *fairness, inclusiveness, simplicity and accountability*. Fairness stipulates that each vote should be equal, as well as that votes should be used to compound elected representatives, i.e., ensure proportional representation. Inclusiveness intended to ensure active participation for all demographics, hence, no legal/formal thresholds should be applied in South Africa. Taking into consideration the use of two ballot papers, simplicity refers to the comprehensive understanding a voter should have of how the system functions, that despite having several ballot papers, voters should be able to use them without difficulty. As an example, in Kenya voters are able to distinguish between six ballot papers. Lastly, accountability was also a main concern for the ETT, as the current system does not allow voters to hold individual politicians accountable, as they can only do that by voting for another party, which may be too much to ask from a voter. As it is now, it is the political parties that have to account collectively to the electorate for their performance as a party. The opportunity to reject a disliked individual politician in an election very seldom materialises.

Panel members proceeded to discuss constituencies, specifically single-member constituencies and multi-member constituencies. The majority recommended a system with 65-70 multi-member constituencies, which will allow 300 members to be elected to the National Assembly. The nine current multi-member constituencies, which are the nine provinces, have 200 seats allocated proportionately. The number of constituencies is thus recommended to be expanded considerably. The number of seats allocated in each new MMC should be at least three and not more than seven, to ensure that voters can easily recognise and evaluate their representatives in the National Assembly.

Furthermore, the proposal envisages two sets of closed lists of party candidates, as now, one for national (but prepared for and issued separately in each MMC) and one for provincial. The candidate lists can become open at a later stage, which will further increase the level of accountability.

In light of the abovementioned, several concerns were noted for reflection:

- A large number of political parties that do not necessarily have political support to contest in elections confuses and aggravates voters, which motivates the introduction of stringent ballot paper access requirements for parties intending to contest elections.
- The number of seconding voters should be used instead of a monetary fee for participating.
- Provisions for independent candidates are lesser; therefore, have an improved prospect of contesting in the proposed 3- to 7-member multi-member constituencies in provinces or nationally, where between 50 000 and 95 000 votes are required.
- Whether independent candidates and political parties should appear on the same ballot paper.
- If independent candidates would only stand in one multi-member constituency, while (national) parties contest on a national level and also have access to 100 compensatory seats.
- Requirement for an independent candidate to introduce a number of voters to second him or her as an independent candidate in that specific multi-member constituency. The number should not be less than 1% of registered voters and the validity of signatures is to be verified by the IEC.

- If a multi-member constituency seat allocation system, more or less identical to the current quota system, is implemented, one would like to see the long strings of decimals removed from the computations. A divisor system would be simpler to handle and is therefore to be preferred. The Sainte-Laguë system delivers a more proportional outcome than the D'Hondt system and is therefore suggested here.

2.2 Danish Electoral Model

A comparison of the electoral systems in South Africa and Denmark outlines several key points that can be extracted to review whether a two-tier compensatory system is a category of its own.

When comparing the two systems, several similarities and disparities were noted pertaining to voter registration, access to ballot papers, seat allocation system, formal threshold, party order on ballot papers, amongst others.

- With regards to voter registration, approximately 69% of citizens eligible to vote register in South Africa, while in Denmark citizens are registered automatically resulting in a 100% voter registration.
- In South Africa, political parties are required to pay a fee to contest in the elections, whereas in Denmark they submit a number of voter signatures. Currently, the value of one seat in the previous election is around 20 000 voter signatures.
- While the proportional representation consists of closed lists of party candidates, in Denmark, the parties decide for themselves if they want to run on open or semi-open (or semi-closed) lists.
- Although South Africa and Denmark both have two spheres, in South Africa with nine lower multi-member constituencies the voters are represented by 400 seats of which 200 seats are allocated to provinces, while in Denmark there are ten lower-level multi-member constituencies and voters are represented by 175 members in Parliament, of which 135 are allocated proportionally in the ten MMCs.
- The natural threshold in South Africa is a little bit less than 0.25%, while in Denmark the formal threshold is 2.0% of the votes.
- The party order on ballot papers is alphabetical in both South Africa and Denmark; however, in South Africa the first letter to appear on a ballot paper is determined by lot. Conversely, in Denmark the letter A (used by the Social Democrats) always appears first on the list.

Refer to the below image as an example of a ballot paper in the 2019 parliamentary election. Please note that in this particular MMC five independent candidates are running. They are found at the bottom of the ballot paper as “Uden for partierne” (outside the parties).



3 GERMAN MIXED MEMBER PROPORTIONAL (MMP) SYSTEM: PRESENTED BY PROFESSOR MICHAEL KRENNERICH, UNIVERSITY OF ERLANGEN-NÜRNBERG

The Bundestag is comprised of 598 members, in addition to surplus seats referred to as overhang mandates, as well as compensatory seats.

The basic features of the Bundestag are stipulated as follows:

- There are currently two votes. The first vote is an individual vote provided to a candidate in one of the 299 single-member constituencies and the second vote is a party list vote, which is given to a closed regional party list in one of the 16 states the candidate resides in.
- The candidates who achieve a plurality in the single-member constituencies are elected as direct mandates. The second vote determines the seat allocated for each party in the Bundestag.
- Parties that obtain more than 5% of the second vote at the national level, or that have three members elected in the single-member constituencies are considered in the national allocation of seats, as stipulated by the legal threshold. The aforementioned is referred to as the legal threshold.
- In the Bundestag, the seats are allocated proportionately according to the party lists on the regional level of the states, which is determined by the second vote. The proportional seat share of each party is calculated according to a PR formula at the national level.
- In the event that a party wins more constituency seats (direct mandates) in a state, above what is allocated to it by the second votes in that state, the votes remain that of the party. These votes are referred to as overhang seats.
- It should be noted that since 2013, all parties that have passed the legal threshold receive additional seats to compensate for any disproportionality by the overhang mandates in the respective 16 states. (However, there will be another electoral reform in two steps before the elections of 2021 and 2025).

The German electoral system produces highly proportional results for those political parties that have passed the legal threshold. When reviewing the inclusiveness of the German electoral system, it can be said that only very small parties are excluded from parliamentary representation. However, this legal threshold is not a necessary element of an MMP system.

With regards to simplicity, German voters are familiar with the current voting system and the management of an MMP system is well known by German authorities. However, there is some difficulty in understanding the calculation process of the MMP system, especially following the reform in 2013. When the reform took place during 2013, there was no pre-calculation of the seats in the Bundestag. However, following the reform, 598 seats are distributed to 16 states according to the population. The seats are distributed among parties according to second votes won by each party in that respective state. If the number of seats won by a party exceeds the number of allocated seats for the state, the higher number of constituency seats is taken as a basis for further calculation, which is referred to as "hidden" overhang seats.

Although the MMP system enjoys legitimacy in Germany, it should be noted that due to the number of seats of the Bundestag, the size is considered problematic. A half-hearted electoral reform (in two steps) before the 2021 and 2025 election aims at reducing the seats in Parliament, making the seat calculation, however, even more difficult to understand.

With regards to political parties, their role is supported through using closed party lists while also allowing candidates to compete in single-member and regional party lists simultaneously. Floor-crossing of MPs is also allowed, regardless of whether they have been elected through party lists or single-member constituencies.



In terms of individual accountability, single-member constituencies aim to secure a close constituency-based voter-representative relationship. Moreover, no independent candidate has thus far obtained a parliamentary seat in a single-member constituency in Germany since 1949. Candidates in single-member constituencies are mainly elected on the basis of party preferences rather than the personality of the candidates. In addition, women have generally been more successful in the nomination and election of the party lists than in single-member constituency. However, the proportion of women elected to the Bundestag is significantly lower in constituencies than on the party lists.

Against the backdrop of the basic features of the German MMP system, the following would be the possible effects on the system in South Africa:

- **Fairness:** The multi-member proportional system would produce equally proportionate results if no electoral threshold was applied.
- **Legitimacy:** The increase in the number of seats in the National Assembly may contradict the Constitution.
- **Accountability:** Party and independent candidates would be more accountable to their electorate if elected in constituencies. Compared to single-member constituencies, however, small multi-member constituencies (e.g. 3 to 5 seats) may have the same effects but would additionally allow candidates of different parties to gain constituency seats.
- **Simplicity:** Voters would need to adjust to the features of an MMP system. With constituencies, a careful elucidation of electoral boundaries would be required.
- **Possible weakening of parties:** With an MMP system, political parties still select both party list candidates and constituency candidates. Some politicians may be inclined to stand as independent candidates, however, whether independent candidacies would be successful is an unanswered question.



4 THE IRISH SYSTEM – PROPORTIONAL REPRESENTATION BY THE SINGLE TRANSFERABLE VOTE: PRESENTED BY PROFESSOR DAVID FARRELL, UNIVERSITY COLLEGE DUBLIN

The limitations presented by the South African electoral system differ from those of Ireland in many aspects. Ireland uses a proportional representation electoral system with a single transferable vote. The system consists of multi-seat districts, and as in the Irish case, they have small districts or constituencies. There is a maximum of five members of Parliament per district.

Ireland makes use of an electoral formula, namely the “Droop quota”. Since the electoral formula and the multi-seat districts are used together, the result is a proportional outcome. The “Droop quota” is a standard electoral formula. To obtain one seat in a district, a candidate needs a sufficient number of the votes in that district, which is determined by the size of the Droop quota: the more seats in the district, the lower the quota. The country’s proportional system is often referred to as a semi-proportional system, due to the small size of the districts. Ireland has many political parties, approximately 13, for a country of just under five million people.

The Parliament consists of 166 members and is evenly spread out between the three major parties, Fianna Fáil, Fine Gael and Sinn Féin. However, the electorate votes for a candidate instead of a political party. Within the single transferable vote system, voters rank the order of their preferred candidates on the ballot paper. Additionally, no specific requirements exist regarding the number of candidates that a voter should rank, as they can choose to only rank a few candidates, or all the candidates listed on the ballot.



The Irish electoral system is a candidate-based system. It was developed in the 1850s independently, in both Britain and Denmark. The system is often also referred to as British proportional representation. Formerly it was useful for the British to test this new electoral system on colonies, which is why Ireland makes use of the system and upheld it when the country became an independent nation in 1922.

Furthermore, political party names did not appear on the Irish electoral ballot paper until 1965. There seems to be some anti-party bias built into the logic behind the system in its original or traditional way. Another feature is that the candidates are listed alphabetically. Moreover, along with candidates' names being listed alphabetically, the names of the political parties and their logos are given next to full-colour photographs of each of the candidates.

Provision for independent candidates

Since 1922, independent candidates have been a permanent fixture in Ireland's Parliament. In 2016, 15% of the seats in Parliament were won by independent members. According to data gathered by a colleague from University College Cork, the number of independent members in the Irish

Parliament tends to be greater than the number of independent candidates from all other European Parliaments, combined. The Irish electoral system assists independent candidates in many ways, including through the usage of liberal ballot access rules. Candidates are only required to obtain 30 supporting signatures to appear on the ballot paper.

Previously, only political parties had special recognition as parties in Parliament. Prior to 2016 it was possible for independent candidates to form a single technical group providing they had at least seven members. A change of the parliamentary rules in 2016 allowed Ireland to have as many technical groups in the Parliament as they might need, provided there are at least five MPs. These technical groups have access to similar resources as political parties in terms of funds, parliamentary speaking time and committee membership.

Funding

Most political parties are funded generously, with two-thirds of party income stemming from the State. This is a high figure and above the average in Europe. It is also extended to independent candidates, who are granted an annual party leader's allowance.

Accountability and representativeness

In terms of accountability and representativeness, Ireland is not fully proportional. For example, the Irish Parliament has an unstable history in terms of the representation of women. In 2011, electoral quotas were introduced for the first time, however, despite these quotas the Irish Parliament still has fewer women than in the British House of Commons.

Some level of accountability in the Irish electoral system can be seen in the way candidates prefer door-to-door campaigning during electoral campaigning. Candidates are known for persevering until they are certain that they will have secured substantial voter support, despite being ranked lower on a ballot paper. Additionally, every MP has a well-resourced constituency office located within the constituency, which provides greater opportunity for contact between the public and representatives. Moreover, research among voters indicated that in elections, voters have tended to have between 12% and 16% contact with MPs. Therefore, this indicates that there is regular contact between MPs and their constituencies. Accountability is a key principle in Irish politics, however, some shortcomings in this practice have been noted as many MPs spend more time on constituency contact than on legislation, which can result in a weakened Parliament.

Positive and negative features of the system

A positive feature of this system is that it offers an abundance of choice and accountability to voters, as well as being accommodating towards independent candidates. However, against this, representativeness can be considered weak and the system is not as proportional as it could be. Another perturbing factor is the impact these types of shortcomings would have if a similar system were to be applied in a larger country, such as South Africa.

5. SPANISH ELECTORAL MODEL: PRESENTED BY PROFESSOR IGNACIO LAGO, UNIVERSITAT POMPEU FABRA, BARCELONA

There are three key issues when considering electoral models. The first is two crucial trade-offs that must be considered when deciding on an electoral system. Secondly, consideration should also be given to how the Spanish electoral system is dealing with these two trade-offs. Finally, one would have to look at what to do within the South African context.

The first trade-off when deciding on an electoral system is the option between the inclusive representation of citizens' preferences and the accountability of government. If the goal is to have a system in which all views of the society are to some extent reflected in Parliament, the best option is to have a proportional representation (PR) electoral system with large districts. This is the model of Portugal, Finland, Spain and South Africa. On the other hand, if the goal is to emphasise individual accountability, the best option is to have a first-past-the-post (FPP) system with single-member districts. A midway between these two options is to have mixed-member systems. How these mixed-member systems administer this trade-off depends on whether they are dependent or independent.

Lower House elections in Spain are conducted according to the D'Hondt formula, where representatives are elected using a PR system in 52 districts ranging from 1 to 37 seats. Moreover, there is a 3% threshold at the district level. Therefore, in this first trade-off, Spain prefers the representation of the different opinions in society instead of having majority governments or giving more influence to individual candidates. Consequently, following the November 2019 elections, Spain has a minority coalition government, with 16 political parties obtaining seats in Parliament. Additionally, Spain uses the limited vote method for the Senate election operating on a simple majority vote. The principle rule is that four seats are allocated to each province, where each voter then has three votes.

Once a PR system has been adopted, the second trade-off is whether the electoral system will provide priority to parties or to individual candidates. In Spain it has been found that most voters cast their votes in the same direction in Congress and Senate elections, which are held simultaneously. In the 2000 Senate elections, for instance, only 3% of the respondents in a survey said that they voted for candidates from different parties in both elections. Thus, the focus will be on the lower house electoral system used in Spain, which has a closed list system. In contrast to this, there is also the option of having a PR system with an open list such as in the case of Switzerland. Moreover, a third possibility exists, whereby voters have the option to display their preference on the ballot paper.

Independent candidates in Spain

In Spanish elections, officially registered parties, coalitions, and independents can contest elections. In each district, the number of candidates presented by each party must be equal to the number of seats to be filled. An example of this is Madrid, which is a 37-seat district and, therefore, parties must present 37 candidates. Furthermore, there are two possible options for independent candidates in Spain. Firstly, candidates in the party list who are not members of a political party can be identified as independents on the ballot. Secondly, a group of candidates not belonging to a specific party can decide to run in the election together, however, they do not constitute a formal political party, but are referred to as "voter groups". Moreover, in order to participate in the Lower or Upper House election, a "voter group" must obtain the support (signatures) of 1% of the individuals included in the district electoral census.

Consequences of the Spanish electoral system

One of the most relevant consequences of the Spanish electoral system is that voters view individual candidates as less relevant than parties. This was revealed by a survey that was conducted after the 2000 elections, where 74% of the respondents said they could not recall the name of the first candidate of the party for which they voted. In the Senate elections of the same year, only 3% of the votes went to candidates from different parties. Voter preference is therefore not in the forefront of Spanish elections.



Should Spain's electoral system and process be used as a reference to make minor changes in the South African electoral system, these changes can be categorised in three different ways:

- Citizens should be allowed to run in elections, even if they do not belong to political parties. Candidates should also obtain the minimum support for their candidacy before they contest the elections.
- There should be a ballot paper per candidacy running in the election including the names of all candidates.
- Candidates in a party list who are members of a political party, should be identified as independent candidates on the ballot paper.



6. TURKISH ELECTORAL MODEL: PRESENTED BY PROFESSOR ALI ÇARKOĞLU, KOÇ UNIVERSITY, ISTANBUL TURKEY

Within the Turkish electoral system, seats in the representative assembly are translated from the population figures, as they are divided based on provinces' geographical boundaries. Each province has a provincial governor, "vali", appointed by the central government in Ankara. Each province is also sub-divided into districts with district governors, "kaymakam", and then into villages and neighbourhoods, each having a headman or "muhtar". While the central government appoints valis and kaymakams, the muhtars are elected by their local constituencies. In addition, provinces and districts also have an elected executive mayor working with provincial assemblies.

At the national level, the Turkish Grand National Assembly (Türkiye Büyük Millet Meclisi [TBMM]) is the representative legislative assembly, with a total of 600 seats. Each one of the 81 provinces is first allocated one seat irrespective of its population, thereafter the remaining 519 seats are distributed in accordance with provincial population figures. Such distribution necessarily creates seat allocations with fractions. The integer part of these seat allocations are made, and the fractions of seats are ordered and ranked from the largest to the smallest for all provinces. The integer seat allocation will always leave a certain number of undistributed seats due to the fractions. Consequently, the undistributed seats are then allocated from the largest seat fraction for the corresponding provinces down in the list until all remaining seats are allocated.

The list system of proportional representation (PR)

As seats are allocated to provinces, each province is comprised of a large electoral district, with a PR system and multiple seats, as determined by the D'Hondt formula, which translates party votes to seats in the TBMM. Furthermore, each political party formulates a list of candidates to occupy the number of available seats in each province or electoral district. For example, if a given district is allocated 10 available seats, then each political party typically forms a list of 10 candidates. According to the system formula, each party sends the top candidates from their list who win, in proportion to their share of the vote.

In an attempt to avoid the formation of coalition parties within the TBMM, the 1980's military regime in Turkey imposed a threshold of a minimum 10% nationwide electoral support to obtain any seats in the national legislature. Therefore, should a regional party win a substantial majority in several provinces, the party's total votes must constitute 10% of the valid votes nationwide. If this threshold is not achieved, the party will not gain any seats from those provinces. Thus, this practice served to circumvent the fragmentation of seat distribution in Parliament through small parties voting in coalitions and has also worked to exclude regional minority ethnic parties from Parliament.

Moreover, the arrangement also made it increasingly difficult for minority groups to form new political parties that would realistically be able to obtain this threshold. Consequently, these smaller constituencies grouped along specific issues of ideologies, assembled under larger umbrella parties, effectively introducing coalitions into party organisations. From this, party politics were played out in the shaping of party lists put forth for elections in sizeable multi-member district PR elections.

Independent candidates

As the nationwide electoral threshold is only applicable to parties contesting national elections, independent candidates who run at a district level are only constrained by the D'Hondt formula requirements to win a single seat. If each of these candidates receives a level of support that qualifies for a seat, they can all get elected as independents from a multimember district. However, if an independent candidate receives more votes than necessary to win a seat, those excess votes are, in a sense, "wasted". Furthermore, parties may support multiple independent candidates. Administering such a system where many independent candidates from a party do not



necessarily pass the national threshold, each running separately in different provinces, requires a great deal of coordination and voter mobilisation.

Political parties have been known to support independent candidates as a means to bypass the 10% national threshold limitations, as seen during the 2007 and 2011 elections when Kurdish parties used this strategy. This has helped the Kurdish parties to grow and nationalise the previously regional bases of support. Additionally, there have also been a few independent candidates who have contested elections in their hometowns based on their name recognition, family, or tribal ties, which renders their election easier.

The importance of district magnitudes

A 2011 decision by the Supreme Election Council (Yüksek Seçim Kurulu, YSK) effectively reduced the district sizes in large metropolitan provinces, which had serious electoral consequences, particularly impacting smaller parties and independent candidates. The decision stated that single provincial election districts will be used for provinces with 1-18 available seats; two election districts will be used for provinces with 19-35 available seats; and three election districts will be used for provinces with 36 or more available seats. Consequently, cities like Istanbul and Ankara would have three election districts.

To illustrate the importance of district magnitudes in the outcome of elections, Istanbul will be used as an example. As Istanbul has 98 seats available, the first election district has 35 seats, the second election district has 28 seats and the third district also has 35 seats. As the D'Hondt formula is applied for a total of 98 seats, the number of votes that would be required to win a seat is lowered considerably when compared to a district where only 35 total seats are available. Therefore, the larger district size increases smaller parties' and independents' chances of winning seats in an electoral district. In other words, in a province like Istanbul, where there are nearly 10.5 million voters, an independent candidate with slightly more than 100 000 votes could win a seat if all 98 seats are available in a single district. However, when the province is divided into three electoral districts with about 30 seats each, the minimum level of support for an independent candidate rises by nearly threefold.





INCLUSIVE SOCIETY INSTITUTE



This report has been published by the Inclusive Society Institute.



The Inclusive Society Institute (ISI) is an autonomous and independent institution that functions independently from any other entity. It is founded for the purpose of supporting and further deepening multi-party democracy.

The ISI's work is motivated by its desire to achieve non-racialism, non-sexism, social justice and cohesion, economic development and equality in South Africa,

through a value system that embodies the social and national democratic principles associated with a developmental state. It recognises that a well-functioning democracy requires well-functioning political formations that are suitably equipped and capacitated. It further acknowledges that South Africa is inextricably linked to the ever-transforming and interdependent global world, which necessi-

tates international and multilateral cooperation. As such, the ISI also seeks to achieve its ideals at a global level through cooperation with like-minded parties and organs of civil society who share its basic values.

In South Africa, ISI's ideological positioning is aligned with that of the African National Congress (ANC) and others in broader society with similar ideals.

