

# A Systematic View on the Electoral Reform Debate in South Africa

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## Introduction

A wide variety of electoral systems is in operation throughout the world, and in principle an infinite number of electoral systems can be designed. According to Dieter Nohlen<sup>1</sup>, all electoral systems can nevertheless be traced back to either one of the two basic principles of representation: the principle of majority representation or the principle of proportional representation (PR). The distinction between these two basic principles is mainly based on their respective political objectives regarding the nationwide electoral outcome. The major political aim of the principle of majority representation is to produce a parliamentary majority for one party or for a coalition of parties. The major political aim of the principle of proportional representation is an accurate reflection of social and political groups in Parliament. Empirically, the difference between the principles of majority and proportional representation can be seen best in their effects on the relation between votes and seats. In majority representation systems there is usually a significantly higher degree of disproportionality between votes and seats than in proportional representation systems.

In the past few decades, the variety of both majority representation systems and proportional representation systems has been widened considerably without sufficient theoretical discussion accompanying this trend. In the continuous debate on majority representation versus proportional representation, advocates and critics of either principle are still inclined not to adequately accept the variety of subtypes of electoral systems. They still try to establish the pros and cons of either basic principle of representation from the extreme ends of the scale, the plurality system (first-past-the-post system) on the one hand<sup>2</sup> and the pure PR

<sup>1</sup> *Nohlen, D.*, *Wahlssysteme der Welt*, Piper, München/ Zürich 1978; *ders.*, *Wahlrecht und Parteiensystem*, Leske & Budrich, Opladen 1990; *ders.*, *Elections and Electoral Systems*, Macmillan India, New Delhi 1996.

<sup>2</sup> At present the plurality system in single-member districts is applied in Great Britain, Canada, the United States, in many former British territories in Africa (for example Botswana, Kenya, Malawi, Tanzania, Zambia, Zimbabwe), in Asia (for example India, Malaysia, Singapore, Pakistan, Bangladesh) as well as in all anglophone Caribbean countries except Guyana. A few countries apply the plurality system in multi-member districts, for example Mauritius with its three-past-the-post system.

system (PR list system at national level) on the other<sup>3</sup>. Other subtypes of majority representation and proportional representation are hardly dealt with in such theoretical discussions. This is also the case with other "classic" variations such as absolute majority systems<sup>4</sup> and PR list systems in multi-member constituencies<sup>5</sup>, and even more so with electoral systems where the seats are allocated on different levels (e.g. constituencies, constituency associations, national constituency) and in multi-phase and separate electoral procedures. Such systems are for example a) PR list systems in multi-member constituencies with additional seats at national level, which are applied, for example, in Poland and Guatemala; b) PR list systems in multi-member constituencies with compensatory seats at the national level, which are applied, for example, in Denmark<sup>6</sup>; c) the mixed-member proportional system (personalised proportional representation), a system which has proved worthwhile in Germany and which was introduced a few years ago in New Zealand and, slightly modified, also in Venezuela. Under the mixed member proportional system, a part of the parliamentary seats is distributed in single-member constituencies, whereas the votes obtained by the parties at the national level constitute the only basis for determining, proportionately, the seat shares of the parties<sup>7</sup>; d) the compensatory mixed-member proportional system, which was only recently introduced in Italy and Hungary. Under this system one share of the seats is assigned under the plurality formula in single-member constituen-

<sup>3</sup> The classic example of the pure PR system is the electoral system of the "Weimar Republic" in Germany. Today the pure PR system is in operation in a few countries only, for example in Israel (with a threshold of 1.5% at national level), Guyana, Namibia and the Netherlands.

<sup>4</sup> France, in particular, is the force behind this system. Different forms of absolute majority systems are applied, among other countries, in Gabon, Haiti, the Comoro Islands, in Congo, Mali, Macedonia, the Ukraine, White Russia and in Australia (in conjunction with the alternative vote).

<sup>5</sup> This type of PR system is used in many Western European and some Eastern European countries (for example Austria, Finland, Czechia, Lichtenstein, Luxembourg, Portugal, Spain, Slovakia and Switzerland), in most Latin American states (for example Argentina, Brazil, Colombia, Costa Rica, El Salvador, Paraguay, the Dominican Republic) as well as in some African and Asian countries (for example Benin, Cape Verde, Indonesia).

<sup>6</sup> For a detailed description of the Danish electoral system see: Parliamentary Election Act of Denmark (Act No.271 of May 13th 1987, latest amendments added on April 10th, 1991) as well as *Elklit, J.*, Simpler than its Reputation: The Electoral System in Denmark since 1920, in: *Electoral Studies*, Vol.12, 1993, no.1, 41-57. It is noteworthy, that the effects of the Danish electoral system – namely, high proportional outcome (which results from calculating the proportional seat share of each party at the national level) and personal vote (by open lists) – are very similar to the mixed-member proportional system, discussed below; see *Elklit, J./ Roberts, N.*, A Category of their Own? Four PR Two-tier Compensatory Member Electoral Systems in 1994, in: *European Journal of Political Research*, Vol.30, 1996, 217-240.

<sup>7</sup> For a description of the electoral systems of Germany, New Zealand and Venezuela see, among others, *Nohlen, D.* 1990, 1996 (see fn.1) as well as *Krennerich, M.*, Electoral Systems. A Global Overview, in: *de Ville, J./ Steyler, N.* (eds.): *Voting in 1999. Choosing an Electoral System*, Butterworths, Durban, 101-113. With regard to the New Zealand electoral system, see also *Boston, J. et al.*, *New Zealand under MMP: A New Politics?*, Auckland University Press, Auckland 1996.

cies, another share is assigned according to the proportional formula in a national constituency (or in large multi-member constituencies at provincial level). Contrary to the parallel system (see below) the assignment of seats is not carried out in completely separate procedures. The allocation of the list seats aims at compensating to a great extent the disproportionality effect of the plurality formula in single-member constituencies<sup>8</sup>; e) mixed-member majority systems (e.g. majority systems with additional proportional lists/parallel systems), on which elections in Mexico, Japan, Russia, Croatia and Lithuania are based. Under this system, in a separate procedure, one share of the seats is allocated according to the majority formula in single-member constituencies and one share according to the proportional formula in a national constituency (or in large multi-member constituencies at the provincial level). The total electoral outcome is, as it were, composed of two independently calculated results.

It is essential that theorists of electoral systems give their increased attention to such complex electoral systems – and not only to the effects of these systems but also to their origins.

### **Constituency elements within Proportional Representation systems**

In the light of these more complex systems the constituency elements within Proportional Representation (PR) systems will be discussed next. In the classical debate on electoral systems, constituency elements have been traditionally connected with majority representation systems, not with PR systems. The reason for this is that the debate usually started out from the extreme ends of the scale of subtypes – that is the plurality system on the one hand and the pure PR system at national level on the other. The pure PR system at national level operates without any constituencies or rather with one national constituency.

The situation became somewhat more complicated after PR systems began to operate in small, medium and/or large multi-member constituencies in many European and Latin American states today during this century. This was when the distinction between single-member and multi-member constituencies became more important. Usually, only majority representation systems used single-member districts, where individual party candidates were elected. Under proportional representation systems, members of Parliament generally were elected in multi-member constituencies. With the combined electoral systems coming

<sup>8</sup> From the technical point of view this is achieved through the fact that parties having obtained seats in single-member constituencies are disfavoured in one way or another when the list seats are allocated. See the Italian Electoral Law in: *Supplemento ordinario alla Gazzetta Ufficiale*, 20.8.1993. For a description of the electoral system of Hungary see *Nohlen, D./ Kasapovic, M., Wahlsysteme und Systemwechsel in Osteuropa*, Leske & Budrich, Opladen, 1996.

into existence, or rather after taking note of these, it became completely questionable to classify electoral systems where single-member constituencies are used exclusively as plurality or majority systems. The reason for this lies in the fact that some of these more complex electoral systems combine single-member constituencies with the principle of proportional representation. We are referring here to the mixed member proportional system applied in Germany, New Zealand and Venezuela, and to the compensatory mixed-member proportional system used in Italy and Hungary.

The question arises what the function is of constituency elements within PR systems. Single-member districts – as well as very small multi-member districts – have two important effects: Firstly, they produce a high degree of disproportionality between votes and seats. As is well-known, the vote-seat-proportionality or rather disproportionality depends to a high degree on the magnitude (size) of the constituency (defined as the number of representatives elected in a constituency). Nohlen puts it as follows: "The smaller the size of the electoral district, the less the degree of proportionality of the electoral system. And generally, smaller parties have less chances to obtain seats"<sup>9</sup>. Mathematical and empirical data, among others, from Douglas Rae, Taagepera/Shugart and Arend Lijphart support this statement<sup>10</sup>. Secondly, small constituencies, and especially single-member constituencies, are considered to be a key element to ensure a close relationship between voters and representatives. They allow the voter to choose between individual party candidates and tend to favour a relationship based on knowledge of the candidate, on trust and on his or her accountability. Candidates who represent single-member constituencies or at least very small multi-member constituencies are usually closer to the electorate they serve. For this reason constituency-based systems are regarded as high on accountability.

Put in rather simplified terms, in proportional representation systems the second effect (that is the close relationship between voters and representatives) is a desired one, the first effect, however, (that is the high degree of disproportionality between votes and seats) is an undesirable one. Certainly, a PR system cannot be composed only of single-member or very small multi-member constituencies; otherwise it would not correspond with the principle of proportional representation, but with the principle of majority representation. Therefore, it is necessary to compensate the disproportional effect of these constituencies (as is the case within compensatory mixed-member PR systems) or even to prevent them from influencing the vote-seat-relationship (as is the case within the mixed member proportional systems).

<sup>9</sup> See Nohlen, D., 1996 (see fn. 1), 53.

<sup>10</sup> See Rae, D.W., *The Political Consequences of Electoral Laws*, Yale University Press Boston 1971; Taagepera, R./ Shugart M.S., *Seats and Votes. The Effects and Determinants of Electoral Systems*, Yale University Press, New Haven/ London 1989; Lijphart, A., *Electoral Systems and Party Systems. A Study of Twenty-Seven Democracies, 1945-1990*, Oxford University Press, Oxford 1994.

To summarise: From the functional point of view, the "strange" combination of constituency elements within PR systems serves to secure a close voter-representative relationship and, at the same time, to guarantee a fair (proportional) representation of parties according to the votes they receive.

It has to be pointed out, however, that from a systematic point of view the voter-representative relation can be influenced not only via the magnitude of the constituencies, but also via the form of the party list. "Contrary to many assumptions, the personality of the candidate can play a larger role in party lists than in individual candidacies, given that there are different forms of lists and some are open to personal votes"<sup>11</sup>. In the case of single-member districts – as well as in multi-member districts in conjunction with closed party lists – provision is made only for inter-party competition (that is, between candidates of different parties). In the case of open or free lists, however, intra-party competition is also possible (that is, among candidates of the same party). Open lists allow the voters to decide which candidate should represent the party in Parliament. The ranking order of candidates on the party list could be altered by the voters. The free party list even allows the voter to cross party lines. These non-closed lists aim at greater participation of voters, giving them the opportunity to elect not only the parties, but also the candidates of their choice.

However, non-closed lists may have harmful side-effects as can be seen from the experience in Italy and Japan, prior to recent electoral reforms, and also in Panama and Peru. In these countries, open party lists do not only increase significantly intra-party competition, but also favour political clientelism, corruption and even electoral manipulation. In countries like Panama and Peru, where democracy, political parties and the party system are still in a stage of development, it is a problematic phenomenon that open lists weaken the parties by favouring individual candidates and intra-party factionalism<sup>12</sup>. Furthermore, it should be noted that non-closed lists are not easily handled by the electorate and the election administration. In Peru as much as 41% of the votes in the parliamentary election in 1995 were ruled invalid compared to 9% to the presidential election. This is mainly due to the voters' lack of understanding and the electoral staff's maladministration of the voting ballots and electoral documents<sup>13</sup>.

<sup>11</sup> See *Nohlen, D.*, 1996 (see fn.1), 61.

<sup>12</sup> See *Krennerich, M.*, 1996: La reforma electoral en América Latina. Paper presented at the "Seminario Internacional sobre Reformas Electorales", organized by the Tribunal Electoral de Panamá, Panama, 4./5.10.1996.

<sup>13</sup> See *Roncagliolo, R.*, 1996: El voto preferencial en el Perú. Paper presented at the "Seminario Internacional sobre Reformas Electorales", organized by the Tribunal Electoral de Panamá, Panama, 4./5.10.1996.

Aiming at an improvement of the voter-representative relation, both options, that is introducing constituency elements on the one hand and non-closed party lists on the other, may be considered in electoral reform debates. A good example of this is the reform debate in Venezuela. There, a PR list system in multi-member constituencies with additional seats at the national level had been applied since 1946. The electoral system was criticized particularly because of the closed party lists which fostered the widely lamented anonymity between voters and representatives<sup>14</sup>. In order to solve this problem two basic alternatives were considered: introducing open party lists or creating a certain number of single-member constituencies, without affecting the principle of proportional representation. Finally the second alternative was agreed on, not least because single-member-constituencies have less of a weakening effect on the party organisation as open party lists. Today Venezuela applies a personalised PR system (mixed-member proportional system) in a form similar to the German and New Zealand electoral system.

Also in other countries where the principle of proportional representation is widely accepted, the introduction of non-closed lists or a certain number of single-member constituencies or at least of very small multi-member constituencies has been discussed out of functional considerations, without electoral reform being envisaged at this stage. This applies, for example, to South Africa:

### **The electoral reform debate in South Africa**

Traditionally, the plurality system in single-member constituencies had been used in South Africa since its establishment in 1910 for the election of members of the House of Assembly and later also the Houses of Representatives and Delegates in the Tricameral Parliament under the 1983 Constitution<sup>15</sup>. Under the interim Constitution of 1993<sup>16</sup> a pure PR system was adopted after a short, but intensive electoral reform debate<sup>17</sup>. The adoption of this system was motivated by various factors, inter alia the fact that there was not time enough

<sup>14</sup> See *Shugart, M.S.*, Leaders, Rank and File, and Constitutens: Electoral Reform in Colombia and Venezuela, in: *Electoral Studies*, Vol.11, 1992, No.4, 21-45; *Nohlen, D.*, Sistemas electorales de América Latina. Debate sobre reforma electoral, Fundación Friederich Ebert, Lima 1993.

<sup>15</sup> See sections 41-43 of the Republic of South Africa Constitution Act 110 of 1983.

<sup>16</sup> Constitution of the Republic of South Africa Act 200 of 1993. For a general analysis of the interim Constitution see, among others, *Heese, H.-F./ Böhnke, Th.*, Die Neue Übergangsverfassung der Republik Südafrika. Ende der Apartheid – Aufbruch in die Demokratie, in: *Verfassung und Recht in Übersee*, Vol. 27, 1994, 491-515. See also *Klug, H.*, South Africa's New Constitution: the Challenges of Diversity and Identity, in: *Verfassung und Recht in Übersee*, Vol. 28, 1995, 421-448.

<sup>17</sup> See *Mattes, R.*, The Road to Democracy, in: *Reynolds, A. (ed.): Election '94, South Africa*, Philip, Cape Town/ Johannesburg 1994, 1-22.

to register voters (which would be required if representatives were to be elected in constituencies) and the need expressed for a Constitutional Assembly with a composition that reflects as accurately as possible the number of votes cast for each party in the election. The pure PR system was applied in South Africa's first democratic election in 1994<sup>18</sup>. Within the subsequent constitutional-writing process the electoral reform debate was rekindled, but this time with a smaller range of options.

### *The Constitution-writing process*

The 490 member Constitutional Assembly (consisting of all the members of the National Assembly and Senate) was assigned the task of drafting and adopting with a two-thirds majority a "final" Constitution within two years of the first sitting of the National Assembly (i.e. before 8 May 1996)<sup>19</sup>. The text as adopted subsequently had to be certified by the Constitutional Court as complying with the 34 constitutional principles set out in schedule 4 of the interim Constitution<sup>20</sup>. For purposes of drafting the Constitution, various structures were established<sup>21</sup>. The process started in the six Theme Committees (consisting of 30 members each on which parties were represented proportionately to their strength in the Constitutional Assembly). The Theme Committees each dealt with specific aspects of the Constitution: 1) character of the democratic state; 2) structure of the government; 3) relationship between levels of government; 4) fundamental rights; 5) judiciary and the legal system; 6) specialized structures of government. The primary function of the Theme Committees was to receive submissions (from the broader community and political parties) and to process them into reports for consideration by the Constitutional Committee<sup>22</sup>. The Constitutional Committee consisted of 46 members on which parties were proportionately represented. It was the primary forum for discussion and negotiation among parties. It submitted reports to the Constitutional Assembly for debate.

Insofar as the electoral system for future elections of members of the National Assembly was concerned, constitutional principles VIII, XIV, and XVII of the interim Constitution were relevant. VIII was undoubtedly the most important of these and provided the following: "There shall be a representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional

<sup>18</sup> For a general analysis of the 1994 elections see, for example: *Engel, U.*, *Parlamentswahlen in Südafrika*, in: *Verfassung und Recht in Übersee*, Vol.27, 1994, 447-490.

<sup>19</sup> Section 73(1) of the interim Constitution.

<sup>20</sup> Section 71(1) of the interim Constitution.

<sup>21</sup> See, generally, the Constitutional Assembly Debates (1994 and 1995), Cape Town.

<sup>22</sup> These reports' structure included the following: a) issues in respect of which there was agreement; b) issues in respect of which there was no agreement; and c) recommendations of the committee.

representation". Constitutional principle XIV in turn provided that provision should be made for participation of the minority political parties in the legislative process in a manner consistent with democracy while principle XVII stated that at each level of government there must be democratic representation.

For purposes of deciding on the provisions to be included in the final Constitution regarding an electoral system, an Inhouse Workshop was held by Theme Committee Two in Parliament on 8 May 1995. Papers at the workshop were presented by academics from the University of South Africa, Rand Afrikaans University, the University of Stellenbosch, the University of the Western Cape and the University of Heidelberg (Germany).

### *The electoral system applied in the 1994 elections*

Before analyzing the different reform proposals presented at the workshop, we should have a look at the electoral system used in the 1994 elections. Among the main technical features of the South African electoral system, the following points should be noted: For purposes of the 1994 election the country was divided into nine multi-member constituencies of variable sizes. They corresponded to the nine provinces established in terms of the interim Constitution. However, the primary basis for the allocation of the 400 seats was the votes cast for each party in the country as a whole. The 400 seats were filled from national and/or regional party lists. Parties could decide whether to submit only regional lists or to submit both regional lists and a national list, provided that lists of candidates could not in total contain the names of more than 400 candidates<sup>23</sup>. The list form was closed. The parties, therefore, decided on the ranking order of the candidates on their lists. Each voter had one vote for the election of the National Assembly.

In order to allocate the seats, the procedure was as follows: Firstly, 200 seats were distributed proportionately in nine multi-member constituencies of variable size on the provincial level<sup>24</sup>. The formula for allocating the seats was the Droop quota, in conjunction with the largest remainder formula<sup>25</sup>. Secondly, the total number of seats for each party was

<sup>23</sup> The National Party, for example, chose not to submit a national list of candidates, but only nine regional lists.

<sup>24</sup> In the 1994 elections, these constituencies were identical to the nine provinces established in the Interim Constitution. The allocation was as follows: Western Cape: 21 seats, Eastern Cape: 28 seats, Northern Cape: 4 seats, Natal: 40 seats, Orange Free State: 15 seats, North West: 15 seats, Northern Transvaal: 20 seats, Eastern Transvaal: 14 seats, Pretoria/ Witwatersrand/ Vereeniging (PWV): 43 seats.

<sup>25</sup> Quota = votes divided by (seats + 1) + 1. *Elklit/Roberts* (see fn. 6) are correct in saying that it is slightly confusing that the Droop quota used in South Africa is the same as in STV elections

calculated proportionately according to the votes cast for each party in the country as a whole. For this purpose, the Droop quota was applied at the national level<sup>26</sup>. Remaining seats were distributed by the largest remainder formula (a maximum of five seats) and, if necessary, by an additional largest average formula. Thirdly, the number of seats allocated to a given party at the regional level was subtracted from the total number of seats that the party obtained from the votes cast at the national level. The difference was filled by the national party list. If a particular party did not submit a national list, the difference was filled by the regional party lists (in the same proportions as set out in the first step).

Considering the proportionality between votes and seats, the South African electoral system secures a very fair representation of political parties in Parliament, given that the primary basis for the allocation of parliamentary seats are votes cast nationally for each party. The electoral outcome of the 1994 election was highly proportional by international standards. And what is more, a broad consensus existed between almost all the political players that the electoral system should produce a high degree of proportionality and encourage cooperation and national integration by representing all social and political groups in parliament. Given the fact that the degree of fragmentation of the party system, at least at the parliamentary level is relatively low and that the African National Congress (ANC) has gained a clear majority in parliament, the high representativeness of the electoral system is not presently regarded as a problem for the governability or stability of the country<sup>27</sup>. On the contrary, as Andrew Reynolds puts it: "(T)he experience of South Africa illustrates that the inclusion within parliament of small minority parties can play a crucial stabilizing role in the early years of democratization in a divided society"<sup>28</sup>. Indeed, the presence of small parties in parliament has been conducive to an atmosphere of reconciliation in post-apartheid South Africa.

("STV Droop"), and not the ordinary "LR Droop", being votes divided by (seats + 1). The difference between the two quotas, however, is of no practical consequence.

<sup>26</sup> See fn. 24.

<sup>27</sup> We should be aware of the fact that the low fragmentation of the party system at the parliamentary level is not due to the electoral system. A comparison of the party systems' fractionalization at the level of votes and at the level of parliamentary seats indicates clearly the low extent to which the electoral system defractionalizes the party system by converting votes into seats. Moreover, the overwhelming parliamentary majority of the ANC is not produced by the electoral system. The seat share of the ANC corresponds almost exactly with its vote share. This leads one to the conclusion that the electoral system doesn't have a significant concentration effect. But, given the structure of the existing party system, this is not regarded as a problem at present.

<sup>28</sup> See *Reynolds, A.*, The Case for Proportionality, in: *Journal of Democracy*, Vol.6, 1995, No.4, 117-124.

*Table 1: Results of the South African Elections of 1994*

Party	Valid Votes	Percentages	Seats	Percentages
ANC	12.237.655	62,65	252	63,00
NP	3.983.690	20,39	82	20,50
IFP	2.058.294	10,54	43	10,75
VV-FF	424.555	2,17	9	2,25
DP	338.426	1,73	7	1,75
PAC	243.478	1,25	5	1,25
ACDP	88.104	0,45	2	0,50
AMP	34.466	0,18	–	–
AMCP	27.960	0,14	–	–
DPSA	19.451	0,10	–	–
FP	17.663	0,09	–	–
MF	13.433	0,07	–	–
SOCCER	10.575	0,05	–	–
ADM	9.886	0,05	–	–
WRPP	6.434	0,03	–	–
XPP	6.320	0,03	–	–
KISS	5.916	0,03	–	–
WLP	4.169	0,02	–	–
LUSAP	3.293	0,02	–	–
Total	19.533.498	100%	400	100%

Source: Report of the Independent Electoral Commission. The South African Elections of April 1994, Johannesburg, October 1994.

However, the lack of individual accountability of members of Parliament and the lack of "constituency representation" are widely regarded as defects of the electoral system. As mentioned earlier, voters do not vote for individual candidates but for closed party lists. The non-personal and anonymous character of the vote does of course not favour individual accountability of the representatives to the electorate. Moreover, the link between representatives and constituencies is broken. Given the large size of the constituencies (at the provincial level), constituency representation is virtually non-existent.

Therefore, the issues surrounding the voter-representative relationship and constituency representation play a prominent role in South Africa's electoral reform debate. Various proposals for reform aimed at supporting the individual accountability of members of Parliament and constituency representation without giving up the principle of proportional representation stipulated in the interim Constitution of 1993 (as well as in the new Constitution of 1996).

Advocates of South African electoral reform had to find a solution to the question as to how a close relationship between voters and representative can be ensured with a PR system. As demonstrated above, from a technical point of view, the need for close contact between voters and representatives can basically be addressed in two different ways: through the list form and/or through the district magnitude (defined as the number of representatives elected in a district). In other words, in an attempt to overcome the lack of accountability, reforms to the electoral system may provide for non-closed party lists and/or they may introduce small constituencies. In the South African electoral reform debate both options were present, even though not of equal importance. Some academics did advocate non-closed lists either within an amended or a completely new electoral system<sup>29</sup>, but this aspect played a minor role in the academic and political debate. Proposals to combine constituency elements with the principle of proportional representation evoked much more interest. These proposals were a main topic within the reform debate at the above mentioned Inhouse Workshop on Electoral Systems, held in 1995 by Theme Committee II of the Constitutional Assembly<sup>30</sup>.

#### *Proposals by academics*

Apart from Albert Venter's proposal to maintain South Africa's existing electoral system and to provide for the parties' commitment to formally accredit their Members of Parliament to magisterial districts after the elections, all academics at the Inhouse Workshop (including Venter, as a second-best option), voted for retaining the principle of proportional representation and introducing a certain number of single-member constituencies or small multi-member constituencies in order to establish a certain degree of constituency representation and to strengthen the individual accountability of representatives. Without going too much into the technical detail of the respective proposals on electoral reforms, it should be mentioned that basically two quite similar alternatives for electoral reform were proposed:

<sup>29</sup> For example, Andrew Reynolds proposed for the 1994 election the introduction of a PR system in multi-member districts (from 5 to 12 seats) with compensatory seats, and within this system he recommended open lists. See *Reynolds, A.*, Voting for a New South Africa, Maskew Millar Longman, Cape Town 1993. The proposal has gained support from some academics like *Frost, M.*, Choosing an Electoral System, in: *Die Suid-Afrikaan*, February/ March 1993, 19-22. Both Murray Faure and Hennie Kotzé also recommended within their proposals the application of non-closed party lists (see below).

<sup>30</sup> See *De Ville, J.J. Steydler, N.* (eds.), Voting in 1999. Choosing an Electoral System, Butterworths, Durban 1996. This anthology was basically developed from the presentations at the Inhouse Workshop.

1) The first alternative provided for allocating one share of seats to single member districts and the other share of seats to national party lists (Faure, Venter), with the overall party representation in Parliament depending on the national vote cast for each party:

- Murray Faure (1996) proposed a 300 member National Assembly of which 200 members should be elected from open national party lists and 100 members from single-member constituencies. Under the system proposed voters would have two votes, one for a party list of candidates and one for a candidate in a constituency. After the election, constituency representatives would first be determined on the basis of the plurality formula. Thereafter the number of seats each party is proportionately entitled to in the National Assembly based on the party list vote would be determined by making use of the Droop quota. The number of constituency candidates each party obtained would be subtracted from this number, which would indicate the number of list seats a party is entitled to.
- Albert Venter's second-best-option proposed a system similar to Faure's. The main difference being that of the 400 proposed members of the National Assembly, 200 would be elected in single-member constituencies and 200 from closed party lists.

Apart from some technical differences in detail, these options are basically a variation of the personalised proportional representation or the mixed-member proportional system used in Germany and New Zealand, although without a legal threshold.

2) The second alternative provided for allocating one share of the seats in small multi-member constituencies and the other share of the seats at the national level, either to national party lists (de Ville) or to the "best losers" in the constituencies (Kotzé). Again, the national vote cast for each party should determine the final allocation of seats.

- Jacques de Ville (1996) proposed a combination of small (2-5) multi-member constituencies (using party lists) and a national party list for the election of members of the National Assembly. Under this system, voters would have two votes: one for a party list of constituency candidates and another for a national party list. The national party list vote would determine the final allocation of seats. 300 of the 400 members of the National Assembly would be elected in constituencies. The number of constituency candidates elected would be subtracted from the overall allocation of members of each party, which would determine the number of national party list seats a party is entitled to. In the event of overhang seats a party would retain its excess seats but other parties would, where appropriate, be allocated additional seats to ensure full proportionality.
- Hennie Kotzé (1996) also proposed multi-member constituencies. He, however, suggested that constituencies should have either three or five members each and that voters should have only one vote which would be counted twice, once to determine the election of the 300 constituency representatives and a second time to establish the overall party representation in the National Assembly. The 100 "additional members" would not be allocated from party lists but from the "best losers" in the constituencies. He also

favoured the introduction of the preferential vote in constituencies which would enable voters to cast their vote for a particular constituency candidate. In the event of overhang seats a party would retain all its excess seats.

What is new in this alternative is that it does not advocate the implementation of single-member constituencies, but for small multi-member constituencies. Thus not only the strongest parties, but also other parties have an opportunity to obtain constituency representation which is of vital importance considering the dominant role the ANC is playing in most South African provinces. Systematically, this alternative finds itself positioned between the German system, which combines highly proportional outcomes with the personalisation of the vote through single-member constituencies, and the Danish system, which combines highly proportional outcomes with the personalisation of the vote through open party lists in predominantly large constituencies. De Ville and Kotzé are proposing a highly proportional system, which provides for a personalisation of the vote by introducing small multi-member constituencies with closed (de Ville) or non-closed (Kotzé) party lists.

From the systematic point of view, the South African electoral debate is highly interesting. Not only because the reform proposals present some original ideas, but also because the debate shows that the functioning of an existing electoral system can lead a reform debate into a certain direction and it can considerably influence the attractiveness or non-attractiveness of possible alternative electoral systems. The logical step from the South African electoral system to the alternatives mentioned above is easy to make: It simply results from the idea of reducing the size of the large constituencies in South Africa existing at the provincial level and thus to change them into single-member constituencies or small multi-member constituencies. This would be a small technical alteration with major political effects.

It is worth pointing out that within the constitutional writing process academics widely agreed in their opinions on the existing electoral system as well as on the basic direction of the presented reform proposals. Various South African academics seek to improve the present electoral system in order to rule out its shortcomings (in particular, the lack of constituency representation and of individual accountability of representatives) while simultaneously retaining its strong points (especially, the high degree of proportionality of the electoral system). A central feature of the proposals was the implementation of constituency elements, without affecting the widely accepted and constitutionally attested principle of proportional representation. However, the best-designed electoral reform proposals are naturally of no use if they are not supported by political actions, which takes one from the academic to the political debate.

### *The political debate*

It is remarkable that many politicians shared the opinions of academics concerning the virtues and vices of the electoral system applied in 1994 and advocated improving the accountability of the Members of Parliament via constituency representation. Interestingly enough, soon after the 1994 elections voices were raised on the political scene advocating the introduction of constituency elements in the PR system. Even top politicians within the ANC and the National Party expressed their support for a combined electoral system along the lines of the German model<sup>31</sup>.

An opinion poll among members of parliament, carried out by the Parliamentary Information and Monitoring Service (PIMS) in 1995, "... showed overwhelming support for a change in the electoral system, to include at least an element of constituency representation"<sup>32</sup>. About two-thirds of the sample supported a combination of constituency representation with the principle of proportional representation. The majority of the representatives of five of the seven parties in parliament advocated such a combination. According to the survey, only in the NP and the African Christian Democratic Party were less than 50% of those who participated in favour of such a system.

Also in the political party submission on electoral systems to the Constitutional Assembly, specifically those of the African National Congress (ANC), Democratic Party (DP), National Party (NP) and Pan Africanist Congress (PAC), the sentiment was evident that the accountability of members of Parliament to the electorate should be strengthened whilst the advantages of proportional representation should be retained. The "preliminary" submissions of the majority party, the ANC, however, was perhaps the most cautious, noting only that "the implementation of a system of both proportional and/or constituency-based representation needs to be carefully considered".

The submission of the DP, however, was rather concrete. It provided for 80% of the members of the National Assembly being elected in multi-member constituencies and 20% from national party lists. Each voter should have two votes: one vote for a constituency party list and one for a national party list, the second vote determining the number of seats a party is entitled to in the National Assembly. In the event of overhang seats, the number of members of the National Assembly should be increased slightly. The submission of the NP was to the effect that the current electoral system should be retained and that each party should, after the election, formally designate its elected representatives to the various magisterial districts. The Inkatha Freedom Party (IFP) proposed a combination of party lists

<sup>31</sup> See Cape Times, 24 April 1996.

<sup>32</sup> See Parliamentary Whip, 17 May 1996.

(to determine the extent of representation to which each party is entitled to) and constituencies (to determine which candidates are elected). While the PAC clearly expressed its preference for a system of proportional representation which contains a constituency element, it did not indicate its preference for a specific type of electoral system. The African Christian Democratic Party (ACDP) submission did not show a clear preference for any particular type of PR-system either, while the Freedom Front did not make any submission in this regard. From the public submissions received, there was strong support for some form of constituency element in the PR-system<sup>33</sup>.

Against this background, many observers as well as many politicians actively involved in the constitution-writing process were surprised by the deal cut by politicians of the ANC and of the National Party during the final period of constitutional negotiations<sup>34</sup>. Politicians of both parties agreed in April 1996 to put the pure PR system into the Final Constitution. After some vehement protests, a compromise was reached in all-night negotiations. The Constitution only provides for the Members of Parliament being elected in terms of an electoral system that "results, in general, in proportional representation" (Art. 46 1d), without specifying a particular type of PR system. An amendment to the Constitution, however, keeps the existing system in place for the 1999 election. The reform of the electoral system and therefore also the implementation of constituency elements remain impossible for the coming election. The deal between the ANC and the NP was rejected by several parties, first among them the Democratic Party. Even within the ANC it was not totally accepted. On the academic level, some academics of the University of Western Cape (in particular, Nico Steytler, Jacques de Ville, Pierre de Vos) voiced strong criticism against maintaining the current system.

The reasons why the ANC and the NP wanted to stick to the current electoral system can only be guessed at – at least from the distance. Obviously the fear was growing in certain groups within the ANC and the NP that non-African candidates had reduced prospects of being elected to parliament via the constituency system<sup>35</sup>. Especially within the ANC, where a racially diverse composition is sought after, objections were made that constituency representation would probably result in a majority of black candidates being elected in the constituencies, at the expense of white, coloured and Asian members represented in the current ANC parliamentary caucus. They also saw the danger – empirically hardly justified – that members of parliament elected via the national party list might be regarded as second-class representatives. Furthermore, ANC sources indicated that the need for the

<sup>33</sup> See Theme Committee Two's Report to the Constitutional Committee of the Constitutional Assembly, September 5th, 1995.

<sup>34</sup> According to the Business Day (18 April 1996), the deal was brokered by the ANC's Essop Pahad and the NP's Alex van Breda.

<sup>35</sup> See Cape Times, 24 April 1996.

ANC to be able to run a disciplined parliamentary party was also critical in their decision<sup>36</sup>. This latter consideration is supported by the theory of electoral systems which shows that there is a greater independence of the elected representative from his or her party in single-member constituencies, given that he/she is elected as an individual candidate.

Perhaps the strongest argument for maintaining the existing system was, however, the time factor. Within the rather short constitutional writing process the decision on the electoral system was a political decision taken under time-pressure. The politicians had not much time to take into account the academic debate and to seriously consider the pros and cons of electoral reform. In order not to precipitate the decision they maintained the existing electoral system at least for the 1999 election. Obviously, the two major political parties also did not wish to incur the risk of undesired side effects of electoral reform. The fact, however, that even the ANC and the NP consider it necessary to improve the voter-representative-relationship can be seen in the introduction of an intra-party system of informal constituency representation – which admittedly hasn't functioned properly up to now.

One will have to wait and see whether the electoral reform debate will start again before or after the 1999 elections. It should be stressed that at least an astonishing consensus exists on the academic and political level with regard to the evaluation of the strong and the weak points of the electoral system (namely high representativeness versus lack of constituency representation), the objectives of possible electoral reform (improvement of the voter-representative relationship within the principle of proportional representation) and the spectrum of technical means in order to reach these objectives (introduction of constituency elements one way or another).

<sup>36</sup> See Parliamentary Whip, 17 May 1996.

## **A Systematic View on the Electoral Reform Debate in South Africa**

*By Michael Krennerich and Jacques de Ville*

In the past few decades, the variety of both majority representation and proportional representation systems has been widened considerably. Some of the more complex electoral systems combine highly proportional outcomes with the personalisation of the vote through single-member constituencies or through open party lists. The issues surrounding the relationship between voters and representatives and constituency representation play also a prominent role in the South African electoral reform debate, rekindled within the Constitution-writing process (1994-1996). In South Africa's first democratic elections (1994), a pure proportional system was applied. On the academic as well as on the political level, an astonishing consensus exists with regard to the evaluation of the strong and weak points of the existing electoral system (namely high representativeness versus lack of constituency representation), the objectives of possible electoral reform (improvement of the voter-representative relationship within the principle of proportional representation) and the spectrum of technical means in order to reach these objectives (introduction of constituency elements). However, reform proposals which aimed at supporting the individual accountability of members of Parliament and constituency representation without giving up the widely accepted principle of proportional representation have failed. The strongest argument for maintaining the pure PR system was the time factor. Within the rather short Constitution-writing process the decision on the electoral system was a political one under time-pressure. In order not to precipitate the decision and not to incur the risk of undesired side effects of electoral reform, the two major political parties maintained the existing electoral system at least for the 1999 election.

## **Paradisiacal Conditions? – The Background and the Development of the Constitution and the Law in Fiji**

*By Jörg Menzel*

The Article gives an outline on the Constitution and the Law in the Republic of Fiji, with an emphasis on the latest developments. Fiji's Legal System is based on the English model, but English Law has never been the only source of Law. Even in colonial times the traditional structure of Fijian Society (Chiefly System) and the indigenous customary law were recognized. The strengthening of the "Fijian" element in the political process as well as in the Legal System has become a dominant factor of the constitutional development since the Military-Coups in 1987.