

For the Constitutional Committee:

Some Issues arising out of an
Electoral System for a Democratic South Africa

1. Introduction

This paper supplements my earlier discussion document of 1988 which has already been circulated to members of the Committee. Members are asked to refer to it concerning the background to some of the systems.

Some important political decisions will have to be taken fairly rapidly in order that consequential studies can be undertaken on such matters as the appropriate regional or constituency units and population distribution. Also, depending on which electoral system obtains favour, the movement will have to embark on crash-courses for cadres to train them in the electoral rules which will operate the system which has been adopted.

We must learn from the experience of Zimbabwe and Namibia, especially as the experience of the latter has been held out as having some validity for South Africa. Regrettably, both in Zimbabwe and in Namibia, there was hardly any cogent discussion on the electoral system. In the case of Zimbabwe, the Zimbabwean Constitution Order-in-Council of 1979 imposed a party-list system without a registration of voters and a number of seats was allocated to each one of the eight electoral districts. This was part of the Lancaster House deal and no real investigation was carried out on the relation between the allocation of seats and the electorate in each district. The white seats were fought for on a constituency basis.

In Namibia, even before the 1990 Constitution was adopted, the electoral system which was implemented in 1989 was the one proposed by the Contact Group of Western States and included in the principles attached to Resolution 435 of 1977, which formed the basis of the transfer of power. There was no negotiation between SWAPO and the Contact group and only the vague formula that the assembly would be elected under one-person, one vote through a system of proportional representation.

The Namibian Constitution now provides (Article 46) for the 72 members of the National Assembly to be elected by registered votes by "general, direct and secret ballot". Although the electoral law is to be determined by act of parliament, Article 49 lays down that these members shall be elected on party lists "in accordance with the principles of proportional representation". Schedule 4 provides some details as to how the list system is to operate.

The upper house, known as the National Council, is constituted by two members being elected from each region (Article 69(1)). But proportional representation for the National Council is not entrenched in the Constitution as paragraph 2 of Article 69

empowers the election of the National Council to be "conducted according to procedures to be prescribed by Act of Parliament". Significantly, Article 106(3) specifically lays down that the "candidate receiving the most votes in any constituency shall be elected a member" of the Council for that constituency. In other words, the majority system prevails. There is also no provision for proportional representation for local elections.

The most significant conclusion to be drawn from the Namibian and Zimbabwean Constitutions is, therefore, that the list system is constitutionally prescribed only for the important lower house. In other countries, where proportional representation is used for elections to the national parliament the proportional representation system permeates other levels also, regional and local. If the representation of minorities was the motivation for the national list system, then the omission of proportional representation for regions etc is significant.

2. South African Background

It seems to me, reading a number of proposals on the electoral system from various South African, American and European sources, that the general perception of the ANC's position is that we are strongly wedded to the system of direct election in equal constituencies, otherwise the "majority" or first-past-the-post system. If this is the received view - and there are considerable advantages to us in such a perception - then we ought to be clear about the advantages of such an approach and the extent to which we are prepared to concede on our attachment to the system.

On the other hand, there is virtually uniform opposition to the first-past-the-post system among nearly all the academic, "think-tank" and politically-motivated writers on this topic. Some are motivated simply by an opposition to "simple" majoritarianism; others are concerned that minorities may not be able to obtain representation under the present system and therefore propose reliance on some version of proportional representation, without having worked out the implications of such a system or accepting as self-evident, the advantages of the particular system they propose. I propose to ignore some of the more hare-brained proposals but we will have to look more closely at one or two proposals such as the one suggested by Professor Donald Horowitz of Duke University, the "alternative vote" or the Australian system.

One real problem we face is that the Government has not signified in any way their preference. On the assumption that phrases such as "power-sharing", "no domination by one group", "participatory government" are really coded references to the continued role of whites as a group in the political life of South Africa, one may conclude that the regime would subscribe to an electoral system which would fortify such expectations. Even if the electoral boundaries are manipulated by a commission of their choice, it

is difficult to see how the present system could guarantee adequate racial or white representation. It would appear to me that governmental thinking must surely be working towards some version of proportional representation. The Democratic Party has already supported PR (without being specific about the version) and the Kwa-Zulu-Indaba proposals adhere to a regional list, together with constituencies, which appears to me to be influenced by the West German system known as the "additional member system".

There is evidence from the Namibian experience that the regime does not appear to have a firm grasp of the proportional representation system. On the other hand, there is a very developed culture of voting in single-member constituencies among the whites, with established procedures for implementing the complex procedures and rules for the conduct of the first-past-the-post system under the existing Electoral Acts. This is a reality which the white bureaucrats may not wish to buck.

3. Existing Arrangements

Present constituency arrangements will not be able to be used automatically with the enfranchisement of the African majority. To a large extent, the white constituencies take into account the existing magisterial districts but the size of the constituencies and the number of the electorate are heavily affected by the "loading" factors permitted by the South African "Constitution" and laws. The first method for distorting the distribution of seats is allocating a stated number of seats to each of the four provinces and one to Walvis Bay (Section 49 of the Republic of South Africa Constitution Act, 1983). Secondly, the delimitation commission, in fixing the constituency boundaries is obliged to take into account seven factors (density of population, physical features, community or university of interests etc) which enables it to depart from the provincial quota by 15% more or less than the quota. In addition, if the constituency size is 25,000 square kms or more, the commission may reduce the number of voters "to a number equal to 70% of the quota" (Section 49(3), *ibid*).

There has grown up a whole culture of gerrymandering constituencies in white South Africa over the past forty or so years. The result is that heavily populated white Transvaal is under represented (it took over 15,000 voters to elect a candidate there in the 1989 white election) while the Cape is over-represented (10,575 voters to a seat in 1989).

Having looked carefully at the map of white delimitation for 1989, my conclusion is that the present constituency size and criteria for electoral divisions and number of voters are totally inadequate for a non-racial electorate. I ignore the arrangements for the "Indian" and "Coloured" electorate under the 1983 Act (40 and 80 elected representatives respectively) as these constituencies were not South Africa-wide but limited to areas

where these ethnic groups registered.

The white electorate areas take into account only white registered voters. As a result, the variation in size of constituencies and the number of the electorate are determined by white requirements. If you add the ten homelands to the "tricameral" areas, the picture changes dramatically. The breakdown of the population of the provinces (Sutcliffe's 1990 estimates based on the 1985 census) is as follows:

Cape Province: (30% of the population), of which the Transkei accounts for 3,203,491, 9% of the population	10,560,866
Orange Free State: (8% of the population)	2,969,731
Natal: (21% of the population)	7,331,755
Transvaal: (42% of the population, of whom the PWV area accounts for 7,276,055, 20% of the population).	15,509,864

These figures are also relevant to any discussion as to whether a federal form of government should be adopted. (For the first time, a government spokesman has recently made a demand for a federal state. Roelf Meyer, Deputy Minister for Constitutional Affairs is reported in the Irish Times, 24 August 1990, as having said that the government "seeks support for a federal state".) Unless the federal units are to be based on the homelands and provinces (which is not a credible proposition, taking into account the huge economic and social disparities, although the suggestion has been made by a Minister that the homelands could form local government or "regional" units,) the provinces must be the units of the federation. The experience of other federal systems shows that very large differences in size or population or economic power or a preponderant role for one unit ensures that the federal system will not be able to get off the ground because of the dominance of the powerful unit. In other words, that there must be a reasonable equivalence between units, unless there are to be, as in the US, 50 states, in which case the role of the smaller states is increased. A federation based on four units - as the Kilbrandon Report said of the UK - would be so "unbalanced as to be unworkable".

The arguments in favour of the minority or first-past-the-post system have been canvassed in my earlier paper and will not be rehearsed here. The only additional points to be made are:

- (i) that the majority system is simple for the electorate to understand and, in a country with a high rate of

illiteracy and without a culture of voting, (for the majority) clear symbols to identify the candidates will assist in the process of voting;

- (ii) the electorate can identify not only with the party but also with the candidate which would assist parties with candidates with a national profile.
- (iii) a mark or X is easier to make than the use by the elector of numbers such as 1,2,3.... which are necessary in the alternative vote method or in some of the systems of proportional representation.
- (iv) the simple majority system is used in a significant number of countries, including countries with great cultural diversity or political differences in Asia, Africa and the Americas. Of the 82 countries covered in a survey by the Inter-Parliamentary Union, Parliaments of the World (1986), 35 countries elected their parliament by simple majority vote. If the two additional constituency-based systems are added (absolute majority and the alternative transfer vote), then the total comes to 49. Apart from Ireland where the most complex system of proportional representation (the single-transferable vote in multi-member constituencies) was imposed by the British in 1920, the history of the Commonwealth countries is associated with the constituency-based system. However, as in Guyana in 1964, so with Zimbabwe in 1980, the British proposed the list system of proportional representation. So history and practice are on the side of the retention of the "majority" system.

Points which must be borne in mind are:

- (i) The absolute need for registration of the voters. White South Africa has about the most developed system of registration of voters which is not only kept up-to-date constantly in a way rarely achieved in real democracies but the parties must be informed by the registrar of voters when voters move from one constituency to another! Without a proper register (which Zimbabwe did not have in 1980), it is not possible to hold any form of "free and fair" constituency-based elections. Under a "list system", such a fraudulent practice as "bussing" in voters does not make any difference; in any constituency-based system (majority, alternative vote, exhaustive ballot), such a practice, if properly organised could make the difference between victory and defeat.

Voter registration requires time and a considerable degree of organisation.

(ii) The delimitation of constituencies is a crucial matter. In nearly all countries, whose constituencies play a role, this is done by a commission whose composition varies. In some countries, the composition of the commission is entrenched in the Constitution; in others it is determined by legislation or by government fiat. In Namibia, there is no delimitation commission for the conduct of the National Assembly elections as there are no constituencies; regional and local government boundaries will be determined by a Delimitation Commission comprised of the judge of the Supreme Court and two other persons to be appointed by the President, with the approval of Parliament. This formula cannot be supported for a first free election in South Africa as there can be no confidence in appointments by a regime and a parliament in which the majority have had no say. An alternative composition of the Delimitation Commission would be on the Zimbabwean model (section 59), with the Chief Justice or the judge of the Appellate Division, plus three others appointed with the approval of the Chief Justice, following agreement or consensus by the principal political parties. Public hearings of the Commission should be held.

(iii) The issue of the "loading" factor referred to has to be dealt with. The Zimbabwean Constitution permits up to 20% (section 60) but the grounds for doing so are more rational than the existing South African provisions. If, on the other hand, the national list system is used, the case for "loading" falls away.

But is there a case for "loading" at all? One person one vote, one value!

(iv) There is a strong case for a reference to an Electoral Supervisory Commission in the Constitution. There is no such body in the Namibian Constitution but there is in section 61 of the Zimbabwean Constitution, as amended by Section 5 of the Constitution of Zimbabwe Amendment Act, 1987. A number of countries have such a Commission and its role would be crucial in a first-ever democratic election held in South Africa. In Namibia, complaints about registration and other irregularities were dealt with by the returning and chief returning officers with a complicated system of recourse to the high court. The Zimbabwean approach has much to recommend it. As in Zimbabwe, there has to be a distinction between the arrangements for the

first election and subsequent elections, especially in relation to the composition of the Commission. In Zimbabwe, the President appoints the members of the Commission - the chairman and two other members are appointed after consultation with the Judicial Service Commission; two other members are appointed after consultation with the Speaker of the House of Assembly.

I suggest that for the first election in South Africa, a larger Commission should be appointed and the Commission would have regional offices in order to expedite the investigation of complaints. If there are difficulties in constituting the Commission, this is one area where there could be international representation of individuals with a reputation for impartiality and fairness.

- (v) In Zimbabwe, the powers of the Commission are broad. It supervises the registration of voters and the conduct of the elections of the upper and lower houses of parliament and has a consultative role in relation to changes in the electoral law. Electoral law is a complex arrangement and I would suggest that the interim arrangements which the ANC has in mind should charge such a body to scrutinise the existing Electoral Acts with a view to proposing changes. In addition, the Commission should have the added duty of ensuring fairness concerning the treatment of elections by radio and television, with reasonable and equal access to political broadcasts by parties. Supervision of radio and television, a matter of great importance to the ANC in the absence of a national newspaper, was a controversial and partisan issue in the first elections in Zimbabwe and Namibia and cannot be left to a regime which will be an active participant in the election process.

4. Other Majority Systems

One of the principal criticisms of the first-past-the-post system is that a candidate may win a constituency on a minority vote. In nearly every country where the "plurality" system is used, large numbers of candidates are elected in a system where the combined votes of the other candidates exceeds that of the winner, sometimes by very large margins.

As a result, three different methods, using the constituency base, have been used in order to overcome this defect. They are discussed in my 1988 paper at page 6. Firstly there is the Eastern Europe "exhaustive ballot" where the lowest polling candidate is eliminated and another vote held. This continues until a candidate wins at least half the votes. Secondly, the

"double ballot" approach as in France. If an election in any constituency does not produce an overall winner, there is a second election a week later. Candidates who have gained the votes of 12.5% of the registered electorate in the first ballot can compete in the second ballot. The French parties usually make electoral deals to ensure that there are only two candidates on the second round. This system ensures that parties that form an alliance are able to compete in the first ballot and then arrange for the party with the larger vote to contest the second round. This system attempts to keep out minority parties and to ensure the stability of governments.

Both the exhaustive ballot and the double ballot are special to the historical situations in these European countries. Parties in these countries tend to be hostile to proportional representation, especially in France where government policy is clearly attached to the idea that there are no racial, cultural or ethnic minorities.

The "alternative vote" is a preferential system of voting in single-member constituencies. The elector votes by expressing his first preference and such subsequent preferences as she chooses to or she may vote down the list 1,2,3,4 or 5 if there are 5 candidates or she may vote for one or two only. If no candidate has an absolute majority of the vote (50% of those who voted + 1), the candidate with the fewest votes is eliminated and his second preference redistributed. This process continues until one candidate has an absolute majority of the vote. There is, of course, only one election.

Professor Horowitz, in a sustained defence of the alternative vote sees advantages for the system in South Africa. Alliances between parties are encouraged as allies can each put up candidates without fear of splitting the vote (as would occur in the plural system where only one candidate for an alliance can stand in a constituency). As a result, the elector is offered a wider choice of candidate.

I fear that the real reason as to why this system is being proposed for South Africa is that it will encourage anti-ANC parties by ensuring that the transfer of votes between non-ANC alliances will outweigh the initial and major first preferences for the ANC.

Voters will not be able to put an X on the ballot paper as this would "spoil" the paper. The use of numbers in a society with a high degree of illiteracy would also create problems of a serious kind. Finally, the drawing up of constituency boundaries remains crucial.

5. Proportional Systems

None of the above has any element of proportional representation

where the essence is a relationship between the number of votes a party gains and the number of seats allocated to it. No system of election using only single-member constituencies can ensure proportional representation, since votes for those supporting losing candidates are "wasted". There is a profound conflict between the idea of territorial representation and the ideal of proportional representation, or between the representation of territories and the representation of opinion or party.

On pages 8-12 of my earlier paper, I discuss some of the different systems of proportional representation. The most significant one for South Africa is likely to be the "list" system. But even here, there are many types. The list system can be classified according to four criteria.

- (i) whether the list is national or sub-national i.e. regional or local;
- (ii) whether the system allows voters to choose between different candidates of their preferred party - or even across parties - or whether it confines them to voting for a party list, with the order of candidates being determined by the party;
- (iii) The nature and size of the threshold, if any.

The national list system is used in Namibia, Israel, Guyana and the Netherlands. The first three have no constituencies at all. In the Netherlands, constituencies do not determine how many seats each party wins. But they determine which candidates fill the party seats.

The list system has certain attractions and its use in Namibia may be used as a precedent. But the "pure" national list system where the seats are allocated on the basis of voting for a party (or a symbol) is found only in small countries (Guyana and Israel) or with small populations (Namibia). Unless there is a threshold (1% in Israel, 5% in West Germany), there will be a proliferation of small parties. In Israel, even with a threshold, rabid and extremist parties have had little difficulty in electing representatives but the system works there (through virtually permanent coalitions) because of fundamental agreement on the nature and basis of the State. Such agreement or consensus does not exist in South Africa.

In my view, the national list system is inappropriate for South Africa. Apart from the need for a substantial threshold, a national list election would resemble a referendum and totally denies the close connection between a representative and a constituency. The advantages of (i) proportionality between votes and seats (ii) the impossibility of manipulating boundaries and (iii) minority representation and (iv) ease of

voting, are outweighed by the disadvantages of remoteness of the elected representatives from their constituents and the referendum-style of the campaign during "list" elections. Remoteness can be mitigated either by inserting a regional element (in which case the allocations of seats to the region, by reference to the population of the region, will require a proper census or prior registration) or by adopting the West German model, of single member seats combined with a national list to top up the seats in order to obtain a proper relationship between votes and seats. Two-thirds in West Germany are elected on a constituency basis and the remaining MPs are chosen so as to adjust the inevitably disproportionate result.

We must be prepared for the fact that some version of the List system may seriously be proposed during the elections.

6. Conclusion

My recommendation remains somewhat inconclusive as I do not think that it is possible to propose a particular course of action without referring to the other and, possibly, more important imponderables. These other matters refer to:

- (i) a decision on whether a unitary or federal form of government is to be established;
- (ii) the extent to which regions are to be identified and whether the regions are based on existing provinces, or on the provinces and bantustans or on a new geographical division, similar to the 14 ANC regions;
- (iii) The possibility of a second parliamentary chamber based on a criterion other than direct election in equal constituencies.

These and political issues concerned with power and the electoral system must be related to a decision on these matters.

In the meantime, I make two recommendations. Firstly, that the ANC should not take a final (or even a drafting) decision on the electoral system we would hope to have. Instead, it would be appropriate at this stage if we propose that the Constitution should have a general reference to the right of the people to exercise political power through universal, equal, direct, secret and periodic elections, the right of all citizens over 18 years of age to vote, with exceptions laid down in law, the right of all citizens to hold public office under conditions of equality and freedom. Freedom of association shall include the right to establish or join political associations and parties (quaere: right to form parties which have racist or ethnic policies or which advocate nazism, racism etc - see ANC Constitutional Guidelines); the electoral system shall be regulated by law.

Secondly, I am convinced that for the first election, either for a Constituent Assembly or the first democratic parliament, the electoral system which ought to be used is the national list system. Such an election is in reality a referendum as to how power is to be distributed in such a parliament; it is concerned with determining which party, not individuals, is to operate power. In the South Africa context, reliance on the list system (for the first election only) will avert such contentious issues as constituency delimitation, precise voter registration etc.

After such an election, careful thought could be given to what kind of electoral system would best be suited for South Africa.

South Africa does not have to take a system off the peg from another country. It would be better to establish the principles that should guide an electoral system and then design a system that follows those principles.

Commentators often talk about proportionality as though it were the only principle that mattered but it is only one of at least four: proportionality; accountability - voters should have a local representative they turn to; equal value, so every vote counts equally towards the result, with no votes wasted; and effective choice between the real contenders for power, not artificially induced coalitions to blunt the thrust towards reform and redistribution.

It is impossible to devise a system that fully satisfies each principle. Existing systems are a compromise between each one. The system chosen depends on the order of importance in which one puts them.

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Kader Asmal