

THE ELECTORAL PROCESSIssues for CODESA Working Group 3
Assignment 2Elections for a Constituent Assembly

1 Introduction

One of the issues which will have to be discussed and agreed in regard to the election of representatives to a constituent assembly is the electoral system which will be employed. The ANC has from time to time publicly stated that it would be prepared to consider a proportional representation form of electoral system through the means of the party lists. However, it is unclear whether this viewpoint, also endorsed by the Constitutional Committee in their various documents, has been adopted by the ANC as policy. It is necessary then to briefly review the possible modes of methods of election which could be used for the elections to a constituent assembly. In this regard a distinction must be drawn between an electoral system form which would be enshrined in a future constitution and in terms of which regular multi-party elections would be held for the legislature and in turn the executive of a new South Africa.

2 Nearly all the recent elections for a constituent assembly have taken place in terms of a proportional representation/party list system. Indeed this is the basis of the Cambodian election for a constituent assembly and

was the basis for the Namibian constituent assembly. However it is also possible to identify other electoral systems which could be used. Such systems are:

- i) The "mark first-past-the-post" or simple majority system. This system has been criticised as allowing for a capricious relationship between the proportion of votes, and the seats won of a particular party. It does not guarantee that significant minority parties or parties with a significant base will be represented at all in the constituent assembly. It could give tribal or racial groups a monopoly in areas where they are dominant and encourage them to base their mandate on narrow, parochial or group needs rather than on national, common values. In addition before such a system could take place the country would necessarily have to be divided into constituencies. This is a complex and difficult process which can take years. It is also a process which inevitably produces conflict, tension and suspicion. Clearly the boundaries of any particular constituency can shape or determine the outcome of such a constituency. A person who votes for a party which does not win that particular constituency effectively ensures that his vote is of no effect. Similarly once a party has achieved over the required number of votes to win a seat all surplus votes are useless. Had the Namibian election been conducted on a constituency basis it is likely that

the large majorities which SWAPO enjoyed in the northern provinces would not have compensated for its marginal, narrow defeats in southern constituencies.

(ii) The single transferable vote and the alternative vote are systems which require the voter to mark the candidates in their order of preference. The Constitutional Committee having considered both systems has deemed that such systems would prejudice parties who possess a significant number of members who are illiterate. In addition such complex systems may lead to a large number of spoilt papers.

iii) The party list system has certain implications which we should take cognisance of. While independents may stand it is extremely unlikely that they would muster the necessary threshold support to obtain a seat in parliament. The party list system inevitably advantages political parties above individuals wishing to make an independent contribution. It does not however prevent an individual or an independent from attempting to enter national elections. The list system normally requires a threshold percentage below which a party gets no representation. This threshold percentage reduces the number of tiny parties. It also minimises the tendency for highly parochial parties, church congregations, sporting fraternities and local interest parties from entering national elections.

List systems do give power to a political party to determine which candidates get elected. In this regard the problems of conformity to the parties should be dealt with in terms of the internal democratic practices and constitution of the party itself. The party list system has also been criticised on account of its inability to provide a link between a constituency and its representatives. In regard to the ordinary electoral processes this defect can be dealt with by allowing for some constituency representation or regional lists. However, when one is dealing purely with a constituent assembly election the importance of this factor diminishes. In an election to a constituent assembly one is essentially attempting to test political support of party political perspectives and programmes. This system is thus endorsed because it is easier to organise, easier to conduct, is exclusive of all shades of opinion, and democratically reflects support for discrete political programmes. It is also possible for coalitions to enter the process through arrangements in regard to the composition of the party list.

2.1 The implications of the party list proportional representation system are as follows:

- i) no constituencies need to be drawn before the elections take place;

- ii) parties would be required to register either as coalitions of parties or as a single party;
- iii) parties would be required in due course to furnish their lists of candidates and such lists would not appear on the ballot form as such. The ordering of the candidates would be a matter for the parties to determine. Ballot papers need only list the symbols of the parties and/or the parties' name;
- iv) a party which chose not to include the fair regional representation in its list of candidates and/or a fair gender would prejudice its ability to appeal to voters in those regions or genders;
- v) The party list system is not compatible with the regional notion of recallability. However should a person cease to be a member of a party he/she would simultaneously cease to be eligible to be a member of the forum which the party has nominated to which the party has nominated him.

REGISTRATION OF POLITICAL PARTIES
SOME EXAMPLES

South Africa

- 1 The electoral process is governed by the Electoral Act 45 of 1979.

- 2 Before any political party may participate in an election as a party, it must apply to the Chief Electoral Officer for registration. (See sections 33-39 of the Act) Among their particulars which must be furnished, are the name and the abbreviated name of the party; the full names and signatures of the national leader, the chief executive officer and the provincial leader of the party; and the business and postal addresses of the party's head office and the provincial head office.

- 3 A political party which has no representative in the legislature must submit, together with its application, a *deed of foundation adopted at a meeting of at least five hundred voters who have signed the deed*. This deed must contain : a statement that it was adopted at a meeting as described above; the full names of voters who have signed the deed; the residential address and names of the electoral divisions in which these voters are registered. These provisions limit freedom of association and are aimed at preventing the proliferation of fringe parties.

- 4 The Chief Electoral Officer must register the applicant party if he is satisfied *that the object of the political party is to promote the election of its members to the legislature*. The application must also be accompanied by the *prescribed registration fee* and the party's *deed of foundation* (where applicable). The Chief Electoral Officer will not register the party if the name of the party resembles that of another political party, or is obscene, blasphemous or prejudicial to the safety of the state. (Section 35 C(ii) of the Act).
- 5 It would seem that the provisions of the South African electoral law, as it is presently framed, would preclude the organisation which does not in its constitution contain as one of its objects the election of its members to parliament from registering as a political party for electoral purposes.
- 6 The registration of political parties is governed by the Political Parties (Registration and Regulation) Act 19 of 1991. The registration procedure provided for in this Act closely parallels the provisions of the South African Electoral Act.
- 7 The Act provides for the appointment of a Registrar of Political Parties to whom application for registration must be made in prescribed form, together with the prescribed

fee.

- 8 Appeal lies through the Supreme Court against the decision of the Registrar to refuse to register a political party.

Seychelles

- 9 Section 7(2) of the Seychelles electoral law is of particular interest. This provision effectively outlaws parties which a) directly or indirectly, further ethnic, racial, religious, or discrimination upon the ground of colour; b) dictates or seeks to effect political changes through violence; and c) seeks to secede from any part of the Republic of Seychelles.

- 10 The Seychelles Act defines a political party as follows: "A combination of person who have constituted themselves for a political purpose." This definition appears to be wide enough to include organisations which do not otherwise have the characteristics of political party.

Mauritius

- 11 In Mauritius the first schedule of the constitution contains a provision regulating the registration of political parties. Section 2(1) provides for the registration of any lawful association or a political party for the purposes of election. The registration procedure is

supervised by the Electoral Supervisory Commission. A dispute which arises in relation to the nomination of candidates or the registration of political parties may be referred to the Supreme Court for final determination.

12 Section 2(1) is of particular interest. It provides for the registration of two or more political parties that are in alliance with a single party for the purpose of an election. Section 36(9) of the South African electoral law also makes provision for the registration of two or more political parties as a political party for the purposes of an election.

13 The Mauritian electoral law provides that a candidate shall declare which of four communities he/she belongs to. This declaration is required to be published in a notice of his/her nomination. The communal affiliation of the candidate is however excluded from the ballot paper.

Namibia

14 In Namibia political parties were required to register in terms of section 4 of the Registration of Political Organisations (Constituent Assembly) Proclamation in order to participate in the constituent assembly election.