

Constitutional Constraints on South Africa's electoral system

By
Glenda Fick

Glenda Fick is an Associate Professor in the School of Law, University of the Witwatersrand, Private Bag 3, Wits, 2050, South Africa. Email: fickgc@law.wits.ac.za

An earlier version of this paper was presented to the Electoral Task Team (ETT). The author would like to thank the members of the ETT for their comments. The opinions expressed in the paper are the author's own and should not be attributed to the ETT.

Abstract

This paper surveys the constitutional provisions pertinent to a future electoral system applicable to the election of South Africa's National Assembly and provincial legislatures. It also addresses court decisions relevant to these provisions. The Constitution of the Republic of South Africa Act 108 of 1996 (the constitution) requires that this electoral system "results, in general, in proportional representation". What exactly this provision means is unclear. It may be interpreted to allow a future electoral system to give effect to a degree of accountability while reducing the degree of proportionality. There is a range of electoral options available, resulting in higher and lower degrees of proportionality. The national legislation that will prescribe the electoral system for the 2004 elections should, taking all the constitutional requirements and the functional demands of the system into account, seek to achieve optimal proportionality.

Introduction

The election of South Africa's national and provincial legislatures in 1994 and 1999¹ took place under a system of closed list proportional representation. Constitutionally, these legislative bodies are to be elected for a term of five years.² The next election of these legislatures is due to take place in 2004. However, as will be explained below, there is currently no electoral system according to which the 2004 elections (or any election of the National Assembly or provincial legislature called before then) will take place. This situation requires the design of an electoral system applicable to the election of South Africa's national and provincial legislatures.³

This paper surveys the constitutional constraints faced by the designers of South Africa's post-1999 electoral system. It also discusses certain court decisions pertinent to these provisions. The most important constraint is found in sections 46(1)(d) and 105(1)(d) of the constitution, which require that an electoral system, applicable to the election of the National Assembly and the provincial legislatures, "results, in general, in proportional representation". The paper recognises that what is meant by "in general, in proportional representation" is not immediately clear, but certainly rules out any system that is majoritarian.

Describing what electoral systems are, Reynolds and Reilly state that they "translate the votes cast in a general election into seats won by parties and candidates".⁴ These authors identify nine main types of electoral system that can be reduced to three groups: majoritarian, semi-proportional and proportional.⁵ Assessing how closely an electoral system converts votes into seats won in a legislative body gives an idea of how proportional it is.

Recognising the functional demands of electoral systems, Krennerich lists the following five basic requirements:

- *Representation*: Which requires the electoral system to ensure adequate representation of minorities, women and special interest groups in Parliament and also a fair representation of parties according to the votes they have received.
- *Concentration*: Which relates to the aggregation of social interests and political opinions in such a way that the political institutions are able to act decisively.
- *Participation*: Which determines the extent of voter participation, that is, whether the voter can choose only between political parties or also between individual candidates.
- *Simplicity*: Which requires that an electoral system should not be too difficult for the electorate and the election administration both to understand and to operate.
- *Legitimacy*: The members of the community should accept the electoral system, the election results and the elected institutions as legitimate.⁶

System for the election of the National Assembly and the provincial legislatures applicable to the 1999 election

Schedule 6 to the constitution states:

Despite the repeal of the previous Constitution, Schedule 2 to that Constitution, as amended by Annexure A to this Schedule, applies –

(a) to the first election of the National Assembly under the new Constitution.⁷

A similar provision⁸ extends the application of schedule 2 (as amended)⁹ to the first election of the provincial legislatures under the 1996 constitution.

Schedule 2 to the Constitution of the Republic of South Africa, Act 200 of 1993 (the interim constitution) (as amended) sets out the details of the electoral system that applied to the 1999 election of South Africa's provincial and national legislative bodies. There is no constitutional or legislative provision that extends the closed list proportional representation system beyond 1999 when the first elections under the 1996 constitution took place.

Notably, since the 1999 elections a vacuum has existed in this country's constitutional and electoral law. This vacuum needs to be filled before the 2004 election or before any election of the National Assembly and/or provincial legislatures called prior to that.¹⁰ Sections 46(1)(a) and 105(1)(a) require that this vacuum be filled by national legislation. Although national legislation in the form of the Electoral Act 73 of 1998 was passed to regulate elections of the National Assembly and the provincial legislatures in 1999, the act does not make provision for a post-1999 electoral system. Instead, it contains provisions that complement the closed list system of proportional representation contained in schedule 2 to the interim constitution (as amended).¹¹

The introduction of a new electoral system does not have to take place by constitutional amendment. Furthermore, it is worth noting that it is perfectly possible for Parliament, by national legislation, to reintroduce the closed list proportional representation system as the electoral system applicable to the future election of national and provincial legislatures in South Africa.

Other constitutional provisions relevant to the electoral system

The founding provisions

Several provisions of the constitution provide the framework for South African elections. Its founding provisions are important in this regard. In the first place, against a background of constitutional supremacy (provided for in sections 1(c) and 2 of the constitution), section 1(a)

stipulates that the state is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. Secondly, section 1(b) provides that South Africa is founded on non-racialism and non-sexism. Thirdly, without expressly referring to the electoral system, section 1(d) recognises universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. Multi-partyism, accountability, responsiveness and openness (in the sense of accessibility, participation,¹² and diversity) are all values that must be taken into account when designing the electoral system envisaged by the constitution.

These values apply to every aspect of the state and government.¹³ All organs of state¹⁴ including the National Assembly and provincial legislatures are required to operate according to and to give effect to the section 1 values. When choosing the electoral system according to which the National Assembly and provincial legislatures are to be elected, the section 1 values must be taken into account. When Parliament passes the legislation prescribing the electoral system for the election of the National Assembly and provincial legislatures,¹⁵ the act must give effect to the section 1 values including human dignity, the achievement of equality (including gender equality) and non-sexism and must not violate the rights to equality (s9) and human dignity (s 10) (and other rights) contained in the Bill of Rights in the constitution.

The values of non-sexism and the concomitant of gender equality are relevant to women's representation in South Africa's legislative bodies. Considering the connection between women's representation and electoral systems, Reynolds writes "[c]hief among institutional variables, electoral systems have most often been cited as the key determining factor in the number of women elected to legislative office".¹⁶ He cites Rule who states:

Favourable societal conditions will not substitute for unfavourable electoral systems for women to reach their optimal representation in parliament and local legislatures. But unfavourable contextual conditions – including cultural biases and discriminatory practices – can be overcome to a great extent by alternate electoral systems.¹⁷

The text of sections 46(1) and 105 (1) of the constitution expressly require the National Assembly to consist of between 350 and 400 women and men and the provincial legislatures to each consist of between 30 and 80 women and men. This choice of words gives effect to the section 1 values of non-sexism and achieving (gender) equality. The text of these sections needs to be contrasted with the text of the corresponding sections in the interim constitution. The latter (in sections 40(1) and 127(1)) referred to "members" and not "women and men". The electoral system envisaged by the constitution has to facilitate the electoral success of women and men in order to meet the requirement of sections 46(1) and 105(1).

The Bill of Rights

The legislation prescribing the electoral system must not violate any of the rights in the Bill of Rights. Section 36 of the constitution permits limitations of the rights in the bill in certain circumstances. These must be prescribed by law and must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking account of all relevant factors including those set out in section 36(a)-(e). The rights most pertinent to the electoral system are mentioned below.

Section 19 of the constitution guarantees political rights to South African citizens. In order to ensure universal adult suffrage and regular elections, the constitution states that every citizen has the right to free, fair and regular elections for any legislative body established in terms

of the constitution.¹⁸ It also states that every adult citizen has the right to vote in elections for such legislative body and to do so in secret.¹⁹ The latter section also guarantees the right to stand for public office and, if elected, to hold office. The political right set out in section 19(3) of the constitution applies to voting for elections of legislative bodies. The right does not apply to voting in referenda.

Political rights guaranteed under section 19 of the constitution include the making of free political choices pertaining to the formation of a political party, the participation and recruitment of members for a political party and campaigning for a political cause.²⁰

Other rights in the Bill of Rights, which pertain directly and indirectly to the electoral system, include the rights to equality (section 9), human dignity (section 10) and freedom of association (section 18). The rights to equality and dignity resonate with the values in section 1. Addressing equality, section 9(2) stipulates that:

To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

According to section 9(3) the state is prevented from unfairly discriminating directly or indirectly against anyone on grounds that include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Section 9(2) permits Parliament to include measures (such as quotas) in the legislation prescribing the electoral system. A quota of this kind would be aimed at addressing the effects of unfair discrimination based on gender, sex, ethnic or social origin or any of the other section 9(3) grounds.

Apart from meeting the substantive requirements set out by the section 1 values and the Bill of Rights, the legislation prescribing the electoral system would also have to meet certain procedural requirements. These require that the legislation be passed according to the correct constitutional procedure. The legislation prescribing the electoral system would probably be passed in terms of section 76 of the constitution. This section details the procedure for passing bills affecting the provinces.

Composition of Parliament

The National Assembly

Parliament is composed of the National Assembly and the National Council of Provinces (NCOP).²¹ According to the constitution the NCOP represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. The NCOP is composed of a single delegation from each province consisting of ten delegates.²² Unlike members of the National Assembly, these delegates are indirectly elected to Parliament from the provincial legislatures. Details of the designation and appointment of members to the NCOP fall outside of the scope of this paper.

The National Assembly "is elected to represent the people and to ensure government by the people under the Constitution".²³ Section 46(1) states that the National Assembly is to consist of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that:

- (a) is prescribed by national legislation;
- (b) is based on the national common voters' roll;
- (c) provides for a minimum voting age of 18 years; and
- (d) results, in general, in proportional representation.

With regard to section 46(1)(d) Elklit has written,

[i]t is a little unclear what the 'in general' is supposed to mean; but the Constitution makes it very clear that the electoral system cannot be a majoritarian one of any kind. Minor deviations from full proportionality can, of course be accepted, for example because of electoral thresholds or the use of mixed systems (as long as they aim primarily at proportional representation).²⁴

According to Reynolds and Reilly, "the rationale behind all proportional representation systems is to consciously reduce the disparity between a party's share of the national vote and its share of the parliamentary seats".²⁵ Such systems create a perception of fairness because, unlike majoritarian (or first-past-the post [FPTP]) systems, they result in very few wasted votes and a greater number of parties have access to representation.²⁶ Dahl notes that a system of FPTP is often defended because it works against certain parties contesting an election, and aids the production of a two-party system.²⁷ This needs to be contrasted with a system of proportional representation, the outcome of which is likely to be a multi-party system.

As stated above, South Africa's constitution includes multiparty-ism as one of the values upon which the state is founded and requires an electoral system that results, in general, in proportional representation.

Composition of provincial legislatures

Under section 105(1) of the constitution a provincial legislature is to consist of women and men elected in terms of an electoral system based on the same requirements as section 46(1) above, and which is determined by national legislation.

The Constitutional Court has had an opportunity to decide on the requirements of section 105(1) of the constitution. Shortly after the 1996 constitution took effect, the Western Cape legislature tried to change the provincial electoral system in the course of adopting a constitution for the province. The Western Cape constitution (WCC) departed from the national constitution in two ways. First, the WCC provided that provincial legislation (and not national legislation) should prescribe the provincial electoral system. Second, it provided that the electoral system should be "based predominantly on the representation of geographical multi-member constituencies; and results, in general, in proportional representation".

In its judgment²⁸ the Constitutional Court refused to certify the WCC to allow it to become law. Section 143 of the constitution provides that a provincial constitution must not be inconsistent with the national constitution, but may provide for provincial legislative or executive structures that differ from those in chapter 6 of the constitution.

According to the Constitutional Court an electoral system is not a "legislative structure or procedure", but "simply a way to convert large numbers of votes won by parties or candidates into much smaller numbers of seats in an elected body". The court stated that although the electoral system has a direct bearing on the selection and identification of legislators, it has no effect on the constituent elements of the legislative structure. The nature and number of the constituent elements of a legislative structure are not affected by the electoral system. In its opinion while the electoral system has some bearing on the representation in a legislative structure, it does not bear on the structure itself.

The court held that the constitution allowed for a list system of proportional representation for both national and provincial elections and seat allocation mechanisms designed to promote optimal proportionality. At provincial level this system regarded each province as a single multi-member constituency. The Western Cape constitution sought to establish a different form of proportional representation for its legislature based on a division of the province into geographic multi-member constituencies. It decided that the province was not

allowed to introduce an electoral system inconsistent with that stipulated in the national constitution.

The outcome of this decision is that a province cannot introduce an electoral system in a provincial constitution passed under section 142 of the constitution or through provincial legislation. A province's electoral system must be prescribed by national legislation (section 105(1)). However, as explained above, the constitution no longer prescribes the electoral system, and therefore, consistency with its provisions in this regard falls away.

It is now possible to have two different electoral systems applicable to the election of the National Assembly and the provincial legislatures. If so, both systems must be prescribed by national legislation as required by the constitution (sections 46(1) and 105(1)) and must result, in general, in proportional representation. The desirability of this course of action needs to be considered thoroughly.

Membership and loss of membership of the National Assembly and provincial legislatures

The grounds of eligibility for membership of the National Assembly and provincial legislatures, set out in sections 47 and 106 of the constitution respectively, have no direct bearing on the electoral system according to which legislators are elected to these bodies. Candidates on party lists must comply with the eligibility requirements of sections 47(1) and 106(1) of the constitution. These will not be discussed here.

However, under the constitution, the list system is directly related to the loss of membership and the creation of vacancies in either legislature. The constitutional provisions canvassed below illustrate this point.

Item 6(3) of schedule 6 to the constitution provides that despite the repeal of the previous constitution, schedule 2 (as amended) applies to:

- (a) the first election of the National Assembly under the new constitution;
- (b) the loss of membership of the assembly in circumstances other than those provided for in section 47(3) of the new constitution;²⁹ and
- (c) the filling of vacancies in the assembly and the supplementation, review and use of party lists for the filling of vacancies, until the second election of the assembly under the new constitution.

Item 11(1) contains similar provisions applicable to any provincial legislature.

Addressing the filling of vacancies in the National Assembly and provincial legislatures, item 23(1) of schedule 2 (as amended) states that the party which nominated the vacating member shall fill the vacancy by nominating a person:

- (a) whose name appears on the list of candidates from which the vacating member was originally nominated; and
- (b) who is the next qualified and available person on the list.

The issue of the loss of a seat in the National Assembly when the person concerned ceased to be a member of a political party arose in 2000.³⁰ The Cape High Court expressed the principle that, under South Africa's system of proportional representation, "the amount of seats allocated to each party was dependent on the votes cast in favour of such party at the general election".³¹ Once a member of the National Assembly lost his or her membership of the party under whose ticket he or she was elected to the assembly, the party was entitled to fill the vacancy by nominating the person whose name appeared next on the party's list of candidates and who was the next qualified and available person on the list.

When Makwetu ceased to be a member of his political party, under the electoral system the seat in the National Assembly vested in the political party. The party's seat became vacant

and the party was required to fill it with another candidate so that the party had its full quota of seats in the National Assembly.

Items 6(3) and 23(1) will apply to the filling of vacancies in the National Assembly and provincial legislatures until the 2004 elections. Thereafter, according to sections 47(4) and 106(4) of the constitution, these vacancies are to be filled in terms of national legislation. The effect of such legislation is suspended until the second election under the 1996 Constitution.³²

It would be appropriate for the national legislation prescribing the electoral system for the next election of the National Assembly and the provincial legislatures to make provision for the filling of vacancies in these legislative bodies after that election.

The anti-defection clause

Item 23(A)(1) of schedule 2 contains an anti-defection clause applicable under South Africa's closed list system of proportional representation.³³ It stipulates that a person loses membership of the legislature to which this schedule applies if she or he ceases to be a member of the party that nominated that person as a member of the legislature.

The anti-defection clause was considered by the Constitutional Court in the *First Certification* judgment.³⁴ In the court's opinion:

In a democracy the electoral system and the elections in accordance with that system provide the most important check on the legislature and its members. An anti-defection clause can act as an additional check on the legislators who become accountable, not only to the electorate and the legislature, but also to their party. It is the party that faces the voters during the succeeding election and has to justify its acts in the previous legislative period. If members wish to be re-elected they need to bear in mind party discipline. This does not amount to a reduction in the accountability to the electorate.³⁵

The court added:

Under a list system of proportional representation, it is the parties that the electorate votes for, and parties which must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election. In such a system an anti-defection clause is not inappropriate to ensure that the will of the electorate is honoured. An individual member remains free to follow the dictates of personal conscience. This is not inconsistent with democracy.³⁶

An anti-defection clause enables a political party to prevent defections of its elected members, thus ensuring that they continue to support the party under whose aegis they were elected. It also prevents parties in power from enticing members of small parties to defect from the party upon whose list they were elected to join the governing party. If this were permitted it could enable the governing party to obtain a special majority which it might not otherwise be able to muster and which is not a reflection of the views of the electorate.³⁷

Item 23(3) of schedule 2 (as amended) states:

An Act of Parliament may, within a reasonable period after the new Constitution took effect, be passed in accordance with s 76(1) of the 1996 Constitution to amend item 23(3) and item 23 to provide for the manner in which it will be possible for a member of a legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature.

This item creates the scope for legislation that permits members of legislative bodies to

cross the floor. Legislation that permits floor crossing was recently passed by Parliament, and at the time of writing is subject to constitutional challenge.

The South African courts have confirmed that under a list system of proportional representation a seat in a legislative body belongs to the political party voted for by the electorate rather than to an individual candidate. It is therefore unusual to have individual members cross the floor to another party and retain their seats in the National Assembly or in a provincial legislature. However, the constitution expressly permits the promulgation of legislation that will have the effect of countering the anti-defection clause. The Constitutional Court's ruling on whether the legislation is constitutional or not will have a bearing on how floor crossing will be accommodated under a future electoral system.

Conclusion

The electoral system that applied to the election of South Africa's National Assembly and provincial legislatures in 1994 and 1999 resulted in a guaranteed high degree of proportionality and multiparty-ism.

Elklit observes that in these elections the system allowed parties to know that they would gain representation in exact proportion to their share of the vote.³⁸ Beyond the 1999 elections, proportionality remains a central feature of political representation in South Africa. This is because of the constitutional requirement that the electoral system results in "in general, proportional representation". This provision may be interpreted as allowing a future electoral system to give effect to "personal accountability of parliamentary representatives"³⁹ while reducing the high degree of proportionality that exists under the system applicable to the 1994 and 1999 elections. There is a range of electoral options available, resulting in higher and lower degrees of proportionality. The national legislation that will prescribe the electoral system for the 2004 elections should, taking all the constitutional requirements and the functional demands on electoral systems into account, seek to achieve optimal proportionality.

Endnotes

- 1 Details of the electoral system applicable to the 1999 election are set out in schedule 2 to the Constitution of the Republic of South Africa, Act 200 of 1993 (the interim constitution) amended by annexure A to schedule 6 to the Constitution of the Republic of South Africa Act 108 of 1996 (the constitution).
- 2 Sections 49(1) and 108(1) of the 1996 constitution. These sections address the election of the National Assembly and the provincial legislatures respectively.
- 3 The Local Government: Municipal Structures Act 117 of 1998 addresses the electoral system applicable to the election of legislative bodies at local government level. This paper does not discuss the electoral system applicable to these bodies.
- 4 Andrew Reynolds and Ben Reilly, *The International IDEA Handbook of Electoral System Design*, Stockholm: International Institute for Democracy and Electoral Assistance, 1997, p 7.
- 5 *Ibid.*, p 18.
- 6 Michael Krennerich, 'Electoral Systems: A Global Overview' in Jacques de Ville and Nico Steytler (eds) *Voting in 1999: Choosing an Electoral System*, Durban: Butterworths, 1996, p 16.
- 7 Item 6(3).
- 8 Item 11(1).
- 9 Schedule 6 to the constitution sets out the transitional arrangements following the repeal of the interim constitution and the coming into effect of the 1996 constitution. Annexure A to schedule 6

- amends schedule 2 to the interim constitution.
- 10 Section 49(2) of the constitution allows the president to call elections when the National Assembly is dissolved under section 50(1). Section 108(2) allows the premier of a province to call elections when a provincial legislature is dissolved under section 109(1). The acting president must also dissolve the assembly if there is a vacancy in the office of the president and the assembly fails to elect a new president under section 50(2). An acting premier has the power to dissolve a provincial legislature, which fails to elect a new premier under section 109(2).
 - 11 Particularly sections 26-31 of the Electoral Act 73 of 1998.
 - 12 Christina Murray and Lia Nijzink, *Building Representative Democracy: South Africa's Legislatures and the Constitution*, Cape Town: Parliamentary Support Programme, 2002, p 4.
 - 13 For the distinction between 'state' and 'government' see *Independent Electoral Commission v Langeberg Municipality* 2001(3) SA 925 (CC) paragraph 27.
 - 14 See the definition of 'organ of state' in section 239 of the constitution.
 - 15 *Ibid.*, sections 46(1) and 105(1).
 - 16 Andrew Reynolds, *Women in African Legislatures and Executives: The Slow Climb to Power*, Johannesburg: EISA, 1999, p 8.
 - 17 Wilma Rule, 'Women's Underrepresentation and Electoral Systems' 1994 XXVII (4) *Political Science and Politics*, p 689.
 - 18 Section 19(2).
 - 19 *Ibid.*, section 19(3).
 - 20 *Ibid.*, section 19(1).
 - 21 *Ibid.*, section 42(2).
 - 22 *Ibid.*, section 60(1).
 - 23 *Ibid.*, section 42(3).
 - 24 Jørgen Elklit, 'What Could a New South African Electoral System Look Like?' *Electoral Systems Roundtable Report*, Cape Town 14-15 August 1998, Johannesburg: EISA, 1998, p 27.
 - 25 Reynolds and Reilly, p 19.
 - 26 Andrew Reynolds, 'Electoral Systems Choices for South Africa Beyond 1999', *Electoral Systems*, p 9.
 - 27 Robert A. Dahl, *On Democracy*, New Haven and London: Yale University Press, 2000, p 135.
 - 28 *Ex Parte Speaker of the Western Cape Certification Provincial Legislature: In re Certification of the Constitution of the Western Cape*, 1997 1997 (4) SA 795 (CC).
 - 29 Section 47(3) provides that a person loses membership of the National Assembly if that person ceases to be eligible or is absent from the assembly without permission in circumstances for which the rules and orders of the assembly prescribe loss of membership.
 - 30 *Speaker of the National Assembly v Makwetu* 2001(3) SA BCLR 302 (C).
 - 31 *Ibid.*, 308.
 - 32 Items 6(4) and 11(2) of schedule 6 to the constitution.
 - 33 This item is introduced by item 13 in annexure A to schedule 6 to the constitution.
 - 34 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996, 1997 (4) SA 744 (CC) paragraphs 182-188.
 - 35 *First Certification judgment*, paragraph 185.
 - 36 *First Certification judgment*, paragraph 186.
 - 37 *First Certification judgment*, paragraph 188.
 - 38 Elklit, p 27.
 - 39 Tom Lodge, 'Which Criteria are Most Important in Choosing an Electoral System for Post-1999 South Africa?' *Electoral Systems* pp 3-7.