

What Can Kenya Learn from Lesotho?

Or: Something about Electoral Systems¹

Electoral systems are those procedural rules, which govern the transformation of votes to seats in the National Assembly (or any other elected body), so one cannot conduct elections without having some sort of electoral system. This note will concentrate on electoral systems as such and not venture into a detailed discussion of the functions of elections in democracies or other elements of electoral systems in the broadest sense.²

Criteria for Choosing an Electoral System

The choice of an electoral system should always be based on a careful consideration of a relevant set of criteria. A useful set of such criteria has been supplied in the International IDEA Handbook on electoral system design (Reynolds et al., 2005):

1. Provide (equitable? How equitable?) representation (geographical?, social?, sectional/tribal?, ideological/attitudinal?)
2. Make elections accessible and meaningful
3. Provide incentives for (re-)conciliation
4. Facilitate stable and efficient government
5. Hold government accountable
6. Hold individual representatives to account
7. Encourage the formation and development of political parties
8. Promote legislative opposition and oversight
9. Make the electoral process sustainable
10. Take international standards into account

Other lists of criteria may be suggested, but this is as good as any. It should from the very beginning be realized that no electoral system will allow the simultaneous fulfillment of all those criteria, so (hard) choices must be made and trade-offs accepted.

The Nine Electoral Systems Families

¹ This is a slightly revised version of the paper, which was prepared for presentation at the IREC technical workshop on electoral systems, KICC, Nairobi, 1 August, 2008

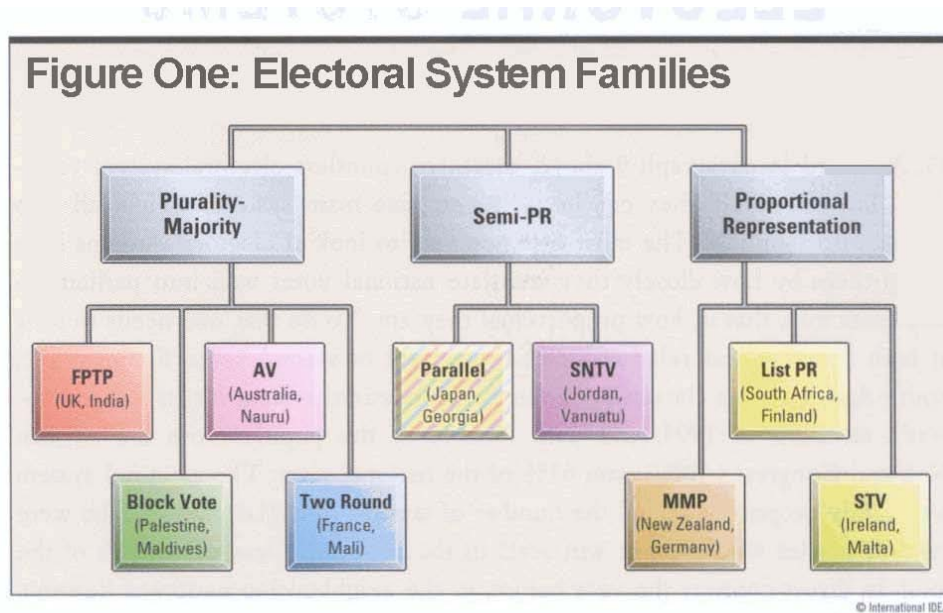
² Such as securing representativeness, providing legitimacy etc.

The main distinction in relation to electoral systems is between majoritarian systems and proportional representation (PR) systems. Almost all electoral systems of any practical relevance can be categorized as belonging to either of these two broad categories.

The basic idea behind majoritarian systems is to allocate seat(s) to the party/candidate with more votes than any other (plurality systems) or to the party/candidate with at least 50 per cent + 1 vote (majority systems). The figure below (borrowed from the 1997 edition of the International IDEA Handbook on Electoral Systems by Reynolds et al.) shows in the left hand side the four members of the majoritarian systems family:

- The ordinary First-Past-The-Post (i.e., plurality in single member districts, SMDs),
- the Block Vote (i.e., plurality in multimember districts),
- the Alternative Vote (i.e., an immediate run-off system using rankordering of) and
- Two Round systems.

The last two are different ways of obtaining majorities behind the winning candidate, if that does not come by itself.



Two-round systems is a way of securing that there is always a majority of constituents behind the selected candidate. This is achieved by conducting a second round of elections in cases, where the first round winner does not get at least 50 per cent + 1 of the votes. This second round (usually) only has participation by the two top contenders, which means that the winner will have the support of a majority of those voting, which also gives him/her a strong position in parliament (and in the constituency).

Two-round electoral system – which in a considerable number of countries are used for **presidential elections** – are often seen as contributing to further strengthening the bigger parties, as they will usually be among the contenders in the second round (and they will also normally be those who win seats in the first round). This might in itself contribute to a reduction in the number of political parties, so it should be considered a viable option at both the presidential and the parliamentary level. As many MPs in Kenya are elected with impressive majorities already now, the cost component of introducing a second round of elections should not be considered prohibitive.

The basic idea behind proportional representation (PR) systems is to have a seat allocation system in place, which *consciously* attempts to achieve that the allocation of seats to parties to a considerable degree – and not only accidentally – reflects the vote distribution among parties proportionally. The three PR electoral system families in the right hand side of the figure, i.e., List PR, MMP (Mixed Member Proportional), and STV (Single Transferable Vote), will be explained below.

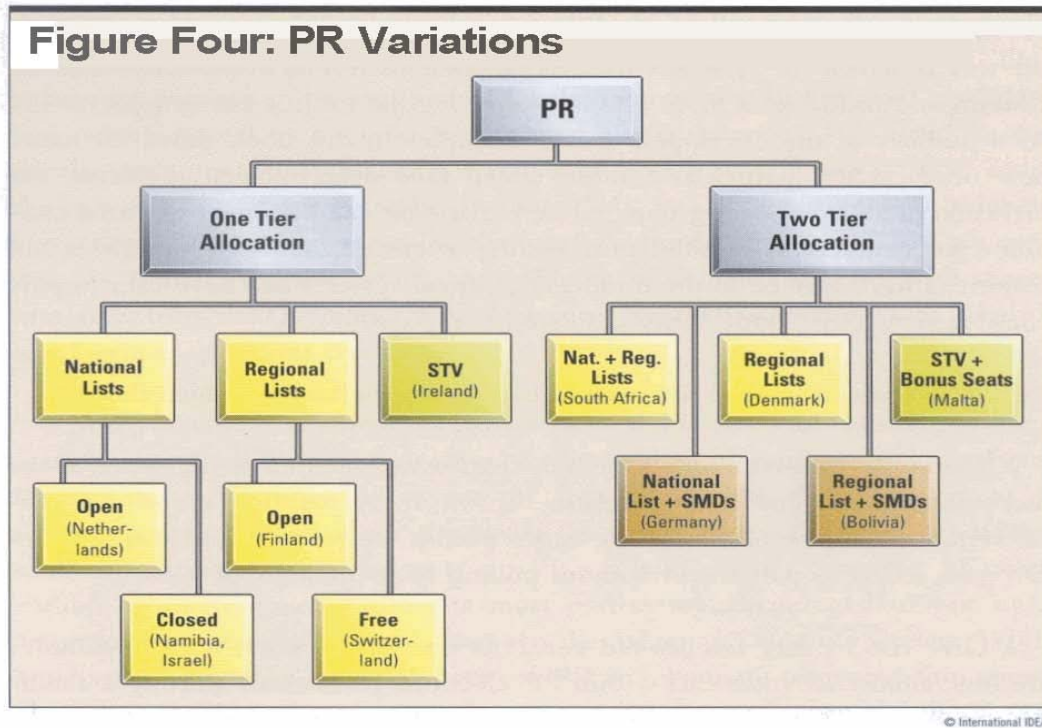
Two electoral systems in between the two major categories complete the picture. In the figure, one system (SNTV, Single Non-Transferable Vote) is placed here, even though it is a plurality system, which means that it belongs in the left hand side of the figure. The other system in the figure's semi-PR category, the Parallel System, mixes elements from both of the two larger categories without aiming at achieving a reasonable degree of proportionality, so it is more clearly a kind of mid-way house between majoritarian and PR systems.

PR systems are a mixed bag of systems. This becomes clear when one looks at the next figure, where the main categorization is according to whether or not seat allocation takes place on one or two levels (tiers). One tier allocation means that all seats are allocated either on the national or the provincial/regional level (as in Namibia or Finland), while two-tier allocation – where seat allocation takes place at two different political-administrative levels – is found, e.g., in South Africa and Lesotho.

PR systems are further categorized according to

- the magnitude of the constituencies (national, provincial, or smaller), which must be multi-member to allow for proportional allocation,
- the allocation formula (quota or divisor methods; no need to dig deeper into those methods, which are therefore not indicated in the figure. They will be covered in the paper by Commissioner Borneo)
- the list forms (open, closed, semi-closed)
- in the case of two-tier systems:
 - PR systems used on both tiers (if so: do they differ, e.g., by the formulae employed?)
 - Are single member districts (SMDs) used on the lower tier?

STV is a special type of PR system based on the voters' rank ordering of candidates in multi-member constituencies according to the order in which they want them elected. The system has some advantages, but cannot be used in settings with a high level of illiteracy.



MMP, the two-tier combination of FPTP and PR at a higher level – as the overarching feature – is in the figure exemplified by Germany, which also reflects that this system is oftentimes referred to as “the German system”. The basic features of this system are that voters have two ballots, where one (the national – or PR – ballot, as it is sometimes called) is used to determine the overall, proportional composition of parliament as such. These are the main feature of this system: Two ballots and the more important of these determines that parties get seats in proportion to their strength in the electorate. The other ballot is used to elect a parliamentarian from the single-member constituency, where the voter is registered, usually by traditional FPTP. So all voters are given two ballots, which they can – if they so wish – use to support different parties. They can also decide only to use one of the two ballots.

Seat allocation under MMP is done in several steps. One is to allocate seats to candidates in the constituencies on the lower level (tier). Seats won in the constituencies cannot be lost in later calculations, i.e. they are final. Another step is to calculate each party's *overall* seat entitlement based on the distribution of the PR ballot. If a party is entitled to 36 seats overall, but has only won 19 constituency seats, it is entitled to 17 compensatory seats from the pool of compensatory seats. All parties vying for compensatory seats must have submitted a (closed) list of candidates, and in this case the first 17 names on that list get a (compensatory) seat in parliament. Some of these 17 candidates may also have won a constituency seat, in which case one just moves down to the next name(s) on the party list. If a vacancy

occurs among those parliamentarians occupying a compensatory seat, one again goes to the next available person on the list, i.e., by-elections are not needed in case of compensatory seat vacancies.

If a party happens to win more constituency seats than its overall seat entitlement, it keeps the constituency seats, i.e. that allocation is final. But the consequence is that there are fewer seats available for the achievement of full proportionality among the other parties. In this case two options are available: (1) to allocate seats as proportionally as possible with the number of seats available, or (2) to increase the size of parliament for that parliamentary term. This latter option is used in Germany, where one talks of “surplus” seats, but that system might be misused and is not really recommendable.

The MMP system has previously been discussed in Kenya as part of the constitution review process (primarily advocated by academics like Reynolds and Hartman). It was, however, dropped from the debate already in the Bomas draft and It was also absent from the Wako proposal, which was rejected in the 2005 referendum.

Instead of MMP, these two documents both proposed a combination of

- Single-member constituencies (as now),
- Single-member constituencies (the districts), each to elect one woman (the Bomas-proposal as well as the 2005 Wako constitutional proposal are both silent on whether all voters should be allowed to vote in these elections or only women, which some might say would make more sense).
- Representatives of marginalized groups (the Bomas draft proposes 14 such members, to be indirectly elected by electoral colleges of the respective marginalised groups; Wako a more complicated proposal aiming at the same, but also aiming at securing a better gender balance, to be based on lists submitted by political parties and allocated in proportion to votes obtained).

Neither of these proposals has anything to do with MMP. The reason is that there is no attempt to ensure overall proportionality in the allocation of seats (based on a separate calculation on the basis of the vote distribution of the national/PR ballot) and there is – in particular – no attempt to ensure that such seats go to parties underrepresented in the allocation of constituency seats. On the contrary, the current distribution of the nominated seats reflects party strength in parliament.³

There appears to be some confusion about how to categorise Kenya’s current electoral system. Some seems to believe that it is MMP (because it combines ordinary FPTP with some seats allocated proportionally), but that is not the case. Others, including a universally used standard text, classifies it as FPTP (Reynolds *et al.*, 2005, p. 185), disregarding the 12 nominated seats, which is to skip the key categorisation problem.

The solution is to understand that Kenya’s current electoral system is a *variant* of a parallel system, i.e. one part being the system with 210 seats allocated by FPTP in single-member constituencies, the other

³ Cf Art. 33 in the Constitution of Kenya.

part the system with subsequent, separate, and – in particular – non-compensatory allocation of 12 seats to represented parties on the basis of their number of seats obtained in the constituency elections.

A standard parallel system would allocate the PR seats on the basis of the number of votes cast for parties on a separate ballot, with or without an electoral threshold. However, that the current allocation of the 12 nominated seats based on the number of seats already obtained by the parties does not change the basic character of the system. One can also say that the one and only ballot is – firstly – used for the constituency seat allocation and then – secondly – for the allocation of the 12 nominated seats, via the number of seats obtained in parliament by the political parties.⁴

Similarly, neither the Bomas draft, nor the Wako proposal did in any way attempt to *compensate* parties for disproportionality experienced at the level of constituency seat allocation, so they cannot be MMP proposals. The Wako proposal was a little closer to being a parallel system,⁵ than the actual electoral system in Kenya, while the Bomas draft is of a different category.

Special seats for specifically identified marginalized groups is in itself a complicated thing to have. The establishment of a proper and acceptable (i.e., legitimate) group of electors is complicated and easily becomes discriminatory; furthermore, such representatives will almost by their very nature become – and be seen as – defendants of special interests, unable or unwilling to prioritise broader, national interests; they *might* therefore contribute to the increase of the level of political tension. And why should – e.g. – members of trade unions be more entitled to special representation than farmers? This compartmentalization of representation is not a good way of integrating marginalized groups in the political life and providing them with the access to participation and representation, they might need. Such commendable objectives are much more easily achieved by implementing a closed list PR system, where parties can demonstrate their social profile through placing representatives of various groups in need of special attention in winnable positions.

Special seats for women is an equally complicated and much debated issue. More equal representation of the two genders is important, and it is well documented that a reasonable level of representation of women does not go well with FPTP (in Kenya or elsewhere). However, special seats often entail the perception that MPs holding such seats are only second order MPs. The most solid and sustainable female representation is seen in countries with forms of list PR, where women are included since they – in their own right – can attract additional votes to their parties, because these parties by nominating women candidates show that they evidently value the presence of these women on their lists and in their parliamentary caucuses.

Discussion of the difference between MMP and Parallel systems:

⁴ The allocation of the 12 nominated seats by the ECK in early 2008 remains a contentious issue. In 1997 and 2002 these seats were allocated to parties on the basis of a standard Hare + largest remainders formula. In 2008, the allocation was done differently and not by any known seat allocation formula.

⁵ Because the PR seats were to be allocated on the basis of the sum of votes obtained by parties, not their number of seats in the National Assembly. But still the system would build on voters having one ballot only, not two.

Consider a system with 100 constituency seats and 100 seats available as compensatory seats.⁶ There are four parties, A, B, C, D, and one independent candidate, E, winning the number of constituencies indicated in the table below. Their general strength in the electorate (measured on the basis of the votes on the second, national or PR ballot) is as indicated.

MMP	Constituencies won (1)	Strength (per cent of PR ballots won) (2)	Overall seat entitlement based on PR ballots won (N=200 – 1 = 199) (3)	Compensatory seats (3) – (1) (4)	Sum of constituency and compensatory seats (1) + (4)
Party A	60	45 %	89	29	89 (= 45.5 %)
Party B	30	25 %	50	20	50 (=25.0 %)
Party C	9	20 %	40	30	40 (=20.0 %)
Party D	0	10 %	20	20	20 (=10.0 %)
Independent E	1	Not applicable	Not applicable	Not applicable	1 (= 0.5 %)
Total	100	100 %	200	100	200 (= 100.0%)

Parallel system	Constituencies won (1)	Strength (per cent of PR ballots won) (2)	Overall seat entitlement based on PR ballots won (N=100) (3)	PR seats = (3) (4)	Sum of constituency and PR seats (1) + (4)
Party A	60	45 %	45	45	105 (=52.5 %)
Party B	30	25 %	25	25	55 (=27.5 %)
Party C	9	20 %	20	20	29 (=14.5 %)
Party D	0	10 %	10	10	10 (= 5.0 %)
Independent E	1	Not applicable	Not applicable	Not applicable	1 (= 0.5 %)

⁶ The sizes of these two groups are chosen for ease of calculation and comparison. In real life, they are only rarely of the same size (as in Germany). The constituency part normally has more seats than the other part (as in Lesotho (80 + 40) or Kenya (210 +12)).

Total	100	100 %	100	100	200 (=100.0%)
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The Case against MMP

There has since the early 1990s been a trend in electoral system reform in the direction of MMP (and the other main category of two-tier combinations of SMDs and PR, i.e., the parallel system).

One important reason for this trend has been that retaining the FPTP/SMDs has been attractive to many incumbent parliamentarians (and many voters), while many reformers – and parties and groups suffering from the well-known disproportionalising effects of FPTP – have been attracted by, in particular, the idea of approaching overall PR (at the national level).

Usually, this has been attempted by using two different ballots as indicated above. It is, however, also a possibility to use the constituency ballot as the sole basis for allocation of compensatory seats, even though that creates a harder (more difficult) decision situation for voters, as it decreases the number of options they have. The flip side of the argument is that it makes voting simpler and it also takes away the possibilities for manipulating the system which are discussed below. However, almost all known cases of MMP operate with two ballots, even though it has been argued by some commentators (and critics) that many illiterate and politically less experienced voters might not understand the different considerations behind having two ballots. Recent experience (such as Lesotho) demonstrates that good voter education and information from political parties can easily address at least some of that concern.

Many see MMP as an attractive electoral system because:

- Parties which are underrepresented in the constituencies (normally all but the two biggest⁷) can to some degree be compensated for their underrepresentation, which by many is seen as a good thing.
- Small, geographically concentrated parties can meaningfully stand for election in a limited number of constituencies
- Independent candidates with sufficient local support can compete for constituency seats
- Small and geographically dispersed parties, which can never win a constituency seat, can campaign for national (PR) ballots which will subsequently allow them to obtain a corresponding number of compensatory seats
- Restrictions on the formation of the (closed) party lists can be used to further the representation of otherwise underrepresented groups, e.g. by requiring that parties submit lists with both male and female candidates, often ordered according to the so-called zipping principle: a woman, a man, a woman, a man, etc. (or: a man, a woman, a man, a woman, etc.)
- Party leaders – who might risk losing in their constituencies – can be given a political life belt, if they are also put on top of the party list (which is only natural).

⁷ This problem is less pronounced in Kenya than in many other FPTP countries because of the strong geographical/tribal structuring of the vote.

However, a traditional MMP system can relatively easily be circumvented by unscrupulous political parties, either by arranging for a more or less informal agreement between two parties, where the expectedly bigger party (A) only presents candidates at the constituency level, while the expectedly smaller party (B) only presents a party list. If supporters and followers of the two parties now vote for Party A in the constituency election and for Party B in the national election (because they are being told to do so), then whatever number of constituency seats Party A gets over and above its proportional share of the total number of seats cannot be deducted from whatever number of compensatory seats Party B is allocated on the basis of its share of the PR votes. So it's a win-win situation for both A and B – at the expense of other parties entitled to compensatory seats on the basis of *their* share of the national PR votes.

This is exactly what happened in Lesotho in the February 2007 elections to the National Assembly, even after two of the involved parties (Lesotho Congress for Democracy, LCD, and National Independent Party, NIP) had their MoU scrutinized by the Independent Electoral Commission, which, however, could not establish any legal reason not to accept the arrangement. The problems following from this circumvention of the ideas behind the 2001 political and constitutional settlement are dealt with elsewhere (Elklit 2008), but the parliamentary impasse has created a huge number of problems in Lesotho since early 2007. A July 2008 High Court judgment only postponed the finding of a proper solution to the complicated political and legal problems, which are now (again) waiting for SADC mediation.

Similar problems arose in the 2005 National Assembly Elections in Albania, even without a formal MoU between the two participating parties, one big, one small, because voters were easily educated to do as their political leaders suggested: Trick the MMP system!

These two illustrations are obviously from countries where there is no firm and well-established party structure and culture. In countries with more well-established parties, it is difficult to imagine that parties would engage in purposively circumventing the constitution or even breaking the relevant legislation. Two such countries using MMP are Germany and New Zealand.

New Zealand represents another problem in relation to introducing MMP, which was only gradually realized after 1993-94, when New Zealand introduced MMP. New Zealand was previously considered the archetypical Westminster-country, where parliamentary rules, procedures, and traditions were applied even more strictly and consequently according to traditional Westminster thinking than in the UK! After the change to MMP, there was no clear winning majority in parliament (as is often the case under PR, whether MMP or list PR systems) and no well-defined opposition, only a handful of parties vying for power and influence according to their relative strength in parliament. Even small parties were doing very well in the House because they held the seats which were key to the formation of majority government coalitions as well as to legislative winning coalitions, i.e., they had considerable political blackmail potential. Parliamentary life in New Zealand changed considerably over some years (a couple of parliamentary terms and some snap elections), probably to the better, but certainly to the surprise of most political actors.

The key point is that the introduction of MMP is not necessarily a good thing. For it to function reasonably well there must be

- a strong political party system, with well-established norms and traditions, which political parties and leaders adhere to;
- the legal drafting of constitutional amendments and electoral law changes must foresee all eventualities, but also maintain the basic principles of the system, and
- a period of adjustment to the new system – a parliamentary system, which will not go well together with a traditionally strong presidential system, like in Kenya – must be allowed, as a different system might not work well from Day 1. Such period might easily last at least ten years and there is no need to deny that a new balance between the Presidency and the National Assembly would also have to be defined.

A supplementary issue is the relative share of constituency and compensatory seats. The rule of thumb is that for an MMP system to be able to obtain a reasonable level of proportionality, the balance between the two kinds of seats should be *at least* 3:1 and probably more (in Lesotho it's 2:1, in Germany even 1:1). In a system with 210 single member constituencies, this means that there should be at least 70 compensatory seats, and probably more (maybe around the +/- 100 discussed at Bomas).

Conclusion

There is no easy solution to the issue of the future electoral system in Kenya (cf. the criteria on p. 1).

The main options appear to be these:

- (1) continue with FPTP, but carry out some redistribution of constituencies (delimitation in the traditional way, by using the GPS-based system developed by Joel Barkan and his collaborators, or by employing combination of principles⁸)
- (2) change to a two-round system at the parliamentary (and presidential) level. Will be understandable for voters and contribute to a further reduction of parties.
- (3) introduce changes along the lines suggested by Bomas/Wako. Changes in the constituency structure are also necessary in this case.
- (4) MMP (which will also require changes to the constituency structure)
- (5) PR (closed list, some kind of gender zipping) at the provincial level. The district level can also be considered for this, as that will allow for smaller distances between voters and representatives.
- (6) PR (with closed list and some kind of gender zipping) at the national level

⁸ The use of multiple criteria – and not only, e.g., the number of registered voters – is recommendable to balance various considerations. One possibility is to do the delimitation on the basis of a figure, which itself is the sum of the number of registered voters, the overall population figure, and the physical areal of the constituency in km², maybe even multiplied by a factor 2.

All six options have advantages and disadvantages, including that the constituency boundary delimitation will be an important element in the first four options.⁹The views of the author are that (1) and probably (5) are the most promising system for Kenya at this point in time, but the scoring of all six systems against the criteria on page 1 is not easy!

The MMP system is in any case not an obvious choice because of the in-built risks for misuse. The MMP system should – if nevertheless chosen – only be used with one ballot – even though that is against a key principle behind MMP thinking!

⁹ ECK points of view on this were presented in a paper by ECK Chairman Samuel M. Kivuitu: *Matters to consider with Regard to the Review of Electoral System for Kenya*, which was presented to the Independent Review Commission (IREC) at KICC, August 1, 2008.