Determinants of Electoral Reform in Africa: The Cases of South Africa, Lesotho, and Kenya

by

Jørgen Elklit
Department of Political Science,
Aarhus University, Denmark

elklit@ps.au.dk

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The recent growth of book-length studies as well as journal articles and chapters in edited books on electoral systems is impressive and interesting, but it does not need to be documented here. However, it is still interesting to ask why is it that this field of political science – which, not so long ago, was considered somewhat esoteric – has become so trendy that it can even be awarded a workshop at the ECPR Joint Sessions of Workshops?

One likely explanation – even though it is obviously only a partial explanation – is the number of electoral system reform attempts during the 1990s and the first decade of this millennium. Some of these attempts led to implementation of new electoral systems (or less substantial elements of such systems), while other attempts for one reason or another was aborted.

There is, however, an apparent bias – or whatever one would like to call it – in the selection of electoral system change attempts subjected to scrutiny by political scientists. One group consists of those cases where the analyst lives in the country in case – has maybe been involved in the policy process – or is quite familiar with the case because of his or her previous scholarly work on that country. Obviously, one gets very well informed about processes and complications in the cases belonging to this group, which is a great advantage. Another group consists of studies aiming more consciously at generalizations based on studies of a certain number of cases, while a third group might be the various studies of post-1989 developments in Eastern and Central Europe and the former Soviet Union. The end result is in any case that some electoral system change attempts are overstudied while others, for a variety of reasons, are understudied even though they may be at least as interesting as many others – and in some cases even more so because the political and social contexts differ so much from what is the case in the overstudied countries. Thus they can contribute substantially to generalizations about determinants, policies, and politics of changing electoral systems.

It is for this reason that this paper aims at (1) presenting three (four) specific cases of electoral system change attempts in Africa (two successful, one (two) aborted) and (2) testing the usefulness of “the barriers approach” suggested by Rahat in earlier works, but which for the purpose of this workshop is taken from the paper by Rahat & Hazan (2009).
One consequence of this relatively recent interest in electoral system change is apparently also – at least in certain situations – a new political willingness to test new electoral systems, which, however, might lead to other results than previously experienced because of contextual differences. In some situations, it might also tempt electoral engineers and their political masters to manipulate the electoral system to their party’s benefit, no matter what the consequences will be for political inclusivity or legitimacy, not to speak of how external observers or developing partners with whom one co-operates will assess such manipulation.

The cases included in this paper are: First, South Africa which easily changed its FPTP system to one of closed list, full proportionality as part of the preparation for political dispensation following the demise of apartheid. As a follow-up to the paper by Jacobs and Leyenaar (2009), an (aborted) minor electoral reform in South Africa is also looked at, partly to expand on their analysis by including both a major and a minor reform attempt from that country. Second, Lesotho – as part of the solution to a major political crisis – decided to opt for MMP as the successor to its previous FPTP. And third comes Kenya, where MMP (in one form or another, cf below) was put on the reform agenda some years ago, during the then Constitutional Review Process. It did not make it into legislation because the government’s constitutional reform proposal was defeated in the 2005 referendum. Other Sub-Saharan countries could have be chosen for inclusion – such as Senegal, Zimbabwe, Rwanda, Sierra Leone, or Tanzania – but three should suffice for the purposes of this paper: (1) To argue that electoral system change might also learn from analyzing cases from less studied parts of the world and (2) to test the Rahat/Hazan framework on other cases than the ones they themselves employ.

One example of the parallelity between electoral system change processes and consequences in Africa and elsewhere is that the problems encountered in Lesotho before the 2007 election (cf below) had already been experienced in Albania in connection with the 2005 parliamentary elections (OSCE/ODIHR, 2005). It should not be overlooked that these two cases represent a broader set of problems emanating from the use of two-tier compensatory electoral systems, where political actors (parties) may find
themselves tempted to exploit electoral system weaknesses – or loopholes – to their own advantage.

The format of the paper is straightforward: First the Rahat/Hazan analytical framework is briefly introduced followed by a presentation of the three cases and an attempt to use the barrier approach on these African cases and, eventually, one finds a preliminary conclusion.

The Rahat/Hazan Barriers’ Approach

The Barriers Approach is a framework for analyzing electoral reform by asking how reformers approach and deal with (i.e., pass) seven possible barriers; the choice is between continuing with the status quo (the default option) and changing to something more to the liking of the reformers.

Four of the seven barriers are studied using an institutionalist approach, while three are studied using a rational choice approach (Rahat & Hazan 2009, 4ff).

The South African Case

The South African case is probably well-known to workshop participants (see Renwick 2009: 23-24): During *apartheid*, parliamentarians were elected by FPTP, and the first inclination in ANC circles – when the political transition became more than a distant dream – was to continue with that system (Reynolds 1999: 183; Gouws and Mitchell 2005: 355f). ¹ But in an October 1990 ANC meeting with various constitutional experts, a paper prepared by Kader Asmal (a professor of constitutional law who had been in exile in Ireland) in which he advocated list PR with two closed lists in each of the nine provinces (i.e. one national and nine provincial lists) was adopted as the basis for the future electoral system that should provide 400 members to the National Assembly. The other parties – in particular the National Party, the Democratic party and the Kwazulu-Natal

¹ Lodge (2002: 21) adds that COSATU (the trade unionist part of the ANCAlliance) was also an early supporter of PR.
Inkhata Freedom Party – were happy that ANC had eventually decided on PR, so the electoral system was never an important issue during the transition negotiations leading up to the 1993 Interim Constitutional and Electoral Act.

The Democratic Party would ostensibly have preferred a system with 100 three-member constituencies and a compensatory national list of 100 seats (Reynolds 1999: 186), but that did not attract the interest of ANC and was therefore never a serious option. The proposal, nevertheless, continued to emerge – in one form or another – whenever later changes to the 1994-system have been discussed in South Africa.

Gouws and Mitchell (2005) and Reynolds (1999) agree on explaining the ANC 1990 decision as a combination of principled, pragmatic, and self-interested reasons: Principled, because it would provided for the fairest, most proportional representation of all kinds of groups and interests, pragmatic because it would ease other parties’ acceptance of the outcome of the transition and facilitate co-operation (at least in the short term), and self-interested because ANC could (1) avoid being seen as taking almost all seats (as it would be very difficult to delimitate 400 new SMDs in such a way that ANC would not take more than the lion’s share – some said that they might even take almost all 400), and (2) that a closed list system would allow the party considerable control of who were actually elected, something which at least some party stalwarts did not want to leave to the voters. The official reason for opting for a closed list was the low level of literacy in the previously disadvantaged segments of the electorate.

In order to illustrate Benoit’s various points about founding electoral systems and the special problems one encounters when analyzing them (Benoit, 2004: 384-385), South Africa is obviously an interesting case to use.

The system chosen in 1991-93 has functioned well, as one would expect, in three national elections so far – 1994, 1999 and 2004 (Gouws and Mitchell, 2005: 368 – and will in all likelihood also do so in the upcoming elections on 22 April.


**Barrier Approach Analysis**

<table>
<thead>
<tr>
<th>The Barrier</th>
<th>The Approach</th>
<th>The 1990-93 Major Electoral Reform in South Africa</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedural superiority of the institutional status quo</td>
<td>‘Old’ institutionalism</td>
<td>Not relevant, because of the unique situation created by the transition from the apartheid state to something different. What the key negotiating teams could agree on was implemented. The very special window of opportunity made everything possible.</td>
</tr>
<tr>
<td>Political tradition</td>
<td>Cultural institutionalism</td>
<td>The demise of apartheid and the old dispensation created a unique situation where the shift to something different was more easily acceptable than it would otherwise have been.</td>
</tr>
<tr>
<td>Societal structure</td>
<td>Sociological institutionalism</td>
<td>The previous system did not fit (and could not be made to fit) South Africa’s complex social and racial structure, so PR was an obvious solution</td>
</tr>
<tr>
<td>Systemic rationale</td>
<td>New institutionalism</td>
<td>In a system with a strong need for reconciliatory measures and the reflection of different social and political interest, a PR solution was the obvious answer to the quest for electoral reform</td>
</tr>
<tr>
<td>Actors’ vested interest</td>
<td>Rational choice (group/individual level)</td>
<td>Not important as the key actor decided to value other objectives higher.</td>
</tr>
<tr>
<td>Coalition politics</td>
<td>Rational choice (game theory)</td>
<td>Very relevant as the ANC position was developed (at least in part) to suit a least some of the other parties – in particular the NP – and accommodate their concerns (at least in the short run).</td>
</tr>
<tr>
<td>A majority for change; disagreement over content</td>
<td>Rational choice (game theory)</td>
<td>Not a problem, as the formulation was loose (“achieve, in general, PR”) and details were not considered important (how to allocate the very last seats based on the decimals etc.)</td>
</tr>
</tbody>
</table>

The very special transition situation created an almost unprecedented window of opportunity for electoral reform which meant that only one of the barriers (i.e., coalition politics) contributes substantially to identify the determinants of the content of this particular electoral reform.

**The Aborted 2001-2003 Attempt of Electoral System Reform in SA**

In 1996, time constraints contributed to the finalization of a South African constitution, but a specific electoral system was not included in the constitution, only the same
reference to the requirement that the system should “in general” allow for proportional representation. It was therefore decided that the 1999 elections should use the same system as in 1994. However, nothing was said about 2004, so there was – somehow – a need to fill this constitutional gap as 2004 approached.

The gap was, of course, recognized all along among most observers (and by Cabinet at least from early 2001), but it was only in March 2002 that the so-called Electoral Task Team (ETT), headed by Dr van Zyl Slabbert (and with the present author as its only non-South African member), was eventually appointed (ETT, 2003; Gouws and Mitchell, 2005: 368-371; Slabbert, 2006: 105-108).

The ETT was given quite an open mandate, but time was running short, and it soon became evident that there were two strands of opinion: The majority wanted a few changes which to some degree could address the issue of the lack of accountability often seen as part of closed list PR systems, while a minority wanted to stick to the “1994 system” as it was soon termed.

The majority (eight of the twelve remaining members) proposed a change to a system where the less important tier was not the nine provinces with their 200 seats (distributed according to size of the provinces), but a system with 69 multi-member constituencies with three-seven members each that reflected the different sizes of the basic district councils or sub-divisions of metro councils. These seats were to be allocated by PR as was the remaining 100 compensatory seats, which would be taken from the national party lists. It was realized that time would not allow proper implementation so it was suggested that this system should not be implemented before the 2004 National Assembly elections had taken place (i.e., in all likelihood in 2009), and that it could later be contemplated to change from closed to open lists in the multi-member constituencies.

However, the report – and the reasoning behind the majority proposal – was apparently never seriously considered as Cabinet, without much ado, decided to adopt the proposal of the ETT minority, i.e., to re-implement the 1994 system (Slabbert, 2006: 107).
According to the criteria suggested by Jacobs and Leyenaar (2009: 11-12), the majority proposal would have amounted to a minor electoral reform because of the combined changes in election level and eventually in ballot structure.

**Barrier Approach Analysis**

<table>
<thead>
<tr>
<th>The Barrier</th>
<th>The Approach</th>
<th>The Aborted 2001-2003 Minor Electoral Reform in SA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedural superiority of the institutional status quo</td>
<td>'Old' institutionalism</td>
<td>Important as the obvious default option, ready for easy implementation</td>
</tr>
<tr>
<td>Political tradition</td>
<td>Cultural institutionalism</td>
<td>The 1994-system was already well established and change would therefore require strong reform ambassadors (in Cabinet) – a support not available</td>
</tr>
<tr>
<td>Societal structure</td>
<td>Sociological institutionalism</td>
<td>Not important as overall proportionality would be the same</td>
</tr>
<tr>
<td>Systemic rationale</td>
<td>New institutionalism</td>
<td>The proposed system would have solved some problems, such as the lack of specific representation for smaller geographic and administrative units. It would also eventually increase the level of accountability for individuals as well as parties</td>
</tr>
<tr>
<td>Actors’ vested interest</td>
<td>Rational choice (group/individual level)</td>
<td>Probably decisive as the majority’s proposed system would potentially decrease the level of central party control of MPs, i.e. weaken the ANC NEC</td>
</tr>
<tr>
<td>Coalition politics</td>
<td>Rational choice (game theory)</td>
<td>Not relevant because of ANC’s sizable majority in parliament</td>
</tr>
<tr>
<td>A majority for change; disagreement over content</td>
<td>Rational choice (game theory)</td>
<td>Not relevant because the ANC did not want to engage in a discussion of the content of the majority's proposal</td>
</tr>
</tbody>
</table>

Evidently, the inability of the ETT majority to get its proposal accepted in Cabinet points to the importance and relevance of other barriers than was the case in relation to the 1990-1993 major electoral system reform (cf the summation table towards the end of the paper). Whether it is due to difference in size between the two reforms or because of the different positions of the ANC – or both – is left for discussion in the workshop.
The Lesotho Case

The situation ex ante

As a former British colony, Lesotho had a first-past-the-post electoral system since its independence in the mid-1960s. The turbulent political history of the mountainous kingdom with abruptly changing political allegiances, military governments, and the like is not unrelated to the Basotho belligerent political mentality, but need not bother us here, as our purpose is different (but see, e.g., Southall, 1999).

The 1998 elections for the 80 seats in the National Assembly triggered a long sequence of dramatic events because it so happened that the incumbent party, Lesotho Congress for Democracy, LCD, was able to win 79 of the 80 seats for only slightly more than 60 per cent of the total vote. Most – if not all – of the eleven opposition parties (some of them quite small) cried foul, but the elections were actually relatively clean, and it was just one of those occasions when a party in an FPTP election wins at least relative majorities in almost all constituencies.

Post-election violence, nevertheless, escalated soon after the announcement, public buildings in Maseru – and some private ones as well – were burned down, and at least some cabinet ministers started to question the loyalty of the army and the police forces. SADC was asked to intervene, which the organization did (primarily in the form of deploying South African military forces), and peace and stability was soon restored. As part of a political agreement (which had the full support of the international community), a new political institution in Lesotho, the Interim Political Authority (IPA), was established, mandated to propose institutional changes (constitutional, legislative, or other), which could eventually remedy the political impasse created by the opposition parties’ unwillingness to accept the outcome of the election.

The IPA was established with two members from each of the 12 parties participating in the 1998 elections. This format was inspired by the South African negotiation fora of the...
early 1990s, and the idea apparently also came from a member of the South African delegation to the settlement talks.

However, identical solutions only make sense when the problems are identical, or nearly so, which was not the case here. As a consequence, a complicated situation arose when the 22 opposition representatives (some of them from minuscule parties) opted for a solution suggested by a German political scientist, namely the introduction of a mixed member proportional (MMP) system. The basic feature of MMP systems is the combination of single member constituencies and a compensatory PR element, which – at least to some degree – compensate parties underrepresented in parliament, i.e. did not receive a seat share commensurate to their vote share.

The two LDC members of the IPA objected strongly, and a political stalemate developed when the IPA majority – mandated to propose constitutional and other amendments – insisted on the MMP solution, while the LDC government (with its 79:1 majority in the National Assembly) benefited from the fact that all IPA proposals had to be legislated according to existing legislative and constitutional requirements (Elklit, 2002; Southall, 2003). It soon became evident that it would not be possible to have fresh elections in May 2000 as scheduled in the international agreement brokered by SADC and supported by the UNDP and the Commonwealth Secretariat.

The IPA had a rather blurred picture of the practical and logistical consequences of its decision when the present author was drawn into the picture in late 1999. Nevertheless, the IPA was adamant that it had made a worthwhile decision, and the LDC government was equally adamant that it could always block all IPA proposals as they would have to be enacted by parliament. Furthermore, it was quite clear that the LCD preferred the parallel system (or MMM, mixed member majority) where only a fraction of the seats are allocated by PR, which means that it – by definition – is not a genuine PR system (as the MMP system) because all seats are not included in the attempt to reach a proportional result through the use of the over-arching compensatory mechanism.

It was only during the second half of 2001 that a compromise was finally reached, maintaining the IPA’s much preferred MMP option, but the seat combination reflected
the LCD proposal for a parallel system (80 single member constituency seats and 40 PR seats). The political compromise was to a considerable degree brokered by the present author (as a seconded expert), who is happy to report that the May 2002 National Assembly election all in all went well (Elklit, 2002; Southall, 2003. The result reflected the electorate’s partisan distribution much better than any of the previous elections in Lesotho had done.

And then what...?

As a couple of candidates had passed away before the 2002 elections, two fresh constituency elections were conducted later in 2002, leaving LCD with a 79:41 parliamentary majority. It soon became clear, however, that the governing party had not really bought into the idea of a more consensual political style and a consensus-oriented parliamentary system as the party leadership in different ways continuously tried to hamper and annoy opposition parties and MPs. Various electoral system adjustments, which would have decreased the prospects of the opposition in the next election, were also suggested, that is, the old political power game was still being played, even though those proposals were eventually dropped.

Lesotho has a five year electoral cycle; thus the next National Assembly elections were expected in mid-2007, either before or after the problems created by winter weather conditions in the mountain districts. However, it was no big surprise that PM Mosisili called an early election to be conducted already in February as that could expectedly inconvenience his former colleague in government and long-time LCD stalwart Tom Thabane, who was trying to prepare for the up-coming elections spear-heading a new party, the All Basotho Congress, ABC.

Keen to be returned with more than the very slim majority Mosisili commanded at the eve of the election (because of the break-away), the LCD developed strategy would, to all intents and purposes, annihilate the seat allocation effects of the MMP electoral system accepted and voted for in parliament by the party as part of the 2001 constitution and election law amendment compromise. The irony of it all is that the master-mind behind
this strategy was supposedly Tom Thabane when he was still in LCD (and, as the rumor has it, inspired by foreign advice).

The basic idea of this strategy was that LCD should partner with a minor political party for which purpose the National Independent Party, NIP, was chosen. NIP had done reasonably well in 2002, when the party won five compensatory seats. On 15 January 2007, the two parties signed a memorandum of understanding “on strategic partnership and co-operation for the 2007 general elections”, as the front page reads. The core of the agreement (Art. 3) spelled out in sufficient detail that LCD should only compete for the single member constituencies, while NIP should only compete for the compensatory seats. However, the NIP party list should be compiled by the two parties’ executive committees according to a clear-cut formula, which gave NIP the five first positions on the list, LCD the next six, but also to candidates running in single member constituencies, LCD the next four for some “ordinary” party list candidates, then five NIP candidates followed by ten LCD candidates, and thereafter alternately one from NIP, one from LCD, etc. The article also states that the followers of the two parties as well as the general electorate should be sensitized to vote for LCD on the constituency ballot and for NIP on the party ballot.

The Lesotho electoral commission, IEC, had already in December 2006 declined to take a clear position on the legality of an informal agreement between two registered political parties, only reminding the recipient of a letter of the fact that only registered parties can lawfully endorse candidates for election. So the MoU developed and endorsed by LCD and NIP then became the basis for subsequently submitting 80 LCD constituency nominations as well as an NIP party list with 50 names to the IEC. This was possible because (1) the electoral law does not request a party to compete for both constituency and compensatory seats (which also applies in other MMP systems), and (2) nothing in the current electoral law forbids a candidate for one party to also stand for another party

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4 Letter dated 8 December 2006 from the Director of Elections to the Secretary General of the LCD.
5 The internal political and legal battle in NIP over who had authority in these matters is not relevant to the discussion here and will therefore not be dealt with.
(which is against the practice in electoral legislation in most countries).\(^6\) The importance of the agreement was made even more evident when the LCD incumbent Prime Minister, Pakalitha Mosisili, was chosen to appear as the first of the top six LCD candidates on the NIP party list (as number six on the list) and the other early LCD positions also being obtained by high-ranking party members.\(^7\)

The National Assembly election on 17 February 2007 gave the expected results in the constituency elections: LCD took 61 and ABC 17 constituencies. Of the last two, one went to a renowned political personality, Kelebone Maope, leader of a small political party, which had merged with another small party to form the Alliance of Congress Parties, ACP, while the election in the last constituency was postponed due to the demise of a candidate. As the LCD and the ABC did not run party lists, they obviously could not be included in the allocation of compensatory (PR) seats.

This created confusion among most of the Basotho political actors who found it difficult to accept that the IEC had to allocate compensatory seats according to the rules in the Electoral Act (Schedule 5), and that computations had to be based only on the votes cast for those parties that had submitted party lists. The first round of seat allocation gave – as one would expect – an odd result as all ten parties with party list were entitled to at least one of the 119 seats, which – again according to Schedule 5 – had to be the basis for computations during this phase. However, because only 41 seats were actually available for this purpose (41 being the sum of 40 compensatory seats and the only constituency seat gained by a party with a party list), a second round of computations had to be performed (again according to Schedule 5).\(^8\) This increased the electoral quota by almost a factor 3, and now the 40 compensatory seats were easily allocated to the nine parties entitled to participate in the allocation of such seats.

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\(^6\) This was clearly a drafting oversight when the 2001 electoral law amendments were prepared, but apparently nobody in the IEC or outside thought of this possibility as something that should be legislated against.

\(^7\) A few discrepancies between the party list included in the MoU and the final party list approved by the IEC need not bother us here.

\(^8\) This procedure – the joint computation based on available constituency seats and compensatory seats – demonstrates that the electoral system is an MMP electoral system. For the system to function (in practice) as a parallel system, compensatory seats should have been allocated separately from the constituency seats.
NIP (LCD’s alliance partner) had won 52 per cent of all party votes cast, and LWP (ABC’s alliance partner) had won 24 per cent. It is, therefore, only natural that the two parties in the end got 21 and 10 compensatory seats, respectively. The remaining nine compensatory seats were scattered among seven parties; six of them each got one such seat, and one – the previously so strong BNP – three.⁹

As a hypothetical exercise, a private computation was subsequently conducted based on the assumption that the NIP party vote could be used as a reliable estimate of the party vote which a combined LCD/NIP electoral alliance would have been able to bag. Based on a similar argument, the LWP party vote was used as an estimate of what the ABC/LWP alliance would have gained, had they run under one label only. The election results in constituencies (constituency votes as well as party votes, available on the IEC website) make these assumptions utterly realistic. This hypothetical calculation demonstrated that the LCD/NIP arrangement had secured 20 additional seats to the two parties when they – running together – would probably only have got 62 seats (61 constituency seats + 1 compensatory seats) instead of their official allocation of 82 seats (LCD 61 constituency seats + 21 NIP compensatory seats (of which 10 went to NIP candidates and 11 to LCD candidates)). The computations also showed that the ABC/LWP had actually lost two seats on this circumvention of the 2001 agreement and subsequent constitutional amendment as the hypothetical calculation gave them 29 seats (17 from constituencies and 12 compensatory), compared to their actual 27 seats (17 constituency seats + 10 compensatory).

This calculation also demonstrated that all other parties (and, as just mentioned, also the ABC/LWP alliance) would have got more compensatory seats than they actually did because of the way LCD and NIP were allowed to run during these elections. Subsequently, the seat allocation was challenged by one of the small parties, MFP, at the High Court in Maseru.

It took until early July 2008, after more than fifteen months, for the High Court to issue its judgment. The judgment is a fine illustration of the ostrich strategy of avoiding problems

⁹ Results reported on the basis of the official IEC computation sheets.
by hiding one’s own head.10 The court dismisses the case with reference to three extremely legalistic arguments (one of which is even not properly understood and not investigated) instead of looking into the substance of the matter which would have made it possible to build on the explicit intentions of the legislators when the constitution was amended by introducing the MMP system in 2001. The judgment, however, also refers to the urgent need to address the legal (and constitutional) problems identified before and after the 2007 elections. One would hope that SADC mediation will be resumed soon, as under the leadership of Sir Ketumile Masire, former President of Botswana, in 2007.

The main problem is that Lesotho in 2001 formally amended its constitution specifically to include provisions for an MMP electoral system. An MMP electoral system has a clearly defined compensatory element, and it is evident that the LCD/NIP MoU – with its specification of the party list positions each party was entitled to – was a conscious circumvention of the country’s constitution as it would allow the LCD to obtain a number of compensatory seats over and above its (full) complement of seats won in the constituencies.

The letter of the fourth amendment to the constitution explicitly states that the principle of proportional representation must be applied in respect of the National Assembly as a whole. The IEC’s acceptance of the mixed LCD/NIP (and ABC/LWP) lists as NIP and LWP party lists, respectively, has, however, disallowed seat allocation according to the principles and intentions of the current Lesotho constitution.

The consequences of this combination of accepting party lists with candidates standing for other parties in the constituencies and subsequent allocation of compensatory seats – following Schedule 5 to the letter – are that the electoral system in Lesotho to a considerable extent – probably unintended by the IEC – has changed from an MMP (Mixed Member Proportional) System to a Parallel System, i.e. exactly the system which was rejected in 2001. So the claim that this violates the constitution is well-founded.

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10 High Court of Lesotho, CIV/APN/116/07, 2 July 2008.
**Barrier Approach Analysis**

<table>
<thead>
<tr>
<th>The Barrier</th>
<th>The Approach</th>
<th>The Relevance in the Lesotho Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedural superiority of the institutional status quo</td>
<td>‘Old’ institutionalism</td>
<td>Highly relevant: New procedures should be legislated through existing NA with a 79:1 majority. Constitutional amendments only possible through a referendum (not possible because of status of voters’ register) or super-majorities in both houses of parliament. So the barrier was high, even in this very special situation with international interference.</td>
</tr>
<tr>
<td>Political tradition</td>
<td>Cultural institutionalism</td>
<td>Lesotho was a PR system since independence, but with many violations of standard parliamentary and democratic procedures, so this barrier was probably not important, even though some will argue that FPTP fits ‘African’ political tradition well.</td>
</tr>
<tr>
<td>Societal structure</td>
<td>Sociological institutionalism</td>
<td>Lesotho is a relatively homogeneous country, but it appears that this barrier (this approach) is not very useful as one can argue either way. It was apparently not a barrier in this particular case.</td>
</tr>
<tr>
<td>Systemic rationale</td>
<td>New institutionalism</td>
<td>Effective number of parties did not support need for PR. Super-majority for the largest party by implication meant serious underrepresentation for the second largest party, so the implicit expectations of the system were not fulfilled. This created the window of opportunity for reform, which was used by the IPA majority, consisting of all parties outside LCD.</td>
</tr>
<tr>
<td>Actors’ vested interest</td>
<td>Rational choice (group/individual level)</td>
<td>Highly relevant. LCD eager to keep a strong constituency element and as little proportionality as possible, which is demonstrated by their sympathy for a parallel system as the minor evil (if change had to be).</td>
</tr>
<tr>
<td>Coalition politics</td>
<td>Rational choice (game theory)</td>
<td>Not relevant</td>
</tr>
<tr>
<td>A majority for change; disagreement over content</td>
<td>Rational choice (game theory)</td>
<td>Only formally a majority for change (because of the government’s formal commitment to reform because of the external pressure for reform). The internal disagreement between the formal supporters of change is thus best interpreted as the LCD attempt to derail any prospect of reform. So this barrier was very important, even though it was overcome.</td>
</tr>
</tbody>
</table>
The Kenya Case

Kenya was a de jure one party state since 1982, but the repeal of the constitution’s section 2A in late 1991 paved the way for reintroduction of multi-party democracy. However, for a variety of reasons, KANU and President Daniel arap Moi were able to remain in power to the end of 2002 as a new two presidential terms provision did not become effective until then. The 1992 and 1997 elections both saw serious splits in the opposition so it was not difficult for KANU and Moi to be returned with “artificial” majorities in parliament; in the presidential elections, Moi not only obtained more voters than the other candidates, but he also fulfilled the distribution requirement, i.e. he won more than 25 per cent of the vote in at least five of the nine provinces. The parliamentary electoral system was/is primarily a simple FPTP system and the two elections were not particularly well administered (Throup & Hornsby, 1998, among others).

From 1997 onwards, opposition parties met outside parliament in the so-called Inter-Parties Parliamentary Group (IPPG) to deliberate on constitutional and other reforms, and they were able to get various bills through, even though not much happened after the elections.

Before the December 2002 elections, a National Rainbow Coalition (NARC) was formed, demonstrating that most of the opposition parties had eventually learned their lesson. Mwai Kibaki of NARC won an overwhelming victory, and in many circles he was met with great expectations as one of his electoral promises had been to deliver a new constitution within not more than a 100 days! However, it lasted, not surprisingly, until March 2004 before the so-called Bomas Draft (named after a conference venue) came out as the end result of the extensive and lengthy consultation process, which also included a number of foreign advisors.\(^\text{11}\)

One element in the Bomas Draft was a suggested reduction of the executive powers of the presidency, but as that was unacceptable to the government, a new situation developed when the government was able to secure parliamentary support for some key

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\[^{11}\text{This section – as well as the subsequent sections – builds, to some degree, on Okech-Owiti 2008.}\]
constitutional amendments, which had been prepared by the Attorney General, Amos Wako, and consequently were referred to as the Wako Draft.

This new constitutional amendment draft was subjected to a referendum in November 2005, when 58 per cent of the voters chose the orange on the ballot paper which was the symbol for “No”. This clear rejection put an end to serious constitutional discussions before the 2007 elections as it was not only seen as a rejection of the specific proposals in the Wako Draft, but also as a vote of no confidence in Kibaki.

The referendum result also gave opposition members reason to believe that it would not be impossible to defeat Kibaki and his political and ethnic alliance in the upcoming elections, especially if the opposition could rally under an overarching orange banner. This expectation led to the 2007 presidential elections being fought primarily between the candidate of the Orange Democratic Movement (ODM), Mr Odinga, and the incumbent president, Mr Kibaki, now spearheading the newly formed Party of National Unity (PNU). Below that level, parliamentary and local council elections were conducted simultaneously, but with many more parties and ambitious party leaders, who were also positioning themselves and their ethnic bases for inclusion in either of the groupings around the top two presidential contestants.

The end result of the presidential elections in December 2007 was that Kibaki was declared the winner with 46 per cent of the vote against Odinga’s 44 per cent. For many reasons – which are not the subject here – this announcement led to havoc across the country which lasted well into February 2008, with killings (with at least 1,100 victims), violence, rapes, and internal displacement of at least 400,000 persons.

The GoK and AU eventually agreed on assigning a much needed negotiating role to Kofi Annan’s "Panel of Eminent African Personalities", and one of the steps towards solving the crisis was the establishment of the “Independent Review Commission on the General Elections in Kenya on 27th December 2007”. The Commission was also referred to as IREC – or the Kriegler Commission, after its chairman.

12 The present author served as Secretary to the Commission.
IREC handed over its report to President Kibaki and PM Odinga on 19 September 2008. Its main finding was that it had not been possible to establish evidence supporting the claim by ODM and others that the end result of the presidential elections had been doctored (at the National Tallying Centre or elsewhere). But it was also very clear that there had been all kinds of election administration-related problems all over the country, so the elections were certainly in for a prize had there been a competition about having the most poorly administered and conducted elections ever!

IREC was also mandated to suggest ways forward which was expected to include suggestions for electoral system reform. However, a fresh constitution amendment process was also put in motion during the second half of 2008, and issues related to electoral reform should in any case be part of that process. However, the constitutional amendment process is apparently stalling, due to the quickly deteriorating political climate in Kenya, which augurs badly for the attempts to get the constitution and electoral system house in order before the 2012 elections.

Electoral System Reform in Kenya

As indicated above, the electoral system for the National Assembly is primarily an FPTP system even though there are also 12 so-called “nominated seats”. The constitution requires that only MPs are appointed ministers, and it was therefore necessary with a loophole if the president wanted to appoint a non-MP as a minister. These seats were later (due to IPPG intervention) allocated to parties in proportion to the number of seats obtained in the 210 constituencies, and parties then nominated the number of MPS allocated to them.

Foreign academics included in the process as advisors (Gash, Reynolds, Hartman [references to be added]), suggested the introduction of MMP during the 2002-034 constitutional reform debate, but when the Bomas Draft was finally released, it was considerably more complicated due to the influence of well-meaning Kenyan politicians, academics, public commentators, and representatives of civil society organizations. Instead of more or less ordinary MMP, the Bomas Draft as well as the Wako constitutional amendment proposal saw a combination of
• Single-member constituencies (basically as now, but apparently to be more evenly delimitated),

• Single-member constituencies (the districts), each to elect one woman (the Bomas Draft as well as the 2005 Wako Proposal were both silent on whether or not all voters should be allowed to vote in these elections or whether it should only be female voters, which some might claim makes more sense).

• 14 representatives of marginalized groups (Bomas proposes these members to be indirectly elected by electoral colleges of the respective marginalized groups; Wako a more complicated proposal aiming at the same, but also aiming at securing a better gender balance based on lists submitted by political parties and allocated in proportion to votes obtained).

Obviously, neither of these two proposals has anything to do with MMP (even though some participants in the process claimed that) as there is no conscious attempt to ensure overall, compensating proportionality in seat allocation (based on a separate calculation based on the vote distribution of a second national/PR ballot), and there is absolutely no attempt to ensure that these seats go to parties who have been underrepresented in the allocation of constituency seats. The current distribution of the 12 nominated seats reflects only the distribution of elected seats in the National Assembly and can thus not provide any kind of compensation for underrepresentation in the ordinary elections to the National Assembly and therefore only cements existing disproportionality.

A proper classification of Kenya’s current electoral system could build on the recognition that it is, maybe, a strange variant of a parallel system, i.e. a system with separate and, therefore, non-compensatory allocation of 210 seats by FPTP in single-member constituencies and subsequent allocation of 12 seats to represented parties based on their number of seats obtained in the constituency elections. A standard parallel system would of course 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, but the fact that this allocation in Kenya is based on the number of seats already obtained by the parties does
not change the perception of the system. One can also say that the ballots are used, first, for the constituency seat allocation and, second – via the number of seats obtained in parliament – for the allocation of the 12 nominated seats.\(^\text{13}\)

Following the same logic, it is important to understand that neither the Bomas nor the Wako proposal attempt to compensate parties for disproportionality experienced at the lower level of seats allocation. So they were definitely not MMP proposals.

**Barrier Approach Analysis**

<table>
<thead>
<tr>
<th>The Barrier</th>
<th>The Approach</th>
<th>The Relevance in the 2002-05 Kenya Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedural superiority of the institutional</td>
<td>‘Old’ institutionalism</td>
<td>Highly relevant; those who did not favor reform (no matter in what form) could rely on the institutional status quo as the default option. So the referendum outcome in 2005 was probably not a problem for Kibaki and his alliance.</td>
</tr>
<tr>
<td>status quo</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Political tradition</td>
<td>Cultural institutionalism</td>
<td>Apparently not important as a factor so the hypothesis is supported.</td>
</tr>
<tr>
<td>Societal structure</td>
<td>Sociological institutionalism</td>
<td>Kenya is a country with serious ethnic cleavages so this factor should tend towards favoring PR preferences. But it appears that the many local ethnic strongholds actually pull towards the upkeep of the SMD system.</td>
</tr>
<tr>
<td>Systemic rationale</td>
<td>New institutionalism</td>
<td>No fit between effective number of parties and electoral system; if the implicit expectations are that the system must ensure local representation in parliament, then it fulfills these expectations and – therefore – should resist reform attempts</td>
</tr>
<tr>
<td>Actors’ vested interest</td>
<td>Rational choice (group/individual level)</td>
<td>It appears that the system serves the immediate interests of the majority of the larger ethnic local majorities so this barrier is considered important</td>
</tr>
<tr>
<td>Coalition politics</td>
<td>Rational choice (game theory)</td>
<td>Also important because no tribe has anything near majority so coalition politics is important, including safeguarding smaller tribes local command of “their” constituencies</td>
</tr>
<tr>
<td>A majority for change; disagreement over content</td>
<td>Rational choice (game theory)</td>
<td>No majority for change outside “the reform community”, so not really relevant</td>
</tr>
</tbody>
</table>

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\(^{13}\) ECK’s allocation of the twelve nominated seats in early 2008 was reportedly done in a rather arbitrary – or even capricious – way. In 1997 and 2002 these seats were allocated to parties on the basis of a standard Hare + largest remainders formula. In 2008, the ECK attempt to apply the same formula was marred by irregular calculations as well as subsequent reallocation of one seat to a party not entitled to it – at least not by any known seat allocation formula (Independent Review Commission 2008: Annex 7A). The case is now before the court.
Conclusion

Evidently, it is not always easy to apply the barriers approach suggested by Rahat & Hazan (2009) on specific cases. One reason is that the approach in its present form takes the form of a set of hypotheses of a rather general nature, when the situation in a specific case might or might not support the claim that things are so and so. So one has to determine if the aim is to “test” the various specific – and sometimes conflicting – hypotheses or if the aim is to analyze what determinants of electoral reforms have been of particular importance in a specific case of either failed or successful reform.

This duality can easily have blurred this paper here and there, but the key purpose of the paper has been to see to what degree the seven barriers suggested by Rahat and Hazan might have determined the outcome of these four African electoral reform processes.

The conclusions from the four cases have been entered in the summary table below, and two observations immediately meet the eye:

1. In the Kenyan case, more barriers were apparently activated/important than in the other three, so it is not surprising that the reform attempts in Kenya were unsuccessful – even though all seven barriers might not carry the same weight (and in particular not across cases).

2. It is also evident that some of the barriers appear to be more important than others, in particular barriers 1, 4, and 5. The question then is if this holds generally, if it is a particular African feature, or if it only reflects peculiarities of the cases under scrutiny?
Barrier Approach Analysis

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<tbody>
<tr>
<td>1. Procedural superiority of institutional status quo</td>
<td>'Old' institutionalism</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>2. Political tradition</td>
<td>Cultural institutionalism</td>
<td>-</td>
<td>+/?</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>3. Societal structure</td>
<td>Sociological institutionalism</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>4. Systemic rationale</td>
<td>New institutionalism</td>
<td>++</td>
<td>+</td>
<td>+/?</td>
<td>+</td>
</tr>
<tr>
<td>5. Actors' vested interest</td>
<td>Rational choice (group/individual level)</td>
<td>-</td>
<td>++</td>
<td>+</td>
<td>++</td>
</tr>
<tr>
<td>6. Coalition politics</td>
<td>Rational choice (game theory)</td>
<td>+</td>
<td>-</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>7. A majority for change; disagreement over content</td>
<td>Rational choice (game theory)</td>
<td>-</td>
<td>-</td>
<td>+</td>
<td>-</td>
</tr>
</tbody>
</table>

++ indicates particularly important barriers

References


Ghai, Yash (200x)


Hartman, Christof (200x).


