

ELECTORAL LAW : GENERAL PRINCIPLES AND REGULATORY LEVELS

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Introduction

Modern democracy is inconceivable without elections, since it always includes a representative element. Legislation on elections is among the most fundamental in the State based on the rule of law.

This paper will begin by outlining the basic principles without which genuine democratic elections are impossible. This will be followed by an overview of electoral systems proper, particularly the way electors' votes are turned into seats. Special attention will be paid to the main implications of voting methods, with a view to defining the fundamental rules that must figure in the constitution.

Beforehand it is worth giving some definitions:

- An election is defined as the choice, by a body composed of a community (people, Parliament), of one or more members of another body belonging to that community, smaller in number, intended to represent the former body.
- The constituency is the (usually territorial) unit in which electoral votes are turned into numbers of seats.
- The list is an instrument allowing the elector to cast more than one vote - in principle to more than one candidate - in one operation (from the elector's point of view). From the parties' viewpoint, the list is the set of candidates a party puts before the electors.
- The electoral system (proper) is a set of procedural rules governing the expression of votes cast at an election and their conversion into seats. Seats may be shared out either according to a majority system (according to the rule of the majority) or a proportional system (according to a calculation based on the proportion of votes obtained by each party or each candidate).

A. Fundamental rules of democratic elections

A truly democratic election must obey a certain number of fundamental principles, as follows: suffrage must be universal, equal, free and secret^[1]. We shall now look at each of these aspects in turn.

1. Universal suffrage

Universal suffrage, a component of the constitutional principle of equality, obviously does not imply that everybody can vote on any territory. In most cases it is deemed to be respected when foreigners are not entitled to vote. The exclusion of nationals resident abroad is not problematic either, nor is that of minors, provided that the age of majority is set reasonably (in any case not above twenty-five years). As for passive civic capacity, setting a higher age for eligibility to certain bodies (executive, upper chamber^[2]) does not, in principle, run counter to the notion of universal suffrage. This would not be the case, however, if the age of eligibility were raised overall to thirty or forty years of age.

For a long time, universal suffrage allowed for women to be excluded from civic life. Nowadays, it is acknowledged that genuinely universal suffrage must include nationals of both sexes, provided they have reached the age of majority and are resident on national territory.

Universal suffrage does allow for certain exceptions, some of which are on the technical side. The first is the requirement to be registered on an electoral roll. Where registration is automatic^[3], no problem arises. Citizens may, however, be required to register on their own initiative. If this is the case, registration should obviously not entail any complicated administrative procedure, be possible only within a limited period or even give rise to the payment of a tax^[4].

It is also admissible to demand that, in order to take part in local elections, voters must first be resident for a certain length of time in the locality. This waiting-period must, however, not be too long (one year at most), otherwise long-term residents will be in a privileged position^[5].

Other exceptions concern civic capacity itself. Traditionally, two kinds of limitation on civic capacity have been practised: suffrage based on property qualification and suffrage based on ability. The former excludes those who do not pay a certain amount of direct taxes. The property qualification proper disenfranchises those whose income is too low. So called "fiscal qualifications", on the other hand, exclude anyone who is behind in the payment of his taxes. Suffrage based on ability disenfranchises all but those who possess a certain standard of education. In its strictest form, it only prevents the illiterate from voting in elections. Whatever the arguments in favour of both forms of franchise limitation, they have virtually ceased to be practised. In any case, they hardly seem compatible with the principle of universal suffrage.

Generally speaking, disenfranchisement must be founded on a well-defined legal base, be in the public interest and obey the principle of proportionality.

It used to be common practice for domestic staff, or even those not living at home, to be deprived of their civic rights. Exceptions of this kind are unacceptable^[6]. Suffrage is not universal if the clergy are deprived of their active civic capacity, an unjustifiable measure^[7].

In our opinion, disenfranchising people receiving assistance or in a state of insolvency is highly debatable. It could be interpreted in two ways: either it is tantamount to a kind of property qualification for entitlement to vote or it sets out to punish bankrupts, an idea which we find outmoded^[8].

Similarly, withholding civic rights from persons who have undertaken activities hostile to the State, although not inconceivable per se, runs the risk of distorting democracy since it may well be used by those in power to keep adversaries out of office. Failure to respect certain obligations of public law (such as military service) should not affect civic rights either.

On the other hand, it might be reasonable to disenfranchise convicts, as long as the principle of proportionality is still be applied. In France, for example, people are disenfranchised if condemned for intentional violation of the law and sentenced to six months' imprisonment (suspended) or three months (not suspended) - or even one month in some cases^[9]. In Switzerland, on the other hand, active civic capacity may no longer be limited because of criminal conviction^[10].

A classic reason for loss of civic rights is prohibition or guardianship. In France, anyone under such supervision may not vote^[11]. Some modern legal systems no longer limit the civic capacity of people under prohibition orders. Swiss law, for example, only excludes them if they are suffering from mental illness or deficiency^[12].

Violations of universality of suffrage may also result from apparently harmless rules, such as fixing the place of the ballot, or even its date or time, such that a large number of citizens are prevented or at least discouraged from voting (eg because the ballot takes place during working-hours^[13]).

Restrictions on passive civic capacity - rules on ineligibility - are generally more widespread than those on active civic capacity. It is admissible to set a maximum age over which a person may no longer be elected^[14]; this age should not, however, be lower than the normal retirement age. It is more commonplace for criminal convictions to be taken into account^[15], along with other reasons which raise doubts as to whether the interested person is fit for public office (especially prohibition).

As for the regulatory level for making rules on universal suffrage, the very principle of universality of suffrage should obviously be given constitutional rank. The risks of excessive deviations can be limited if the constitutionality of laws allowing for exceptions is monitored. In our view, however, at least when they affect active civic capacity, these exceptions should be listed and limited in the constitution^[16].

2. Equality of suffrage

Equality of suffrage includes three aspects: equality of voting power, equality of electoral strength and equality of chances of success ^[17].

2.1. Equality of chances of success

Equality of chances of success is achieved if the application of an electoral system gives truly proportional results. If it is proclaimed in the constitution, in principle it excludes majority systems; it also means that the legislator cannot come up with variants to the proportional system which weigh excessively against the smaller parties^[18]. Swiss case-law has enshrined this in cantons which unreservedly proclaim the proportional principle in their constitutions; in Germany, the Constitutional Court feels that it is compulsory under the federal constitution since a proportional system is provided for by the legislator.

2.2. Equality of voting power

Equality of voting power prohibits multiple votes, ie the possibility for some electors to vote more than once. Multiple voting has disappeared and so is no longer a real problem.

2.3. Equality of electoral strength - manipulations

As a rule, the territory on which the election is held is divided up into a number of constituencies.

It is unusual for the whole elected body to be appointed by the electorate as a whole (single constituency). This does occur for example in Israel, for parliamentary elections. The single constituency, in democratic States, is only used for proportional voting. If majority voting is applied, it mostly allows a single party to win all seats.

When the territory is divided up into constituencies, respect of equality of electoral strength is required. The key to the way seats are shared out between constituencies may be the number of inhabitants in each constituency or else the number of nationals (including minors) residing there, or even the number of electors or voters. Equality of electoral strength is obeyed if each seat represents an equal number of inhabitants, nationals, electors or voters, according to the criterion applied^[19].

Certain forms of manipulation sometimes prevent equality of electoral strength being respected. The most glaring form of manipulation is active electoral geometry, occurring when the electoral share-out or share of seats among constituencies brings about inequalities of representation as soon as they are applied. Obviously, absolute equality can never be achieved. However, it is inadmissible to allow patent inequalities. The degree of tolerance with regard to this varies greatly from country to country. The Supreme Court of the United States is extremely strict, in any case for elections to the House of Representatives, whereas the Japanese Supreme Court has tolerated a ratio of variation in number of inhabitants per seat as high as 3.94:1 (!). In the view of the German Constitutional Court the population of a one-member constituency should not vary by more than 25% either way of the average population of all federal constituencies. The British system tolerates a 25% variation either side of the average number of electors per constituency in

each large region (England, Wales, Scotland and Northern Ireland). The French Constitutional Council allows a variation of some 20% in the case of elections to the National Assembly but was more lenient when examining the law on changes to constituencies in New Caledonia.

In certain circumstances, deviations from strict equality may be permissible. This was the case, in fact, with the peripheral regions of New Caledonia, which were entitled to favourable treatment because of the special situation of this territory. The same is true in cases of representing an isolated region, allocated a seat so that it can have a representative of its own, even though its population is so small that it ought not to qualify for one in normal circumstances. The Swiss Federal Court also felt it legitimate to give special treatment to economically less favoured regions or those at a disadvantage by being remote from large cities.

Of course, a supple interpretation of the principle of equality, even though justifiable in some cases, runs the risk of allowing manipulations which are difficult to control. The best way to avoid them is to set in the constitution not only the principle of equality, which must be included in any case, but also possible deviations. One solution, for example, might be to award each district one, two or even three seats, regardless of its population. In Spain, for example, each province is entitled to at least three seats.

Another major source of inequalities of representation is passive electoral geometry. This occurs when the territorial share-out of seats remains unchanged for a long time, or constituencies are not redrawn. This is a more underhand phenomenon than active electoral geometry, because it is a result of inertia rather than clear political will. In some cases equality of suffrage is nothing more than a memory. In 1874, there had been twice as many electors in the sixth single-seat constituency of Berlin as in the first, but by 1912 there were fifteen times as many. The fact that constituency boundaries in Alabama had not been changed between 1901 and 1964 meant that the ratio between the largest and smallest State constituencies in terms of population reached 16:1 for the Lower House and 46/1 for the Senate.

There are two remedies for passive electoral geometry. The first is a regular redistribution of seats among constituencies. This approach is the rule in multiple-seat systems (where each constituency elects more than one seat). It is, however, impossible in a single-seat constituency system, where passive electoral geometry is avoided by regularly redrawing constituency boundaries.

The best way to avoid passive electoral geometry is to allow, at legislative level, for the share of seats among constituencies or the redrawing of their boundaries to be redone at regular intervals. For example, in Switzerland this operation takes place after each federal census, ie every ten years^[20].

Gerrymandering is an even subtler form of manipulation, favouring a party by artificially drawing constituency boundaries, even when there are no inequalities of representation. It creates inequalities between the parties. This type of manipulation is practised especially in majority election systems.

Judicial control in this case is a pipe-dream. The best way to avoid gerrymandering is to fix constituencies in the constitution. Stability of constituencies of this kind can only be envisaged in a multiple-seat system; in a single-seat system, it would trigger off a passive electoral geometry effect. In Switzerland, it was imposed by the constitution when the proportional system was introduced for electing the national Council, in 1919. This once-and-for-all setting of electoral boundaries put an end to the distressing debates between the radical majority, accused of gerrymandering, and the opposition: each canton forms a constituency^[21].

3. Voting freedom

3.1. Voting freedom proper

Without voting freedom, the electoral operation would be merely for form's sake. Optimum conditions must be ensured so that citizens may express themselves freely.

Voting freedom has two essential aspects: free formation of the electors' will and their free expression. We cannot enter into the details of the different aspects of voting freedom; we shall just give some examples of the attacks which may be made on it.

The most serious attacks result in general from State action. As for the formation of the elector's will, voting freedom is well and truly flouted if the authorities put limits on presenting candidates or prevent campaigning. It is also inadmissible for a ruling authority to practise electoral propaganda or spend money on the campaign. On the other hand, the State must adopt certain positive measures, in particular making the list of the candidates known to the public.

Free expression of the elector's will obviously implies, above all, that the State should not use coercive means in order to determine the elector's vote. It also entails making available suitable premises for exercising the right to vote.

Secrecy of voting should not be considered as a separate principle, but as a fundamental means of guaranteeing free expression of the elector's will. It is ensured by numerous rules of procedure which, for example, make it compulsory that voting should take place in polling booths and that ballot-boxes should not be opened until voting has come to an end.

Freedom of voting would make no sense if the results announced did not correspond to the popular will. The obligation to announce correctly the result of the ballot is therefore its indispensable corollary. In order to avoid tampering when the count is on, returning officers and their tellers must represent a cross-section of political tendencies.

The principle of freedom of voting should, in our view, be enshrined in the constitution. Although a written text can specify the various rules of procedure to be respected, it cannot allow for every possible attack on voting freedom. This leaves it up to case-law to decide case by case and, if the irregularity could influence the outcome of the ballot, to declare it null and void.

Attacks on both formation and expression of the elector's will can also come from individuals. It is up to the legislator to penalise them^[22]. The election will be declared null and void if the irregularity could influence the outcome^[23].

3.2. Elector's freedom of choice

The question of voting freedom cannot be separated from that of the elector's freedom of choice. According to the type of electoral system, electors have at their disposal a varying degree of freedom of choice.

Most often, at least in the proportional system, they can only vote for persons who have stood for election. In practice, the elector will only vote in general for candidates, even if he can vote for any citizen, except perhaps at local level.

If a criterion for distinguishing between electoral systems is whether the elector can choose, we can roughly distinguish between two forms of ballot-paper: changeable and unchangeable^[24].

3.2.1. Unchangeable ballot-papers

In all blocked list systems (ie where electors are obliged to vote for a list of candidates without modifying it, even for one party without even knowing the lists of candidates), the ballot-paper cannot be altered. Blocked lists usually concern elections under a proportional system, where electors vote en bloc for one party. This is the case in Portugal, Spain for the Congress of deputies or even in Germany for deputies elected by list ballot (proportional).

In majority voting, blocked list systems mean that all seats in one constituency go to one party. In proportional voting, those elected are determined in the order of the list. That allows parties to place anyone they want elected at the top of the list.

Single-seat majority elections, or first-past-the-post (where only one candidate can be voted for) also do not allow the ballot-paper to be altered, whether in two rounds, as in France, or one, as in the United Kingdom and the United States. As each party puts up one candidate, electors really have to choose between parties; the candidates' personality is of secondary importance (in any case, in France and the United Kingdom).

3.2.2. Changeable ballot-papers

Changeable ballot-papers come in all types, which we shall not explain in detail here. They can be split into two categories.

In the first, electors are entitled to mark on their ballot-paper candidates belonging to more than one party list. In French, this is known as "panachage". This system is rarely practised, and can be found in particular in Switzerland and Luxembourg, where electors have the same number of votes as there are seats to be elected. In Ireland, this form of voting allows voters to put candidates in order of preference (single transferable vote). Generally speaking, if electors can vote for candidates of more than one party they tend to decide who exactly is elected.

Other electoral systems allow electors to choose only from candidates on a single list, but do allow them to choose between them (lists with possibilities of internal choice). In Italy, for example, those electing Deputies may indicate the name of the candidate to whom they are awarding their preference vote. The same goes for Austria and Belgium. In practice, however, in the latter two countries, the influence of the elector's will on exactly which members are elected is limited, and it is usually the order of candidates on the list that decides. In Italy, on the other hand, the elected members of each party are determined by the number of votes they win.

B. Electoral systems proper

So far we have dealt mainly with the basic conditions of democratic elections, attempting to demonstrate the hard core of democracy, ie the affirmation of the principles of universal, equal and free suffrage, and how it may be adapted without deviating from those principles.

The following part of this study will be dedicated to electoral systems proper.

We shall make just a passing reference to the territorial foundation of the election and the elector's possibility of choice, subjects already touched upon. Nor shall we be going into the technical details of ballot methods, either generally or on a country-by-country basis. That would go far beyond the objective of this study. Much has been written on the subject and we refer you to it for more details^[25].

We should rather, therefore, concentrate on certain specific questions. We shall begin by looking at the stability of the electoral system and its regulatory level, before attempting to present the main types of electoral systems.

1. Regulatory level and stability of electoral systems

We have already seen that the main principles of democratic elections must be set at constitutional level, whereas putting them into practice may be left up to the law. However, there are always certain risks of manipulation (whether in the determination of the causes of exclusion from entitlement to vote or the drawing of constituency boundaries), which may be avoided by a certain precision of constitutional rules.

Although no fundamental principle of democracy requires that the electoral system should be set in the constitution, the voting method does have an influence, because it can favour a certain composition of the elected assembly. Thus, the more proportional a system is, the less easy it is for a single party to obtain an absolute majority of seats.

Consequently, where the electoral system is defined solely at legislative level, the ruling majority can always be tempted to amend it in its favour, or

against that of the opposition as a whole or one party in particular. Such manipulations are obviously risky, as who wins seats depends above all on the elector's will, but they can nevertheless clearly influence the results.

In order to avoid this risk, the best solution is to set the electoral system in the constitution or at least establish in it whether it is a majority or proportional system^[26]. A change of system is thereby made extremely difficult. In order to avoid both such rigidity and instability of the electoral system, it would equally be possible to allow in the constitution that, in the case of changing the electoral law, the old system remain applicable at the next election, and that the new will only come into force at later elections. This rule is undoubtedly the best way of avoiding manipulations, since politicians cannot foresee which type of ballot will favour their party in four or five years' time.

It should also be noted that, generally speaking, no Western European country has radically altered its voting system since 1945 or their more recent return to democracy (in the case of Spain, Portugal and Greece). France is the odd-man out.

2. Main types of electoral systems

2.1. Majority systems

Traditionally, electoral systems are divided into majority systems and proportional systems. However, each of these categories is sub-divided into a very large range of different types.

Before defining the majority system and its variants, we should point out that it may be applied in single-seat constituencies and multi-seat constituencies alike. In Western Europe, multi-seat constituencies, formerly commonplace, have mostly disappeared along with majority systems. They continue to be used for elections to the Swiss States Council (which only has two deputies per canton) and the Spanish Senate (whose powers are limited). Multi-seat majority voting has generally been abandoned because it very heavily favours the larger parties.

Under the majority system, any candidate who obtains the majority of votes is elected. This notion still needs to be defined. In fact, "majority" may mean relative majority or absolute majority.

In a multi-seat constituency, candidates are elected by relative majority if they obtain more votes than each of their adversaries taken separately. In a constituency with more than one seat, the winner of the most votes is elected.

It is traditionally held that the relative majority system (often called single-round majority system) leads to two-party politics. This is, however, only true in certain circumstances, as in the United States. In the United Kingdom, the system does considerably reduce the number of seats won by the third party, but does not stamp it out altogether. Moreover, although the relative majority system is in principle favourable to the two biggest parties and unfavourable to the smaller ones, the latter are not excluded from parliament all together, provided they have a strong local base. In the United Kingdom, the Scottish and Welsh nationalists, whose electorate is concentrated in certain regions, are represented in Parliament.

If the party structure is unstable and there are large numbers of candidates, the simple majority system can be unpredictable, allowing candidates who win very few votes to win seats.

Generally, the single round majority or "first-past-the-post" system is mainly practised in the United Kingdom and former British colonies, such as United States, Canada, India and New Zealand.

Under single-seat absolute majority systems in order to be elected the candidate must win at least half the valid votes cast. Sometimes, in multi-seat ballots, the number of votes needed to be elected is lower, but there is no room for details here. In principle, the absolute majority system does not allow all the seats to be won in the first round of voting, a second round is then held, in which a relative majority is allowed. The time lapse between both rounds allows the parties to forge alliances and the least well-placed candidates may drop out; as a rule, only two candidates stand in the second round (in single-seat elections). This is the case in France where, in fact, for presidential elections, only the two best placed candidates in the first round fight it out in the second.

It is possible to require an absolute majority in the second round, without limiting the number of candidates who may stand. In this case, however, a second round might not be enough and further ballots may be needed to fill all the seats (x-round majority system). This solution is not very practical and encourages low turn-outs; it is virtually obsolete.

It is possible, however, to use the absolute majority in a single round system, or so-called alternative vote, as is practised for example in the case of elections to the Australian House of Representatives. The elector classifies the candidates in order of preference. If no candidate obtains the absolute majority of first preferences, the least well-placed candidate is eliminated and his or her votes are reallocated to the second choice candidate on each ballot paper where he or she was first preference. This process is continued until one candidate obtains an absolute majority of votes cast.

Absolute majority systems tend to favour larger parties, but less so than relative majority systems. Some small parties may even be over-represented if they make an alliance with larger parties (as occurred in France under the IIIrd Republic).

2.2. Proportional systems

The proportional system is defined as a means of voting which allocates seats to groups or candidates entitled to a share of seats according to calculations based on the proportion of votes they have obtained.

In Continental Europe, the proportional system is presented as a system of competition between the lists of several parties, each party obtaining a

percentage of seats more or less corresponding to its percentage of votes.

Competition between lists and the proportional system are not inseparable. It might also be possible to share out seats proportionately among candidates, so that the person elected is the candidate who obtains a number of seats equal to the "electoral number" (eg the number of electors in the constituency divided by the number of seats to be filled plus one). Electors classify the candidates in order of preference; the least well-placed candidates are eliminated and their votes redistributed to the candidate who was the next in line on the same ballot-paper, whereas the votes cast for elected candidates who won more votes than the electoral number are also redistributed. This system, which is applied in Ireland, is relatively complex in terms of the counting operation but has the advantage of allowing the elector to vote in a way that is completely independent of parties^[27].

The calculation techniques applied for allocating seats under the proportional system are infinitely varied and we shall not go into that here. It should be pointed out, however, that certain techniques (such as that of "the strongest stays") tend to favour the smaller parties whereas others, such as "the strongest average", tend to favour the larger parties^[28].

It is not so much the means of calculation used for sharing out seats, however, as quorums and restricted numbers of seats per constituency that can markedly reduce proportionality.

A quorum consists in excluding from a share of seats any party failing to obtain a certain percentage of votes (eg 5% or the number of votes in the constituency divided by the number of seats to be filled). The quorum may be set at national level, in which case all tiny parties will be excluded from the Parliament; or else it might be applied at constituency level, in which case small parties with a strong local base will be represented. In Germany, the principle of a 5% quorum applied nationally does not apply to parties representing national minorities^[29].

Contrary to appearances, the quorum is not necessarily the most drastic means of favouring larger parties. A small number of seats per constituency creates a threshold effect which makes it impossible for small parties to be elected. In other words, the fewer seats in a constituency, the more votes it must win to obtain a seat. Moreover, in three-seat constituencies, one party with an absolute majority can win two-thirds of the seats (ie two out of three).

Such reductions of proportionality are not without political consequences. The under-representation of smaller parties and the over-representation of larger parties tend to allow one party (or a coalition) to obtain the absolute majority of seats without winning an absolute majority of all votes cast. This frequently occurs in Greece^[30], Spain and Ireland.

Adapted in this way, the proportional system tends to make it easier to form a parliamentary majority, but obviously does not ensure an absolutely faithful representation of the electorate as a whole. This is only possible in cases where an integral proportional system is applied, without a quorum, in a single constituency, as in Israel and the Netherlands.

At present, the proportional system is applied in all Western European countries except France and the United Kingdom. This outward uniformity however conceals large differences. There is indeed a world of difference between the Dutch system, with almost perfect proportionality, and the Greek system, which greatly favours the two larger parties, because these two systems are based on different political ideas.

3. Electoral systems and politics

This leads us on to state that the distinction between majority system and proportional system, quite pertinent when expounding the technical rules of ballot methods, is markedly less convincing when determining their effects on politics and, in particular, the formation of a parliamentary majority.

Trying to define relationships between electoral systems and politics is a challenge because voting methods are just one of the determining elements of political life, alongside socio-economic, ideological, religious, ethnic or historical factors. Besides, in a democracy, at the end of the day it is the elector's will that is the determining factor of the political choice.

However, it is clear that certain electoral systems make it easier to concentrate seats in favour of some parties, and especially the biggest ones. On the other hand, they also make it easier to form a parliamentary majority. When they have been in force for some time, they encourage electors to cast a "useful vote" as they find it harder to vote for smaller parties. On the other hand, the more proportional systems, which make parliaments mirror the electorate, give a chance to smaller formations but, in favouring a splintering of the elected body and the parliament, they make it harder to form a parliamentary majority.

Just as the effects of each type of ballot on the composition of parliament are uncertain, so their tendency to achieve proportionality also varies. As a rule of thumb, it is possible, all the same, to present the different types of vote as follows, from least to most proportional:

- 1) Multi-seat majority system;
- 2) Single-seat relative majority system (United Kingdom);
- 3) Single-seat absolute majority system (France);
- 4) Virtual proportional system (ie based on constituencies and/or with quorum). The smaller the number of seats per constituency, the less proportional the system is. The Irish and Spanish systems with small constituencies, or the German system, with its 5% quorum, lead to far less proportional results than the Belgian and Italian systems (with large constituencies and no quorum).
- 5) Integral proportional system (in a single constituency, without quorum) (Israel and Netherlands).

The question of forming a stable parliamentary majority, composed if possible of a single party, is important in a country with a parliamentary system. It is far less so when the Government is not responsible to the parliament (United States, Switzerland).

Before choosing a ballot method, it is therefore important to know what its consequences might be. It is possible to oversimplify by saying that a choice

has to be made between forming a majority and faithfully representing the electorate. It is obvious, however, that the situation is far more nuanced than this; the choice is not a clear-cut one between A and B.

4. Final remarks

Before concluding, it seems important to stress two points. In our view, a newly-democratised State should opt for a relatively simple electoral system, where a voter need not be specially educated in order to understand its basic rules, in terms of how votes are converted into seats. That does not rule out later amendments, but these should be made with care.

Besides, it seems dangerous to us to adopt a voting method which systematically excludes minorities from parliament, because anyone thus excluded might jeopardise the political regime as such. This is especially true of national minorities who have no hope of becoming a majority. Where they are present, a less proportional system ought only to be adopted if special methods or circumstances, such as the concentration of a minority in one area of the country, allow these minorities to be represented.

Conclusion

To conclude, we hope that this short study demonstrates that the question of electoral system is not of prime importance for democracy. It is far more important to respect the three fundamental rules of democratic election: universality of suffrage, equality of suffrage and voting freedom. Without them, even the most elaborate electoral system could not bring about democracy. These principles, therefore, need to be affirmed and even turned into black and white, at constitutional level.

All the same, the question of electoral system should not be neglected. The influence of this factor on politics in a country is far from negligible, even if it is difficult to quantify. Although the elector's will is the fundamental element of democratic politics, any manipulation of voting methods can contribute to directing the results in favour of the ruling majority. Consequently, it is imperative that the majority should not be able to determine the electoral system as it sees fit. The most suitable means of achieving this is to set the voting method in a constitution that is difficult to revise.

Summary

Electoral law is one of the fundamental aspects of modern democracy. This study sets out first of all to present the principles needed for the running of a democratic election, namely universality and equality of suffrage, as well as voting freedom, including secrecy of voting. These principles must feature in the constitution. We define its essential elements, without which democracy would not exist, while showing how they could be adapted.

The electoral system is the object of the second part of our study, which sums up the main types of ballot (majority and proportional) and some of their variants. Even if the electoral system is not the determining element of politics and its influence on the composition of the elected body is difficult to determine in advance, it is clear that certain systems favour the formation of a parliamentary majority, while others are more suited to reflecting the electorate. The choice of a voting method is therefore a political one. In order to make it impossible for the ruling majority to change the electoral system to suit it, it is desirable for the guidelines to be set out in the constitution.

[1] For the general principles of democratic elections, consult Tomas POLEDNA, *Wahlrechtsgrundsätze und kantonale Parlamentswahlen*, Thesis, Zurich 1988.

[2] In Italy, for example, the age of eligibility is 40 years for the Senate, but only 25 for the Chamber of Deputies.

[3] This is the case in Switzerland (T. POLEDNA, *op. cit.*, p. 230, but not for example in France - Art. L. 9 ss of electoral code - or in the United States).

[4] In the United States, for example, poll taxes are expressly prohibited by the 24th Amendment to the Constitution (for federal elections).

[5] In Switzerland, entitlement to vote at canton or commune level may be refused for a three-month period in the case of newly-arrived citizens: cf. Art. 43 indent 5 of the Federal Constitution.

[6] For actual examples of disenfranchisement declared unconstitutional in Switzerland because they were based on property qualifications, ability or were linked to social or professional status, refer to T. POLEDNA, *op. cit.*, p. 201 ss. Most examples pre-date World War I.

[7] Cf. Article 49 indent 4 of the Swiss Federal Constitution. Other States continued to exclude the clergy from voting until fairly recently: for example, Greece did so until as late as 1954.

[8] France still excludes bankrupts from voting: Art. L. 5 of the electoral code.

[9] Art. L. 5 ss of the electoral code.

[10] Cf. repeal of former Article 52 of the criminal code.

[11] Art. L. 5 of the electoral code.

[12] Art. 2 of the federal law on political rights.

[13] This has occurred in Switzerland in the past: T. POLEDNA, *op. cit.*, p. 209.

[14] Such is the case in certain Swiss cantons: see thesis, Pierre GARRONE, *L'élection populaire en Suisse - Etude des systèmes électoraux et de leur mise en oeuvre*

sur le plan fédéral et dans les cantons, Basel/Frankfurt 1991, p. 28.

[15] · In Switzerland, criminal convictions may lead to ineligibility, but not privation of active civic capacity: see Art. 51 of the criminal code.

[16] · Cf. Art. 57 of the draft revised version of the Swiss federal Constitution of 1977.

[17] · These are loose translations of the German, terms "Zählwertgleichheit", "Stimmkraftgleichheit" and "Erfolgswertgleichheit", used in particular by T. POLEDNA, op. cit., p. 26 ss.

[18] · This is especially true of quorums (see later).

[19] · For how seats are shared out and inequalities of representation, see in particular Marie-France BUFFET-TCHAKALOFF, Juges constitutionnels et découpage électoral (Allemagne fédérale, Autriche, Etats-Unis, France, Japon), Revue du droit et de la science politique en France et à l'étranger (RDP) 1989 pp. 981-1008; P. GARRONE, op. cit., pp. 137 ss; T. POLEDNA, op. cit., pp. 66 ss (to mention just three works among many).

[20] · Art. 16 of the federal law on political rights.

[21] · Art. 73 indent 1 Federal Constitution

[22] · See Art. 279 ss of the Swiss Criminal Code

[23] · We had in mind solutions used in Switzerland, developed in detail in the thesis by Stephan WIDMER, Wahl- und Abstimmungsfreiheit, Zurich 1989; for a short exposé, refer to P. GARRONE, op. cit., pp. 43-54. In our view, the Swiss solutions are not only applicable only to one country but express a general principle.

[24] · Cf the categories of "ordinal ballot" and "categorical ballot" used by Douglas W. RAE, The political consequences of electoral laws, 2nd ed., New Haven/London 1971, pp. 16 ss. Our classification is slightly different from RAE's however.

[25] · On electoral systems in general, refer to works by Dieter NOHLEN: Wahlrecht und Parteiensystem, Über die politischen Auswirkungen von Wahlsystemen, 2nd ed., Opladen 1990; Wahlsysteme der Welt, Daten und Analysen. Ein Handbuch, Munich 1978, as well as our thesis (already mentioned). For works which concentrate more on country-by-country analysis, refer to Jacques CADART, and others, Les modes de scrutin des dix-huit pays libres de l'Europe occidentale. Leurs résultats et leurs effets comparés. Elections nationales et européennes, Paris 1983, and Vernon BOGDANOR/David BUTLER, Democracy and elections. Electoral systems and their political consequences, Cambridge 1983. Most elements relating to electoral systems developed in the following part of this study are drawn from these works.

[26] · For example, in Switzerland the electoral system was "constitutionalised" (Art. 73 indent 1 Federal Constitution). The same is true of Spain (Art. 68 indent 3 of the Spanish Constitution).

[27] · We shall not enter into every tiny detail of the Irish electoral system, because it would require several pages of explanation. We have reproduced a concrete example in our thesis, pp. 305-308).

[28] · For more details of the different methods of sharing out seats, refer in particular to the works quoted in footnote 25.

[29] · Following the reunification of Germany, the 5% quorum, in the 1989 elections, was calculated separately for the two former halves of the country, the ex-GDR and ex-GFR.

[30] · It is true, however, that in Greece certain seats are specially allocated to the two larger parties, de facto.