

STATE STRUCTURE AND ELECTORAL SYSTEMS IN POST-CONFLICT SITUATIONS



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PREFACE

In contemporary peace processes, almost without exception, the arrangements that bring about transition from conflict to stability include requirements related to elections. These requirements range in level of detail from general calendars to specific, almost legislative requirement for the nature and conduct of the elections. In either case, the electoral requirements are only very rarely subjected to a thorough process of expert review and public consultation. Unintended consequences often result, such as unrealistic timetables (and consequent postponements) in Afghanistan or guarantees for minority representation in Kosovo which, if implemented literally, could have deepened rather than moderated ethnic divisions. In Bosnia and Herzegovina, the Dayton accord introduced strong protection of the three major parties to the conflict, but at the same time created a government at state level which has had difficulty passing laws and making decisions in a reasonably efficient way. In addition, the protection of other groups has been weak. Post-conflict elections often bring conflicting groups back to the positions that created the conflict in the first place.

If well designed and managed, elections can create legitimate political structures which promote conciliation and lead to controversial issues being solved through negotiations. If poorly designed and managed, they can simply restart passionate disputes and undermine the peace process.

Careful consideration of the closely related issues of state structure and electoral systems is therefore essential at an early stage of any peace process. Identifying the requirements of state structure and electoral system design – such as protection of minority groups with separate identity at a national or sub-national level – can help to achieve robust political solutions. This report aims at presenting an overview of the most common issues and most commonly discussed potential solutions in state structure and electoral system design, including federal and unitary states, protection of group and minority rights, protection against changes to constitutionally protected rights, and requirements for efficient government. It should provide a useful handbook for negotiators, mediators and others involved in peace processes.

The division of labor has been as follows: After initial discussions of the scope and structure of the report, Hylland and Vollan wrote the first draft of most of Parts I and II, while Blanc drafted the case studies (Part III). The drafts have been modified after discussions among the authors. All three authors are responsible for the entire report.

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SUMMARY

The report consists of three parts:

- I: Preliminaries
- II: General issues
- III: Case studies

In Part I, the scope and structure of the report is outlined, we explain and define concepts used, and we comment on the selection of the case studies.

The basic question is: How can peace and democracy be brought to a country that has recently been torn by conflict? We do not discuss this in all its aspects and details, but concentrate on issues relating to the structure of the state, the composition and powers of its decision-making bodies, and the electoral process through which these bodies are constituted and get their legitimacy. In this respect, the international community is often called upon to give assistance and advice. What kind of advice should be given? There is no simple and general answer to this; it must depend on the circumstances of the case. Nevertheless, we believe that certain general principles can be established, and in the report we attempt to do so. A more detailed description of the purpose of the report is given in Section I.1.1, and in Section I.1.2 we list issues not separately discussed.

A number of terms and concepts are used repeatedly in the subsequent discussion; some of them are defined and explained in Chapter I.2. Since we discuss societies that have been torn by conflict, the groups that have been parties to the conflict play an important role. Political identity may be tied to groups of many different types; the divisions may be between ethnic, linguistic, religious or sectarian groups, or simply between people living in different geographical areas or having different political views. We use the general term "group", which can refer to any of the divisions mentioned, or more generally to any division that seems politically relevant for those involved. In a divided society, there may exist a dominant group (which may or may not be majority, that is, consist of more than half the population), as well as one or more minority groups. We distinguish between small and large minorities. There is no sharp line between the two concepts, but we nevertheless consider them useful.

Part II mainly contains theoretical discussion, but it is illustrated by a number of examples. A short overview is given in Chapter II.1, and a somewhat more detailed summary follows here.

In Chapter II.2, we briefly describe the dynamics of post-conflict situations. The discussion starts after peace has been restored, but during the process that led to peace, deals may have been struck that have consequences for the future organization of the state. These deals are typically intended to promote the legitimate aim of balancing the interests of the various groups or providing protection for vulnerable groups, but this can go too far. Deals struck and commitments made can have undesirable consequences for the future organization of the state.

Unless pre-existing institutions can be revitalized, one must go through a process of establishing state institution, typically by adopting a new constitution. Ideally, the process should go through the following three phases:

- Election of a constituent assembly.
- Drafting of a constitution and its adoption and ratification.
- Elections of representative bodies and establishment of other permanent state organs, as provided for by the constitution.

This raises a number of questions, discussed in Sections II.2.3 – II.2.6: How soon should the first elections be held? Should a constituent assembly also serve as an interim parliament? Should the constituent assembly have the right to adopt a constitution, or should it just prepare a draft, to be ratified by referendum? To what extent can it be accepted that a country is governed by bodies without democratic legitimacy?

Internal conflict in a country is often caused by groups of the population feeling that their interests are not adequately protected. A possible solution is to give the country a federal structure, where regional units have far-reaching autonomy, protected by the constitution. This is the topic of Chapter II.3. The concept of a federal state is defined and contrasted with its counterpart a unitary state (Section II.3.2). The structure and composition of the national parliament will typically be influenced by the fact that the state has a federal structure, see Section II.3.3. While federalism may be a solution to group conflicts, it also has its problems. In particular, the autonomous regional units will not correspond exactly to the groups, unless the population structure is, or is made, fully segregated. In Section II.3.4, we ask whether this problem can be solved by what might be called "non-geographic federalism". Our general answer is in the negative, but aspects of such a system may be worth considering in some situations. In Section II.3.5, further aspects of federalism are discussed with reference to two important federal states, the United States of America and the Federal Republic of Germany.

Chapter II.4 contains a more detailed description of three federal systems, namely those of Switzerland, Belgium and Canada. The examples are chosen because these are countries where the population consists of two or more groups with a strong identity based on language, a fact reflected in the government structure.

Bosnia and Herzegovina has been through a bloody civil war, and the international community has been deeply involved in the attempts to end the conflict and build stable institutions. Therefore, in Chapter II.5, we give a relatively detailed account of the country's government structure. The war was ended by the so-called Dayton accord, which created a very complicated government structure. In fact, it has turned out that the institutions established have been almost unable to make decisions. It has also been claimed that they entail human rights problems. Bosnia and Herzegovina provides a pointed example of the conflict between on the one hand adopting provisions that are intended to promote understanding between groups in conflict and thereby bringing the conflict to an end, and on the other hand providing for effective government and general rights for all citizens regardless of ethnic affiliation.

In a federal structure, power is divided between national and regional units of government. This is not the only way power can be divided. In Chapter II.6, we discuss general aspects of division of power and, more specifically, the choice between a unicameral and a bicameral parliament (Section II.6.2) and the choice between a parliamentary and a presidential system of government (Section II.6.3).

It is generally required that in a democracy at least one legislative chamber shall be directly elected by universal suffrage and by an electoral system which gives all votes (approximately) equal weight. Under bicameralism, this chamber shall have at least as much power as the other one. We refer to it as the principal chamber. Bicameral systems vary a lot, both concerning the power and status of the chambers and their composition. In some cases, the principal chamber has essentially all legislative power, while the other one is not much more than a consultative body (weak bicameralism). Alternatively, the other chamber has real power, in the sense that it not only has the right to review legislation and raise objections, but must approve the final law, generally or within large and important areas of public policy (strong bicameralism). The latter system is common in federal states. Typically, one chamber of the national legislature is not directly elected, or not elected by a system giving all votes (approximately) equal weight. The composition of that chamber is intrinsically tied to the country's federal structure, and the arguments in favor of federalism also justify some deviation from the standards of elections applied to the principal chamber. This does not mean that any deviation is acceptable, but it is not easy to draw a sharp line. The rules actually in effect in established democracies with strong bicameralism can give some guidance for what should be considered consistent with democratic principles.

In a parliamentary system, the government is responsible to parliament or to its principal chamber. There is a division of functions between parliament and government, but no real division of power. In a presidential system, the president, whose authority is derived from the people through elections and does not depend on parliament, is head of the executive branch of government. There is a real division of power. (In addition to the pure parliamentary and presidential systems, combinations of the two are possible.) We discuss whether a presidential system, through its division of power between parliament and president, can contribute to solving conflicts of the type discussed. We are inclined to answer this question in the negative, since an elected president in all likelihood will represent that dominant group in society, as will the majority in the principal chamber of parliament.

The topic of Chapters II.7 – II.11 is electoral systems. These chapters make up a significant part of the report. The discussion is mainly concerned with elections to legislative assemblies.

General issues are discussed in Chapter II.7. For historical reasons, outlined in Section II.7.1, there exist two different traditions for how to conduct elections. Elections often predate political parties. When political parties do not exist, elections must necessarily be based on individual candidates. Then plurality or majority systems might appear to be the only options. When parties do exist, these systems are not well suited for giving representative results. In an attempt to secure more representative results, the idea of proportional elections emerged in the last decades of the 1800s. Among the first countries to introduce proportional parliamentary elections were Belgium, Germany and the Scandinavian countries. Such systems have become more widespread over the last decades. In the United Kingdom, however, parliament is still elected by plurality vote, and the same is true in most (but not all) countries whose legal and political system is based on the British model.

International standards for elections are quoted in Section II.7.2. These standard are quite general and do not single out one electoral system as the "best" or "most democratic".

Criteria for good electoral systems are discussed in Sections II.7.3 and II.7.4. Two important criteria are the following:

- Create representative assemblies. This means that a party shall get a number of seats corresponding approximately to its proportional share of the vote. This is often regarded as the overriding criterion for a fair electoral system, and it is the most important justification for proportional elections.
- Support accountability of the elected members. Another important aspect of elections is the

relationship between the electorate and the elected member of the assembly. Elections in single-member constituencies are often justified by the need for strong accountability, since a comparatively small electorate will elect its own member of parliament and maintain direct contact with the elected member.

Equality is an almost universally acclaimed value in modern, democratic states, endorsed by all the international standards previously mentioned. It is, however, not always clear what equality means. The precise definition of equal voting rights could even be different for different electoral systems. In Section II.7.5, we discuss what equality means and to what extent deviations from equality can be accepted. The latter question is answered differently for the principal chamber of parliament and for the other chamber in a bicameral system.

The principal types of electoral systems are presented in Chapters II.8 – II.11. We consider the following systems:

Plurality and majority elections in single-member constituencies (*described and discussed in Chapters II.8*):

- Plurality elections, "first-past-the-post" (*Section II.8.1*)
- Majority elections in two rounds (*Section II.8.2*)
- Majority elections by the alternative vote, AV (*Section II.8.3*)

Plurality elections in multi-member constituencies (*Chapter II.9*):

- Elections based on individual candidates, the "block vote" (*Section II.9.1*)
- Elections based on closed lists, the "party block vote" (*Section II.9.2*)

Proportional representation (*Chapters II.10*):

- List-based proportional systems (*Section II.10.1*)
- Mixed member proportional systems (MMP) or list-based proportional systems combined with elections in single-member constituencies (*Section II.10.2*)
- The single transferable vote, STV (*Section II.10.3*)

Semi-proportional systems (*Chapter II.11*):

- The single non-transferable vote, SNTV (*Section II.11.1*)
- Parallel systems (*Section II.11.2*)

Under plurality elections in single-member constituencies (Section II.8.1), the nationwide result tends to be far from proportional. Typically, but not always, large parties get more and small parties less than their proportional share of the seats. In particular, the largest party will normally get a share of the seats much higher than its share of the votes. The systems discussed in Sections II.8.2 and II.8.3 are similar to plurality elections, but also have their special features. In all cases, the election results are sensitive to how the country is divided into constituencies (Section II.8.4).

Plurality vote in multi-member constituencies, discussed in Chapter II.9, is not to be recommended for parliamentary elections. Neither of the two principal criteria mentioned above, creating representative assemblies or supporting accountability of the elected members, is best served by plurality vote in multi-member constituencies. Since such systems are in actual use, we have nevertheless chosen to discuss them.

Systems of proportional representation are discussed in Chapter II.10. This is a class of systems which will give representative results, in the sense that the elected assembly will mirror the voters more or less perfectly. The predominant dimension which should be reflected in the assembly is that of political views. However, there are reasons to believe that other dimensions are also important in order that the assembly's decisions be representative of and accepted by the people. There are two major types of proportional systems, the list-based or party systems and the preferential voting systems. The former are described and discussed in Section II.10.1. In Section II.10.2, we consider the possibility of combining what is essentially a list-based proportional system with systems of the type described in Chapter II.8. Preferential voting is the topic of Section II.10.3, where one such system, the single transferable vote, is presented.

The topic of Chapter II.11 is semi-proportional systems. Among these are the parallel systems, discussed in Section II.11.2, in which some members are elected by plurality or majority vote and some by a proportional system. This must not be confused with the mixed member proportional systems of Section II.10.3, which are truly proportional.

Ideally, an elected assembly should be representative of the people along all dimensions considered relevant by those concerned. In practice, only a few dimensions can be taken into account, and it is important to identify the most important ones. General issues related to group representation are discussed in Chapter II.12. Balancing the interests of large groups, including the majority if one exists, is the topic of Chapter II.13, while protection of small minorities is considered in Chapter II.14. In each of the latter chapters, we attempt to formulate criteria for representation (Sections II.13.2 and II.14.2, respectively). The two sets of criteria are not identical, but in both cases we require that the system – be it for balancing the interests of large groups or for the protection of small minorities – should have as little effect as possible on the composition of the elected assembly along regular political dimensions. This important criterion is often violated, as several of our examples in Chapters II.13 and II.14 illustrate.

After a bitter conflict, special group representation as discussed in Chapters II.12 – II.14 is legitimate and may indeed be needed to secure peace and stability. The long term goal, however, is to build down the group divisions and to promote the normalization of politics. Chapter II.15 contains some remarks on how the electoral system can promote dialogue and reconciliation.

In Chapter II.16, we comment on some aspects of what might in general be called "good governance", namely accountability, transparency and effectiveness.

In the case studies of Part III, the concepts introduced in the report are applied to three current conflicts, namely those in the Philippines, Sudan and Sri Lanka.

In the Philippines, discussed in Chapter III.1, there are really two conflicts. One is ethno-religious and regionally contained, requiring devolution of power (perhaps as part of a federal structure) along with protections of the interests of local minorities. The second is a more wide-ranging communist insurgency, which like the Maoist insurgencies in Nepal and India has gained strength in the years since the end of the cold war. Its solution is probably linked to the solution of the Philippines' broader political problems, which regularly lead to elected assemblies and governments which do not adequately represent the concerns of marginal (but quite populous) communities.

Sudan (Chapter III.2) suffers from innumerable many civil wars, insurrections and local tensions. The longest running civil war in Africa, between the north and south of the country, was formally ended in 2005 by an internationally mediated peace accord. The agreement calls for an interim federal structure for Sudan along with elections and an eventual referendum on independence for the south of the country. The details of interim state structure design, and especially the viability of the

federal arrangements, may decide if the agreement holds or dissolves. The electoral system and electoral administration used in the elections required under the interim arrangement may have a strong influence on the direction of Sudan's other conflicts.

Sri Lanka's conflict (Chapter III.3) represents the very common dynamics of violent conflict between a dominant majority and a medium sized minority, but the violence of the conflict, which has cost more than 60,000 lives since 1983, is anything but common. The violence of the conflict has also affected the political culture of the majority – again, a common dynamic – making the country's democracy fragile. Both the structure of the state and the system of representation can be improved so as to reduce the concentration of power and thereby encourage greater minority participation in government. This may require a range of reforms, including the devolution of power to regional units and restructuring of the state executive.

PART I: PRELIMINARIES

I Scope and structure of the report

I.1 The purpose of the report

How can peace and democracy be brought to a country that has recently been torn by conflict?

It is not the purpose of the report to discuss this fundamental and wide-ranging question in all its aspects and details. We concentrate on issues relating to the structure of the state, the composition and powers of its decision-making bodies, and the electoral process through which these bodies are constituted and get their legitimacy.

We have in mind situations where a country has been plagued by bitter internal conflict. Perhaps there has even been a civil war. (There are regrettably many actual examples of this from recent years, some of which are discussed or mentioned in Parts II and III.) When peace is restored or the level of conflict sufficiently reduced, time has come to start building stable institutions for the future.

At this point, the international community is often called upon to give assistance and advice. What kind of advice should be given? There is obviously no simple and general answer to this; it must depend on the circumstances of the case. Nevertheless, we believe that certain general principles can be established, and we attempt to do so.

The parties involved in the conflict will often be groups defined by ethnicity, language, religion or the like. Other possibilities are a purely political or ideological conflict, or simply a power struggle between competing elites. The nature of the conflict is important when post-conflict institutions shall be designed.

We take it for granted that the institutions shall be democratic, at least in the minimal sense that a minority shall not be allowed to dominate at the expense of the majority. A more difficult question is whether and to what extent minorities shall have their rights and interests protected. Any such protection is "undemocratic" in the sense that it removes certain decisions from the power of the majority. Nevertheless, in a post-conflict society special protection of minorities is definitely called for, be it achieved through the structure of the state, the composition of the decision-making bodies or the electoral system. The principal task is to weigh the need for such protection off against the interests of other groups, including the majority (if one exists), and to find ways to achieve the desired protection at minimal harm to other valid considerations, such as the effectiveness of government. Most of the report is devoted to these issues.

The basic cause of a conflict cannot always be removed, nor is it necessarily desirable to remove it. Tension among ethnic groups must be expected, and ideological struggle is a natural part of democratic life. The aim is to establish institutions that can handle conflicts in a civilized way, so that they are not played out on the battlefield, but solved democratically and peacefully.

1.2 Issues not separately discussed

Immediately after the end of a bitter conflict such as a civil war, many tasks may seem more important, or at least more urgent, than building democracy by establishing state institution and designing electoral systems. Holding elections too soon could even be detrimental to peace and stability. There exists conclusive evidence that mature democracies rarely go to war against each other. On the other hand, there are reasons to believe that in emerging or immature democracies the danger of conflict, including war, is particularly high; see, for example, Mansfield and Snyder (2005). Therefore, the order in which things are done in a post-conflict situation is important, with the building of democratic institutions not necessarily coming first in time.

There is an urgent need for securing peace and guaranteeing security. If there has actually been a war or if combat forces have been mobilized, high priority must be put on disarmament, demobilization and reintegration of these forces. Other important tasks include the protection of human rights and the rebuilding of destroyed infrastructure. More generally, economic and social life must be put back on track.

The conflict itself, especially if it has reached the level of a civil war, may have caused demographical changes in the country or parts of it. This may have been brought about deliberately by parties to the conflict ("ethnic cleansing"), or it may be the incidental effect of people fleeing hostilities. In any case, people who have had to leave their homes must be taken care of, and ideally they should be allowed to return to their pre-war place of residence as soon as possible.

These issues, although important in post-conflict situations, fall outside the scope of this report and are not discussed separately. They are, however, touched upon on a number of occasions, when relevant for the main topic of the report.

During civil wars and similar conflicts, atrocities are often committed. Afterwards, it must be decided whether and to what extent to bring those responsible to account. That is, issues of *retribution* must be addressed. In the conflict, innocent people may have been injured or had their property destroyed, or they may have had to leave their homes. This raises issues of *compensation* or *restitution*. Similar questions can arise in other circumstances, for example, during the (re)establishing of democracy when a country has been freed from foreign occupation or an authoritarian regime has been deposed. There is an extensive literature on retribution and restitution, discussing theoretical issues and describing actual cases (from the restoration of democracy in Athens after a short oligarchic reign in the year 411 BC till modern times). These issues are certainly relevant for the type of post-conflict situations we consider, but they fall outside the scope of this report. An insightful treatment of the subject is found in Elster (2004).

1.3 The structure of the report

In addition to the preliminaries in Part I, the report consists of a discussion of general issues (Part II) and three case studies (Part III).

The discussion in Part II follows the general outline mentioned in the Summary, above. That is, we discuss the structure of the state, the composition and powers of its decision-making bodies, and the electoral process. The discussion of elections and electoral systems takes up most of the space. A more detailed overview of Part II is given in Chapter II.1.

Along the way, the general issues are illustrated by examples. They are usually placed in separate

chapter or sections, to which we refer from the chapters and sections where general issues are discussed. The examples show the great variety of circumstances that exist in post-conflict situations and the many different solutions that actually have been chosen. Not all of these can be recommended. Hence the examples illustrate good as well as bad practices.

The case studies in Part III concern the Philippines, Sudan and Sri Lanka.

2 Explanation of terms and concepts

Below, we define and explain some of the terms that are used throughout the report. Other terms are introduced as needed.

Group

Political identity may be tied to groups of many different types. The divisions dealt with in this report may be between ethnic, linguistic, religious or sectarian groups, or simply between people living in different geographical areas or having different political views. We will not define each of these terms, since such definitions are in themselves often controversial. Moreover, precise definitions are not needed for our purpose. We simply use the vague and general term "group". It can refer to any of the divisions mentioned, or even more generally to any division that seems politically relevant for those involved.

Minority

In a divided society there often exists a dominant group, as well as one or more minority groups, each with its own group political identity. The dominant group can be a majority, that is, it consists of more than half the population. It can, however, also be just a plurality, that is, less than half the population but the largest of three or more groups.

Minorities are important in our discussion because they often need some kind of protection against decisions taken by the majority (the dominant group).

Small minorities

There is sometimes a need for distinguishing between small and large minorities. We will not, however, attempt to draw a sharp line between the two concepts.

A small minority will typically have a strength of a few percent of the population (for example, less than ten), but their characteristics are such that they may need special protection in such areas as the use of language, the promotion of culture etc. A group which in the country as a whole is a large minority or a majority may in some areas constitute a small minority and may need corresponding protection.

Except when a small minority is geographically concentrated, it will typically not be involved in civil wars and other major conflicts, or it will at least not be among the principal parties to such conflicts.

Large minorities

The major parties to conflicts of the type discussed in this report are normally the majority and one or more large minorities, or several large minorities in cases where no majority exists.

A large minority runs the risk of losing all influence by systematically being voted down by the majority or a coalition of other large minorities. Protection against this would typically take the form of balancing the group interest within the organization of the state, or by introducing an electoral system which secures a balance between competing groups.

To use Bosnia and Herzegovina as an example, the main groups involved in the civil war – Bosniacs, Croats and Serbs – are large minorities in the country as a whole, and each of them may be a majority in certain regions. On the other hand, Romas, Slovenians, Montenegrans etc. are small minorities. (More details about Bosnia and Herzegovina can be found in Chapter II.5.)

Federal state

If the state structure is federal, the country is divided into regional units, and a measure of autonomy is constitutionally guaranteed to these units. Sovereignty is divided and rests partially with the nation as a whole and partially with the regional units.

The concept is discussed further in Section II.3.2.

Unitary state

In a unitary state, sovereignty is undivided, rests with the people as a whole, and is exercised by the institutions of the national government. Democratically elected bodies on regional and local level have no other power than that which is delegated to them by national decision makers.

Parliamentary system

In a parliamentary system, the government is responsible to parliament. If a motion of no confidence is passed, the government cannot continue in office. It must resign, unless the constitution gives it the power to dissolve parliament and call new elections.

The concept is discussed further in Section II.6.3.

Presidential system

In a presidential system, the president is not only head of state, but also – both formally and in political reality – leader of the executive branch of government. The president's authority is derived from the people through elections. The government is responsible to the president, not to parliament.

The principal chamber

In general, one legislative chamber is directly elected by all voters on equal terms. This we call the principal chamber. Note that this is a technical definition introduced for convenience; it does not follow that the principal chamber is "principal" in a more fundamental sense.

The principal chamber can be the only one (unicameralism) or one of two chambers (bicameralism). In theory, a parliament can have more than two chambers. There are historical examples of this (see the beginning of Section II.6.2), but we know of no modern instance and ignore the possibility.

In the latter case, the composition of the other chamber could, in various ways, deviate from direct election on equal terms. For example, the representation of geographical units could be based on equal treatment of these units rather than equal treatment of voters; see Section II.3.3. Moreover,

the chamber can be indirectly elected, or in some cases even appointed.

Bicameralism is discussed in Section II.6.2. Examples of bicameral systems are given in Section II.3.5 and Chapter II.4, and also elsewhere in Part II.

3 Selection of case studies

The concepts introduced in this report are applied to three current conflicts in the case studies in Part III. The Philippines, Sudan and Sri Lanka were selected because they are pressing conflicts which have each claimed many lives over many years. Each of the three conflicts is the subject of ongoing peace processes, making analysis of state structure and electoral system design timely. The three cases also present an interesting range of conflict dynamics. The Norwegian Ministry of Foreign Affairs has played important roles in peace processes seeking to resolve each of the three conflicts studied.

In the Philippines, there are really two conflicts. One is ethno-religious and regionally contained, requiring devolution of power (perhaps as part of a federal structure) along with protections of the interests of local minorities. The second is a more wide-ranging communist insurgency, which like the Maoist insurgencies in Nepal and India has gained strength in the years since the end of the cold war. Its solution is probably linked to the solution of the Philippines' broader political problems, which regularly lead to elected assemblies and governments which do not adequately represent the concerns of marginal (but quite populous) communities.

If the Philippines is the subject of two conflicts, Sudan suffers from innumerable many civil wars, insurrections and local tensions. The longest running civil war in Africa, between the north and south of the country, was formally ended in 2005 by an internationally mediated peace accord. The agreement calls for an interim federal structure for Sudan along with elections and an eventual referendum on independence for the south of the country. The details of interim state structure design, and especially the viability of the federal arrangements, may decide if the agreement holds or dissolves. The electoral system and electoral administration used in the elections required under the interim arrangement may have a strong influence on the direction of Sudan's other conflicts.

Sri Lanka's conflict represents the very common dynamics of violent conflict between a dominant majority and a medium sized minority, but the violence of the conflict, which has cost more than 60,000 lives since 1983, is anything but common. The violence of the conflict has also affected the political culture of the majority – again, a common dynamic – making the country's democracy fragile. Both the structure of the state and the system of representation can be improved so as to reduce the concentration of power and thereby encourage greater minority participation in government. This may require a range of reforms, including the devolution of power to regional units and restructuring of the state executive.

The case studies are not based on field visits or expert local knowledge. This limits them, but it also serves to demonstrate the general applicability of the theoretical analysis in this report.

PART II: GENERAL ISSUES

I Overview of Part II

In Chapter 2, we briefly describe the dynamics of post-conflict situations. Unless pre-existing institutions can be revitalized, a new constitution must be adopted, whereby state institutions are established. Interim and transitional issues are also discussed.

Internal conflict in a country is often caused by groups of the population feeling that their interests are not adequately protected. A possible solution is to give the country a federal structure, where regional units have far-reaching autonomy, protected by the constitution. This is the topic of Chapter 3. The concept of a federal state is defined and contrasted with its counterpart a unitary state. Various aspects of federalism are discussed, in the abstract and with reference to two important federal states, the United States of America and the Federal Republic of Germany.

Chapter 4 contains a more detailed description of three federal systems, namely those of Switzerland, Belgium and Canada. The examples are chosen because these are countries where the population consists of two or more groups with a strong identity based on language, a fact reflected in the government structure.

Bosnia and Herzegovina has been through a civil war, and the international community has been deeply involved in the attempts to end the conflict and build stable institutions. Therefore, in Chapter 5, we give a relatively detailed account of the country's government structure, and we use it as a point of departure for the discussion of general issues.

In a federal structure, power is divided between national and regional units of government. This is not the only way power can be divided. In Chapter 6, we discuss the choice between a unicameral and a bicameral parliament, and the choice between a parliamentary and a presidential system of government.

The topic of Chapters 7 – 11 is electoral systems. These chapters make up a significant part of the report. The discussion is mainly concerned with elections to legislative assemblies. General issues are discussed in Chapter 7. This includes international standards for elections (Section 7.2), criteria for good electoral systems (Sections 7.3 and 7.4), as well as an extensive discussion of the concept of equality (Section 7.5).

The principal types of electoral systems are presented in Chapters 8 – 11. We consider plurality and majority elections in single-member constituencies (Chapter 8), plurality elections in multi-member constituencies (Chapter 9), proportional representation (Chapters 10) and semi-proportional systems (Chapter 11).

Ideally, an elected assembly should be representative of the people along all dimensions considered relevant by those concerned. In practice, only a few dimensions can be taken into account, and it is important to identify the most important ones. General issues related to group representation are

discussed in Chapter 12. Balancing the interests of large groups, including the majority if one exists, is the topic of Chapter 13, while protection of small minorities is considered in Chapter 14.

After a bitter conflict, special group representation as discussed in Chapters 12 – 14 is legitimate and may indeed be needed to secure peace and stability. The long term goal, however, is to build down the group divisions and to promote the normalization of politics. Chapter 15 contains some remarks on how the electoral system can promote dialogue and reconciliation.

In Chapter 16, we comment on some aspects of what might in general be called "good governance", namely accountability, transparency and effectiveness.

2 Post-conflict situations

As mentioned in Section I.1.1, we envision a situation where a country recently has been plagued by bitter internal conflict, perhaps even at the level of a civil war. Then peace has been restored or the level of conflict has been significantly reduced, and time has come to start building stable institutions for the future.

For one thing, we have in mind cases in which there has actually been armed struggle. This holds for the three case studies in Part III and several of the examples used in Part II. Moreover, deep tension and bitter conflict can exist within a country without this (yet) having escalated into warfare. Then it would of course be desirable that the conflict be solved, so that stable and viable institutions can be established without shots being fired. Even in such a case, effective institution building might require prior reduction in the level of conflict, achieved by something comparable to a "peace agreement" after an actual war.

When we below use phrases like "peace is restored", "peace process", "peace agreement" etc., we have in mind both the possibilities mentioned. Therefore, the use of the word "peace" should not be taken to imply that there has necessarily been armed conflict.

2.1 The peace process and its repercussions

In a sense, our discussion starts *after* peace has been restored or the level of conflict sufficiently reduced. During the process that led to peace or brought the country back from the brink of war, commitments may have been made and deals struck that have consequences for the future organization of the state.

These deals are often intended to balance the interests of the groups involved in the conflict or provide protection for vulnerable groups. These are legitimate objectives; indeed, a central theme of the report is the need for such arrangements in post-conflict situations. (This is the specific topic of Chapters 12 – 14, but it underlies the discussion in most of the report.)

In particular, commitments and guarantees may be needed to end the conflict in cases where the conflict itself has caused demographic changes, for example, if a previous majority has been turned into a minority or vice versa, or if other changes have occurred concerning the positions of the various groups.

Although making commitments during the peace process is necessary and legitimate, it can go too far. Deals struck and commitments made can have undesirable consequences for the future organization of the state.

A case in point is Bosnia and Herzegovina. A bloody civil war raged from 1992 until it was ended by the so-called Dayton accord of 1995. The agreement stopped the war, but it contains a complicated system of ethnic quotas and veto powers which has turned out to be a strong impediment to effective government. It has also been claimed that some of the rules contradict international human rights conventions. Since we repeatedly use Bosnia and Herzegovina as an example, a comprehensive description and evaluation of its government system is given in Chapter 5.

Although we do not discuss the peace process as such, the considerations and arguments of this report are relevant even at this stage. When entering into agreements, one should keep in mind their consequences for the long-term functioning of the political system. In particular, when representatives of the international community are aiding the peace-making process, it is incumbent upon them to advise the parties of possible conflicts between suggested agreements and sound principles of democratic and effective government.

In this connection, hard choices may have to be made. The overriding importance of ending indiscriminate killing of innocent people in a civil war, or preventing such a war from breaking out, can justify accepting rules and institutions one would ideally have avoided. Nevertheless, one should be aware of the long-term consequences of the choices made and take them into account in the decision making.

2.2 Recourse to pre-existing institutions

In the best of cases, the institutions that have to be established in a post-conflict situation already exist. One can simply revitalize the legal system that existed before the conflict broke out, reestablish the previous institutions and go on from there.

Even a bitter conflict need not have affected the existence of the country or the state. In such cases, existing or previous precedents concerning state structure, electoral system etc. may be very strong. Then there are good reasons for building on these precedents.

This is not always possible, however. There may not ever have existed institutions that satisfy, or come close to satisfying, international standards of democracy. Even where previous institutions have been based on democratic principles and have adequately represented the majority of the population, they may – in whole or in part – have been the cause of the conflict. For example, a minority may have felt, and had reason to feel, that it and its interests were not sufficiently represented and taken account of in the old system. In such a case, perpetuating the pre-conflict institutions is not likely to solve the problem, but would rather lead to renewed conflict.

Without ignoring the possibility of circumstances being different, we base most of our discussion on the assumption that after a conflict of the type considered, one should more or less start from scratch, establishing new institutions. There is nothing wrong in maintaining aspects of a pre-existing system, but in any case the main emphasis should be put on the post-conflict situation and the interests and concerns of the various groups that make up the population of the country.

2.3 Priorities and timing

As pointed out in Section I.1.2, immediately after the end of a bitter conflict, there are tasks that may seem more important – or at least more urgent – than establishing state institution and designing electoral systems. Holding elections too soon might even be detrimental to peace and stability. A lasting solution requires, however, that democratic institutions be established within reasonable time. The process should start immediately, and if possible even be prepared before the conflict has ended. As pointed out in Section 2.1, it may even be necessary – but not always desirable – that decisions concerning the future structure of government be taken as a part of the peace agreement.

When starting from scratch, the process of establishing democratic institutions should ideally go through the following three phases:

- Election of a constituent assembly.
- Drafting of a constitution and its adoption and ratification.
- Elections of representative bodies and establishment of other permanent state organs, as provided for by the constitution.

When pre-existing institutions can be relied on in whole or in part, this process may be abbreviated. In some cases, amending an old constitution could be preferable to writing a wholly new one. For the most part, however, our discussion assumes that the process is structured as described above.

Until democratic institutions are established, the country must necessarily be governed by (interim) authorities that do not have democratic legitimacy. Moreover, the process must be put in motion by such bodies, in the sense that they must adopt rules for the election of the constituent assembly. It can be left to the assembly itself to adopt its rules of procedure and to determine how the draft constitution shall be ratified, but it can also be argued that these decisions should be taken before the assembly convenes, even if they must then be made by non-elected authorities.

The interim authorities can be appointed in different ways. They can get their mandate from the United Nations or other international organs, they can be established by agreement during the peace-making process, or they can simply have taken power and declared themselves "council of the revolution" or the like. In the best of cases, the interim governing bodies have *real* legitimacy, in the sense that most of the population, including the groups recently involved in the conflict, regards them as representative of national and group interests. Nevertheless, they will always lack *formal* democratic legitimacy. Therefore, the interim period should not be unnecessarily prolonged.

On the other hand, there are disadvantages to holding elections immediately after the end of a conflict. Some of these are of a purely practical nature. The necessary infrastructure, including reliable voters' lists, may not exist, and other tasks may be considered more urgent than preparing for and holding elections. With international assistance, however, it might be possible to carry out meaningful elections within a very short time, and in some countries this has actually been done.

More importantly, there are arguments of a principal nature for not holding elections too soon. Peace and stability may be best served by taking other steps before elections are held and democratic institutions established. These important considerations are mentioned in Section I.1.2, but they fall outside the scope of the report and are not discussed further. When attention is restricted to the political system, it should be noted that in many post-conflict situations (though not all), no party system has yet developed and there exists no democratic culture or tradition. In such cases, immediate elections may aggravate the conflict rather than solve it.

The first elections cannot and should not be postponed until a full-fledged party system and a mature democratic culture is in place. Indeed, if no elections are held, this state is likely never to be reached. The development of the party system and the democratic culture requires a process of trial and error, where imperfect institutions are put to the test of actual elections and thereby develop. It is also possible that the holding of elections in itself contributes to the establishment of peace and reduction of conflict.

Another relevant consideration is the relationship between on the one hand the elected bodies, and on the other hand the legal system and the rest of the state apparatus. An elected parliament cannot operate in a vacuum; it needs an administration to carry out its decisions and a basic legal structure within which to function. These elements must therefore be in place before the first elections can be held, although they must then be established by non-elected interim authorities or inherited from a – possibly non-democratic – previous regime. In the long run, the legal system and the administrative structure of government shall be shaped by democratic decisions taken by elected bodies, but it will necessarily take time to reach that state of affairs.

In conclusion, the first elections should be held reasonably soon after the end of the conflict, even if they must take place under less-than-ideal circumstances. On the other hand, insisting on elections within a few months, which has sometimes been done, can do more harm than good. How soon the elections should be held, will depend on the circumstances and cannot be specified in the abstract. In difficult cases, it might be appropriate to wait as much as two to four years after the end of the conflict before elections are held. In any case, the process for establishing democratic institutions should start much sooner than this.

There are arguments for electing the first ordinary parliament for a shorter period than that stipulated by the permanent rules. The results of the first elections may be somewhat arbitrary due to the imperfectly developed political system, and it is desirable to limit the temporal consequence of this. Also, frequent elections may itself contribute to a more rapid development of the political system. On the other hand, if people are called to the polls again and again with short intervals, the interest in electoral politics is likely to be reduced, which in turn could lead to low voter participation. A succession of parliaments elected for short periods is therefore not to be recommended.

2.4 The constituent assembly

Should a constituent assembly also serve as a (provisional) parliament? There are theoretical reasons for answering this question in the negative.

Ideally, a constitution should be written behind a "veil of ignorance", at least a partial one. That is, general facts about the country, in terms of geography, composition of the population etc., should be known to the constitution makers, but they should not know the specific issues that will be decided by the state bodies they establish. Otherwise, there is a danger that the constitution will be tailored specifically to current conflicts, to the detriment of more important long-term considerations.

Hence one should perhaps attempt to keep the constitution-making process and ordinary parliamentary work separate. To this end, one might prohibit the constituent assembly from doing anything but writing a draft constitution. One could go even further by barring members of the constituent assembly from being elected to the ordinary parliament, at least for a period after the adoption of the constitution.

These measures will prevent members of the constituent assembly from taking account of their

personal interests, as present or future legislators, when drafting the constitution. In all likelihood, they will represent *groups* of various kinds, such as political parties, participants in the previous conflict, or any other type of groups as the concept is defined and explained in Chapter I.2. Nothing prevents them from attempting to tailor the constitution to the (perceived) interests of these groups. The desire to have the constitution written behind a veil of ignorance is a laudable one, but it is not achieved by the measures discussed here. It could be achieved by letting the constitution not come into force until a very long time after it has been adopted, for example a generation, but the disadvantages of this solution are strong and obvious.

If the constituent assembly is not also an interim parliament, either elections must be held at (about) the same time both to a constituent assembly and to an interim parliament, or the period in which parliamentary functions are carried out by non-elected bodies must be prolonged. Both alternatives are undesirable.

There are arguments in both directions, but all things considered we believe that the best solution will usually consist in letting the constituent assembly also serve as an interim parliament.

2.5 The draft constitution

Should the constituent assembly have the power to *adopt* the constitution, or should it only present a draft, to be ratified by somebody else, for example, by the people in a referendum?

A constitution will normally contain a lot of quite technical rules, concerning composition of government organs, electoral system, division of power etc. Such rules are hardly suited for decision by referendum; they represent a clear instance of issues for which representative democracy is the appropriate form of decision making. In addition, the constitution will typically include provisions codifying basic human and civil rights, which should not be at the disposal of a popular majority. These considerations count against putting the draft constitution to a referendum.

On the other hand, the legitimacy of the constitution could be enhanced by its having been adopted by the people in a referendum. Moreover, there may be disagreement on specific and important issues that are well suited for debate among the general public and decision by referendum, such as whether the state shall have a unitary or a federal structure. (These concepts are defined and discussed in Chapter 3; see, in particular, Section 3.2.)

In any case, in a post-conflict situation one should strive for a constitution that can be adopted by broad consensus. Ratification by referendum should therefore require more than a simple majority. By way of example, in the October 2005 constitutional referendum in Iraq, the draft would have been rejected if there had been an overall majority against it, and also if there had been a two-thirds majority against it in each of at least three of the country's 18 governorates (provinces).

This exact rule can hardly be copied in other cases. Moreover, the appropriateness of the specific rule has been challenged. On the one hand, by its very design it allowed two major groups (Shiite Arabs and Kurds) to pass the constitution in spite of almost unanimous opposition from a third large group (Sunni Arabs). On the other hand, any rule requiring more than an ordinary majority increases the probability that no constitution will be adopted. Hence the costs of not having a constitution must be traded off against the need for it receiving general support from all groups. Very strict requirements may in the aftermath discredit the process because a general opinion may be formed that a small group has been able to block the decision.

Nevertheless, arrangements similar to those of Iraq may be suitable when a broad consensus, cutting across groups of various types, is required for the constitution to function satisfactorily.

2.6 "All public power originates with the people"

This slogan is a basic principle of modern democratic rule, and it is explicitly stated in the constitutions in many countries, of which Germany and Sweden can be mentioned as examples.

In a transitional period after the end of a conflict, the principle cannot always be respected. The country must be governed, and often there exists no institutions with democratic legitimacy. Then rule by non-elected bodies must be accepted, but only for a limited period, which must not be unnecessarily prolonged; see Section 2.3.

Even in established democracies, the principle does not require that only elected officials can exercise public power.

For one thing, parliaments and similar supreme bodies of state cannot and should not themselves run the government on a daily bases. Public power must necessarily be vested in executive and judicial officials who are not elected, but whose power – perhaps through a long and complicated chain – originates with elected bodies or officials and therefore with the people. This is the natural state of affairs and causes no problems from a democratic point of view.

Historically, it has been the rule rather than the exception that public decision makers, even at the top level of society, have not been elected and have derived their power from other sources than the people. In some unquestionably democratic countries, this would appear still to be the case. The most obvious examples are the constitutional monarchies of Western Europe. In most of these, Sweden being an exception, a literal reading of the law would lead to the conclusion that the monarch has considerable public power, derived not from the people, but from inheritance. In practice, however, these monarchs do not exert personal power. They function as a symbol of the nation and of national unity, and to the extent they formally make decisions, they automatically approve what has been decided by their ministers, who (albeit indirectly) derive their power from the people. These systems are therefore acceptable from a democratic point of view.

Legislative bodies with real power should always derive this power from the people. It is often stated that in a democracy at least one legislative chamber should be *directly elected by universal and equal suffrage*; see, for example, CSCE (1990), items (7.2) and (7.3), quoted below in Section 7.2. The requirement of equal suffrage must be taken to imply that the electoral system for this chamber should give all votes (approximately) equal weight. We call it the principal chamber, see definition in Chapter 1.2. It is further discussed in the beginning of Section 6.2.

An additional chamber may be indirectly elected or appointed. In a federal system, in particular, there may be good reasons for having legislative bodies that represent the regional units of the federation, or at least are based on these units. Such bodies need not be directly elected. (See Section 3.3 with further references.) Even a non-elected (appointed) legislative chamber can be acceptable, provided that its powers are limited; see the discussion of "weak bicameralism" in Section 6.2. An example of a non-elected chamber with limited powers is the House of Lords in the United Kingdom, which can only delay a bill but not stop it. Another example is the Canadian Senate, see Section 4.3.

The question remains whether it could, on a permanent basis, be acceptable that decisive public

power is vested in bodies or persons who are not elected at all, and who cannot claim that their power is legitimized through a chain of authority originating with the people.

There are examples of post-conflict situations in which a group of people have seized power, and arguably could justify this by reference to the necessities of the situation. They have then tried to perpetuate their influence by establishing a non-elected permanent body with (at least) veto power over legislative and/or executive decision, and whose task should be to "defend the ideals of the revolution" or the like. Below we give two examples of this. One of them has been abolished, but the other one still exists.

From a democratic point of view, permanent arrangements of this kind are not acceptable.

The "Council of the Revolution" in Portugal

After the revolution in Portugal in 1974, the officers and the communists formed a revolutionary council with a veto powers over both legislative and executive decisions. The revolutionary council appointed its own members. After a long debate, and as part of a constitutional reform in 1982, the council was replaced by a Council of State, which is an advisory body to the president. The new council has *ex officio* members from regional governments and the judiciary, as well as some members appointed by the president and the parliament. It is only rarely called into session.

The revolutionary council was supposed to protect the values of the revolution, but it was in the end abolished in favor of purely democratic bodies.

The "Guardian Council" in Iran

After the 1979 revolution in Iran, a semi-democratic system was introduced. The President is elected, as is the Parliament, officially called the Islamic Consultative Assembly. In addition, decision-making power is vested in the Guardian Council, the Council of Experts and the Supreme Leader.

The Guardian Council has the authority to oversee all fundamental issues relating to the state, including its relationship to Islam. It interprets the constitution and determines if laws passed by parliament are constitutional. It also has the authority to approve all candidates running for President, for Parliament and for the Council of Experts.

The Supreme Leader is elected by the Council of Experts, which consists of clerics only. The Council of Experts is directly elected after a screening of the candidates by the Guardian Council, not only on their religious capabilities but also on their political inclination. The Guardian Council has twelve members, six appointed by the Supreme Leader and six elected by Parliament after nomination by the head of the judicial branch, who in turn is selected by the Supreme Leader.

The process for appointing the Guardian Council, the Council of Experts and the Supreme Leader contains elements of election, by the people or by Parliament. It is, however, impossible to claim that the Guardian Council derives its power from the people. Since this body has the power to make important decisions affecting public policy, we have a clear violation of the principle that all public power originates with the people.

3 State structure – unitary or federal

3.1 Federalism as an instrument to reduce conflict

Internal conflict in a country is often caused by a group feeling that its interests are not adequately protected by the existing government structure. (The group can be of any of the types mentioned when the concept was defined and explained in Chapter I.2.) There may even be more than one group having similar grievances.

Post-conflict solutions must take account of this. A central task is to design institutions that respect the interests of the various groups, including the majority, if one exists.

Could one give each group a piece of the country and let them rule themselves? This might seem like a simple and straightforward solution, but it has obvious problems. The groups need not be geographically segregated, in which case the proposal would require extensive relocation of people. If the groups are ethnically defined, this would imply ethnic cleansing on a grand scale, and for other types of groups the consequences may be equally undesirable. Moreover, in many areas of public life there is probably a real need for coordination on a national level. This can only – or at least most conveniently – be achieved through a national government. Hence there is a considerable cost to abolishing the national government altogether.

There is also another objection to the arrangement just mentioned. It may perpetuate a situation in which group division is the main conflict dimension. As things develop and the situation is normalized, it may be that the ordinary political dimension comes to dominate in people's minds, but borders once drawn, cannot easily be abolished or redrawn. (Dividing up the country could even *create* group conflicts where none existed before, but we assume that the point of departure is the existence of groups which feel that their interests are not adequately protected by the existing government structure.)

Nevertheless, a case can be made for dividing the country into regional units, which are given a considerable degree of autonomy. This amounts to introducing a *federal* structure of government. If the regional units approximately correspond to the groups whose interests are at stake, federalism can contribute significantly to the reduction of conflict. On the other hand, this solution usually creates another problem, namely that of the minority within the minority. Unless the population structure is or is made perfectly segregated, some people will live in a regional unit dominated by another group. Their interests must also be taken into account when the post-conflict institutions are designed. The objection that conflict lines may be perpetuated, applies to federalism as well, but it is not as important as in the case discussed above, where the proposal was a division of the country into separate states.

3.2 Federalism – definition and basic characteristics

In a *unitary* state, sovereignty is undivided, it rests with the people as a whole, and it is exercised by the institutions of the national government. Democratically elected bodies can exist on regional and local level, but they have no other power than that which is delegated to them by national decision makers. Legally, nothing prevents the national legislature from restricting or even abolishing regional and local autonomy, although this may politically be difficult.

In a *federal* state, the national constitution provides that the country shall be divided into regional units, and a measure of autonomy is guaranteed to these units. Regional autonomy can only be restricted by constitutional amendment. In such a case, one might say that sovereignty is divided and rests partially with the nation as a whole and partially with the regional units.

Just as a federal state must be distinguished from a unitary one, it must – in the opposite direction – be distinguished from a confederation or union of independent states. In the latter case, sovereignty rests with each member state. The union is a system of treaties or agreements between these states, involving delegation of authority from the members to the union. We shall not have much to say about this type of organizations.

When discussing federalism generally and in the abstract, we refer to the two levels of government as the *national* and the *regional* one. The actual terminology varies. The regional units can, for example, be called *states* (Australia, India and the USA), *provinces* (Canada), *cantons* (Switzerland), *federation subjects* (Russia) or *entities* (Bosnia and Herzegovina). When describing and discussing a specific case, we use the country's own terminology or a translation thereof.

There might appear to be a clear-cut distinction between unitary and federal states, but it is possible to imagine cases that are hard to classify. If the constitution merely states that the country is divided into communes, which are governed by elected bodies and whose authority is defined by law, the state is clearly unitary. What if the constitution gives the communes the right to levy taxes, within limits stipulated by law? Still the communes do not have independent and constitutionally guaranteed power, but the example can be continued, the communes' constitutionally mandated power being expanded in small steps, so that it is unclear when the line to federalism has been passed. In spite of this, the concepts unitary and federal are precise enough to be useful.

The establishment of a federal state need not be motivated by the concerns of Section 3.1. Even if the population is homogenous and there are no particular group conflicts, a general preference for decentralization of power can justify federalism. Giving power to regional units decreases the distance between those who govern and those who are governed, but this can also be achieved through delegation in a unitary state. More fundamentally, division of power reduces the danger that it be abused. Within a specific level of government, power is typically divided among the legislative, the executive and the judicial branches, and possibly also between several chambers of parliament. (This is discussed further in Chapter 6.) Similarly, a case can be made for constitutionally protected distribution of power between the national and the regional level, thus preventing the national government from unilaterally recentralizing power.

Typically, the national constitution of a federal state is the supreme law of the land. It is binding on governmental authorities on all levels and takes precedence over any other law, including the constitutions of the regional units (if such documents exist). This must be seen as a defining characteristic of a federal state; had the regional constitutions been superior to the national one, the whole arrangement would be more like a confederation or union of independent states.

The procedure for amending the national constitution will usually involve the regional units. If the constitution, which presumably shall protect the autonomy of the regional units, could be amended by a decision taken solely by national political bodies, the protection would in reality be quite weak. This does not mean that one regional unit on its own can veto a constitutional amendment. Typically, what is required is not unanimity but a qualified majority. (In a confederation or union of independent states, by contrast, a change in the basic rules will require a new treaty which must be approved by all member states.)

Traditional federalism is *symmetric*, in the sense that all regional units have the same degree of

autonomy and the same powers. In some cases, however, the appropriate state structure may be *asymmetric* federalism, where different regions have varying degree of autonomy. Assume that the population of a country consists of a majority and one or more regionally concentrated minorities. (Sri Lanka is an example of a country having that kind of a demographic structure.) Then the minorities may want autonomy for their regions, while the population of regions dominated by the national majority may feel no need for similar arrangements. Whether asymmetric federalism is a good solution must be determined in the individual case, but it should not *a priori* be ruled out. Spain has a state structure which can perhaps be classified as asymmetric federalism. In general, it is a unitary state, but Catalonia has wide-ranging, and the Basque Country somewhat less extensive, regional autonomy.

The number of regional units in a federation varies a lot. In some cases it is quite high, for example, it is 50 in the United States of America and 16 in the Federal Republic of Germany, to take the two cases discussed in Section 3.5. However, there also exist federations with a smaller number of members, all the way down to two. Potentially, there are special problems related to a federation of two units. The smaller one may feel that it is a permanent minority, but if power is equally divided, the larger unit may feel that the system is unfair. With three or more units, alliances can change, so that nobody is permanently in the minority. In the recent past, we have seen that Czechoslovakia did not manage to stick together, and it is uncertain how the federation between Serbia and Montenegro will develop. Belgium can be seen as a union of two parts, since the language divide is important and there are two large linguistic groups (Dutch and French). As described in Section 4.2, Belgium has a more complicated structure, and there is a third, albeit quite small, linguistic group (German). The Belgian state still exists, but many functions have over the last decades been transferred to units below state level.

3.3 The national parliament in a federal state

The defining characteristic of a federal state is the autonomy of the regional units. This must logically be distinguished from the rules for decision making on the national level, including the electoral system for (the various chambers of) the national parliament. In practice, however, there is a connection.

A unitary state consists of its inhabitants or citizens. To the extent equal treatment is an ideal, it must necessarily be *individuals* (inhabitants, citizens, voters) who are treated equally. (It is not likely to make a big difference whether inhabitants, citizens or voters are considered. We do not discuss the question, except for a few remarks in Section 7.5 where we ask how equality should be defined.) Whether some limited deviations from equality are acceptable, is a different question. It is not discussed here, but is considered in Section 7.5. It is also a central issue in the discussion of balancing the interests of large groups and protection of small minorities, see Chapters 13 and 14.

A federal state has, in a sense, two types of members, the citizens and the regional units. Therefore, "equal treatment" can be given two different interpretations:

- A Equal treatment of *individuals* (inhabitants, citizens, voters)
- B Equal treatment of *regional units*

Corresponding to these two notions of equality, there are two relevant but competing considerations that are relevant when designing the system for representation in the national parliament. On the one hand, it can be argued that individuals shall have equal influence, in which case representation of the regional units should be proportional to their numbers. (Alternatively, the electoral system could

pay no attention to the division into regional units, but that seems unnatural in a federal state.) On the other hand, the federation can be seen as a cooperative arrangement between the regional units, in which case these units are to be treated equally and given equal representation on the national level. By analogy, in international organizations it is not uncommon that each member state has one vote regardless of size (although actual power may vary even in such organizations).

It is hardly conceivable, and it would be problematic from a democratic point of view, if the composition of the national parliament was based solely on B, so that each regional unit – large or small – had equal representation. In Section 2.6 we referred to CSCE (1990) and drew attention to the oft-stated requirement that in a democracy at least one legislative chamber shall be directly elected by universal and equal suffrage (see quotation in Section 7.2). We interpret "equal suffrage" as requiring that the electoral system for this chamber shall give all votes (approximately) equal weight, which means that representation must be based on A. Hence the regional units cannot be equally represented. In federal states there will typically be a chamber that satisfies these requirements, but in addition there may be a chamber whose composition in whole or in part is based on B. The members of such a chamber may be directly elected, but other modes of election or appointment are also conceivable. In Section 3.5 we present two examples to illustrate this. Other examples can be found in Chapters 4 and 5. See also Section 6.2.

Even in a unitary state, parliamentary representation need not be based solely on A. Therefore, the existence of a chamber with representation based on regional subdivisions and influenced by principle B, does not imply that the state is federal. On the other hand, there are limits to how far the electoral system of a unitary state can deviate from equal treatment of individuals without violating basic democratic principles. Such limits exist in federal states as well, but they are wider, since it is legitimate to take account of the intrinsic features of federalism when designing the electoral system on the national level.

3.4 "Non-geographic federalism"

In Section 3.1, the point of departure was a wish to protect the interests of different groups. Ordinary federalism, based on geographical units as described in Section 3.2, will achieve this goal if the groups concerned are simply the population of different regions. For other types of groups, federalism is at best an imperfect solution, unless the population structure is, or is made, fully segregated.

Could this problem be solved by what might be called non-geographic federalism? By this we mean a system in which power is divided between a national government and governmental units on a lower level, but each of the latter units has authority not over a specific geographic area, but over a group of the population defined by some other criterion. Then everyone will belong to the "right" lower-level unit, and the problem of minorities within minorities does not exist. Also, the country has a national government, which can secure coordination and take care of tasks that necessarily must be solved nationally. Hence the problems mentioned at the end of Section 3.1 are solved.

In order to implement such a solution, it must somehow be registered who belong to which of the lower-level government units, which requires compulsory revelation of, for example, ethnic affiliation. We have objections to imposing such a requirement on all citizens and consider this a serious objection to non-geographic federalism. A similar issue is discussed in Section 14.2 in connection with group quotas in parliamentary elections.

There are other objections as well. Significant parts of the legal system and many government

functions are intrinsically tied to the land. This includes property law, zoning regulations, construction of physical infrastructure, exploration of natural resources, and many other issues. In a non-geographic federal system, all of this must remain the responsibility of the national government. This limits the degree to which power can be decentralized on a non-geographic basis. Moreover, if the non-geographic lower-level government units are given substantial power over a broad range of issues, people who live in the same community will be governed by different legal systems. This necessary causes significant coordination problems. It is not easy to foresee the extent and nature of these problems.

To our knowledge, no country has attempted to implement non-geographic federalism in a genuine sense. Given the objections discussed above, there seem to be good reasons for this.

One can, however, imagine a system in which there exist bodies representing groups not defined by place of residence, but these bodies do not exercise substantial power over a broad range of issues. Instead their authority is restricted to more narrowly defined fields. Typical examples will be bodies representing ethnic or linguistic groups, with competence in areas such as culture or education. The rules for electing or appointing the bodies need not require compulsory registration of group affiliation, and significant coordination problems can be avoided. At the same time, such an arrangement might be sufficient to meet the needs of those who feel that their interests are not adequately taken care of by a traditional (unitary) form of government.

In some countries, family law varies or has varied between religious communities. This can be seen as an arrangement of the type just mentioned, but it creates coordination problems – though perhaps not insurmountable ones – in cases such as inter-community marriages. More importantly, there may be a tension between the wish to protect universal human rights, including non-discrimination of woman, and group autonomy. We do not further discuss these difficult questions.

The Belgian system, described in Section 4.2, contains elements of the kind discussed here. According to the constitution, Belgium is a federal state made up of communities and regions. The regions are geographically defined, but the communities are not. They are the French Community, the Flemish Community, and the German-speaking Community. For each community, there is a Community Parliament with authority within specific fields. The whole system is quite complicated and is not described in detail here. Complexity is in itself a disadvantage. Arrangements of the Belgian type might nevertheless be worthy of consideration in post-conflict situations.

3.5 Examples and discussion

In Chapter 4, three federal systems (Switzerland, Belgium and Canada) are described in relatively great detail. They are chosen because they seem particularly relevant to the discussion of federalism in post-conflict situations.

In order to illustrate more general aspects of federalism, we here discuss two other examples, namely the United States of America and the Federal Republic of Germany (*Bundesrepublik Deutschland*). Other examples could have been used instead, but we have chosen these two because they are important and well-known countries with long, stable and well-developed traditions for democratic federalism. The US Constitution took effect in 1789 and the Federal Republic of Germany was established in 1949.

In the USA the national level of government is referred to as the *union*, while a regional unit is a *state*. The corresponding German words are *Bund* and *Land* (plural *Länder*).

In both countries, the national constitution is the supreme law of the land, not only in the sense of being the superior source of federal law, but also by being superior to the regional legal systems. (As pointed out in Section 3.2, this is typically the situation in federal states.) The consequence is not that regional law must always yield to national legislation. The national constitution divides the legislative power between the two levels of government, and a statute adopted by the national legislature may be invalid if it intrudes into the sphere of regional legislative power.

Legislative power is regional unless the national constitution explicitly provides otherwise. That is, national laws must have explicit constitutional authorization. The constitution may rule out certain types of legislation altogether, for example, in order to protect individual rights. Apart from this, the regional level has the residual legislative competence, that is, the right to legislate in areas not constitutionally assigned to the national level. This is the situation in the USA and in Germany and in many other federal states, but it is not a necessary feature of federalism. There can be federal states in which it is the other way round, that is, the legislative powers of the regional units are explicitly enumerated and the national legislature has the residual competence.

The composition of the national legislatures of the two countries is clearly influenced by the ideals of federalism. In this connection we refer to Section 3.3; see, in particular, principles A and B introduced and discussed there. In each country, there is a legislative body with a composition based solely on principle A, and another body where the representation is wholly (the USA) or predominantly (Germany) based on B.

The national legislature of the USA, the *Congress*, consists of two chambers, the *Senate* and the *House of Representatives*. Each of the two principles A and B, equality among individuals and equality among states, is applied in pure form to one of the chambers. The seats in the House of Representatives are apportioned among the states in proportion to population. (Hence this is the principal chamber, as that concept is defined in Chapter I.2.) In the Senate, the states are equally represented. The most populous state has about 68.5 times as many inhabitants as the least populous one (according to the 2000 census, see Huckabee (2001) Table 3). All members of Congress are directly elected by plurality vote. It should be noted that the Senators do not represent their states in the sense of being appointed by or responsible to any body of state government. It is often said that the Senate is the states' chamber. This is only true in the sense that its composition is based on equality among the states.

The two chambers have essentially equal power, since all laws must be approved by both. The Senate has some special functions relating to the appointment of public officials and the ratification of international treaties and the House of Representatives has a privileged position concerning revenue bills, but the general picture is that of two equally powerful chambers.

In Germany, national legislative power is shared between the Federal Parliament (*Bundestag*) and the Federal Council (*Bundesrat*). The Federal Parliament is directly elected by a so-called mixed member proportional system, explained in Section 10.2. It guarantees proportional representation of political views and leads to the *Länder* being represented in (approximate) proportion to their population. The Federal Council consists of delegates from the *Länder* governments. Each *Land* has between three and six votes depending on population. The ratio between the populations of the most and least populous *Land* is more than 25. That is, representation is not equal, but compared to their population the smaller units are strongly overrepresented. Hence a compromise has been struck between principles A and B, with emphasis on B. Voting rights in the Federal Council belong to the *Länder* governments as such. The delegates can be instructed to vote in a specific way and can therefore not be regarded as representatives with an independent mandate. With reference to the discussion in Section 2.6, we can say that the power of the Federal Council originates with the people, but through a fairly complicated chain. In each *Land* there is a parliament directly elected by

the people, the government is elected by and responsible to this parliament, and the government decides how the votes in the Federal Council shall be cast.

The two bodies do not have equal power. For some types of laws, both must agree, and hence the Federal Council has veto power. In other cases, the Federal Council only has the right to object and delay, but it does not in the end have veto power. On the other hand, the Federal Council has some functions of an executive nature. We do not discuss this in detail. All in all, there is no doubt that the directly elected Federal Parliament is the more powerful body.

There are several possible procedures for amending the US constitution, but the one used most often in practice requires a two thirds majority in both houses of Congress and the ratification of the amendment by the state legislatures of three quarters of the states. In Germany, an amendment must be adopted by a two thirds majority in both the Federal Parliament and the Federal Council. In both cases, therefore, an amendment will fail if a significant number of the regional units, through their legislatures or governments, do not approve it.

The US Constitution is old and relatively short. It has been amended only 27 times over a period of more than 200 years. The German constitution (*Grundgesetz*, literally "Basic Law") is long and detailed, and it is frequently amended. Since 1949 more than 50 laws to amend the constitution have been adopted, some of them affecting a large number of provisions.

In both countries, there is a strong tradition for judicial review of legislation. That is, the courts can be called upon to judge whether a law is consistent with the constitution. If this is answered in the negative, the court has the right and duty to declare the law null and void or refuse to apply it. This makes constitutional protection of individual rights more effective, since the individual need not rely on the legislature voluntarily respecting the constitution when adopting laws, but can have the question of constitutionality determined by an independent body. In addition, in a federal state judicial review provides a mechanism for solving conflicts of authority between national and regional units of government. Such conflicts can hardly be avoided, even if the relevant constitutional rules are precise and detailed.

The US Constitution contains no explicit provision mandating judicial review. The practice has been created and developed through decisions of the US Supreme Court, starting in 1803. Judicial review is exercised by the ordinary federal courts, with the Supreme Court having the last word. (State courts have similar functions within their jurisdictions.)

The German constitution of 1949 established a separate body, the Federal Constitutional Court (*Bundesverfassungsgericht*), to serve as the "protector of the constitution". The Court can adjudicate cases of many different kinds. Most important, at least in terms of the number of cases, are individual constitutional complaints (*Verfassungsbeschwerden*), which can be raised by anybody who claim that their basic constitutional rights have been violated. More pertinent to the federal system, the Court can be called upon to solve conflicts of authority between *Bund* and *Länder*. Moreover, an individual complaint can be based on a claim that legislation has been adopted in violation of the constitutionally determined division of power.

Since the US Constitution is short and rarely is amended, a large body of constitutional jurisprudence has developed, in which the Supreme Court has interpreted and developed the text, and also to a considerable extent amended it. The constitution can hardly be understood without reference to this jurisprudence. In spite of the different nature of the two constitutions, the same is true for Germany. The real meaning of the constitution can only be grasped if the practice of the Federal Constitutional Court is taken into account.

4 Further examples of federal systems

When federalism is proposed as a solution to internal conflict, as outlined in Section 3.1, reference is often made to the federal systems of Switzerland, Belgium and Canada. These are all countries where the population consists of two or more groups with a strong identity based on language, a fact reflected in the government structure.

We will in the following describe the federal models of these countries. One should bear in mind that the models have developed over time and work by tradition as much as by law or pure logic. There are unwritten rules which make the systems work, and the models cannot be transferred directly to other countries with different traditions.

4.1 Switzerland

The regional units of government are called *cantons*. The country has four official languages. As a consequence, different words are used to designate the national government. For example, Switzerland is an *Eidgenossenschaft* in German and a *Confédération* in French. As a compromise of sorts, the Swiss sometimes use Latin and refer to their country as *Confoederatio Helvetica*. The country is, however, a federal state, not a confederation as that word is used in Section 3.2. We refer to the national level as the *federation*. In some cases, we use the German names of state bodies and institutions, German being the language spoken by a majority of the Swiss population.

Relationship between the cantons and the federation

Switzerland consists of 23 cantons, three of which are each divided into two "half cantons". The latter have the same autonomy as the "full" cantons, the difference being related to representation on the federal level. Therefore, one should perhaps say that there are 26 cantons.

The cantons have far-reaching powers. The constitution gives a detailed account of what is to be decided by the cantons and what is the power of the federation. Schools and culture, including the choice of language to be used in the canton administration, is decided at canton level. In addition, there is a long list of other tasks that are carried out by the cantons.

Organization at the federal level

The parliament (*Bunderversammlung*) has two chambers. The *Nationalrat* has 200 members, elected in the cantons for a term of four years by a list system of proportional representation. The number of seats per canton is proportional to population, with a minimum of one. The *Ständerat* has 46 representatives, two from each "full" and one from each "half" cantons. The cantons decide how they are elected. The two chambers are equal in the legislative process.

The seven members of the government, the *Bundesrat*, are elected in a joint session of parliament, one by one by majority vote. (That is, the electoral system is similar to the one discussed in Section 8.2.) All areas and languages are supposed to be properly represented. Even though the electoral system could give all seats to the majority group or to a large group in the middle of the political landscape, there is a tradition for electing members from all major parties represented in parliament. The term of office is the same as that of the *Nationalrat*.

The president of the government (*Bundespräsident/in*) is elected by a joint session of parliament for

one year among the seven members. The president is both head of state and head of government (prime minister). The president cannot be immediately re-elected. There is tradition for rotating the position among the cantons and languages.

Referenda

Referenda are often used. For some types of legislation, including constitutional amendments, referenda are mandatory.

Constitutional amendments (and certain other measures) require a "double majority" to be approved by referendum. That is, a majority of those participating in the referendum must vote yes, and there must be a majority for the proposal in a majority of the cantons. When deciding what is the "majority of the cantons", each "full" canton has one vote while each "half canton" has half a vote.

4.2 Belgium

The federal structure

Belgium can be called a "double-layered" federal state, since there are two types of entities below the national level, communities and regions. Regions and communities both have their own elected assemblies and governments.

The communities are the French Community, the Flemish Community and the German-speaking Community. The regions are the Walloon Region, the Flemish Region and the Brussels Region. In addition there are four linguistic regions, the French-speaking region, the Dutch-speaking region, the bilingual region of Brussels Capital and the German-speaking region, but these do not have their own decision-making bodies.

The Walloon Region is made up of the provinces Walloon Brabant, Hainaut, Liege, Luxemburg and Namur. The Flemish Region is made up of the provinces Antwerp, Flemish Brabant, West Flanders, East Flanders and Limburg.

Below these levels there are "communes", which are subdivisions of the linguistic regions.

The national parliament

The Parliament has two chambers, the Chamber of Representatives and the Senate.

Each chamber is divided into a French linguistic group and a Dutch linguistic group. This division is important, since certain so-called special majority laws require a majority within each linguistic group, in addition to two-thirds overall majority.

There exists an "alarm procedure", which does not give anybody veto power, but provides for particularly thorough consideration and debate when there is a danger that a measure might "gravely damage the relations between the communities". If at least three-quarters of the members of one of the linguistic groups sign a motivated statement declaring that a proposal is of such a nature, parliamentary procedure is suspended and the matter is referred to the Council of Ministers. Within thirty days, the Council of Ministers gives its recommendations and invites the chamber involved to express its opinion on these recommendations or on the original proposal, possibly in revised form. This procedure can only be applied once by the members of a linguistic group to the same issue. It

does not apply at all to the budget or to laws requiring a special majority.

The Chamber of Representatives consists of 150 members, who are directly elected in 20 constituencies by a proportional electoral system. The number of seats assigned to each constituency is based on its population.

The Senate's composition is more heterogeneous and reflects the objective to ensure, at least in part, representation reflecting the country's federal structure. The Senate has 71 members, divided into three categories.

- 40 senators are directly elected in three constituencies, the Flanders constituency, the Walloon constituency and the bilingual Brussels-Halle-Vilvoorde constituency. The Dutch-speaking voters elect 25 and the French-speaking voters 15 senators. The residents of the Brussels-Halle-Vilvoorde constituency can choose whether they want to vote in the election of Dutch-speaking or French-speaking senators.
- 21 senators are appointed by and from the assemblies of the three Communities, ten by the Parliament of the Flemish Community, ten by the Parliament of the French Community and one by the Parliament of the German-speaking Community.
- Ten senators are chosen by the two above-mentioned categories of senators. Six of them are appointed by the other Dutch-speaking senators, and four by the other French-speaking senators.

In addition, certain members of the royal family are senators by right.

For regular legislation the Senate has reviewing powers only and the Chamber of Representatives has the decisive powers. For a number of specified types of legislation, including the Constitution, election laws and laws involving vital interests of the communities or regions, approval by both chambers is required. In some cases, there is even a requirement of two-thirds majority in each chamber and majority within each linguistic group of each chamber.

Executive power

According to the constitution, the federal executive power belongs to the King, but the political responsibility lies with the Council of Ministers. With the possible exception of the Prime Minister, the Council of Ministers shall include an equal number of French-speaking and Dutch-speaking members.

Ministers are responsible to the Chamber of Representatives. A motion of no confidence must be "constructive", that is, the Chamber of Representatives can only force the resignation of the present government by electing a new Prime Minister. (Respecting the formalities of constitutional monarchy, the Chamber of Representatives does not formally elect the Prime Minister, but proposes to the King a candidate for that office. In reality, an election takes place.)

Organs of communities and regions

Although the Constitution seems to suggest that communities and regions have identical institutions and operate in the same way, they each have their own legal status, tailor-made to their needs. On the Flemish side, there is a Flemish Parliament which serves both as the parliament of the Flemish Community and the Flemish Region. In addition, there is a Parliament of the French Community and a Parliament of the German-speaking Community, as well as Parliaments of the Walloon Region and the Brussels region.

These parliaments are composed of elected representatives. Each Community Parliament is composed of members elected directly as members of the concerned Community Parliament or as members of a Regional Parliament, and vice versa.

Corresponding to each of the parliaments mentioned, there is a government elected by that parliament.

We do not go in detail concerning the powers of the community and regional bodies, but it should be noted, in particular, that the Parliaments of the French Community and the Flemish Community have wide-ranging competencies in the areas of culture and education. The Parliament of the German-speaking Community has more limited competencies in the same areas.

4.3 Canada

Canada consists of provinces and territories. The provinces enjoy extensive self-determination. The division of powers between the national level and the provinces is described in detail in the constitution. The territories have more limited autonomy than the provinces.

The country has two official languages, English and French. Whenever economically possible, parents of the minority language shall be offered primary and secondary education for their children in their own language.

The British Queen is Head of State of Canada and appoints a Governor General who has a constitutional role, but who does not actually exert power. The role is comparable to that of the constitutional monarchs of Western Europe, see Section 2.6. For each province, the Governor General appoints a Lieutenant Governor with similar functions at provincial levels.

Canada has a bicameral parliament with a Senate and a House of Commons.

The Senate is appointed by the Governor General, previously for life, now until a retirement age of 75. The Senate has 105 members, but the number can be increased to 109 or 113. The distribution between provinces and territories is set in the constitution.

The House of Commons consists of 308 members distributed among the provinces in proportion to their population. The territories are represented by explicit constitutional provision. The members are elected by plurality vote in single-member constituencies.

The provinces have similar structures, but the directly elected chamber of the legislature may be elected by another electoral systems than the one used for the House of Commons.

Amendments to the Constitution must be approved by both chambers of the federal parliament and by the assemblies of at least two-third of the provinces representing at least fifty per cent of the population of all the provinces.

Bills may have their first reading in the House of Commons or the Senate. Amendments from the Senate may be accepted or rejected, and the House of Commons has the final say, but both chambers must in the end have had the same version for its final reading.

5 Bosnia and Herzegovina

Bosnia and Herzegovina provides an example of the type of situations discussed in this report. The country has been through a civil war, and the international community has been deeply involved in the attempts to end the conflict and build stable institutions. Therefore, we give a relatively detailed account of the country's government structure. We also use it as a point of departure for the discussion of general issues, both in this chapter and elsewhere.

More is said about Bosnia and Herzegovina, or the country is used to illustrate electoral systems and aspects of the government structure, in Sections 13.1 and 13.3, and also in Chapters 14 and 15.

5.1 Background

The population of Bosnia and Herzegovina consists of three large minorities, Bosniacs, Croats and Serbs, and a number of small minorities.

After a bloody civil war, the so-called Dayton accord, officially called the "General Framework Agreement for Peace in Bosnia and Herzegovina", was signed in 1995. The Constitution of Bosnia and Herzegovina is a part of the Dayton accord.

The agreement ended the war, but also created a complicated government structure, to be described below. In fact, it has turned out that the institutions established by the Dayton accord have been almost unable to make decisions. Stalemate has been the rule rather than the exception.

The international community appoints a High Representative to Bosnia and Herzegovina, who has been given wide-ranging power. In the period since 1995, most important decisions have been taken by the High Representative, not by the elected parliament.

5.2 State organization on the national level

Bosnia and Herzegovina consists of two so-called entities, named the Federation of Bosnia and Herzegovina and Republika Srpska.

The terminology is a little confusing. We will consider the country as a whole as a federal state, consisting of the two regional units just mentioned. In spite of its name, therefore, the Federation of Bosnia and Herzegovina is a part of the federal state Bosnia and Herzegovina. (The Federation of Bosnia and Herzegovina is divided into ten cantons and can itself be said to have a federal internal structure. We do not discuss this here, but see Sections 13.1 and 13.3.)

The national parliament, the Parliamentary Assembly, has two chambers, the House of Representatives and the House of Peoples. The House of Representatives has 42 members, 28 elected from the Federation of Bosnia and Herzegovina and 14 from the Republika Srpska. This chamber is directly elected and there are no ethnic quotas. The House of Peoples consists of five Bosniacs and five Croats elected by the respective ethnic groups in the House of Peoples of the Federation Bosnia and Herzegovina, and five Serbs elected by the National Assembly of Republika Srpska.

Legislation has to pass both chambers. A majority must contain at least one third of the votes from

each of the two entities. If that condition is not met, legislation may still pass, provided that the dissenting votes do not include two thirds or more of the representatives from an entity. In the House of Peoples this means that seven Croats and Bosniacs, or four Serbs, can stop any proposal.

In addition to these conditions, legislation may be vetoed by an ethnic caucus of the House of Peoples if it is declared to be "destructive of a vital interest" of that ethnic group. Since each caucus has five members, three votes suffice for a veto. This veto power can be said to make the House of Peoples more powerful than the directly elected House of Representatives, since the members of the House of Representatives do not have this special veto power. As far as we know, there is no other country in which an indirectly elected chamber is more powerful than the directly elected one. The construction is problematic from a democratic point of view (see Sections 2.6 and 3.3, and the discussion of the "principal chamber" in the beginning of Section 6.2).

Basically, the government system of Bosnia and Herzegovina is a parliamentary one. (The concept is discussed in Section 6.3.) The role as head of state is, however, vested in a multi-member Presidency. This follows a tradition from the former Yugoslavia. The presidency of Bosnia and Herzegovina has three members, one Bosniac and one Croat, each directly elected from the territory of the Federation of Bosnia and Herzegovina, and one Serb directly elected from the territory of Republika Srpska. The members rotate in chairing the presidency.

5.3 Ineffective decision making

During the Dayton talks, representatives of the international community promoted a unicameral national parliament. This was not supported by Serbs and Croats, who feared that their vital interests would be violated by majority decisions in a parliament dominated by Bosniacs. Then the solution described in Section 5.2 was chosen. As pointed out in Section 5.1, the Parliamentary Assembly of Bosnia and Herzegovina has been almost unable to make decisions.

Even with the fairly straightforward composition of the House of Representatives, it has been difficult to have legislation passed in that house. The real challenge, however, is the House of Peoples where very few members can veto legislation. In particular, if a proposal is declared to be destructive of a vital interest of a group, only three members of the House of Peoples are needed for a veto.

5.4 Possible human rights problems

In addition to the voting rules which easily lead to a stalemate, the composition of the House of Peoples has been challenged for violating international human rights. The relevant provisions are found in the European Convention for Human Rights and the International Covenant on Civil and Political Rights, quoted in Section 7.2. The ethnic provisions written into the constitution mean that only members of the so-called constituent peoples – Bosniacs, Croats and Serbs – can be elected to the House of Peoples. Moreover, they must be voters in the right entity. Serbs residing in the Federation of Bosnia and Herzegovina cannot be elected to the House of Peoples. The same holds for Bosniacs and Croats in the Republika Srpska. All adult citizens can (indirectly) influence the composition of the House of Peoples, but the right to be elected is severely restricted.

Similar restrictions apply to the Presidency. Serbs living in the Federation and Bosniacs and Croats living in the Republika Srpska cannot be elected.

In Republika Srpska, there is no problem concerning voting rights. All members of the National Assembly of Republika Srpska can, according to a decision of the Constitutional Court, vote for the Serb members of the House of Peoples. (It could even be argued that non-Serbs can also be elected. As the slogan goes, "whoever is elected to represent Republika Srpska, is by definition a Serb".)

The Bosniac and Croat members of the House of Peoples are, however, elected by the respective caucuses in the Federation House of Peoples, and only members of the respective ethnic group can be elected.

The House of Peoples is not just a reviewing body, but a chamber of parliament with definitive powers. In the terminology of Section 6.2, the system is one of strong bicameralism. It can be argued that the restrictions of voting rights and the right to be elected violate the conventions mentioned, see the discussion in Nystuen (2005). On the other hand, if such provisions had not been introduced, there was a real danger that the Dayton accord would never have been signed and the war would not have ended.

The Constitution includes a provision (Article II, second paragraph) to the effect that the rights and freedoms of the European Convention for Human Rights shall apply directly in Bosnia and Herzegovina. Moreover, it is provided that these rights and freedoms "shall have priority over all other law". Nystuen argues that the contradiction between the incorporation of European human rights standards and the specific ethnic provisions of the same Constitution shall have to be resolved in favor of the human rights standards. This argument may seem weak, but after the country has become a member of the Council of Europe and has ratified the European Convention, a decision by the European Court of Human Rights may force Bosnia and Herzegovina to change the ethnic structure of the House of Peoples.

Concerning the presidency, things may be a little different, since the relevant provision in the European Convention explicitly refers to the choice of the legislature. The International Covenant, on the other hand, talks more generally about the right to vote and to be elected.

5.5 Dilemmas and alternative

To sum up, we point to the possible contradictions between on the one hand adopting provisions that are intended to promote understanding between groups in conflict, and on the other hand providing for effective government and general rights for all citizens regardless of ethnic affiliation.

Even in the difficult situation in Dayton it might have been possible to design a system which would have made the Serbs and Croats trust that their rights would be protected, without denying a large number of citizens the right to vote and to be elected. The difficulties were partly caused by the international community not allowing the establishment of a third entity dominated by Croats, since this would be regarded as an even stronger acceptance of ethnic cleansing than dividing the country into the two entities that were actually created. On the other hand, it may seem to be a paradox that by giving special rights to ethnic groups instead of geographical areas, it became more difficult to give protection to Croats and at the same time not deprive others of their democratic rights.

A model based on a large number of cantons instead of two (or three) entities, might have worked in Bosnia and Herzegovina. The cantons might then have been given veto power on certain issues. The human rights issues could have been solved, but the problem of ineffective government would have had to be addressed separately.

6 Division of power

6.1 General considerations

In a federal structure, as described and discussed in Chapter 3 and illustrated by examples in Chapter 4, power is divided between national and regional units of government. This is not, however, the only way power can be divided. In this chapter, we concentrate attention on the national level of government, be it in a federal or a unitary state. We shall discuss two issues, namely the choice between a unicameral and a bicameral parliament, and the choice between a parliamentary and a presidential system of government. (In addition to these institutional mechanisms for dividing power, parties or other political forces often agree on various arrangements for power sharing, for example, when an elected assembly appoints an executive authority. This is not the topic of the present chapter.)

The existence of an independent judiciary, which is an essential element of liberal democracy, also represents division of power. The courts are not, however, supposed to be political actors. They shall ascertain the facts of the cases before them, interpret the law, and apply the law to the facts. Interpreting the law is no mechanical exercise, and there is no sharp line between interpreting the law and developing it. Hence the courts will necessarily play a political role by *de facto* exerting some limited legislative power. (This cannot be avoided, but even if it could, it is not clear that it ought to be avoided.) Nevertheless, it must be kept clear that the courts are bound by laws adopted by the democratically legitimized legislative bodies, and court-made law can always be amended by these bodies. This might appear not to be the case when the courts, be it the ordinary ones or some specialized tribunal, can be called upon to review the constitutionality of laws; see the discussion of judicial review in Section 3.5. Even in this case, however, the courts do not have the last word, since the constitution can be amended, albeit usually by a more complicated and demanding procedure than that required for ordinary legislation. We do not further discuss the courts and their role in the structure of government.

Certain executive agencies can also have some degree of independence from the supreme, political bodies of state, but they must operate within their mandates as determined by law. Examples of such bodies can be the central bank and independent election commissions.

Traditionally, division of power has been justified as a means to prevent the abuse of power. This is certainly a valid consideration, but in our context it may be more relevant to point out that such arrangements may improve the chances that the political system will take account not only of the interests of a majority or dominant group, but also of those of various minorities.

Division of power has its costs. In the best of cases, when everybody is interested in reaching compromises that take account of the various group interests, the chances of achieving this may be improved by power being divided. When conflicts are sharper, however, the result can be a complete stalemate. The various bodies, among which power is divided, will often be unable to reach a common decision, and the machinery of government is brought to a halt. This will have immediate detrimental effects, and it could also in the longer term create popular dissatisfaction with the government structure and spur (renewed) conflict.

Moreover, in spite of our repeated emphasis on the need for taking all group interests into account, we do not deny that in a democracy there are situations in which the majority legitimately can force its will through, even if the minority disagrees. It is not easy to say exactly when this is true, but such cases certainly exist. Division of power can prevent the majority from getting its way even in clear-

cut cases of this type.

The task, therefore, is to trade off the advantages and disadvantages of power being divided. Clearly, the solution must depend on the circumstances, so there cannot generally and in the abstract be identified an "optimal degree of division of power". Nevertheless, some general considerations may be of relevance.

6.2 Unicameral or bicameral parliament

In theory, a parliament can have more than two chambers. There are historical examples of this. When the French Constituent Assembly met in 1789, it consisted of separate chambers for the nobility, the clergy and the "third estate". Until 1866, Sweden had a four-chamber legislature, the chambers representing the nobility, the clergy, the bourgeoisie and the peasantry. We know of no modern instance of there being three or more chamber. Therefore, we shall discuss the choice between a unicameral and a bicameral parliament, ignoring the possibility of more chambers.

As pointed out in Sections 2.6, in a democracy at least one legislative chamber should be directly elected by universal suffrage and by an electoral system which gives all votes (approximately) equal weight. We refer to it as the *principal* chamber. As emphasized in Chapter I.2, this is a technical definition introduced for convenience; it does not follow that the principal chamber is "principal" in a more fundamental sense.

In the subsequent discussion, we generally assume that there exists a principal chamber in this sense. An exception is Zimbabwe, where both chambers of parliament are partly elected and partly appointed; see Section 7.6.

The principal chamber may be the only chamber or one of two. In the latter case, democratic principles require that the principal chamber has at least as much power as the other one. It need not have *more* power than the other chamber, but it should not have less. For example, in the USA (see Section 3.5) and Switzerland (Section 4.1) there are two chambers with essentially equal power, but one of them – the House of Representatives and the *Nationalrat*, respectively – is the principal chamber by our definition.

A possible case of the principal chamber being the least powerful one is Bosnia and Herzegovina (see Section 5.2). The House of Representatives is directly elected by a system giving all voters close to equal weight. It can, however, be claimed that the House of Peoples has more power. The latter is indirectly elected by a system based on the "peoples", that is, the three major ethnic groups.

Bicameral systems vary a lot, both concerning the power and status of the chambers and their composition. We shall distinguish between *weak* and *strong* bicameralism. In some bicameral systems, one chamber is essentially only a consultative body; this is called weak bicameralism. Alternatively, the other chamber has real power, in the sense that it not only has the right to review legislation and raise objections, but must approve the final law, generally or within large and important areas of public policy. This is called strong bicameralism. The dividing line is not sharp, but we nevertheless find the concepts useful.

Weak bicameralism

Examples of chambers that in practice have no more than a consultative role, are the House of Lords in the United Kingdom (see Section 2.6) and the Canadian Senate (Section 4.3). The same is by and

large true for the Belgian Senate (Section 4.2), although it has veto power in some cases. Therefore, Belgium can be regarded as a borderline case between weak and strong bicameralism.

Weak bicameralism causes no problems from a democratic point of view, even if the "consultative chamber" is not democratically elected.

It might appear that weak bicameralism is harmless, but also pointless. In a situation of strong conflict, this may be true. Then the majority in the principal chamber is likely to ignore comments and advice from the other chamber, which will therefore have limited influence. Things may be different, however, if conflicts are not strong, so that everybody is interested in reaching compromises that take account of the various group interests. Then the principal chamber will probably be willing to listen to advice, and the final decisions may better take account of varying group interests, in addition to being better from a purely technical point of view, than would have been the case if the consultative chamber had not existed.

The statement that weak bicameralism is harmless from a democratic point of view, should perhaps be somewhat modified. Situations can arise in which the majority in the principal chamber finds it important that a certain measure be adopted *immediately*, so that even a delay caused by the other chamber exerting its right of review might be seen as a violation of democratic ideals. Although possible, the situation seems remote and improbable, and the possibility of it occurring would seem a price worth paying. Issues that typically are urgent, like the budget, can be – and in practice often are – excluded from the other chamber's right of review.

Strong bicameralism

As is evident from the discussion above, weak bicameralism is not likely to contribute significantly to the solution of bitter conflicts. More substantial division of power is needed. In addition to the principal chamber, there must exist one which has real power and in which interests other than those of the majority or dominant group are represented.

The arguments for and against strong bicameralism basically correspond to the general advantages and disadvantages of power being divided. These are discussed in Section 6.1, and we do not repeat the discussion here.

In a federal state, one chamber of the national parliament will typically not be directly elected, or not elected by a system giving all votes (approximately) equal weight. Two examples are given in Section 3.5, the US Senate (directly elected, but with inhabitants of the most populous states being drastically underrepresented), and the Federal Council in Germany (no elected members, voting rights belong to the Länder governments). Other examples are the Ständerat in Switzerland (Section 4.1) and the House of Peoples in Bosnia and Herzegovina (Section 5.2). Perhaps the Belgian Senate (Section 4.2) should also be included, in spite of its limited powers.

For each of these chambers, its composition is intrinsically tied to the country's federal structure, and the arguments that can be put forward in favor of federalism, also justify some deviation from the standards of elections applied to the principal chamber. This does not mean that no standards should exist for the composition of the other chamber. If a chamber has real power, this power must be derived from the people through a democratic process. For example, if a body whose membership is based on inheritance or appointment not limited to a term of years, like the House of Lords in the United Kingdom or the Canadian Senate, was given veto power over all or important parts of the legislation, a serious democratic problem would arise. The same is true if a substantial part of the members are appointed in a way which cannot be democratically legitimized. (The House of Assembly in Zimbabwe provides an example of a partly elected and partly appointed

parliamentary chamber, see Section 7.6. There we discuss whether rules for electing or appointing a legislative assembly should always be uniform.)

What is and what is not acceptable in this connection? It is not easy to draw a sharp line. However, the rules actually in effect in established democracies with strong bicameralism – like the USA, Germany and Switzerland – could give some guidelines for what should be considered consistent with democratic principles. (Concerning the House of Peoples of Bosnia and Herzegovina, we have reservations both to the electoral system and the rules of procedure, see Sections 5.3 and 5.4. We do not, however, object to the fact that the body is indirectly elected or to the distribution of seats between the two entities.)

Different or similar chambers

In a bicameral system, there ought to be some difference between the chambers in the method for electing or appointing them. Given the existence of political parties, two chambers elected by similar rules will in all likelihood replicate each other's decision and will not, in reality, represent division of power, but only an unnecessary complication.

It could be argued that the issues will be more thoroughly discussed when two chambers, although essentially equal, are involved. The need for thorough discussion can, in our opinion, be equally well taken care of by the procedural rules in a unicameral legislature, for example, by requiring that there be more than one "reading" of a bill. (In a situation without political parties, having two chambers elected by similar rules can perhaps serve a meaningful purpose, but this is not relevant for the present discussion.)

6.3 Parliamentary or presidential system of government

In a *parliamentary* system, the government is responsible to parliament or to its principal chamber. If a motion of no confidence is passed, the government cannot continue in office. This is the defining characteristic of parliamentarism, but otherwise the rules vary.

When parliament has adopted a motion of no confidence, the government can choose to resign. In many parliamentary systems, however, it can instead "appeal to the people", that is, dissolve parliament and call new elections. The results of these elections will then determine the new government. The government's right to call new elections may be subject to restrictions and procedural requirements, or may not exist at all. (To our knowledge, Norway is the only country with a parliamentary system where there is no provision for holding early elections.)

It is generally not required that the government has the active support of a majority in parliament, though it is often seen as preferable to form governments with such support.

In some parliamentary systems, the government or the prime minister is *elected* by parliament. In other cases, the head of state, after formal or informal consultations, chooses a candidate for prime minister. Approval by parliament is needed in some countries, but in other countries the candidate simply takes office unless parliament passes a motion of no confidence.

The German Constitution of 1949 introduced the *constructive* motion of no confidence. This means that parliament can only force the government to resign by simultaneously electing a new head of government. The purpose is to contribute to stability by preventing factions that cannot cooperate among themselves, from joining forces to remove the incumbent government. Several countries

have followed the German example; see, for example, the discussion in Section 4.2 of the executive power in Belgium. In most parliamentary systems, however, a simple motion of no confidence is sufficient to force the government out of office.

Typically, in a parliamentary system the head of state does not have extensive powers, but serves mainly as a symbol of the nation and of national unity. The head of state can be a constitutional monarch or a directly or indirectly elected president.

It might seem pointless to hold direct elections to a position without substantial power. It may even create confusion and conflict, since a directly elected president could claim to have a separate mandate from the people and therefore be inclined to try to exert real power. Nevertheless, there are countries where the president is directly elected but has only formal powers, Austria and Iceland being examples. In addition, the construction has been explored in some post-conflict situations, as a way to reward a senior leader with an elected presidency, without giving that position excessive powers. Kosovo is an example.

In a *presidential* system, the president is not only head of state, but also – both formally and in political reality – leader of the executive branch of government. The president's authority is derived from the people through elections. The government is responsible to the president, not to parliament.

The prime example of a presidential system is the USA. The national legislature and the president are popularly elected through separate election procedures, and hence they each derive their authority from the people.

In addition to the pure parliamentary and presidential systems, combinations of the two are possible. In France and Russia, for example, the government is ultimately responsible to parliament and must resign if a motion of no confidence is passed, but parts of the executive power is vested not in the government, but in the president personally, who in these areas act independently of parliament.

Variants of such systems exist in several Latin American countries and in some of the new democracies in Central and Eastern Europe, and have also been discussed in several post-conflict situations. Not much can be said about them in general. Since they are combinations of two "pure" systems, they will share some properties with each of these. In most cases, they are probably the result of a compromise between factions wanting the one or the other of the pure systems.

When executive power is shared between an elected president and a government responsible to an elected legislature, the possibility exists that the president comes from one party and the government from another party or coalition. This situation is not inherently undesirable, as it may reflect the voters' desire to balance competing interests and agendas. (Similarly, voters in the United States often elect a president from one party and a congressional majority from another.) Without strong institutions for managing the conflict between the parliament and the president, however, this situation can lead to governmental crises. In the Palestinian Authority, for example, this system has developed as the result of a historical accident, triggered by the desire to contain the power of the former president. As a result, the constitutional framework for dividing executive power is ambiguous. In Sri Lanka, the division of power is clearer, but the politics of the country have become largely structured around conflicts between the government and the president, and especially around the ambitions of Prime Ministers and opposition leaders to win the presidency. As described in the case study on Sri Lanka (see Chapter III.3), this has made compromise in peace negotiations very difficult.

While combinations of a pure parliamentary and a presidential system may be an attractive compromise in some instances, it can only be implemented within a sufficiently robust legal

framework and after careful consideration of its political dynamics.

In a parliamentary system, the government takes part in the legislative process by its right of initiative, that is, its right to make proposals to parliament. Perhaps laws must be approved or promulgated by the government or the head of state, but this is a purely formal step in the legislative process. A government which is responsible to parliament can hardly have a real veto power over laws passed by that same parliament.

In a presidential system, however, executive veto of legislation can be a reality. The veto power can take different forms. It could be an absolute veto, so that no law can pass without the president's approval (though we know of no instance of this). Alternatively, the legislature can have the right to overturn a presidential veto, but only by a special majority or through a special procedure. In the USA, two thirds majority in both houses of Congress is needed to set aside a presidential veto.

The presidential system represents division of power between parliament and president. In a parliamentary system, there is a division of functions between parliament and government, but no real division of power. The power rests undivided with parliament. Therefore, the general arguments for and against division of power, as outlined in Section 6.1, are relevant when a choice shall be made between a parliamentary and a presidential system.

Could a presidential system, through its division of power between parliament and president, contribute to solving conflicts of the type we discuss? We are inclined to answer no. For our purpose, division of power is a means to protect the interests of groups other than the majority or dominant group. An elected president will, in all likelihood, primarily represent that group. The same holds for the majority in the principal chamber of parliament. In the cases considered, therefore, little is gained by dividing power between parliament and president. This contrasts with dividing power between the chambers of a bicameral parliament, which can serve an especially meaningful purpose in post-conflict situations, as explained in Section 6.2.

In the best of cases, the elected president will be willing and able to take account of all relevant group interests when carrying out the presidential duties. There is, however, no institutional guarantee that this will happen. When *one* president is to be elected, the winner will most likely be a candidate from the dominant group, nor would it be preferable from a democratic point of view if the president systematically came from another group than the biggest one. One could try to build the protection of various group interests into the executive branch by electing a multi-member presidency, like the one in Bosnia and Herzegovina; see Section 5.2. This has been proposed in other places as well, but it would be alien to the traditions of most countries and is not discussed further.

In conclusion, whatever are the general arguments for and against parliamentary and presidential systems, the presidential system is not likely to contribute to solving conflicts of the type we discuss.

7 Electoral systems – general issues

The discussion in this chapter, and also in Chapters 8–11, is mainly concerned with elections to legislative assemblies. Many of the considerations are also relevant for presidential elections etc., but the main focus is on parliamentary elections.

We start by saying a few words about the historical background, since this can explain why the

various electoral systems have emerged and why there today is such a diversity of systems (Section 7.1). Thereafter, we quote international standards for elections (Section 7.2) and discuss criteria for good electoral systems, first in general terms (Section 7.3) and then by listing and discussing specific criteria (Section 7.4). Equality or equal suffrage is a criterion of particular importance, but at the same time a difficult one; it is discussed thoroughly in Section 7.5. We also ask whether it is acceptable to elect or appoint different members of the same assembly by different rules, or if a principle of uniformity should be imposed (Section 7.6).

The chapter ends with an overview of electoral systems (Section 7.7), as an introduction to the more detail description and discussion of specific systems in Chapters 8 – 11.

7.1 Historical background

In some countries, elections predate political parties, by decades or perhaps centuries. These elections were not democratic by modern standards, since suffrage was restricted. This is not, however, relevant for the present discussion, which is concerned with electoral systems.

When political parties do not exist, elections must necessarily be based on individual candidates. Then plurality or majority systems might appear to be the only options. This is actually not true; preferential systems like the single transferable vote (see Section 10.3) can also be used, but it is a fact that pre-party elections almost invariably were based on plurality or majority principles. (The difference between plurality and majority is explained in Chapter 8.)

In such cases, elections primarily consist in choosing the persons who are best qualified to serve as representatives. The relevant qualifications can vary; some voters look for the candidates who are most able to govern the country, others want to elect those who best represent local interests or other group interests. In any case, the attention is concentrated on qualifications rather than opinions. When voters pay more attention to the candidates' positions and opinions, the process towards formation of political parties has essentially started.

Those who are regarded as best qualified by the largest number of voters, will most probably also be the best. There is at least no reason to assume otherwise. When parties do not exist, therefore, it seems reasonable that elections are conducted by a plurality or majority system, and such a system can function quite well. Other aspects of the electoral system can vary. For example, the country can be divided into districts each electing one member (single-member constituencies), or there can be larger districts each electing several members (multi-member constituencies).

Things change when political parties are formed and come to dominate political life. (The "political parties" need not be known by that name or exactly correspond to modern parties. Other organizational forms can have the same effects.) Then most voters will not primarily ask which candidates are best qualified. Instead they ask whose positions best correspond to their own views. This change in voters' behavior also changes the character and effects of plurality and majority electoral systems. As described in Chapters 8 and 9, these systems are not well suited for giving representative results, in the sense that the elected assembly mirrors the voters along various relevant dimensions.

In an attempt to secure more representative results, the idea of proportional elections emerged in the last decades of the 1800s. Over the years, a number of different proportional systems have been designed; see further discussion in Chapter 10. Among the first countries to introduce proportional parliamentary elections were Belgium, Germany and the Scandinavian countries. Such systems have become more widespread over the last decades. In the United Kingdom, however, parliament is still

elected by plurality vote, and the same is true in most (but not all) countries whose legal and political system is based on the British model.

These two traditions have shaped the two principal types of electoral systems, which are discussed in detail later.

7.2 International standards

There exist some international standards for the conduct of elections.

The International Covenant on Civil and Political Rights, adopted in 1966, regulates elections in Article 25, the relevant part of which reads:

- «Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:
- a. ...
 - b. to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
 - c. ...»

Article 2 obliges the countries to ensure to all individuals "the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

In addition there are regional conventions and protocols governing election, some of which are quoted below.

In 2002, the Organization of African Unity (the forerunner of the African Union) adopted a "Declaration on the principles governing democratic elections in Africa", containing the following provisions:

- «1. Democratic elections are the basis of the authority of any representative government;
2. Regular elections constitute a key element of the democratization process and therefore, are essential ingredients for good governance, the rule of law, the maintenance and promotion of peace, security, stability and development;
3. The holding of democratic elections is an important dimension in conflict prevention, management and resolution;
4. Democratic elections should be conducted:
 - a) freely and fairly;
 - b) under democratic constitutions and in compliance with supportive legal instruments;
 - c) under a system of separation of powers that ensures in particular, the independence of the judiciary;
 - d) at regular intervals, as provided for in National Constitutions;
 - e) by impartial, all-inclusive competent accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics; ...»

Article 23 of the American Convention on Human Rights, adopted in 1969, regulates the right to participate in government. The relevant provisions read as follows:

- «1. Every citizen shall enjoy the following rights and opportunities:
- a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
 - b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; ...»

Article 3 of Protocol No. 1 (adopted 1952) to the European Convention for the Protection of

Human Rights and Fundamental Freedoms is entitled "Right to free elections" and reads:

«The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.»

Concerning Europe, more detailed standards are laid down in the Copenhagen Document, CSCE (1990), paragraph 7. (The Conference on Security and Cooperation in Europe, CSCE, was the forerunner of the Organization for Security and Cooperation in Europe, OSCE.) We quote the provisions most relevant for our purpose:

«(7) To ensure that the will of the people serves as the basis of the authority of government, the participating States will
(7.1) – hold free elections at reasonable intervals, as established by law;
(7.2) – permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote;
(7.3) – guarantee universal and equal suffrage to adult citizens;
(7.4) – ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public;
(7.5) – respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination;...»

As pointed out earlier, we interpret items (7.2) and (7.3) to imply that at least one legislative chamber, which we call the principal chamber, should be directly elected by universal suffrage, the electoral system giving all votes (approximately) equal weight, see Sections 2.6, 3.3 and 6.2.

7.3 Criteria for good electoral systems – overview

In established democracies, the constitution may contain more or less detailed provisions on the electoral system. If details are not given, the constitution will usually lay down general principles for elections, much like the ones quoted from international texts in Section 7.2. For example, the German constitution provides that the members of the Federal Parliament be elected by universal, direct, free, equal and secret elections.

We shall, however, discuss criteria for good electoral systems in greater detail, in general terms in this section and by listing and discussing specific criteria in Section 7.4.

The requirement that elections be periodic or held at reasonable intervals is certainly an important one. Democracy is undermined if election periods are very long. We do not discuss this issue further; in particular, we make no attempt to stipulate an upper bound for acceptable intervals between elections. (In Section 2.3 we discuss arguments for electing the first ordinary parliament after the (re)establishment of democracy for a shorter period than that stipulated by the permanent rules.)

Secrecy of the ballot is needed to guarantee that the voters freely and independently can express their will. The issue falls outside the scope of the report and will not be discussed further.

Universal suffrage is today taken for granted almost everywhere. However, in order to specify exactly who shall have the right to vote, a number of questions must be answered, some of which are listed here, but not discussed further:

- What should be the voting-right age?
- Should only citizens have the right to vote, or should other residents also be allowed to take

- part in (certain types of) elections?
- Should some minimum length of residence be required for being registered as a voter?
- To what extent should criminal convictions lead to the loss of voting rights?

Another question is how a person's right to vote shall be documented. In established democracies, there usually exists a voters' list. Being on that list is a condition for exercising one's voting rights. In some countries a potential voter is required to take active steps to get onto the voters' list, but more commonly it is the responsibility of the authorities to produce complete and correct lists. Without choosing between these two alternatives, we express reservations against a system in which a potential voter must go through an extensive and complicated registration procedure in order to get on the voters' list. Such rules restrict effective voting rights in an unreasonable manner. In particular, this is the case if those active steps must be taken a considerable time ahead of the elections.

In post-conflict situations, it may sometimes be impossible to prepare reliable voters' lists before the first elections, so that other means must be employed for controlling who can vote, thus making the questions asked above largely irrelevant. This can perhaps be acceptable on an interim basis, but eventually the questions must be answered and a system must be designed which guarantees that all those who satisfy the suffrage criteria, and only those, are allowed to take part in the elections, and which also effectively prevents multiple voting.

Reliable voter registration is essential to prevent fraud and the perception of fraud, be it through multiple voting, by manipulation of the eligibility criteria, or in other ways. Especially where there is disagreement about the sizes of the various groups, which frequently is the case in post-conflict situations, voter registration allows people to come to terms with the size of the voting populations some time before the election results are announced. Registration is also an important tool for election administration, since information about the number of voters is an essential basis for planning the logistics.

The question of direct or indirect elections has been discussed on several occasions earlier; see, for example, Section 3.3 (on federalism) and Section 6.2 (on bicameralism).

Among the criteria mentioned in the international standards quoted in Section 7.2, equality or equal suffrage has not yet been mentioned. Although it might seem obvious that voters should be treated equally, the criterion also raises difficult questions; see Section 7.5.

It is not always easy to know how different electoral systems will contribute to reconciliation and dialogue in post-conflict situations. The effects of the system will be mixed with the tradition of the country and a number of other factors.

The range of systems being used in multi-party democracies is wide, and there is no general consensus on what kind of electoral system is the best or the most "democratic". There is certainly no generally accepted international standard which singles out one system as the "correct" one; see the discussion above of international standards. As indicated in Section 7.1, the historical and political context has been decisive for the system chosen in different countries.

Electoral systems have a large range of features and characteristics, which makes each of them work differently in different contexts. The choice of system is often highly controversial, and political contenders will tend to protect their immediate interest when decisions about the electoral system are made. When discussing the issue, decision makers often have an affinity for the system historically used in the country or systems commonly used in the region. However, sometimes new and experimental systems are put forward, be they homemade by the politicians themselves or picked up

from academic sources or the like.

In Chapters 8 – 11, we describe and discuss a number of electoral systems, including the ones most commonly used.

It is common to distinguish between on the one hand the plurality or majority systems, which usually give the largest party a significant advantage, and on the other hand the proportional systems, which give each party a share of the seats close to its share of the votes. The two types of electoral systems have grown out of different traditions, as explained at the end of Section 7.1. They are described in detail in Chapters 8 and 10, respectively. Within each of the major types there are many different electoral systems, varying along a number of dimensions. The two types can also be combined; see Sections 10.2 and 11.2, which describe two quite different ways of combining them.

Traditionally, both the two principal types of electoral systems are regarded as "democratic", and they are widely accepted by the international community. This also holds for combinations of the two types.

This does not mean that everything should be accepted. In particular, the system described in Chapter 9, plurality elections in multi-member constituencies or "block vote", come close to being a "winner-takes-all" system and will probably not be seen as meeting internationally accepted standards, if applied in pure form in parliamentary elections.

Some systems that are being used in practice have been constructed to solve special problems in a particular situation, but have many undesirable side-effects and hardly qualify as satisfactory. A better system could have been found if a more systematic approach had been adopted. We shall give several examples of this; see Section 9.3, 13.4 and 14.5. Section 15.3 also gives examples of unsatisfactory systems.

7.4 Criteria for good electoral systems – specific criteria

Even though a large variety of systems are being used in established democracies, some general criteria for good electoral systems can be defined. The weight put on each of them, however, would vary, among experts as well as among political decision makers.

We list some criteria that electoral systems may meet, and discuss briefly some aspects of each. Most of the criteria apply to elections generally, not just to elections in post-conflict situations, but some of them are particularly important in such situations.

Create representative assemblies. In simple terms this criterion means that a party running in an election shall get a number of seats in the assembly that corresponds approximately to its proportional share of the vote. This is often regarded as the overriding criterion for a fair electoral system, and it is the most important justification for proportional elections. An elected assembly should reflect the political composition of the electorate, as well as other aspects such as geography, gender etc. The decisions made by the assembly should be representative of the opinions of the electorate.

Support accountability of the elected members. Another important aspect of elections is the relationship between the electorate and the elected member of the assembly. Elections in single-member constituencies are often justified by the need for strong accountability, since a comparatively small electorate will elect its own member of parliament and maintain direct contact with the elected

member.

Support stable governments. It has been argued that a fully proportional electoral system may result in an assembly split into a large number of parties, which in turn will lead to unstable coalition governments. The empirical data does not necessarily support this claim, at least not in countries with some kind of threshold for representation; see the discussion of thresholds in Section 10.1.

Give equal weight to each voter. This requirement can be interpreted in various ways when applied to different electoral systems. The most general formulation is that voters shall not be discriminated against on account of ethnicity, geography, gender and so on, except for what may follow from valid affirmative actions. The criterion is discussed further in Section 7.5. In that section, a formal and technical version of the criterion, called "anonymity", is also introduced.

Resist tactical voting behavior. A system should support an immediate link between the voters' primary preferences and the result. Tactical voting means that the voters do not vote according to their primary preferences. Instead, they vote according to, for example, their secondary preferences, because they believe they can thereby get an advantage.

Be simple for the voters. Systems can be designed to meet many requirements, but could end up being extremely complicated for the voters, both in the sense that it is difficult to cast a valid and effective vote, and in the sense that it is not easy to understand how the system works.

Be simple for the election administration. Systems can be very complicated for those implementing them. However, what may seem difficult to implement, need not be complicated from a voter's point of view. A possible example is the single transferable vote (see Section 10.3).

Be generally accepted by the parties and the public. Degree of acceptance should be taken into account when choosing a system. This is particularly important in post-conflict elections, because of the level of mistrust, frequently occurring disorder in election administrations, and the immaturity of the party system. One should not, however, refrain from proposing a system one genuinely regards as good, simply because of fear that it will not be accepted.

Promote conciliation among different groups. In post-conflict situations this is an important criterion, and it is the main focus of this report.

Promote cross-community parties. This is related to the previous item, but is not exactly identical as a criterion for electoral systems. Community may refer to ethnic, linguistic, religious or sectarian groups as well as geographical areas; see the definition of "group" in Chapter I.2.

Promote dialogue and compromise. The electoral system should in general support dialogue and conciliation in post-conflict situations. Therefore, whenever reasonable, the system should promote compromise candidates instead of extremist ones. However, there are clear limits to what an electoral system can and should do in this respect. If the voters really support extremist candidates, the system should not prevent these candidates from being elected.

Be robust against changes. This may be a fairly technical issue, but a system should be designed in such a way that small changes in some aspect of the system, such as constituency boundaries, will not have a drastic effect on the outcome of the elections. In a system based on single-member constituencies, the drawing of boundaries can significantly affect the outcome, even if it is required that all constituencies be of equal size. If the boundaries are determined through a political process, there is a danger that the present majority will try to perpetuate its power by carefully taking account of how

its support is distributed when boundaries are drawn, so-called "gerrymandering". (The issue is discussed in Section 8.4.)

Respond logically to changing support. Increased support for a party should normally lead to increased representation, with as few unforeseen and illogical side effects as possible.

Be sustainable. This means that even though there may be particular needs in a transitional period, the electoral system should be adapted to a normalized situation and should also support the process of normalization. One should keep in mind that systems which are adopted after a conflict, even if they are tailor-made to the current situation, will create precedent, that is, they will have a tendency to perpetuate themselves. This is particularly true if the international community has been instrumental in establishing the system.

7.5 Equality

Equality is an almost universally acclaimed value in modern, democratic states, but it is not always clear what equality means. The precise definition of equal voting rights could even be different for different electoral systems.

Moreover, and perhaps more importantly, not every deviation from equality is unacceptable. In post-conflict situations, preferential treatment of certain groups may be necessary in order that these groups' interest be adequately represented in the political decision making. Hence some deviations from strict equality could be not only acceptable, but an essential part of a solution intended to restore peace and stability.

When a conflict is brought to an end through negotiations and agreement, elements of the electoral system may be part of the settlement, implying deviations from equality over and above what would ideally be justified by the considerations above. The outcome will be determined, at least partially, by the negotiation strength of the parties. Deviations from equality in the interest of ending a war, is probably quite common and should not be considered unacceptable. There must, however, be a limit to what can be characterized as "democratic". See the discussion of the repercussions of the peace process in Section 2.1 and the description of the situation in Bosnia and Herzegovina and the Dayton accord in Section 5.1.

What is equal suffrage?

It seems appropriate to start with an attempt to define the concept of equality, ignoring – for the time being – the possible reasons for deviating from equality.

In general, equality in the electoral system means that people are not deprived of their voting rights on account of ethnicity, geography, gender etc. Neither should voting rights be differentiated on such grounds.

On the formal and technical level, political equality can be identified with the condition of *anonymity*, which is defined as follows: Suppose, initially, that voter *K* has voted for party *X*, while voter *L* has voted for party *Y*. Then *K* and *L* change their votes, so that *K* votes for *Y* and *L* for *X*, while all other votes are unchanged. This shall not lead to any change in the number of seats won by the parties. Note that the condition should ideally be satisfied for any two voters *K* and *L*, whether they cast their votes in the same or different constituencies. We return to the condition in Sections 8.1 and 10.1, in connection with plurality vote and proportional elections, respectively.

What does equality imply for the geographic distribution of seats? In particular, should the distribution be based on the total *population* of the geographic units, the number of *citizens* residing there, or the number of *voters*? The choice between these alternatives is not likely to make a big difference, but they are not identical. (Differences can be caused by variations in the fraction of the residents who are not citizens, or by the age structure varying across the country.) We express no view as to what is the appropriate basis for geographic distribution of seats, and we do not discuss the issue further. It should be noted, however, that in established democracies, the question is answered differently.

In systems based on single-member constituencies, equal treatment of the voters must mean that the constituencies are of equal size. Then everybody elects an equal "share" of a representative, and in this sense equal treatment is secured. This does not guarantee, however, that all votes have the same effective weight. In particular, voters in "swing constituencies" will typically have greater influence on the outcome of the elections than voters in constituencies where one party has traditionally had a strong lead and is almost certain to win. It is not, however, possible to measure the effective weight of a vote in a precise way. Even if this had been possible, it would hardly be acceptable to create constituencies of unequal size in order to equalize effective voting weight. That is, a requirement of equal effective voting weight cannot be formulated precisely, and can and should not be imposed. All that can be required is constituencies of equal size.

In a proportional system, however, equality requires that each vote contributes equally to the representation of the party for which it is cast.

Most countries with proportional electoral systems are divided into (multi-member) constituencies. (Israel, Moldova, the Netherlands, Slovakia and Ukraine are counterexamples.) Equality requires that the constituencies be represented in proportion to their population (or number of inhabitants or voters). This criterion can only be applied to seats that are distributed among the constituencies prior to the election. If some seats are not thus distributed, which may be the case if there are "compensatory seats" (see Section 10.1), the requirements of geographical equality must be appropriately modified.

Deviations from equality – the principal chamber

As pointed out in Section 2.6 and several other places, at least one legislative chamber should be directly elected by universal suffrage. We call this the principal chamber; see definition in Chapter I.2. It can be the only chamber or one of the chambers under bicameralism; see Section 6.2.

To this chamber, strict standards of equality should be applied. Even here, however, some deviations must be accepted.

In plurality and majority systems based on single-member constituencies, these should be of equal size. There are, however, arguments for letting constituency boundaries follow administrative borders. This can justify some differences in constituency size. For example, the seats in the House of Representatives of the USA (see Section 3.5) are apportioned among the states according to population, by a proportional system which guarantees at least one seat to every state. In each state, constituencies of close to equal size are created. The least populous states get one seat each, although these states are by no means equal in population. This creates significant differences in constituency size. Presently, the smallest constituency has a population some 23 percent below the national average, while the largest is 40 percent above that average (according to the 2000 census, see Huckabee (2001) Table 3). Hence the largest constituency is more than 80 percent bigger than the smallest. These differences can only be avoided by letting constituencies cross state borders, which

would run counter to the country's federal structure and also cause practical difficulties.

The Federal Parliament in Germany can also be used as an example. One half of the members are elected in single-member constituencies, which must not cross *Länder* borders. When boundaries are drawn, no constituency shall have a population deviating more than 15 percent (up or down) from the national average. Demographic changes do not immediately lead to revision of the boundaries, but if some constituency deviate more than 25 percent from the average, a new map must be drawn. The Federal Parliament is elected by a so-called mixed member proportional system, explained in Section 10.2, which gives the parties an overall representation in parliament proportional to their national voting strength. Hence the constituency boundaries do not have a significant impact on the political composition of the assembly. This makes it less important to insist on constituencies of equal size than in pure plurality and majority systems, where the results in the single-member constituencies alone determine the parties' parliamentary strength.

Turning to proportional systems, it might appear that the very idea of proportional distribution of seats guarantees equal political weight to every vote. There are, however, different methods of proportional representation, which vary somewhat in the way they treat large parties as compared to small ones. It is also considered acceptable to introduce a threshold for representation, so that a party not reaching this threshold will not be represented although by strict proportionality it may be entitled to a few seats, provided that each vote has an equal influence on whether the party reaches the threshold. Technically, if K and L change their votes as described in the definition of anonymity earlier in this section, no change shall occur in which parties pass the threshold. More is said about these issues in Section 10.1.

In systems based on single-member constituencies, geographical equality can only be guaranteed by appropriate drawing of constituency boundaries. In proportional systems with multi-member constituencies, there is an additional instrument available, namely the number of seats allocated to each constituency. Therefore, administrative borders can more easily be respected, that is, constituencies can be based on municipalities, provinces or similar units. Moreover, instead of redrawing boundaries to maintain geographic equality in response to demographical changes, seats can be redistributed. To minimize the danger of manipulation, the redistribution should not be determined discretionary by political bodies but be based on a predetermined formula.

Most countries with proportional elections in multi-member constituencies base the constituencies on administrative units and allow the number of seats in each constituency to vary. An exception is the Republic of Macedonia, where a 120-member parliament is elected from six constituencies each having 20 seats. The number of voters in each constituency is only allowed to vary three percent from the average. This has the advantage of avoiding constituencies electing very few members, but in our opinion the disadvantages related to the drawing of constituency boundaries are more important. Therefore, in proportional systems this rather unusual arrangement cannot be recommended.

The political consequences of unequal geographical distribution depend on the specific rules and vary among proportional systems. If all seats are allocated to multi-member constituencies and the seats in each constituency are distributed among the parties based on their local votes, inequalities in the geographical distribution necessarily imply that votes differ in their political weight. If, on the other hand, there are mechanisms that guarantee nationwide proportionality in the distribution of seats among parties, geographical inequalities will have no or very limited effect on the political weight of the votes. Such mechanisms are discussed in Section 10.1. In particular, the introduction of "compensatory seats" can serve this purpose. Therefore, deviations from equality in the geographical distribution can more easily be accepted in the latter case than in the former. (This is analogous to the difference pointed out above between the US House of Representatives and the German Federal

Parliament. In the former, differences in constituency size imply similar differences in political influence, while this is not the case in the latter.)

In many established democracies, sparsely populated areas far from the capital have traditionally been given more than their proportional share of the seats. This holds both in plurality and majority systems and in proportional ones. The argument is that people living far from the center of power face difficulties in having their voices heard. Hence real equality is not achieved by strict, numerical equality, but rather by counteracting the mentioned effect by giving remote areas increased representation. In the United Kingdom, for example, constituencies in Scotland have been smaller than those in England. Usually, the overrepresentation of remote areas is the result of specific political decisions, but more than 50 years ago Denmark adopted a system for systematic overrepresentation of sparsely populated areas. Seats in the legislature, which since 1953 has been unicameral, are distributed among the constituencies in Denmark proper on the basis of an index that takes account of the constituencies' areas as well their population and the number of voters. (These rules do not apply to Greenland and the Faeroe Islands, which by law have two seats each.) A similar system was recently introduced in Norway. Both in Denmark and Norway the electoral system includes a mechanism for achieving overall political proportionality based on nationwide votes. Hence the overrepresentation of sparsely populated areas has only limited effects on the political weight of the votes.

Giving remote and sparsely populated areas relatively stronger representation is not necessarily unacceptable. It is not, however, in itself likely to promote cooperation in post-conflict situations. In any case, limits must be imposed on how strongly the remote areas can be favored. In particular, in electoral systems where geographical inequalities automatically lead to votes having unequal political weight, one should not go very far in favoring remote and sparsely populated areas. This case includes systems where all members of the assembly are elected in single-member constituencies, but it also includes some proportional systems. On the other hand, larger geographical inequalities can be accepted if the electoral system contains mechanisms guaranteeing (approximately) equal political weight for all votes. This includes the systems used for electing the German Federal Parliament and the parliaments of Denmark and Norway.

Systematic overrepresentation based on rules is preferable to discretionary and politically determined distribution of seats. The latter can be subject to manipulation, in the sense that the present majority can be tempted to adopt a geographic distribution of seats which is carefully tailored to its own expected support and thereby strengthens its position in coming elections. Moreover, significant demographic change should lead to seats being reallocated. This is guaranteed if the distribution is governed by rules, but not if it is determined by political discretion.

Small minorities will sometimes need special protection. We do not categorically rule out the possibility of achieving this by giving members of such a minority some special rights related to parliamentary elections, not even elections to the principal (or only) chamber. However, only quite limited deviations from equality can be accepted on this account. Preferably, the minority representation should have as little effect as possible on the composition of parliament along regular political dimensions. The issue is discussed further in Chapter 14.

In some federal states, certain regional units have a special status, different from that of the majority of the units. For example, Canada consists of provinces and territories (see Section 4.3). In the USA, the federal capital Washington, officially known as the District of Columbia, is not a state and does not belong to a state. The same is true for the Australian Capital Territory. There may be valid reasons for establishing such special units and granting them less internal autonomy than the regional units in general. It is more problematic to treat the population of these units differently when it comes to electing the national legislature. In this respect, the USA is an extreme case. The

inhabitants of the District of Columbia have no ordinary representation in Congress; they are not represented at all in the Senate and only elect a non-voting delegate to the House of Representatives. This is hardly compatible with international standards, such as the International Covenant on Civil and Political Rights, Article 25(b), and the American Convention on Human Rights, Article 23.1(b). They both secure for every citizen the right "to vote and to be elected", see quotations in Section 7.2. In any case, it is not a system to be recommended.

Deviations from equality – bicameralism

Under bicameralism, if there is a principal chamber satisfying the conditions discussed above and having at least as much power as the other chamber, significant deviations from equality may be acceptable for that other chamber. This is particularly true for federal states, where these deviations typically will reflect the federal structure. However, a unitary state can also be divided into regional units each of which has its own separate identity, and there may be good reasons for taking account of this fact when designing the electoral system for one of the chambers of a bicameral legislature, even if the regional units do not have the degree of autonomy which would make the state a federal one.

In many post-conflict situations, such deviations from equality are not only acceptable; they are necessary in order to protect the interests of minorities and thereby contribute to reconciliation. They may also have been necessary to reach an agreement ending the conflict.

If the principal chamber has essentially all legislative power while the other chamber mainly is a consultative body (weak bicameralism, see Section 6.2), flexibility is particularly great. In this case, one could even accept a body that does not derive its power from the people, like the House of Lords in the United Kingdom.

The situation is different if both chambers have real power (strong bicameralism), which seems necessary if bicameralism shall contribute significantly to restoring peace and cooperation in a post-conflict situation. Then each chamber must derive its power from the people through a democratic process.

How far can one go in tailoring the composition of the other chamber and its electoral system to the federal structure? More generally, which deviations from equality are acceptable? The question has already been considered in Sections 3.3 and 6.2. In Section 6.2, where strong bicameralism was discussed, we concluded that it is not easy to draw a sharp line between that which is and that which is not acceptable, but the rules actually in effect in established democracies with strong bicameralism can give some guidance.

Here we have nothing more to say about this topic, but in Chapter 13 we discuss the question of balancing the interests of large groups. In that connection, parliamentary representation, particularly in bicameral legislatures, is a central issue.

7.6 Uniform rules for election or appointment

Although deviations can be made from the principle that all individuals shall be treated equally, it can be argued that the rules governing the composition of a legislative chamber should be *uniform*. That is, there should not be different categories of members, elected or appointed by different rules.

Such a principle could not and should not be imposed without exemptions. In certain perfectly

legitimate electoral systems, like the mixed member proportional systems (Section 10.2) and the parallel systems (Section 11.2), there are two categories of members elected by different rules. (Once elected, all members have equal rights.) In these cases, however, every voter participates in the election of members from both categories. Although there are two categories of elected members, therefore, the voters are treated equally.

Among the examples discussed in previous chapters, the Federal Parliament of Germany is elected by a mixed member proportional system. In addition, the Belgian Senate is elected by a non-uniform and fairly complicated system, see Section 4.2. This may be acceptable because of the doubled-layered federal structure of Belgium. In Switzerland, the cantons decide how their members of the *Ständerat* are elected (see Section 4.1); hence the electoral system may vary.

A clear-cut case of non-uniform rules would consist in members of a parliamentary chamber being elected by a plurality or majority system in one part of the country and by proportional representation in another part. Such were the electoral rules for the House of Republics of Yugoslavia (Serbia and Montenegro) prior to 1998. The chamber was indirectly elected and had an equal number of members from each of the two republics, those from Serbia being elected by a plurality system and those from Montenegro by a proportional one (see further discussion in Section 13.1). For a period in the 1950s, during the Fourth Republic, France had a system of roughly the same kind; see Lakeman (1974) page 223. The country was divided into multi-member constituencies. In some of these, a proportional system favorable to small parties was used. In the rest of the country, a party or coalitions which got an overall majority in a constituency took all the seats; otherwise the seats were distributed by a proportional formula favorable to large parties.

Such hybrid systems are unbalanced and treat voters unequally. If the electoral rules are adopted by the elected assembly, they are also open for manipulation. The present majority can strengthen its overall electoral prospects by introducing proportional elections in areas where it is weak and plurality or majority elections where it is strong, or by differentiating the proportional formula similarly. In the French case, there is strong evidence that the system was adopted for the purpose of depriving the Communists of their fair share of the seats.

It will not be acceptable today to adopt a system of this type for elections to the principal chamber of a national parliament.

Can hybrid systems be accepted for the other chamber under bicameralism? As we have seen, the electoral rules are, could be or have been non-uniform for the Belgian Senate, the Swiss *Ständerat* and the Yugoslav House of Republics. In these cases, the non-uniformity is tied to the federal structure of the country. In Switzerland, the power to adopt electoral rules for the *Ständerat* is decentralized; hence a majority in the assembly cannot manipulate the rules as described above. The same was true in Yugoslavia.

Nevertheless, for one and the same chamber of a national legislature, uniform electoral rules are generally to be recommended.

The members of the European Parliament are elected by different electoral systems in different countries. The national parliaments determine the electoral rules, so there is no danger that a majority in the European parliament can use the system for manipulation. Moreover, the European Union is a not state, not even a federal one, and the European Parliament cannot be directly compared to national parliaments; see the discussion in Section 3.2 of the distinction between a federal state and a confederation or union of independent states.

Zimbabwe provides a further example of non-uniform rules, which even apply to the most powerful

chamber of parliament. The Constitution has been amended several times since independence in 1980. The present version was adopted in 2005, when a Senate was reintroduced, the system having been unicameral since 1987. Today the parliament has two chambers, the House of Assembly and the Senate. The House of Assembly has 150 members, of whom 120 are directly elected in single-member constituencies. The other 30 are ten governors and eight chiefs appointed by the president, and twelve additional members also appointed by the president. (The Senate has a similar composition, but it has less power and is not discussed separately.) In order to get a majority in the House of Assembly, parties in opposition to the president must win 76 of the 120 elected seats, or more than 63 percent. An official justification for the president's right of appointment is that it provides for a stronger representation of underprivileged groups such as women, ethnic minorities, handicapped etc. It is unlikely, however, that non-elected members of parliament will be regarded as representing such groups. Even if the official arguments are accepted, the composition of the Zimbabwean House of Assembly blatantly contradicts established democratic principles.

More generally, it seems difficult to justify a system where an assembly with substantial powers is partly elected and partly appointed, whatever might be the arguments for appointing some of the members. There are other and better ways of strengthening the representation for underprivileged groups. We refer to Chapter 14, where protection of minorities is discussed. That discussion is mainly concerned with ethnic, linguistic, religious and sectarian groups and the like; see the definition of "group" in Chapter I.2. The methods considered can, however, also be used if it is deemed necessary to secure representation of other groups that are considered underprivileged.

7.7 Overview of electoral systems

The following overview presents the classification used in the subsequent discussion. It follows to a large extent the terminology of the International IDEA Electoral System Design Handbook, International IDEA (2005).

Plurality and majority elections in single-member constituencies (described and discussed in Chapters 8):

- Plurality elections, "first-past-the-post" (Section 8.1)
- Majority elections in two rounds (Section 8.2)
- Majority elections by the alternative vote, AV (Section 8.3)

Plurality elections in multi-member constituencies (Chapter 9):

- Elections based on individual candidates, the "block vote" (Section 9.1)
- Elections based on closed lists, the "party block vote" (Section 9.2)

Proportional representation (Chapter 10):

- List-based proportional systems (Section 10.1)
 - One nation-wide constituency
 - Multi-member constituencies
 - Multi-member constituencies with compensation
- Mixed member proportional systems (MMP) or list-based proportional systems combined with elections in single-member constituencies (Section 10.2)
- The single transferable vote, STV (Section 10.3)

Semi-proportional systems (Chapter 11):

- The single non-transferable vote, SNTV (Section 11.1)
- Parallel systems (Section 11.2)

8 Plurality and majority elections in single-member constituencies

As pointed out in the beginning of Chapter 7, the discussion is mainly concerned with elections to legislative assemblies. However, the methods discussed in Sections 8.1 – 8.3 can also be used for electing one person to an office, such as the presidency.

8.1 Plurality elections

The country is divided into constituencies, each electing one member of the assembly. In each constituency, the candidate with the highest number of votes is elected. A seat can be won with less than fifty percent of the votes. The system is sometimes referred to as majority vote, but we will only use that term when more than fifty percent of the votes is required for being elected. It is often thought of as the British system. In the United Kingdom, parliament is elected this way, and the same is true in most countries whose legal and political system is based on the British tradition.

The historical background is described in Section 7.1. Here we take it for granted that political parties exist and dominate the electoral process, although independent candidates may be allowed. We discuss the system on that basis.

The nationwide result may be far from proportional. Typically, large parties get more and small parties less than their proportional share of the seats. In particular, the largest party will normally get a share of the seats much higher than its share of the votes.

The system establishes a strong and direct link between the voters and the elected members (see the second criterion in Section 7.4). Moreover, it will often give clear majorities in parliament, thereby facilitating the forming of strong governments with majority support (the third criterion in Section 7.4). Under parliamentarism, majority governments are generally regarded as an advantage, see Section 6.3. However, strong governments are not always the result of plurality elections in single-member constituencies, as illustrated by India in the 1990s.

The party system will tend to get polarized, so that the number of parties is low. Often there are only two parties of any importance.

If the support of the parties is (almost) evenly distributed across constituencies, the largest party will benefit strongly from the system. In most countries where plurality systems are used, the social and political composition of constituencies varies. Then the opposition will also get significant representation, since it is likely to be the largest party in parts of the country.

Small or medium-sized parties with support evenly spread over the country, will have difficulties in being represented. Therefore, it can be hard for new parties to enter the political scene. On the other hand, parties with strong regional support have a fair chance of being represented, even if they are small nationwide.

The system is vulnerable to tactical voting. If, ahead of the elections, two candidates are commonly regarded as the strongest contenders, voters who primarily support a third candidate may choose to vote for one of the frontrunners instead of showing their true first preferences. It is even possible

that a candidate really has strong support, but if the support is perceived to be weak, many of the supporters may cast a tactical vote for some other candidate, thereby depriving their favorite of a possible victory.

As already noted, large parties will usually get more than their proportional share of the seats, while small parties get less. There is, however, no direct connection between a party's share of the vote and its share of the seats. In other words, a party's representation does not only depend on its total number of votes but also on how these votes are distributed among the constituencies. It is even possible that a small party gets more and a large party less than its proportional share of the seats. In Section 8.4, we give an example of this; there are two parties, one of them gets a majority of the votes but a minority of the seats, while it is the other way round for the other party. Similarly, a party can increase its share of the votes from one election to the next, but nevertheless lose seats, or vice versa.

In technical terms, the condition of anonymity, defined in Section 7.5, is not satisfied by plurality elections in single-member constituencies. If two voters change their votes as described in the definition of anonymity, nothing changes if they belong to the same constituency. If they cast their votes in different constituencies, however, the result may change in one of these and not in the other one, leading to an overall change in the parties' parliamentary representation.

8.2 Majority elections in two rounds

In some countries with single-member constituencies, a candidate must get at least fifty percent of the valid votes in order to be elected. If no candidate is elected in the first round of voting, there is a run-off. Usually, only the two candidates with the highest number of votes in the first round can participate in the run-off. The candidate with the most votes in the second round wins the seat.

A variant of this, which is strictly speaking not a majority system, is used for parliamentary elections in France. In the first round, more than fifty percent of the votes is needed to be elected. If there is a second round, it is possible that more than two candidates take part, and the plurality winner is elected, whether or not an absolute majority is achieved. (In most of the French constituencies where there is a second round, it involves only two candidates.)

The legitimacy of the elected members may be strengthened when they have obtained absolute majorities in their respective constituencies. Another argument for requiring a majority is to ensure that subsidiary preferences are taken into account. When a voter's first choice has been defeated, at least the second-ranked candidate can be elected.

An extreme candidate, whose support is strong but falls short of fifty percent, will have less chance of being elected under a majority than under a plurality system. When there are strong group divisions within a constituency, therefore, the majority system gives candidates an incentive to appeal to voters beyond their own group, which seems advantageous in post-conflict situations.

The method is vulnerable to tactical voting, but probably less so than plurality vote, since a voter's second preference can be expressed in a possible second round. We do not go in detail concerning the tactical possibilities under majority vote.

Otherwise, the remarks made at the end of Section 8.1 apply here as well. In particular, the largest party will normally get more than its proportional share of the seats. Small parties will have difficulties in winning seats unless they have strong regional support.

8.3 Majority elections by the alternative vote

A variant of majority election is the preferential system in single-member constituencies, often called the alternative vote or AV. It works as a majority system with multiple run-offs, until one candidate wins more than fifty percent of the valid votes.

On the ballot, the names of the candidates are listed, possibly with party affiliation. The voter shall rank candidates by indicating preferences from 1 (most preferred candidate) and upwards. In the standard version of AV, the voter decides how many candidates to rank; a ballot is valid if only one preference is indicated, if all candidates are ranked, or if the number of preferences is between these extremes. However, if only a few candidates are ranked, the voter risks losing influence. The rules could also require that all or a certain minimal number of candidates be ranked in order for the ballot to be valid, or conversely restrict the number of preferences to two or some other limit lower than the number of candidates.

During the counting, the ballots are sorted by first preferences. If a candidate receives more than fifty percent of the first preferences, this candidate is elected. If nobody gets an absolute majority, the votes for the candidate who received the lowest number of first preferences are distributed according to the next preference on each ballot. If a voter has not indicated a second preference, this ballot is taken out of the count and has no influence on the final outcome. A candidate who now has more than fifty percent of the votes is elected. If nobody is elected at this stage either, the procedure of distributing votes from the bottom candidate is continued until either a candidate has received more than fifty percent of the votes or only one candidate is left.

In fact, AV is the single transferable vote (STV, see Section 10.3) applied to the single-member case. As opposed to STV, AV is a majority system, not a proportional one.

8.4 Constituency structure

How the country is divided into constituencies can have a considerable impact on the election results. This is true for all pure plurality and majority systems based on single-member constituencies.

If all constituencies are equal so far as party support is concerned, a party which wins one constituency will win them all. This is, of course, an extreme and unrealistic case, but if the country politically is fairly homogenous, one party is likely to win a large majority in parliament and be represented way above its share of the votes. This was pointed out in Section 8.1 for the system discussed there, but it also holds for the systems of Sections 8.2 and 8.3.

If there are regional variations in the parties' support, the election result will depend on how the country is divided into constituencies. It is perfectly possible that one party gets a majority of the votes, but another party wins a majority in the legislature. This is possible even if all constituencies are of equal size, as required by the principle of equal suffrage (at least for the principal chamber); see the discussion in Section 7.5 of what is meant by equal suffrage. We illustrate this possibility by an example in which there are only two parties. This is again unrealistic; even in countries perceived to have a two-party system there are usually some minor parties as well. A more realistic example can easily be constructed, but it will necessarily be quite complicated, and the main point will tend to drown in the details.

Suppose a country has a 100-member legislature, elected by plurality or majority vote in single-member constituencies. (The details of the electoral system do not matter when there are only two parties.) In each constituency, there are 10,000 voters. In each of 60 constituencies, party *X* gets 6,000 votes while party *Y* gets 4,000 votes. In each of the remaining 40 constituencies, party *X* gets 3,000 votes while party *Y* gets 7,000 votes. Party *X* wins the former 60 constituencies and gets a majority in parliament. The total vote, however, is 480,000 for party *X* and 520,000 for party *Y*, that is, a majority of the voters support *Y*.

In the example, party *X* gets more than its proportional share of the seats because there are a large number of constituencies in which *X* has a relatively small majority, while *Y* has a large majority in a smaller number of constituencies.

If constituency boundaries are determined by a political process, the current majority can try to draw the boundaries so as to get an advantage similar to that enjoyed by party *X* in the example. Thereby it can perpetuate its parliamentary majority, even if it should lose the popular majority in the next election. There are limits to how far one can go in this direction. Formal or informal norms may restrict the majority's freedom when drawing boundaries. Moreover, nobody is able perfectly to foresee the distribution of votes in upcoming elections. Nevertheless, those who determine the constituency boundaries have considerable influence on future election results. This is true even if it is required that constituencies be of (close to) equal size.

In the USA, politically motivated constituency design has been a common practice, or it has at least been perceived to be common. The phenomenon has even been given a name, "gerrymandering".

It clearly violates democratic principles if the current majority uses its position to strengthen its future electoral prospects as described above. Accusations of "gerrymandering", whether or not they are well founded, can sharpen conflicts and make reconciliation more difficult. This consideration is particularly relevant in post-conflict situations, where mutual trust is likely to be weak or absent.

If the electoral system is based on single-member constituencies, one should, if at all possible, remove the power to draw constituency boundaries from the political process and leave it to some neutral and universally trusted authority, like an independent commission or the courts.

9 Plurality elections in multi-member constituencies

9.1 Plurality elections based on individual candidates, the "block vote"

The country is divided into constituencies, each electing a specified number of members. Alternatively, the whole country can be one constituency, from which the whole parliament is elected.

The historical background is described in Section 7.1. Here we discuss the system on the assumption that political parties exist and dominate the electoral process.

Candidates are nominated by political parties. Independent candidates will normally also be allowed.

Each voter has as many votes as the number of seats to be filled. The voter is not bound by party lines. That is, it is possible to support candidates from more than one party, or vote for a combination of party candidates and independents. A voter may be allowed to cast fewer votes than the maximum number permitted, but it is not possible to give more than one vote to the same candidate.

The candidates with the most votes are elected. A majority of the valid votes is neither necessary nor sufficient for being elected. (The number of candidates supported by more than half the voters can both fall short of and exceed the number of seats.)

Even in the case of multi-member constituencies, it is possible to require absolute majorities and arrange run-offs if not enough candidates achieve this in the first round of voting, in analogy with the system discussed in Section 8.2. This amounts to majority elections in multi-member constituencies. We do not discuss this system in detail, but give an example. The system is used for electing the Haitian Senate, which has 30 members, elected from the ten provinces, three from each. The term of office is six years with staggered periods; ten members – one from each province – are elected every two years. For the first election in 2006, all 30 members are elected. The voters can vote for up to three candidates, and the top candidates are elected in the first round, provided that they have gotten more than 50 percent of the votes. If fewer than three candidates get more than 50 percent, there is a new round of election. The number of candidates participating in the second round is twice the number of seats to be filled in that round. The candidate(s) with the highest number of votes in the second round are elected.

Normally, a party will nominate as many candidates as there are seats. Most voters will support a specific party and vote for exactly the candidates nominated by that party. To the extent the voters behave this way, the system functions as a "block vote" and will effectively be a 'winner-takes-all' system, at least within each constituency. That is, when the parties and the voters maintain a high degree of discipline, the largest party – which need not be very big – will take all the seats.

Assume, for example, that five members are to be elected in a constituency where 100,000 votes are cast. If there are five parties, the largest of these may very well have as little as 30 percent of the votes. Then the candidates nominated by this party each get 30,000 votes, while no other candidate gets as much as that. The result is five seats for the party with 30 percent of the votes, and no seats for the rest.

If this system is applied with the whole country as one constituency, we have a true "winner-takes-all" system. Parliament will in its entirety consist of representatives of the largest party. If the country is divided into several constituencies, there is at least a possibility that the election in different constituencies is won by different parties, so that more than one party will be represented in parliament.

The assumption of strong discipline is not always satisfied, as illustrated by the 1996 Palestinian elections, where this system was used. Many voters divided their votes between parties, or gave most of their votes to party candidates but also supported an independent. Thus some highly respected independent candidates were elected even without affiliation to the dominant party. On the other hand, if votes for independent candidates are divided, the chance is reduced for any of them being elected.

Moreover, the dominant party can choose to run fewer candidates in a constituency than the number of seats, thereby consciously giving up seats to other parties or to independents.

In spite of this, smaller parties will have no guarantee of being represented, even if they are well

organized and fairly large. In this connection, all parties but the largest one are "smaller parties". In the example above, support from 25 percent of the voters, which certainly must be regarded as a large minority, is not enough to secure representation.

Whether a smaller party wins any seats, depends on many other factors than its strength among the voters. If the party hopes to attract some support from voters who do not fully support it, the personalities of the candidates can be important. In addition, it might be advantageous to propose fewer candidates than the number of seats, so that the outside support is not diluted by being spread among many candidates. In such a case, the party may tell its supporters to vote only for the party candidates and not fill the ballot with votes for competing parties' candidates. (If a party relies only on core supporters, who vote a straight party line, there is no reason to nominate fewer candidates than the number of votes each supporter can cast.) Under this system, therefore, parties can gain an advantage by tactical behavior, and the outcome may sometimes seem quite random.

The most likely result of plurality elections in multi-member constituencies is an even stronger advantage for the largest party than that produced by plurality elections in single-member constituencies, and a larger deviation from proportional distribution of the seats. In addition, one of the advantages of elections in single-member constituencies is absent, namely the strong accountability made possible by a close and direct link between the elected member and a comparatively small electorate (see the second criterion in Section 7.4). The link between those who elect and those elected will not be closer than under a proportional system with constituencies of similar size.

For these reasons, the system discussed here is not common in elections to parliaments. As already mentioned, it was used in Palestine in 1996, but has later been only partially maintained within a parallel system; see Section 11.2. Jordan used the system before 2001, when it was replaced by the single non-transferable vote (see Section 11.1).

Plurality vote in multi-member constituencies is not to be recommended for parliamentary elections.

9.2 Plurality elections based on closed lists, the "party block vote"

Only parties can nominate candidates. A party shall run a list of candidates, containing as many names as there are seats in the constituency. A voter votes for one of the party lists. The list that receives the highest number of votes, even if it is not a majority, wins the election and has all its candidates elected.

In practice, this system is not very different from the one described in Section 9.1. If, in the latter system, each party nominates as many candidates as there are seats to be filled and party discipline is perfect, there is no difference at all. Under "party block vote", some of the possibilities for deviations discussed in Section 9.1 – some voters not consistently voting according to a party line, strong independent candidates being able to attract support from various quarters, the dominant party giving up seats by nominating fewer candidates than the number of seats in the constituency – are ruled out by law.

The objections raised in Section 9.1 against the system discussed there, apply here as well, with even greater strength. The modifying effects of voters splitting their votes or otherwise deviating from party discipline cannot occur here.

9.3 Local elections in Haiti

For illustration, we shall present a quite peculiar electoral system, which is used for certain local elections in Haiti. It has some resemblance with "party block vote", described in Section 9.2, but it is a system *sui generis*.

Haiti has a number of elected local bodies at several levels, elected by this system or similar ones, or by a pure "party block vote" system, but we do not describe the various bodies in detail.

The local councils to be discussed have seven, nine or eleven members, depending on the population of the community, as shown by the first two columns in the table below.

A party nominates a list of candidates. A voter votes for one of the party lists. The three parties with the most votes, and only these, will be represented on the council. The largest, second largest and third largest parties are awarded the number of seats given in the last three columns in the table below.

Population	Total number of seats	Seats for largest party	Seats for second party	Seats for third party
Less than 5,000	7	4	2	1
Between 5,000 and 15,000	9	5	3	1
More than 15,000	11	6	3	2

Under this system, the largest party wins a majority on the council, but just barely more than half the seats. This contrasts with the systems discussed in Sections 9.1 and 9.2, where the largest party probably (Section 9.1) or with certainty (Section 9.2) will win all the seats (provided that the whole council is elected in one constituency).

The distribution of seats only depends on which parties come first, second and third; the actual numbers of votes do not matter. In particular, the largest party gets the same number of seats both if it gets, for example, 30 percent of the total vote and if it gets 70 percent. It is certainly not unrealistic that the largest party gets as little as 30 percent. In truly democratic elections, a party will rarely get as much as 70 percent of the votes, but the possibility should not be ruled out, at least not in local elections. The largest party will usually get more seats than its proportional share, but not invariably so. For a party with 70 percent of the votes, six out of eleven seats is certainly less than its proportional share.

It is hard to conceive of a set of criteria and values according to which this electoral system would be a good one, let alone optimal. In all likelihood, it was constructed *ad hoc*, without thorough discussion of its effects and of possible alternatives. A better system could certainly have been found if a more systematic approach had been adopted.

10 Systems of proportional representation

This is a class of systems which will give representative results, in the sense that the elected assembly will mirror the voters more or less perfectly. An elected assembly makes political decisions; the predominant dimension which should be reflected in the assembly, therefore, is that of political views. However, there are also reasons to believe that other dimensions, such as geography,

ethnicity, religion or gender (see the definition of "group" in Chapter I.2), are important in order that the assembly's decisions be representative of and accepted by the people.

There are two major types of proportional systems, the list-based or party systems and the preferential voting systems. The former are described and discussed in Section 10.1. In Section 10.2, we consider the possibility of combining what is essentially a list-based proportional system with systems of the type described in Chapter 8. Preferential voting is the topic of Section 10.3, where one such system, the single transferable vote, is presented.

10.1 List-based systems

Under list-based systems, the elections are based on groups of candidates who run together on lists, most often as parties or coalitions. For simplicity, we usually refer to such a group as a "party", without implying anything about its internal organization. The voters will know who the individual candidates are and can be allowed to express preferences for certain candidates, but their primary choice is that of a party.

Methods of proportional distribution

The seats are distributed among the lists, in proportion to their share of the votes. This cannot be done exactly, since the number of seats awarded to a party must be a whole number. There exist several distribution methods which, in somewhat different ways, approximate the proportional distribution. Those most commonly used are the method of the largest remainder and various divisor methods. Among the division methods the most common are those of d'Hondt (divisors 1, 2, 3 and so on) and of Sainte-Laguë (divisors 1, 3, 5 and so on). The methods are also known by other names. The d'Hondt method is somewhat more favorable to large parties than are the Sainte-Laguë method and the method of the largest remainder. The latter two methods usually give quite similar results.

The choice of one of these methods rather than another is not of overriding importance; essentially the methods are just different procedures for rounding the exact proportional representation of the parties to whole numbers. The arguments for or against the various methods are of a fairly technical nature. We do not discuss this issue in detail; neither do we describe the methods precisely. It should be noted, however, that the method of the largest remainder has some peculiar properties. In particular, if the total number of seats to be distributed is increased but the parties' votes are unchanged, a party may lose a seat under this method. As a consequence, counterintuitive results may occur if the method is combined with quota systems of various kinds. Also, the legal texts tend to be quite complicated. Divisor methods are more straightforward and avoid these problems.

The methods and their properties are discussed in detail in Hylland (1990), which also contains references to the extensive literature on the subject.

Nationwide proportionality and compensatory seats

If political proportionality is the only relevant concern, the whole assembly should be elected in one nationwide constituency. Only a few countries use such a system, among them Israel, Moldova, the Netherlands, Slovakia and Ukraine (the latter since 2005). Usually, it is considered important that the assembly reflects the population not only politically, but also geographically. This is achieved by dividing the country into multi-member constituencies, in each of which the proportional formula is applied to distribute the seats among the parties on the basis of their votes in the constituency.

If all seats are distributed in this way, the total result may deviate from proportional representation of the parties. Even if the deviation in each constituency only consists in rounding the exact proportions to whole numbers, the deviations may add up to a few seats when the country is seen as a whole. In particular, if a small party has its support about evenly spread over the country it may be unable to win a seat in any constituency, although it gets a percentage of the nationwide vote that should entitle it to some seats. (This effect is strengthened if the seats are distributed by a proportional formula which is relatively unfavorable to small parties, like that of d'Hondt.) In general, the deviations will be greater when constituencies are small, that is, when only a few members are elected in each constituency. Even then, however, the deviations from proportionality will generally be moderate compared to those encountered under the systems described in Chapters 8 and 9.

A vote cast for a party which wins no seats, is a wasted vote. Under proportional elections in multi-member constituencies, therefore, a voter would want to avoid parties that have no real chance of winning seats in the constituency. This creates a motive for tactical voting, though a weaker one than under plurality or majority elections, where many more votes are typically wasted.

Many countries have introduced mechanisms that compensate for such deviations from nationwide proportionality. One possibility is the so-called compensatory seats. They come in addition to the seats distributed in the constituencies, and the purpose is to secure proportionality of the total result. The system is illustrated by the following example; see table below. The total number of seats in parliament is 275, the number of seats elected in the constituencies is 221, and there are 54 compensatory seats.

The column marked (I) gives the proportional distribution of 275 seats based on the nationwide votes as given in the first column. (In this case, the method of the largest remainder and the Sainte-Laguë and d'Hondt methods all give the same result.) The column marked (II) illustrate what might be the result of the distribution of seats in the constituencies. The distribution of the compensatory seat is given by subtracting (II) from (I). Even if the calculations are based partly on constituency results and partly on nationwide result, each voter casts only one vote.

Note that the compensatory seats are not in themselves proportionally distributed; they are distributed so as to achieve overall proportionality.

	Nationwide number of votes	Nationwide support in percent	Distribution by nationwide support (I)	Seats won in the constituencies (II)	Compensatory seats (I) – (II)
Party 1	2,200,000	22.4	62	57	5
Party 2	3,500,000	35.6	98	85	13
Party 3	1,750,000	17.8	49	43	6
Party 4	1,300,000	13.2	36	23	13
Party 5	800,000	8.1	22	13	9
Party 6	290,000	2.9	8	0	8
Total	9,840,000	100.0	275	221	54

A vote for a party counts in the nationwide distribution whether or not it has contributed to the party winning seats in the constituency where it was cast. At the same time, the subtraction of (II) from (I) prevents votes from counting twice. Therefore, every vote contributes equally to the nationwide representation of the party for which it is cast, and the danger of votes being wasted is slight.

It is possible that a number in column (II) exceeds the corresponding number in column (I), so that subtraction does not make sense. There are several possibilities for what to do then. (One of the possibilities is illustrated, in a slightly different connection, in the discussion of elections to the Scottish Parliament in Section 10.2.) We do not discuss the issue further, but only note that nationwide proportional distribution may not be perfectly achieved in such a case.

Systems based on compensatory seats, as described in the example, are used for elections to the House of Representatives in Bosnia and Herzegovina and the parliaments of Denmark, Norway and Sweden. A number of other countries, such as Austria, Romania and South Africa, have systems that are technically different, but have similar purpose and effects.

If proportional elections are carried out in one nationwide constituency, or if there is a well-functioning system of compensatory seats, every vote has the same political weight, in the strict sense of the electoral system being anonymous. This is defined as follows (see Section 7.5): Suppose, initially, that voter *K* has voted for party *X*, while voter *L* has voted for party *Y*. Then *K* and *L* change their votes, so that *K* votes for *Y* and *L* for *X*, while all other votes are unchanged. This shall not lead to any change in the number of seats won by the parties. The condition is trivially satisfied if *K* and *L* cast their votes in the same constituency, including the case of the whole country being one constituency. If *K* and *L* belong to different constituencies, the local distribution of seats – column (II) in the table – may change. The nationwide votes for the parties have not changed, and therefore the distribution of seats based on nationwide support – column (I) – does not change either. That is, a possible change in column (II) is counteracted by a change in the distribution of the compensatory seats. The interchange of votes between *K* and *L* can lead to changes in the persons elected to parliament, but not in its political composition.

Thresholds

List-based proportional systems sometimes include a threshold for representation. That is, a party with less than a certain percentage of the vote does not take part in the distribution of seats and will therefore not be represented, even if it would have been entitled to a few seats according to the proportional method used. The purpose is to prevent party fragmentation in parliament and make it easier to form a stable government.

For countries divided into multi-member constituencies, the threshold may apply to all seats, including those distributed in the constituencies. In this case, however, there will be an implicit threshold, determined by the size of the constituencies, which prevents very small parties from winning seats. (Nevertheless, Bosnia and Herzegovina introduced a two percent threshold at constituency level, but not at entity level, when the electoral law was adopted in 2001.) It seems more relevant, therefore, to introduce a threshold if the country is one single constituency, or if there are compensatory seats or similar mechanisms that guarantee nationwide proportionality. In the latter case, the threshold may apply only to the compensatory seats. Then a party with strong regional support can win constituency seats and be represented even if it does not reach the national threshold. This will to some extent undermine the purpose of preventing fragmentation of parliament, but securing representation for strong regional forces may be considered more important. For example, Norway and Sweden have a threshold of four percent of the nationwide vote for the compensatory seats, but it is possible to win seats locally without reaching this threshold.

A threshold necessarily leads to some parties, namely the smallest ones, not being represented in proportion to their votes. In that respect, a deviation from the principle of equal suffrage is introduced. If the threshold is applied to nationwide votes, however, each vote has the same

influence on whether the party for which it is cast reaches the threshold. In that sense, all votes count the same.

Moreover, the existence of a threshold increases the danger that votes are wasted, since a vote for a party that does not reach the threshold, has no effect. This, in turn, can create an incentive for tactical voting. A voter whose first choice is likely to fall short of the threshold, or is perceived as being in that situation, may choose to vote for another party. Even if a party's real support is above the threshold, it may end up without representation if many of its supporters fear that a vote for the party will be wasted. In particular, this effect can prevent new parties from entering the political scene.

These disadvantages must be traded off against the argument *for* the threshold. Stable and effective government is in itself a democratic value, which can justify the introduction of a threshold. In countries like Germany and Sweden, the threshold has probably contributed to keeping the number of parties low. If the threshold is high, however, the idea and purpose of proportional representation is undermined. We express no specific view on how high a threshold can or ought to be, but we mention that the Federal Constitutional Court of Germany has accepted a threshold of five percent but rejected one of seven and a half percent, on the grounds that the latter violates the constitutional principle of equal elections. (These decisions concern mixed member proportional systems, see Section 10.2, but the relevant arguments are the same in the present connection.)

In emerging democracies and in post-conflict situations, there may be good reasons for keeping the threshold low until a party system has been established. After a conflict, the parties often represent the groups that were parties to the conflict, and parties promoting dialog and reconciliation may be weak. In order that the party system shall develop, a low threshold may therefore be advisable for the first elections.

The voters' influence on the choice of candidates

When the distribution of seats among the parties has been determined, persons must be selected to fill the seats.

For list-based systems, the lists can be closed or open. Closed lists mean that once the list has won a number of seats, these are given to the candidates in the order they appear on the list. The lists should, however, be made public and the parties should not after the election be allowed to change their candidates or the order in which they are listed.

Open lists, on the other hand, mean that the voters have influence on who, out of the candidates on a list, shall be elected. In the most moderate form, the voter can give one extra vote to a candidate on the chosen list. More radical is a system where the voter can give extra votes to several candidates on the list, and possibly even strike out candidates. The voters' influence on the choice of candidates does not only depend on the changes they are allowed to make on the ballot, but also on the specific rules governing the counting. The number of variants is enormous, and we do not go in detail. The use of open lists will not in itself affect the distribution of seats among the parties.

Even more radical are systems where voters can give votes to candidates from other parties than the one for which they primarily vote. This will usually be combined with rules providing for the dividing of such a vote between the parties whose candidates are listed on the ballot. Hence one dilutes the support for one's favorite party by using this option.

List-based proportional systems can also account for independent candidates, who will in a sense be regarded as separate lists or parties.

Discussion

List-based proportional systems clearly meet the criterion of a representative distribution of seats between the parties. The parties will most often cover the political dimension, but there is usually no prohibition against basing parties on other divisions or dimensions, such as gender, ethnicity or any of the other alternatives mentioned in the definition of "group" in Chapter I.2.

If the whole electorate is one constituency and the lists are closed, it can be claimed that accountability is weak. The voters will not necessarily have a direct link to the persons they have elected, even if they have cast their votes knowing who the candidates are.

Accountability is strengthened if lists and candidates run in smaller constituencies. This will also secure that all parts of the country are represented in the assembly. Introducing open lists may also strengthen accountability.

List-based proportional systems may lead to a fragmented assembly, since small parties have a good chance of winning seats. This in turn will often lead to a need for forming a coalition government. To prevent the fragmentation, one may introduce a threshold. On the other hand, giving smaller parties a chance to be represented may be a wanted feature of the system.

As already mentioned, a list-based system may also allow independent candidates to run. Depending on the specific rules and the division of the country into constituencies, the independent candidates may have a fair chance of being elected.

10.2 Mixed member proportional systems

This is a class of electoral systems intended to combine the advantages of elections in single-member constituencies (accountability) with those of proportional elections (a representative parliament); see the first two criteria in Section 7.4.

It is often referred to as the German system, since it has been used for elections to the Federal Parliament since the establishment of the Federal Republic of Germany in 1949. (Actually, the system had previously been used for a short period in Denmark, where it was abolished for reasons we do not discuss.) There are many variants of the system. We start by describing the rules for electing the German Federal Parliament. Thereafter, we discuss variants which are in use or have been proposed.

The Federal Parliament of Germany

The Federal Parliament normally has 598 members, though the membership may increase for reasons described below. There are 299 single-member constituencies, so the number of constituencies is half the normal membership.

Candidates proposed by political parties as well as independent candidates can run for the constituency seats. The parties present lists of candidates in the *Länder*. A voter has two votes, one for a candidate in the constituency and one for a party list.

In each single-member constituency, a candidate is elected by plurality vote (see Section 8.1). The list votes are used to determine the overall political composition of the assembly, that is, the total membership of 598 is proportionally distributed based on nationwide list votes. At this stage there is

a threshold; a party only takes part in the proportional distribution if it nationwide has gotten at least five percent of the list votes or has won the election in at least three single-member constituencies. Within each party, the seats it has been awarded by this process are distributed among its *Länder* lists. From the number of seats thus obtained by a list, is subtracted the number of seats the party has won in the single-member constituencies of the *Land*. The difference is the party's number of "list seats" in that *Land*. Those seats are filled from the top of the list, candidates elected in single-member constituencies being passed over.

If a party has won more constituencies in a *Land* than the number of seats awarded to its list, it keeps the constituency seats. The other parties get what they are entitled to according to the computation described above. Hence the parliamentary membership is increased above 598. The extra seats are called "*Überhangmandate*", which may be translated "hangover seats". There have been a few such seats in each of the elections since German unification in 1990. Computations are not redone based on the increased membership, and perfect proportionality is not achieved.

Note that the political composition of the Federal Parliament – apart from the threshold and the possibility of "hangover seats" – is determined solely by the number of list votes won nationwide by the parties. The internal distribution of seats among the *Länder* lists of a party only affects the geographical composition of parliament. Thereby it is secured that all members have some local affiliation, be it for the "list members" to a *Land*, not to a constituency.

Other variants of the system

For one thing, the elections in the single-member constituencies need not be conducted by plurality vote. The majority systems described in Sections 8.2 and 8.3 can also be used. Similarly, the choice of list candidates can be based on open lists instead of the closed lists used in Germany, see the discussion in Section 10.1 of the voters' influence on the choice of candidates in list-based systems. These variants may lead to different persons being elected, but they do not affect the political composition of the assembly.

In Germany, there are as many list seats as there are single-member constituencies. A smaller number of list seats may be sufficient to secure political proportionality. For a given chamber size, this will allow for more and smaller single-member constituencies. Hence the link between the voters and the elected representative can be strengthened and accountability improved.

In recent years, a number of countries have adopted mixed member proportional systems. Examples are Albania and New Zealand. In these countries, significantly more than half the members of parliament are elected in single-member constituencies.

With some variations, the system is also used for electing the regional parliaments in most of the German *Länder*. In a couple of places, the voter has only one vote, to be cast for a candidate in the single-member constituency. If this candidate is nominated by a party, the vote is also counted as a vote for that party's list.

All variants discussed so far are similar to the system used for electing the Federal Parliament of Germany, in the sense that they secure proportional representation of the parties on a nationwide basis. A threshold for representation may be imposed, and there may be small deviations for other reasons, but basically the systems are proportional. It is, however, possible to apply the proportional distribution not to the country as a whole, but to regions that are smaller than the country but bigger than the constituencies; see the discussion below of systems used or proposed in the United Kingdom.

There is a clear analogy between the "list seats" of mixed member proportional systems and the "compensatory seats" in list-based proportional systems, see the computation illustrated by the table in Section 10.1. As we emphasized there, the "compensatory seats" are not in themselves proportionally distributed; they are distributed so as to achieve overall proportionality. The same is true for the "list seats" in mixed member proportional systems.

Therefore, mixed member proportional systems must not be confused with the parallel systems to be discussed in Section 11.2.

The United Kingdom

In the United Kingdom, mixed member proportional systems are used for the election of the bodies established in the late 1990s to give local autonomy to Scotland and Wales (so-called devolution). A government commission has also proposed a similar system for the House of Commons. In the UK, the system is sometimes known as the "additional member system" or "top-up".

We first describe the electoral system for the Scottish Parliament. The rules for the Welsh Assembly are essentially the same. Thereafter, we say a few words about the commission's proposal.

Scotland is divided into 73 single-member constituencies. There are eight regions, each consisting of eight to ten constituencies. In each region, seven list members are elected. Hence there are 56 seats of that type, and the Scottish Parliament has 129 members in total. That is, the constituency seats make up about 57 percent of all the seats.

Candidates proposed by political parties as well as independent candidates can run for the constituency seats. The parties present lists of candidates in the regions. A voter has two votes, one for a candidate in the constituency and one for a party list in the region. In each single-member constituency, a candidate is elected by plurality vote (see Section 8.1). So far, the system is equal to the German one.

In each region, the seven list seats are used to obtain, as far as possible, proportional representation of the parties *in that region*. No attention is paid, however, to a party's number of votes in all of Scotland, and hence no attempt is made to secure proportional representation in the Scottish Parliament as a whole. This is a crucial difference from the German system.

The method for distributing the list seats can be described in the following way. (This description does not correspond exactly to the algorithm outlined in the devolution legislation, but it is equivalent in the sense of always giving the same result.) All seats belonging to the region, constituency as well as list seats, are distributed proportionally among the parties, based on the list votes in the region (by the d'Hondt method). From the number of seats thus awarded to a party is subtracted the number of seats it has won in the constituencies of the region. The differences determine the distribution of the list seats. If the difference is negative for some party, it shall nevertheless keep its constituency seats. A new computation is carried out, where this party and its seats are not included. This procedure may have to be repeated. The total number of seats in the region is under no circumstance changed. When a new computation is necessary, full proportionality is not achieved, not even within the region.

As an illustration, we consider the 1999 elections in the Highlands and Islands region. The results are published by the Scottish Parliament (1999).

The Highlands and Islands region contains eight constituencies and thus has a total of $8 + 7 = 15$

seats. The distribution of votes and seats is given by the following table. (Parties so small that they were far from winning seats are left out.)

Party	List votes in the region	Seats by list votes (out of 15)	Constituency seats	List seats
Labour	51,371	4	1	3
Scottish National Party	55,933	5	2	3
Liberal Democrat	43,226	4	5	-1
Conservative	30,122	2	0	2
Green	7,560	0	0	0

The Liberal Democrat has won more constituency seats than its proportional share of the 15 seats. Hence a new computation is carried out, where this party and its five seats are not included. That is, $15 - 5 = 10$ seats are distributed among the other parties based on their regional list votes. The results are given by the table below. Compared to proportional distribution of the 15 seats by the distributional method used (d'Hondt), the Liberal Democrat gets one seat too much and the Scottish National Party one too little.

Party	List votes in the region	Seats by list votes (out of 10)	Constituency seats	List seats
Labour	51,371	4	1	3
Scottish National Party	55,933	4	2	2
Liberal Democrat	–	–	5	–
Conservative	30,122	2	0	2
Green	7,560	0	0	0

In the 1999 elections, Labour won 53 out of the 73 constituency seats in Scotland as a whole, which amounts to almost 73 percent. The party's share of the constituency and the list votes were 39 and 34 percent, respectively. This strong overrepresentation was reduced by the list seats, but in total Labour won 56 out of 129 seats, or 43 percent. That is, the particular version of the mixed member proportional system used for electing the Scottish Parliament, contributes to proportional representation of the parties, but there are still significant deviations from proportionality. The 2003 results were similar.

Turning to the United Kingdom as a whole, the Independent Commission on the Voting System issued its report in 1998. It was headed by former Cabinet Minister and EU Commission President Roy Jenkins (now Lord Jenkins of Hillhead). The commission should recommend an alternative to the present system for elections to the House of Commons, taking account of these four considerations:

- The requirement for broad proportionality
- The need for stable government
- An extension of voter choice
- The maintenance of a link between members of parliament and geographical constituencies

The commission proposed that the House of Commons be elected by a system similar to the one

used for the Scottish Parliament, but with an (even) weaker proportional element.

The proposal can be summarized as follows: Out of the total membership of the House of Commons, 80 to 85 percent shall be elected in single-member constituencies. The commission majority recommended that the constituency elections be conducted by the alternative vote (see Section 8.3). The whole of the UK (England, Scotland, Wales and Northern Ireland), shall be divided into 80 "top-up areas", corresponding to the regions in Scotland. In each of these areas, there shall be one or two list seats, to be distributed in order to obtain or approximate proportional representation of the parties in the area. An open-list system shall be used for choosing persons from the lists.

The proposal will clearly improve proportionality compared to the present system, which is plurality vote in single-member constituencies. On the other hand, the limited number of list seats, 10 to 15 percent of the total membership of the House of Commons, makes it unlikely that the final result will come very close to being proportional. Nevertheless, the commission is of the opinion that the requirement of "broad proportionality" is satisfied, while at the same time adequate attention is paid to the need for stable government and for maintaining a link between members of parliament and geographical constituencies. Voter choice is extended by the structural changes to the electoral system and further enhanced by the introduction of the alternative vote and open lists.

10.3 Preferential voting systems – the single transferable vote (STV)

There are many preferential voting systems, and several of them will, to a greater or lesser extent, guarantee proportional representation. Here we shall, however, only discuss the single transferable vote (STV).

STV is a proportional system, not based on party lists. Individuals run, with or without party affiliation, in multi-member constituencies. One of the features of the system is that it is up to the voters individually to decide which dimension is the most important one for the election, be it political views, geography, ethnicity, gender or whatever else.

If the voters systematically vote along party lines, STV will produce results close to the d'Hondt system of list-based proportional elections.

In brief, the system works as follows: Candidates appear on the ballot by name, and possibly by party or other affiliation. The voter is invited to rank the candidates from 1 (most preferred candidate) and upwards. In the standard version of STV, the voter decides how many candidates to rank; a ballot is valid if only one preference is indicated, if all candidates are ranked, or if the number of preferences is between these extremes. However, if only a few candidates are ranked, the voter risks losing influence.

The result is determined by the steps outlined below. The details may vary, but this description should cover the basic idea.

Assume that N seats are to be filled. The number of valid votes is denoted P . First the election quota Q is calculated by the following formula (other quota formulas may be used for very small electorates):

$$Q = \left\lfloor \frac{P}{N+1} \right\rfloor + 1$$

The quotient is truncated, that is, rounded downwards to the nearest whole number. (This is the meaning of the symbol $\lfloor \cdot \rfloor$.) The formula implies that Q is the smallest integer strictly larger than $\frac{P}{N+1}$.

The quota is the number of votes a candidate needs to get elected. The formula for Q guarantees that at most N candidates reach the quota, so that one does not end up with electing too many representatives. Given this condition, Q is chosen as small as possible.

Then all ballots are sorted by the voters' first preference. Let p_i be the number of votes received by candidate i .

- (a) All candidates that have received a number of votes higher than or equal to Q are elected.
- (b) If at least one candidate is elected, the surplus is calculated for each elected candidate. For example, if candidate i is elected, the surplus is $s_i = p_i - Q$. The surplus is then redistributed according to the next preference on each ballot. If some ballots are redistributed while others are not, voters are not treated equally. Therefore, all the p_i ballots are redistributed, but each with a reduced weight of $w_i = \frac{s_i}{p_i}$, so that the total weight redistributed equals the surplus. Ballots without further preferences are put aside and have no influence in the subsequent stages of the counting. The surplus of all elected candidates is distributed as described above. Then one goes back to (a).
- (c) If no candidates are elected during step (a), or if iterated use of steps (a) and (b) still leave some of the N seats unfilled, the candidate with the lowest number of votes is eliminated, and the votes of that candidate are redistributed according to the next preference (with unchanged weight). Ballots without further preferences are put aside and have no influence in the subsequent stages of the counting. Then one goes back to (a).
- (d) The process continues until all N seats are filled.

We shall illustrate the method by an example. There are $N = 3$ seats to be filled. The total number of valid votes is $P = 49,300$. The quota, the number of votes a candidate needs to be elected, is:

$$Q = \left\lfloor \frac{P}{N+1} \right\rfloor + 1 = \left\lfloor \frac{49,300}{3+1} \right\rfloor + 1 = 12,326$$

There are four candidates. The result is given by the following table.

	First preferences	Transfer surplus	of	Votes after transfer
Candidate 1	12,500	-174		12,326
Candidate 2	22,500	-10,174		12,326
Candidate 3	4,500	8,500		13,000
Candidate 4	9,800	1,848		11,648
Total	49,300	0		49,300

We see that Candidate 3 gets the last mandate, even though Candidate 4 has more than twice as many first preferences. The reason is that Candidate 3 managed to collect a large number of second preferences from voters who primarily supported Candidates 1 or 2, while Candidate 4 was the

second choice of a much lower number of these voters.

The advantage of STV is that it can take account of the voters' priorities independently of the parties' priorities. If many voters support a movement that does not follow party lines, the results will take adequate account of this. Moreover, if some voters who normally vote for party *X* have a strong preference for a particular candidate from party *Y*, they can vote for this person without at the same time giving support to the rest of party *Y*. This is different from list-based proportional systems, even those with open lists. In particular, if voters want to vote for moderate candidates across party lines, they can do so without supporting the rest of the various parties. In that sense, the system may contribute to strengthening the moderate voice in a post-conflict situation. On the other hand, STV can work in the opposite direction if the parties have attempted to present balanced lists. This will be the case if many voters vote for extreme candidates or for candidates belonging to a specific ethnic or other group, independently of the candidates' party affiliation.

One of the desirable features of STV is that it, in most cases, discourages tactical voting. Voters normally have nothing to gain by not voting according to their true preferences. In particular, if a voter supports a small party, there is no serious risk that the vote will be wasted, because it will be transferred to the next preference if the first preferences are not elected (provided, of course, that the voter has ranked a sufficient number of candidates).

Examples can be constructed in which tactical behavior can give an advantage. In some cases, a party can gain by having its supporters' first preferences evenly spread among its candidates. In other cases, voters can see it in their interest to influence the order in which candidates are eliminated (see item (c) in the description above), and this can be achieved by tactical voting. These examples will, however, be strange and particular, and they do not defeat the conclusion that STV is less vulnerable to tactical voting than alternative voting systems.

The main disadvantage of STV is the complexity of the counting process. In established democracies which have traditionally used the method, experience has shown that it is generally accepted by the public. When the voters are used to the system, casting a vote is fairly simple, unless the number of candidates is very high. The results are usually considered reasonable, but the counting is complex and takes time, at least if performed manually.

The electorate should be divided into constituencies with not more than four to five seats if a manual count is envisaged, with possibly more with a fully computerized counting system based on automatic scanning of the ballots.

STV creates an assembly which is fairly representative from a political point of view. In this respect, the method is clearly superior to plurality or majority systems (Chapter 8), but it cannot compete with list-based proportional systems with compensatory seats or the like (Section 10.1) or mixed member proportional systems (Section 10.2). The practical need for small constituencies weakens the political proportionality of STV, but the method is capable of producing a representative legislative body along other dimensions than party lines, if the voters so wish.

The accountability can be quite good, both because the electorate can be divided into geographical units of limited size and because the voters vote for individuals rather than just for parties or lists. Therefore, the link between voters and representatives and the latter's personal responsibility is likely to be stronger than in list-based proportional systems.

The effect on dialogue and conciliation is more difficult to assess. For one thing, small parties that have dialogue and conciliation on their program can more easily gain support because of the safety net offered to the voter by the transfer of ballots and the potential counting of second and

subsequent preferences. Moreover, popular candidates can collect votes due to their personality. The former effect is unequivocally positive from the point of view of promoting dialogue and conciliation, while the second one can have effects in all directions.

Even though it is easy to fill out the ballot, it may take a while before the method is fully understood by the voters. In particular, it may be difficult to convince voters that there is not much to be gained by tactical voting.

II Semi-proportional systems

II.1 The single non-transferable vote (SNTV)

Elections are held in multi-member constituencies, and the ballot is similar to that of STV. Candidates are listed individually, possibly with party affiliation, but the voter can vote for only one candidate. The candidates with the highest numbers of votes are elected.

A party having a majority of the votes cannot secure for itself all the seats. This distinguishes SNTV from the plurality and majority systems of Chapters 8 and 9 and makes it a semi-proportional system. On the other hand, the method only imperfectly guarantees that the parties be proportionally represented in the assembly.

An example can illustrate the properties and shortcomings of the system. Suppose that five members shall be elected from a constituency. A party is supported by 60 percent of the voters and proposes five candidates. One of them is particularly popular and receives the votes of all the party's supporters. Even though the party, on a proportional bases, should be entitled to three seats, it will only have one candidate elected, since its four other candidates do not get any votes. On the other hand, if the party manages to have its vote divided evenly among its candidates, each of them will receive twelve percent of the total vote. This may be sufficient to get all five candidates elected, if the 40 percent of the voters who do not support the party are split among several small parties, some of which may have proposed more than one candidate.

Under this system, the optimal strategy for a party is to try to calculate how many seats it has a chance to win, and then nominate this number of candidates. The party should try to divide its support evenly among its candidates, for example, by asking voters in different parts of the constituency to vote for different candidates. This could be done by issuing appeals of the following type: "Voters in the Northern Valley should vote for *A*, those in the Eastern Village should support *B*, ..." The party cannot be sure that the voters will obey such instructions. Moreover, it is not easy to know how many seats the party has a chance to win. Miscalculations can have disastrous consequences. Aiming for too many seats may lead to the party getting fewer seats than it could have gotten.

We illustrate these phenomena by elaborating on the previous example. Still five members shall be elected from the constituency. Let party *X* be supported by 60 percent and party *Y* by 40 percent of the electorate. Suppose that *X* runs four candidates and manages to split the vote evenly, so that each of them gets 15 percent of the total vote. If *Y* runs two candidates and splits the vote evenly, these two candidates are elected, together with three of those proposed by *X*, and the result is perfectly proportional. Assume, however, that the leadership of *Y* thinks that they can "outsmart" *X*

and get three seats. Therefore, they run three candidates and split the vote evenly. Then all four candidates from *X* are elected, and *Y* wins only one seat. If, on the other hand, party *X* has not been able to split its support evenly among its four candidates, the tactics may succeed, so that *Y* wins three seats and ends up with more than its proportional representation.

If the parties' support is known and all parties behave optimally, both in the sense that they propose the correct number of candidates and by splitting the vote perfectly, the distribution of seats will be that of the d'Hondt method of proportional representations. In popular elections, these conditions are unrealistic, but if an elected assembly elects a committee or the like by SNTV, optimal tactical behavior may be possible.

The discussion illustrates that SNTV is, to a very high degree, vulnerable to tactical behavior by parties and voters. In particular, if a party is better in the tactics than its competitors, it is likely to be overrepresented. This is the main reason why the system is rarely used in parliamentary elections. It was, however, used in Afghanistan in 2005, where it also had the effect that the ballot in the biggest constituencies contained hundreds of names. Party affiliation was not indicated, and voters complained that it was difficult to find their way among all the alternatives on the ballot. In these elections, majority groups in some provinces ended up without representation because of vote splitting, illustrating the weaknesses of the system and contributing to undermining the democratic process.

11.2 Parallel systems

In a parallel system, the voter casts two votes, one for a candidate in plurality or majority elections, usually in single-member constituencies, and one for a party list in proportional elections in a multi-member constituency (possibly a nationwide constituency). The two votes are counted independently. The results of the plurality or majority elections are not taken into account when the seats in the proportional elections are distributed. This distinguishes the parallel systems from the mixed member proportional systems discussed in Section 10.2. The latter are genuinely proportional. In the parallel systems, the deviations from proportionality that probably will result from the plurality or majority elections, are not compensated, but only diluted, by the results of the proportional elections.

Often the number of seats in the two parts of the system is equal. (For example, this is the case in Russia and Ukraine before 2005.) In that case, a party with ten percent of the votes is guaranteed at least five percent of the seats in parliament, not ten percent as in mixed member proportional systems.

We give two more examples of parallel systems. In Japan, 300 members are elected in single-member constituencies and 180 by a list-based proportional system. In Palestine, according to rules applied for the first time in January 2006, 66 members are elected from 16 constituencies by plurality vote in multi-member constituencies (see Section 9.1). Another 66 members are elected by a territory-wide list-based proportional system.

Albania should also be mentioned. Before 1996, the country used a mixed member proportional system with 100 constituency seats and 40 list seats. Then they changed to a parallel system, with 100 seats in the single-member constituency part and 25 seats in the proportional part. This was achieved by a minor change in a sentence in the constitution, and few people understood the drastic effect of the change in the system. (A party with ten percent of the votes would previously get 14 seats, but after the change probably only two or three.) The ruling party played down the importance

of the change by pointing out that the number of list seats was only reduced from 40 to 25, without mentioning the fundamental change of system. A mixed member proportional system has since been reintroduced.

Parallel systems are usually not the result of a consistent assessment of how best to achieve commonly accepted criteria. Rather, they are a compromise between those favoring plurality or majority systems and those favoring proportional ones.

12 Group representation – general issues

Ideally, an elected assembly should be representative of the people along all dimensions considered relevant by those concerned. Potentially, the number of such dimensions is quite large, and in practice only a few of them can be taken into account. Therefore, it is important to identify the most important dimensions. This cannot be done generally and in the abstract, but depends on the specific circumstances.

The purely political dimension, which will always be important, is supposedly taken care of by the party system. The geographical dimension is usually built into the electoral system by the country being divided into constituencies.

In public debate, one sometimes hears demands that the legislative must be representative for the population according to sex, age and profession, or complaints that some groups – measured along these dimensions – are not adequately represented. Gender quotas exist or have been proposed in some cases, but we do not discuss them further. Neither shall we have more to say about the other dimensions just mentioned.

In post-conflict situations, attention is often concentrated on the groups that were the major parties to the conflict. These will often be ethnic, religious, linguistic or sectarian groups, but other possibilities also exist; see the definition of "group" in Chapter I.2.

Some conflicts have erupted exactly because certain groups have felt that they have had no chance of winning influence through elections or other legal means. For them, taking up arms has been perceived as the only way to protect their interests. In such cases, a lasting peace requires that these groups are given, and understand that they are given, a real chance of gaining influence through another channel than the military one, namely through elections. For large groups, "gaining influence" could mean winning the elections outright and be able to form a government, but it can also mean being sufficiently represented in elected assemblies to be able to protect one's interests.

Regardless of the electoral system or the system of representation more generally, it is important that the groups now discussed are represented in the legislature. Within a pure plurality or majority system (see Chapters 8 and 9), a minority will have little chance of winning representation unless it is geographically concentrated, so that it makes up the largest group in some constituencies. Within proportional systems (Chapter 10), parties of a certain size will be represented even if they are a minority.

Parties are generally established to represent the political dimension of the electorate. In divided societies, however, parties may also be based on ethnicity or some other of the previously mentioned divisions. If the voters vote along group lines, such parties may, if their support is sufficient, win

seats by pure electoral strength. In a post-conflict situation, these dimensions will often overshadow the traditional political one.

When building democratic institutions, it might be a long-term objective to strengthen the political dimension, but still maintain the various conflicting groups' legitimate demand for representation. One might try to build bridges across the conflicting lines by offering voters the possibility of electing representatives independently of group affiliation, but at same time secure the genuine interests of each group.

Minority representation could mean two different things:

- Representation of the smaller parties
- Representation of groups of the types mentioned, for example, ethnic or religious groups

The former type of minority representation must be taken care of by the electoral system. The issue has already been covered, in particular, in connection with the discussion of proportional electoral systems in Chapter 10.

Concerning the latter type of minority representation, the needs are different for what may be classified as small and large minorities; see definitions and examples in Chapter I.2. The major parties to conflicts of the type discussed in this report are normally the majority and one or more large minorities, or several large minorities in cases where no majority exists. Examples of large minorities are the Bosniacs, Croats and Serbs in Bosnia and Herzegovina. Examples of small minorities are Romas in the Balkans or Christians in Iraq, who may have a need for special protection.

The conflict between the Albanians and Serbs in Kosovo is an example of a conflict between a majority and a minority. Even though the Serbs in Kosovo only made up around ten percent of the population, they were a principal party to the conflict and therefore played the role of a large minority.

Balance among large minorities is discussed in Chapter 13. Protection of small minorities is the topic of Chapter 14. In both chapters, attention is concentrated on representation in legislative assemblies.

Minority rights should be offered on a collective basis, but they should be exercised individually. The Council of Europe Framework Convention for the Protection of National Minorities states in Article 3:

- «1. Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.
2. Persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others.»

When applied to elections, this mean that a voter should not be forced to vote along ethnic or other minority lines. The choice whether or not to exercise minority rights should be an individual one, preferably made in the secrecy of the voting booth.

13 Balancing the interests of large groups

This chapter is a combination of examples and discussion of general criteria. We start, in Section 13.1, by giving two examples of representation of large groups. In Section 13.2, we make an attempt to formulate criteria for balancing the interests of large groups by means of the state structure and the electoral system. Further illustrations and discussion is found in Section 13.3. Finally, in Section 13.4, by way of illustration we present an arrangement obviously intended to maintain the balance between the major groups that make up the population of the country, but which hardly can be regarded a satisfactory or logical system.

13.1 Some examples

The first example is concerned with the balance among groups in a situation where they are all fairly large, but there is no majority. The second example illustrates the balance between a majority and a large minority.

The House of Peoples in the Federation of Bosnia and Herzegovina

The state structure of Bosnia and Herzegovina is explained in Section 5.2, where we also discuss the powers of the two chambers of the national parliament and the ethnic quotas in effect for elections to the House of Peoples.

The Federation of Bosnia and Herzegovina, one of the two entities that make up the state, also has a bicameral legislature. We shall look at one of the chambers, the Federation House of Peoples. As mentioned in Section 5.2, ten of the fifteen members of the House of Peoples at state level are elected by the Bosniac and Croat caucuses of the Federation House of Peoples. However, the Federation House of Peoples is itself indirectly elected by the ten Canton Assemblies.

In 2000 the total membership of the Federation House of Peoples was 80. The number of members per canton varied from three to fifteen. There were quotas for Bosniacs, Croats and "Others", which would be Serbs and all other groups. Of the 80 members, there should be 30 Bosniacs, 30 Croats and 20 Others. The quotas were distributed among the cantons, so that there was a given number for each of the three groups from each canton.

Before 2000 the election had been performed within the respective caucuses in the Canton Assemblies by plurality vote (see Section 9.1). The result was that most of the delegates from the Bosniacs, and to an even greater extent from the Croats, represented ethnically based parties, since they were the biggest group within each caucus.

In 2000 there was general consensus that proportional representation should be introduced for the elections to the Federation House of Peoples. The Croats insisted, however, that the elections should be carried out within the caucuses. This would provide for a continued bias in favor of the ethnically based parties, as can be illustrated by the following example: In a canton five Bosniacs and five Croats are to be elected, and all parties except one are ethnically based. The only multi-ethnic party has seventeen percent of the members of the Canton Assembly. On a proportional basis, this strength should give the party one or two of the canton's ten seats in the Federation House of Peoples. When the election is divided between the two caucuses, however, it could end up without any seats.

In the rules adopted in 2000 by the Provisional Election Committee, a system was introduced where the election was not divided into caucuses, but was held as one single list-based proportional election with ethnic quotas. Any list could contain candidates declaring to belong to any of the three groups. While distributing seats to the parties, one also fills up the quotas. The party next to win a seat will lose that seat unless it has a candidate from a group whose quota is not yet filled. If necessary, one goes down the party's list to find an appropriate candidate. This removes the disadvantage of multi-ethnic parties and gives an incentive for proposing lists with candidates from different groups.

The rule just described was also included in a draft election law published in October 1999. However, in the law adopted in 2001 this was changed back to elections in separate caucuses. The elections are proportional, but multi-ethnic parties may have their voting powers split among as much as four different elections. The number of seats in the Federation House of Peoples was reduced to 58 (17 Bosniacs, 17 Croats, 17 Serbs and 7 Others).

The House of Republics of Yugoslavia

After the dissolution of the former Yugoslavia in the early 1990s, Serbia and Montenegro were the two entities making up the Federal Republic of Yugoslavia. At times, they were controlled by competing political forces. In the conflict between the two, the federation was important, not least since the military is controlled by the federal level.

The Federal Assembly consisted of two chambers, the House of Citizens and the House of Republics. The House of Citizens was directly elected across the two republics, while the House of Republics consisted of 20 delegates from each republic, elected by the respective parliaments. Until 1998 the Montenegrin parliament had elected their twenty delegates by proportional representation. In Serbia the law prescribed plurality vote, but the dominant party had decided to give a few seats to the opposition (see Section 9.1). In 1998, Montenegro decided to change its electoral system to plurality vote, which would mean that all the twenty delegates would come from the ruling coalition. This would in turn give them veto power over changes to the Yugoslav constitution; changes which the Montenegrin government felt would violate the basic interests of Montenegro.

13.2 Criteria for balanced representation of large groups

In deeply divided societies, the conflicting groups may have to be given protection against majority decisions that change the balance of power, in particular, if this balance is the result of a delicate compromise designed to end a conflict. On the other hand, a country needs a well-functioning government which is able to make decisions, that is, stalemate must be avoided in parliament and elsewhere in the political system. The structure of the state and the electoral systems are interconnected. It is the combined structure which must strike a balance between on the one hand protection of minorities, and on the other hand other considerations, such as effective government and efforts to normalize the country and promote reconciliation and dialogue.

The example of Bosnia and Herzegovina illustrates that the balance created in order to stop a war does not necessarily promote effective government and the creation of multi-ethnic parties, see the discussion in Sections 5.3 and 5.5.

The main objective is to protect each group from being deprived of fundamental rights by majority decisions. Fundamental rights often include the right to use a language, decide on a school system and control other cultural issues, but could also extend to control of police, budgets, etc. A peace agreement will often include elements of self-determination for groups or areas. In such cases, there

will usually be adopted measures securing that these principles cannot be changed by one of the conflicting parties alone.

A common instrument for preserving a power-sharing agreement is the introduction of a second chamber of parliament. In this chamber each conflicting group may have the same strength regardless of size, or at least smaller groups may be overrepresented. We refer to the discussion of bicameralism in Section 6.2.

There are large variations between the bodies to be elected, and therefore it is difficult to define general criteria for how the electoral systems shall take account of the need for maintaining balance between groups. We nevertheless make an attempt to formulate some criteria. In principle, they apply both to unicameral and bicameral legislatures, but we primarily have the latter case in mind.

- (a) While maintaining the prescribed ethnic balance, the system should have as little effect as possible on the composition of the elected assembly along regular political dimensions.
- (b) If there are elections to the same body from various groups or areas, the electoral system should – as far as possible – be the same for all groups and areas (see also Section 7.6).
- (c) When creating protection for each of the groups that were the main parties to a conflict, the citizens at large should not be deprived of the fundamental right to vote and to be elected.
- (d) There shall be a parliamentary chamber directly elected by an electoral system which gives each voter (approximately) equal weight (the *principal chamber*). Under bicameralism, the principal chamber shall have at least as much power as the other one.
- (e) Representation of geographical areas generally has fewer undesirable side effects and therefore is preferable to representation explicitly based on group affiliation.
- (f) If a second chamber of parliament is charged with securing checks and balances among conflicting groups, the interests of these groups should not overshadow the interests of the citizens at large.

An example of a system which takes reasonably account of criterion (e), is the election of the 40 directly elected members of the Belgian Senate, see Section 4.2. There are three constituencies. In one of these, the voters can choose whether they want to vote in the election of Dutch-speaking or French-speaking senators. This is an individual choice made in the secrecy of the voting booth and no pre-election registration of linguistic affiliation is required.

13.3 Discussion and illustrations

As shown by the example from Serbia and Montenegro (Section 13.1), the political conflict lines may be similar in the various parts of a federation, even though the majority may be different. The overall political balance should therefore be taken care of by a directly elected parliamentary chamber. However, since the role of the other chamber primarily is to preserve the constitutional arrangements and the balance of power, each regional unit may have the same representation in that chamber, even though the size of the units varies a lot.

Often the chamber designed to protect group rights is indirectly elected. (See also Section 2.6 and the more detailed discussion of bicameralism in Section 6.2.) A variety of electoral systems are in

practice used for electing such chambers. We mention a few examples:

- Simultaneous election of several members by plurality vote (see Section 9.1): Serbia and Montenegro
- The single transferable vote (Section 10.3): India and Pakistan
- List-based proportional elections (Section 10.1): Bosnia and Herzegovina

Proportional systems are likely to make the fronts between the units softer. Nationwide political parties are likely to win representation from several regional units, and more generally differences in opinion between the delegations is likely to be weaker.

In the case of Bosnia and Herzegovina, the elections of Bosniac and Croat members of the House of Peoples and the three-member presidency are not based on geographical areas (see Sections 5.2 and 5.4). This raised a number of dilemmas, in particular concerning the Croats, who make up the smallest of the major groups. It is also problematic in relation to criterion (e) above.

When the government structure of Bosnia and Herzegovina was designed (see Section 5.1), there was little willingness to divide the country into three entities, so that one would be dominated by the Croats. The country was already segmented enough and geographical representation would mean some kind of acceptance of ethnic cleansing. However, the Bosniac and Croat entity, the Federation of Bosnia and Herzegovina, was divided into ten cantons. Some of these are predominantly Croat. The nationalistic Croats wanted a Croat entity, which was vigorously resisted by the Bosniacs and the international community.

In the long run it might have been better if the representation in the Bosnia and Herzegovina House of Peoples had come directly from the cantons, instead of being based on the Federation House of Peoples. Then a few cantons could have been overrepresented in order to take account of the interests of the Croats, and there would be no problems related to limited voting right or restrictions on the right to be elected, see the discussion of possible human rights problems in Section 5.4.

If geographical representation is impossible, list-based proportional systems with quotas seem to be the solution which best strikes the balances between the political and the group dimensions. As explained in Section 13.1, such a system was used in 2000 when the Canton Assemblies elected the Federations House of Peoples. It was also used for the direct elections to the city council of Mostar. Even though it is fairly complicated technically, in that case it worked for some years, until the quotas could be abolished.

13.4 An unsatisfactory system – community representation in Mauritius

The National Assembly of Mauritius has 70 members, of whom 62 are elected from 20 constituencies which have three seats each, and two are elected from the island Rodrigues. The electoral system is majority vote in multi-member constituencies; see Section 9.1. The remaining eight seats are filled in such a way that the balance between the groups is kept as close as possible to the groups' strength in the population.

Each candidate running for the 62 seats must declare affiliation with a community. The communities are the Hindu community, the Muslim community and the Sino-Mauritian community; and the rest are regarded as belonging to the General Population, which is in itself the fourth community. Candidates may or may not have party affiliation.

The eight remaining seats shall, so far as possible, be filled by persons who belong to parties and have stood as candidates in constituencies without being elected. The seats are filled with candidates representing the communities which – according to the census of 1972 – have the highest number of citizens per seat already won by candidates from that community.

The first four seats are given, one by one, to the so far unelected party candidate of the most underrepresented community who, regardless of party, has won the highest share of the votes cast in the constituency.

The next four seats are filled, one by one, with candidates of the parties which won the highest number of seats in the constituencies. Again the candidates are taken from the most underrepresented community. The seat is given to the unelected candidate who comes from the chosen party and community and who has the highest share of the votes in the constituency.

The system is sometimes referred to as the best loser system, since the ethnic balance in a sense is guaranteed by electing the next candidates in line to be elected. However, it is possible that the distribution of the eight seats change the party balance in parliament, even in a fairly random manner, in violation of criterion (a) of Section 13.2. A mixed system with quotas built into the proportional part of the elections would have given results that were less random and more in line with the vote distribution.

The candidate who has the largest share of constituency votes without being elected, is not necessarily the one who would have been elected under the plurality system had the number of seats been increased by one. This, however, is a minor issue compared to the possibility of the extra eight seats changing the political majority in parliament.

14 Protection of small minorities

In many countries, representation of small ethnic minorities is secured even if the voting power of a minority is not sufficient to give it representation in parliament. The options for such arrangements would depend on the system of representation.

The discussion below applies both to unicameral and bicameral parliaments. If the population of a country consists of a majority and one or more small minorities, the special arguments for bicameralism related to the need for balancing the interests of large groups, do not apply. There may be other reasons for having a bicameral parliament, but we do not discuss that question.

We start by describing and discussing a few examples of how representation of small minorities is or could have been secured (Section 14.1). Many other examples could have been chosen. In Section 14.2, we make an attempt to formulate criteria for representation of small minorities. Thereafter, we discuss how these criteria can be realized, in proportional systems (Section 14.3) and when elections take place in single-member constituencies (Section 14.4). Finally, in Section 14.5, we give some examples of unsatisfactory systems that are in use or have been proposed.

14.1 Some examples of minority representation

The Gagauz in Moldova

Moldova elects its parliament by a list-based proportional system in one constituency. The large ethnic groups, the Romanians and the Slavs (Russians and Ukrainians), are well covered by the regular party system. There is a number of small minorities such as Bulgarians, Roma and the Gagauz. The Gagauz originates from Turkey, they are Christians and most of them live within the Autonomous Territorial Unit of Gagauzia, with Comrad as the main city. After the Slavs the Gagauz is the largest minority group.

Many Gagauz participate in the activities of regular political parties, but they are also very conscious of their particular interests, which is the reason for having an autonomous unit. In 2002, the Gagauz made up just above four percent of the population, and almost 90 percent of them lived in the Autonomous Territory. With an electoral reform in 2005 the threshold for winning seats in parliament was lowered from six to four percent. With one single party representing the Gagauz and all members of the group voting for that party, it would have a fair chance of winning parliamentary seats. In some comments from international observation missions the need for lowering the threshold had been justified by making it easier for minorities, the Gagauz in particular, to be represented.

Forcing all Gagauz to vote for an ethnic list in order to win representation for the group in parliament, however, would mean depriving them of the right to express ordinary political differences. They would have to feel that the ethnic dimension is the dominant one. Instead of the ethnic factor being reduced in importance, which might be desirable, it could be magnified beyond what it is today.

Some of the national parties nominate Gagauz candidates to positions on the list where they can be expected to be elected. However, these candidates are selected at the grace of the parties. Since they run on national lists, their accountability to the Gagauz minority is weak. On the other hand, the parties will probably want to appear attractive to Gagauz voters in order to get their votes, and this may lead them to nominate candidates that genuinely represent the minority.

The obvious solution to the representation of geographically concentrated minorities of this order of magnitude is to introduce multi-member constituencies. In that way representation of the area, and thereby of the minority, is combined with regular political competition, and the local organizations of the national parties as well as local parties can represent minority issues in addition to promoting their regular political views.

When the country is divided into constituencies, it is the voter's individual choice whether to vote for regular parties or group-based parties. Group interests can be balanced without the political composition of parliament being affected, see criterion (a) of Section 13.2.

The Albanians in Montenegro

In Montenegro, the large majority of the members of parliament are elected in a single constituency by a list-based proportional system. A few seats are set aside for an election held in a number of special polling stations. (There have been four or five such seats.) The special polling stations are established in areas with a concentration of Albanians, who in 1991 made up 6.5 percent of the population of Montenegro. It is up to each individual to register in these polling stations, and in 1998 approximately 30,000 voters registered there. All parties, not only the Albanian ones, compete

for the seats in this special constituency. In 2001 and 2002 an Albanian coalition won two seats, which they would not have won had there not been a special constituency.

In order to avoid wasted votes, votes which are cast in the regular constituencies and which have not contributed to the election of seats there, are transferred to the special constituency, and vice versa.

This system has some advantages. It is up to the voter whether to vote in a special polling station, and parties and voters are not officially identified by ethnicity. However, the method has some unintended side-effects. The arrangement was introduced to protect the Albanian minority. Because of the transfer of votes, however, the system may give representation in the special constituency to small parties which do not pass the threshold at the national level.

In 1998, an OSCE Technical Assistance Team proposed a system with six regional constituencies and compensatory seats to secure proportionality. (See the discussion of compensatory seats in Section 10.1.) The constituencies should be drawn up in such a way that minorities to some extent would be concentrated, but administrative boundaries would be respected. Such a simple solution would have served the purpose of giving representation for the Albanians without losing the proportional political dimension of the elections.

The Tatars in the Autonomous Republic of Crimea

The Tatars started returning to Crimea in 1988 after a forced exile since the Second World War. In 1998, a number of Tartar candidates ran for election without success. The Tartars made up approximately 11 percent of the population of Crimea. In 2002 they won seven out of the one hundred seats in the parliament of the Autonomous Republic.

The Crimean parliament is elected by a plurality system in single-member constituencies. The Tatars are not geographically concentrated, but evenly spread throughout the peninsula. Tatar candidates therefore have problems being elected even if they get full support from their own ethnic group.

In 1998, representatives of the international community recommended that a system based on proportional representation should be considered. The Tatars were politically organized and would most likely vote for Tatar parties. In this situation the small constituencies represented the problem and introducing a proportional system in one constituency covering the whole of Crimea would help provide minority representation. This contrasts with the two previous examples, the Gagauz in Moldova and the Albanians in Montenegro, where the minorities are geographically concentrated.

The Maori in New Zealand

New Zealand's House of Representatives is elected by a mixed member proportional system; see Section 10.2. The assembly has 121 members, of which 69 are constituency seats and 52 list seats. That is, about 57 percent of the members are elected in single-member constituencies.

Out of the constituencies, 62 are general electorate constituencies and seven are Maori constituencies. Hence the country is divided into constituencies in two different ways. Geographically, each Maori constituency is of course bigger than the typical general constituency.

Persons belonging to the Maori people can choose to register as Maori voters and exercise their right to vote in the appropriate Maori constituency. They can also choose to remain on the general voters' list, but they cannot do both. The choice is an individual one.

In the Maori constituencies, there may be candidates proposed by major national parties as well as candidates proposed by group-based parties (in addition to independents).

The party lists are nationwide; there are no special lists for the Maori electorate. As follows from the description of mixed member proportional systems, each voter can vote for a candidate in the constituency and a nationwide party list.

This system guarantees to the Maori community a minimum number of parliamentary seats. Because of the way the system works and since all voters have one vote for a party list, the political composition of parliament is not significantly affected by the special seats set aside for the Maori people.

In the 2005 elections, the Labour Party won three and the Maori Party four of the Maori constituencies. The former won most votes and seats in the elections as a whole and is the party of the Prime Minister, while the latter is group based. The Maori Party was somewhat overrepresented and therefore won no list seats, but otherwise the overall result was close to proportional.

14.2 Criteria for minority representation

In some cases, a minority is sufficiently protected if it is ensured representation in parliament according to its size. Even then, special rules may be needed. Under plurality vote and proportional systems with high thresholds, the minority may otherwise be underrepresented or not represented at all, as illustrated in Section 14.1 by the Gagauz in Moldova and the Tatars on Crimea.

In other situations, one might find it necessary to guarantee overrepresentation of the minority.

Arrangements for minority representation should seek, to the best possible extent, to meet the following criteria:

- (a) The minority representation should have as little effect as possible on the composition of the parliament along regular political dimensions.
- (b) It should be the voters' individual choice whether group affiliation should have priority over the national political dimension. The choice should preferably be made in secrecy when voting.
- (c) If voters are given the choice to register in a minority register or a regular register, such registration must be done free from pressure or intimidation.
- (d) If there are special seats set aside for the minority, all parties should have the possibility to compete for these seats.
- (e) The system should not work in favor of segregation and group division.
- (f) There should be room for making political choices even for voters deciding to vote on a group basis.
- (g) The system should have little room for tactical behavior by parties or voters.
- (h) The system should not be more prone to random effects than the system of representation

in general.

It is often difficult to satisfy all these criteria, so a trade-off has to be made, but each of them should be fulfilled as far as possible.

As is clear from criteria (b) and (c), we have reservations to systems in which voters are required to reveal their group affiliation by registering as belonging to a minority. Representation of geographical areas generally has fewer undesirable side effects and is therefore preferable to representation explicitly based on group affiliation; compare criterion (e) in the discussion of balanced representation of large group (Section 13.2). We recognize, however, that registration of group affiliation in some cases may be unavoidable in order to give the minority adequate protection; see, for example, the discussion in Section 14.1 of the Maori in New Zealand.

In general, it is less problematic to require that candidates register by group affiliation than to impose this requirement on voters. Such registration of candidates may be necessary to implement systems with minority quotas.

In some situation, only parties registered for a special group are allowed to compete for seats set aside for that group. If possible, this should be avoided, see criterion (d).

14.3 Minority representation in list-based proportional systems

List-based proportional elections may be conducted in one nationwide constituency, in a number of multi-member constituencies or in a combination where a number of compensatory seats are distributed at the national level to make up for the deviations from proportionality that follow from adding up the results in the constituencies; see Section 10.1.

A small minority may need special protection because its voting strength, given the existing rules, does not even guarantee to it a representation comparable to its share of the population. This may happen if there is a high threshold for representation, and also if the elections are carried out in constituencies without compensatory seats, and the minority is spread out over the whole country.

There could also be reasons for securing that a group be overrepresented. For example, small groups with even less than one percent of the population may have a legitimate need for special protection and should therefore be secured at least one parliamentary seat. Such measures may also contribute to conflict resolution and conciliation.

There are a number of ways to secure representation of minorities within proportional systems.

Constituencies

With geographically concentrated minorities, introducing constituencies could be sufficient to secure minority representation, provided that constituency boundaries are drawn so that each of the relevant minorities is concentrated in one or a few constituencies. Such a solution would fulfill all the criteria of Section 14.2. See also the discussion in Section 14.1 of the Gagauz in Moldova.

Remove threshold

If the group is not geographically concentrated but has enough members to win seats based on its nationwide size, the only measure needed could be to remove the threshold for nationwide seats for

group-based parties.

In Germany, the threshold for representation is not applicable to parties of national minorities. (See Section 10.2 for a description of the German electoral system.) For elections to the Federal Parliament, this rule has no relevance, since parties of national minorities do not take part. In one of the *Länder*, Schleswig-Holstein, the party of the Danish minority wins seats in the regional parliament by virtue of this rule.

The system requires a procedure for registering certain parties as representing, for example, a national minority. The purpose is to give special protection to the *group*, but as an inevitable side-effect certain *parties* are given a privileged position. In our opinion, this consequence is undesirable. Moreover, the political dimension of the electoral system is weakened for two reasons. For one thing, the individual voters in the minority group are forced to choose between voting for the group-based party or supporting the national party whose political views they prefer. Moreover, representation from parties not reaching the threshold may change the political majority in parliament, in violation of criterion (a) of Section 14.2. In Schleswig-Holstein, the party of the Danish minority has several times been in the position to decide which of the major national parties shall be able to form the government. Presumably, the supporters of the Danish party have voted for it for ethnic and linguistic reasons and may support either of the major parties.

In spite of these objections, removing the threshold for group-based parties may be an acceptable – and possibly the best – way of guaranteeing representation in parliament for small minorities.

Separate constituencies for minorities

If a minority is not concentrated geographically, one possibility is to create one or more separate constituencies for the minority. Members of the minority can vote in such a constituency regardless of place of residence. Registering for voting in a special constituency should be up to the voter, who should also have the option of registering on the regular voters' lists. There must be no pressure or intimidation related to this choice.

Documented group affiliation may be required for candidates running in such special constituencies. The special constituency for the Albanians in Montenegro (see Section 14.1) provides, however, an example of a system where no requirement of this kind is imposed.

As explained in Section 14.1, the Maori in New Zealand can choose between registering in a special Maori constituency or in a general constituency. Previously, when the New Zealand parliament in its entirety was elected by plurality vote in single-member constituencies, special constituencies were in practice necessary to secure Maori representation in parliament; the chance of a Maori being elected in an ordinary constituency was essentially zero. After introduction of the mixed member proportional system in 1996, Maori candidates can be nominated on the national parties' lists and be elected that way. This has indeed happened; see International IDEA (2005) page 139. Therefore, it can be argued that the need for special Maori constituencies is weakened. On the other hand, the objection that the special seats influence the political composition of parliament is also weakened.

Major drawbacks of the system are:

- There may be a pressure from the majority to have all minority voters vote in the special constituencies, so that it is clear how many representatives the minority will get.
- Members of the minority may gain a tactical advantage by not registering in a special constituency, since these seats are secured for the group anyway. It may be preferable to

vote in a regular constituency and thereby in a sense secure double influence.

Seats set aside for a minority without a separate constituency

In some countries, a minimum number of seats are guaranteed for certain minorities. One way of achieving this is to require parties to declare their group identity, or this must at least be required of parties representing a privileged minority. A voter may vote for any party regardless of group affiliation, but the parties identified with a minority are guaranteed a minimum number of seats.

Variants of this system have been used, for example, in Croatia and Kosovo.

The advantage of the system is that voters can decide on their group identity in secrecy at the polling station. (In the Croatian elections of 1996 and 1997, however, observers noted that Serbs were intimidated in polling stations and were pressured to choose the Serb lists.)

A disadvantage may be that voters belonging to the majority can also cast votes for minority lists and therefore partly decide who shall represent the minorities. On the other hand, minority voters may cast their vote for majority lists since the set-aside seats are secured anyway. These factors may, however, also be seen as advantages, since they imply that the segregation of voters is less prominent.

Lists-based systems with quotas

Instead of registering parties or lists with group identity, individual candidates can instead be thus identified. A minority is guaranteed a minimum number of seats, but the seats may be filled from any list running.

For example, if there is a requirement that at least two out of ten seats in a constituency is to be filled from a minority, there cannot be more than eight majority candidates elected. The seats are distributed one by one. If the first eight seats are filled by candidates from the majority, which is likely if the parties tend to nominate majority candidates on top of their lists, the ninth mandate must be awarded to a minority candidate. Therefore, the party next in line to win a seat will have to fill it by a minority candidate. If the party does not have a minority candidate on its list, it will lose the seat. (This system is most easily implemented if a divisor method, such as that of d'Hondt or Sainte-Laguë, is being used, as opposed to the method of the largest remainder and similar systems. The reason is that by division methods, but not by the method of the largest remainder, the seats are allocated one by one, corresponding to the description of the quota system just given.)

A variant of this system has been used for elections to the city councils in Mostar in Bosnia and Herzegovina, and also in 2000 for electing the House of Peoples in the Federation of Bosnia and Herzegovina (see Section 13.1). In these cases, the purpose was to maintain the balance between large groups rather than protecting small minorities, but the system can be used in both cases.

The main advantage of the system is that parties have a strong incentive to nominate candidates from several groups. If a party does not have a minority candidate left on its list when a seat has to be filled by a member of that minority, it loses the mandate.

In some contexts, the system has been criticized for promoting proxy or "fake" group representatives. For example, in Bosnia and Herzegovina it has been argued that a Croat running on an otherwise Serb list could not properly represent Croat interests. On the other hand, it can never be guaranteed that an elected member of parliament will represent the interests of the party or list for which the person has been elected. This holds even for political views. Moreover, any other system

will probably sharpen group division by only allowing the election of minority representatives from "pure" minority lists.

14.4 Minority representation and single-member constituencies

The possibilities for securing minority protection are much more limited in plurality and majority systems than in proportional ones. (We will not here discuss plurality or majority vote in multi-member constituencies, since such systems are generally not recommended for parliament elections, but they are mentioned elsewhere in the report, in Chapter 9 and in examples presented in various sections.)

Drawing up constituencies in order to protect minorities

If a minority is geographically concentrated, one can draw constituency boundaries in such a way that the minority is the largest group in some of the constituencies. In such cases the regular political balance will not be influenced.

Separate constituencies for minorities

Group-based constituencies can be introduced in the same way as explained in Section 14.3. The voters can voluntarily register for the separate elections in these constituencies. (This was the way the Maori people in New Zealand was represented before the mixed member proportional system was adopted in 1996.)

The number of minority constituencies, which in this case equals the number of seats set aside for the minority, can be based on the number of persons registered as belonging to the minority, thus securing that the minority – defined as the group of people who have registered this way – gets its proportional share of the elected assembly. Alternatively, the number of minority constituencies can be based on a conscious choice to secure overrepresentation of the group.

The disadvantages are the same as within proportional systems.

Separate ballot without separate constituencies

It is possible to elect representatives of the minority on one or more separate ballots, without separating out the electorate in special constituencies. A voter may, at the polling station and in secrecy, choose to vote for a minority list.

This solution has the same advantages and disadvantages as under proportional systems.

14.5 Examples of unsatisfactory systems

Representation of non-Muslims in the National Assembly of Pakistan

According to the Pakistani Constitution of 1973, the directly elected house of parliament (the National Assembly) has quotas for non-Muslims (mainly Hindus, Sikhs, Parsis, Jains and Christians) and for women. Before 2002, the voters' lists for Muslims and non-Muslims were kept separately, and the Muslims and non-Muslims voted in separate constituencies. By a Chief Executive Order this was changed for the 2002 elections, in such a way that the voters' lists were joined and everybody

voted for the regular seats. The quotas are kept, however, and out of a total number of 342 seats in the National Assembly, ten are reserved for non-Muslims and 60 for women. Approximately 97 percent of the population is Muslim, so the non-Muslims are not overrepresented, given the present size of the National Assembly. The quotas for women are distributed to the provinces, whereas the ten non-Muslim seats are filled in a nationwide competition.

The 272 general seats are filled in single-member constituencies. All parties running for the general seats may also register candidate lists for the non-Muslim seats. These seats are then distributed to parties in proportion to the number of general seats they won in the single-member constituencies. The seats set aside for women are distributed in the same manner based on the results in each province.

Only the three biggest parties won seats reserved for non-Muslims.

This system fulfills one criterion, namely that the quota does not distort the political balance among the parties. However, the representatives of the minorities have to run on lists proposed by the regular parties, at least some of which have a Muslim affiliation. Since the choice of minority representatives comes automatically as a by-product of the regular election, the minority has little influence on its representation.

The Iraqi electoral system of December 2005

The first elections for a National Assembly in Iraq after the transfer of sovereignty back to an Iraqi government in June 2004 were held in January 2005. All the 275 members were elected under a list proportional system in one single constituency. The distribution method was the method of the largest remainder and the threshold for winning seats was set to the number of valid votes divided by number of seats, or approximately 0.36 percent.

Before the elections in December 2005, the electoral system was up for review. The commission in the National Assembly wanted a system based on constituencies. They did not want to maintain a system only shared by Israel. (It was not actually true that the system did not exist elsewhere, but only countries that are relatively small geographically have elections in one constituency. In addition to Israel, similar systems are used in Moldova, the Netherlands, Slovakia and Ukraine.) The only technically possible solution was to base constituencies on the 18 provinces (governorates), since that was the smallest geographical unit used in the voter register. The drafting committee was concerned with wasted votes. It was presented with systems where most of the seats would be elected from the 18 constituencies, and a number (36 to 54) would serve as compensatory seats to make up for a disproportional result; see the discussion of compensatory seats in Section 10.1. These seats can be said to secure that most of the votes that are wasted in the constituencies nevertheless have effect.

After a negotiation process involving members of the National Assembly and representatives of the United Nations, the electoral law was based on the following model:

Out of the 275 members, 230 are elected in the constituencies by a list-based proportional system. The number of seats per constituency varies from five to 59 (Baghdad). There is no threshold for the constituency seats, and since the method of the largest remainder can give mandates to very small parties, such parties could be represented in the large constituencies.

There are 45 so-called compensatory seats, but they are not compensatory seats as we use that term. The 45 seats are distributed in two steps:

- (1) First seats are given to all parties which have not won constituency seats and which have won more votes than the "national quota", defined as the total number of valid votes divided by the total number of seats (275). A party is given as many seats as the whole number part of its vote divided by this quota. That is, if the vote is 1.99 times the quota, the party still gets only one seat at this stage.
- (2) The rest of the 45 seat are distributed proportionally among all those parties which have won constituency seats. Here there is no threshold, but it is also not needed, since the parties in question have won at least one seat locally and therefore must have a certain support.

It is unlikely that many seats will be distributed in stage (1), since a condition for taking part is not having won any constituency seat. A party with a nationwide vote at least equal to the national quota, most likely will win a seat at least in one of the largest constituencies.

It should be noted that the rules have a paradoxical consequence. A party may lose from winning a constituency seat. Assume, for example, that a party's nationwide vote is a little more than three times the national quota. If it wins no constituency seats, it gets three seats in stage (1). If it wins one constituency seat, it gets nothing in stage (1), and with a vote three times the national quota it is also unlikely to win any seats in stage (2).

Since few seats are likely to be distributed in stage (1), most of the 45 seats are distributed in stage (2). In practice, these seats are part of a parallel system, which will not reduce the number of wasted votes nor make the overall result (significantly) more proportional; see the discussion of parallel systems in Section 11.2.

The system adopted is not only unusual. It is also difficult to find rational reasons for the choices made.

Many Iraqi parliamentarians wished to give a guaranteed number of seats to small minorities such as various Christian groups and Turkmen. The big groups such as Shias, Sunnis and Kurds would be represented by virtue of their support among the voters. The most obvious way of guaranteeing minority representation would have been to let parties register as representing the groups needing special protection, and give them a minimum number of seats when distributing the compensatory seats. For reasons not known, it was at the time claimed that it would not be possible to administer such a registration of parties for the December 2005 elections. Instead it was assumed that the minority lists anyway would be among those winning seats in stage (1) in the distribution of the 45 seats. This is, however, a dubious assumption. The largest of the small minorities, the Turkmen, probably will win a seat in its strongest constituency, Kirkuk, and therefore not be entitled to a seat in stage (1). (In stage (2), all minorities are too small to win any seats.) The other minorities are, however, by far too small to reach the national quota, which is a threshold for representation in stage (1). Should the arrangement work for the Christian minorities, parties representing these groups would have to be exempted from the threshold, which again would require registration of minority affiliation.

What could then be the reasons behind the system? The answer can only be given by those having designed it. There is reason to believe that it was thought that stage (1) would help a number of small parties. However, with some very big constituencies and no threshold in the constituencies, it is not likely that more than a couple of seats will be distributed at that stage.

In stage (2), mandates are given both to parties which already have gotten more than their share in the constituencies and those which have gotten less. Parallel systems, that is, national lists combined with constituencies, are normally used when the constituency seats are elected by plurality vote, such

as in Japan, Russia and Ukraine (prior to 2005). In such cases, a voter has two votes, and the two parts of the system are based on different ideas. In the Iraqi case there is one ballot and no apparent reason to have seats distributed nationally in addition to those distributed in the constituencies, when the nationally distributed seats are not compensatory in the real sense of the term, intended to secure overall proportional representation.

The system also has a number of other anomalies:

- Why should it be more important to give extra seats to the smallest parties than the bigger ones, which may have a number of wasted votes? The minority list reason is not valid. The Kurd party would for example probably lose ten seats in the parliament compared to its fair share. Instead of correcting the big variation from nationwide proportional result, one has chosen to give the smallest parties compensation. It is kind of a worst loser allocation of seats.
- When this group of small parties has been given priority for some reason, it can, as already pointed out, be a disadvantage to win seats in a constituency. This could easily be a reality for the Turkman list. It may win more seats in total if it does not win a seat in Kirkuk than if it does.
- No reason has been given for the rather unusual rule that a party needs a full multiple of the national quota to get a seat in stage (1).

A number of countries have proportional elections in constituencies without nationwide compensation. However, if one takes the trouble of reserving 45 national seats it is hard to understand why not all of them should be used as compensatory seats. The simplest system would serve all purposes; it helps the small parties and gives a proportional distribution of seats with a minimum of wasted votes. It is difficult to see any connection between criteria for a good electoral system for Iraq and the system chosen, not even from an opportunistic point of view.

Since the Iraqi system is designed under intense international supervision, the transparency in the process should be an obvious requirement, and the reasons for the choices that have been made, should be made public. Unfortunately, the process and the chosen system offer a rather negative legacy for the future Iraqi democracy.

Another unsatisfactory proposal

In the case of plurality or majority based systems, yet another system for minority representation has been discussed. It amounts to awarding seats to minorities in the constituencies where minority candidates have gotten the highest number of votes, until the minimum quota is filled. This is a system which clearly would alter the political composition of the parliament, and which could give rather random results. The system is used in Jordan, within a multi-member constituency system, for the quota for women. It was also used in the Palestinian Territory for the elections to the legislature in 1996 and 2006, guaranteeing Christians representation in four multi-member constituencies. In both elections, the political composition of the assembly was changed due to the quotas.

15 Promotion of dialogue and reconciliation

After a bitter conflict, ethnic, linguistic, religious, sectarian and other groups may have legitimate needs for protection. Often an agreement ending the conflict will define a delicate distribution of

powers between a national and a regional level, and between groups at the national level. The long term goal, however, is to break down the group divisions and promote the normalization of politics. It is always desirable that legislatures and executives bodies are representative of the people not only along the political dimension but also along group dimensions. However, if politics is normalized, such representation could be achieved by parties not identified with specific groups, just as well as by formal arrangements or by group-based parties keeping each other in balance.

A lot of effort has been put into designing electoral systems which improve the chances for dialogue and compromise. There have even emerged schools of thoughts which, on this basis, promote one electoral system above others.

15.1 Plurality and majority elections

If only one person is to be elected to a position (such as the presidency), it is important that the elected candidate has wide support. That is why plurality vote (see Section 8.1) is rarely used to elect a president with real powers. Instead a majority system is used, either majority elections in two rounds (Section 8.2) or the alternative vote (AV, Section 8.3). Under both these systems, the elected candidate has gotten more than fifty percent support in the round of election where the result is determined.

If a plurality system is used, a candidate can be elected with less than half the votes, perhaps a third or less. Then the winner can be an extremist who gets the votes of a fairly large number of devoted supporters, but who has no further support. In a deeply divided society, the winning candidate can represent a nationalist party from the largest of the competing groups, but a clear majority might regard this candidate as the worst possible alternative. The President of the Palestinian Territory is elected by plurality vote. Even though the presidents elected in 1996 and in 2005 both won comfortable majorities, it can clearly happen in the future that an extreme candidate is elected from the most disciplined group, winning 30 or 40 percent of the votes in competition with a divided majority.

In such a society one should try to introduce a system which encourages candidates who have an appeal beyond their own primary supporters. At least, this would mean that if the primary choice of a group has no chance of being elected, its subsidiary preference, which could amount to supporting a moderate candidate of another group, should have a chance of influencing the outcome. Both the alternative vote (AV) and a two-round majority system satisfy this requirement and may therefore encourage candidates who will not alienate members of other groups.

For parliamentary elections, the situation is different. It is important that parliament as such is able to make decisions that take the interests of all groups into account, so that the largest group cannot dictate to the others. If no group has a majority, a proportional electoral system will produce a composition of parliament where one must build alliances across groups to achieve majorities, either to form a government or on a case-by-case basis. The ability to negotiate across groups and reach compromises does not necessarily depend on having only moderate representatives elected from each group. Moreover, if the electoral system excludes extreme candidates or puts them at a disadvantage, the parliament may lose importance and extra-parliamentary activities may be initiated.

Nevertheless, AV in single-member constituencies is strongly supported as being the best system in deeply divided societies. In Bosnia and Herzegovina, this system was put forward by a group of international experts as their first choice for parliamentary elections, as part of a mixed system. In this case, the single-member constituencies should be drawn up in such a way that as many as

possible where multi-ethnic, preferably with no group having a majority. This would mean that administrative boundaries could normally not be respected, which would be difficult to explain to a public who had been used to multi-member constituencies before the war. Constituencies drawn up with the purpose of making them multi-ethnic would be regarded as artificial.

The argument, which in the end became decisive for not choosing AV, was that the election law committee felt that single-member constituencies would make voters less courageous in their choice. Traditionally, Bosnia and Herzegovina had used a list-based proportional system (both before and after the war), and that had led to a number of voters voting for multi-ethnic parties, because they knew that the distribution in the end would be fair. When asked to vote for a single candidate only, it was feared that voters would put ethnicity before political preference. The multi-ethnic parties would therefore lose rather than gain if AV had been introduced.

15.2 Proportional systems

In democratic elections, the voters shall decide in the end. Therefore, it is not possible to design an electoral system which with certainty produces a specific result. However, a proportional system will at least make sure that the voters' choices are reflected in the elected assembly. List-based proportional systems produce proportionality among parties or lists, and such systems were chosen in Bosnia and Herzegovina, Kosovo and Iraq.

The single transferable vote (STV, see Section 10.3) could be a good solution in cases where the dimensions along which proportionality is desired, are not set in advance. Group identity, political views and other dimensions may be equally prominent. The voters should, on an individual basis, decide what is the most important dimension. This is what STV can achieve, but the system has two disadvantages. It is complicated to administer and the count takes a long time, and the size of the constituencies can, for practical reasons, not exceed around five seats.

15.3 Examples of other systems

Afghanistan 2005

In Afghanistan, the first parliamentary election after the war against the Taliban used the single non-transferable vote (SNTV, see Section 11.1). The system was promoted by the president, while the international community and political parties in the country advised strongly against the system.

The reason given for the choice was that people had lost confidence in parties, after the Taliban rule, the period of political factions and the communist party rule in the 1980s. Parliament should preferably consist of individuals with broad confidence and respect, chosen directly by the people.

The number of candidates in the September 2005 elections was enormous and some ballots consisted of more than five hundred names. The turnout went down and there were complaints that the voters had difficulties in making an educated choice among all the individual candidates. In addition, SNTV is prone to tactical behavior in nomination of candidates and voting.

The most important objection against the system was, however, related to the reason put forward in its favor. Without regular parties and candidates elected on a program, it is difficult for the voters to choose among clear alternatives. It would be up to the president to negotiate a government which could win confidence in parliament after the elections, and the voters' influence would be less than if

the alternatives had been declared in advance. Instead of trying to normalize political life by legitimizing parties in position and opposition, the non-party system would rather leave much more powers with the executive. The experience from Uganda and from Belarus where parties have been reduced in significance is far from promising.

A proposal for parliamentary elections in Bosnia and Herzegovina

In 1999, when the discussion about the new electoral law for Bosnia and Herzegovina had started, the International Crisis Group (ICG) proposed a system for parliamentary elections which was intended to promote compromise and dialogue. It was implied, and perhaps even stated, that another purpose was to keep the nationalist leaders out of office. The government system of Bosnia and Herzegovina is described in Chapter 5.

The system is based on the idea that parties running should have to gain support not only from their own primary electorate, but also from other ethnic groups. Each party running in an election would in advance be classified as being Bosniac, Serb or Croat. The seats are distributed according to pre-defined ethnic quotas. The quotas are based on estimates of the composition of the electorate of the constituency.

Each voter has three votes, one for a party from each of the major ethnic groups. This means that all voters participate in three parallel elections. In each of these elections, seats are proportionally distributed.

An example will illustrate the system. The electorate consists of 70 percent Serbs, 20 percent Croats and ten percent Bosniacs, 100 seats are to be filled, and there are 10,000 valid votes.

In the example, all voters have their own nationalist party as their first preference and they all vote for moderate parties in the other groups. This assumption is not obviously realistic.

There are 70 Serb seats, and they are divided between the two Serb parties according to their votes. Similarly, the 20 Croat and the ten Bosniac seats are divided between the two parties in the respective group.

Party	Votes cast by Serbs	Votes cast by Croats	Votes cast by Bosniacs	Total votes	Number of seats
Serb nationalist	7,000	0	0	7,000	49
Serb moderate	0	2,000	1,000	3,000	21
Croat nationalist	0	2,000	0	2,000	4
Croat moderate	7,000	0	1,000	8,000	16
Bosniac nationalist	0	0	1,000	1,000	1
Bosniac moderate	7,000	2,000	0	9,000	9
Total	21,000	6,000	3,000	30,000	100

A straightforward proportional system based on lists would give the following result (regardless of the specific method of proportional distribution):

Party	Total number of votes	Number of seats
Serb nationalist	7,000	70
Serb moderate	0	0
Croat nationalist	2,000	20
Croat moderate	0	0
Bosniac nationalist	1,000	10
Bosniac moderate	0	0
Total	10,000	100

We see that the ICG model, in this particular example, produces a far more moderate distribution of seats in the assembly than does the proportional system. However, one can also conclude that the proposal is far from meeting criteria on representativity and accountability. For example, the Bosniacs all vote for the same party, but under the ICG system they will almost exclusively be represented by another party, for which they did not vote. This is the intention of the system, but it is doubtful if the voters would accept an outcome which is that far from their primary wishes. The result would not only be far from representative, it would almost be the opposite of being representative.

In addition, the assumptions that people who vote for nationalists within their own group would vote for moderates in the other groups, is quite doubtful.

16 Good governance

16.1 Accountability

An important feature of an electoral system is accountability. Voters should be able to hold their elected representatives accountable for their deeds when in office. This holds not only for the parties, but also for individual representatives. Generally speaking it is seen as a particular strength of single-member constituency systems that the accountability is strong. The constituencies are small, and it is easy to know who represents the voter and to follow the representative's performance during the term.

In list-based proportional systems with the country divided into constituencies, it can be argued that the connection between the voters and the elected member is even stronger, since not only does a person represent the constituency, but a voter is likely to find a member of parliament representing the voter's party as well. This may lead to a stronger connection between those who elect and those who are elected than if the representative comes from a party for which the voter has not voted.

A weakness of proportional systems is that the voter cannot easily influence the choice of persons, without being active in a party. If the voter feels that a representative has performed badly but still supports the party, the voter may face a dilemma. A similar, and perhaps even stronger, dilemma may also occur in the case of single-member constituencies. In the latter case, however, the party may be more reluctant to re-nominate a person whom the voters have strong opinions against, whereas the party might get away with keeping such a candidate on a list.

This is why open lists are introduced in proportional systems. The voters can be given various degrees of influence, by not only voting for the list as such, but also for candidates within the list.

In particular, in emerging democracies opening up the lists has proven to be a powerful tool in fighting corrupt practice within parties, even though in some countries it has led to public disputes between candidates of the same party and given an advantage to populists.

16.2 Transparency and effectiveness

In new democracies and post-conflict societies one may be tempted to try to achieve a lot by the electoral system. This has led to a number of systems which are complex and unpredictable. Often the intended effect has disappeared in a number of non-intended side-effects. We have given some examples of such systems, where one has tried to repair a system with odd mechanisms, while the underlying problem could have been solved by well-proven and relatively simple mechanisms.

In particular, when the international community has an advisory role, one should look to systems which are simple, transparent, well proven and which can be maintained beyond the first supervised election. The system used in Iraq in December 2005 (see Section 14.5) has fundamental flaws and will set a bad example for the future.

On the other hand, complexity will have to be analyzed from two points of view, that of the voter and that of the administrator. The alternative vote (AV, Section 8.3) and the single transferable vote (STV, Section 10.3) are complex systems from the point of view of the administrator, but fairly simple for the voter. The results are also rather intuitive, and the systems do not raise many questions when being used.

The single non-transferable vote (SNTV, Section 11.1) is simple from the administrative as well as the voter's point of view, unless the number of candidates is very high. However, when used in a party environment, the results will often be far from intuitive, and the system is very vulnerable to tactical voting.

It should be obvious, and is a basic criterion for a good electoral system, that the more votes that are cast for a party or a candidate, the better should the result be for that party or candidate. By introducing a number of add-ons to an otherwise simple system, this aspect can easily disappear.

PART III: CASE STUDIES

I The Philippines

There are two major conflicts in the Philippines: that of the communist guerillas against the government and that of Muslim separatism in the Southern Philippines.

I.1 Muslim separatism in the Southern Philippines

Historical background

The loosely defined region of Mindanao in the southern Philippines was historically inhabited by Muslim tribes which maintained tense and sometimes violent relations with central governments (either colonial or national) in Manila. After assuming colonial powers from Spain, the United States defeated the main Muslim insurgency in Mindanao in the Battle of Bud Bagsak in 1913; despite occasional armed resistance during the remainder of US colonial administration and under the early years of Filipino national government, the central authorities then had sufficient freedom to institute a policy of population migration from more densely populated (and Catholic) islands. In 1913, Mindanao was 76% Muslim; by 1990, it was only 19%. A similar drop in land ownership has made Muslims in Mindanao among the poorest populations in the Philippines.

In the late 1960s and early 1970s, Muslim intellectuals and political leaders found rhetorical and institutional mechanisms to appeal to the 13 major Muslim tribes in the region, forming the Moro National Liberation Front (MNLF) and its armed wing, the Bangsa Moro Army. The launch of the MNLF insurgency saw the beginning of the first substantial armed opposition to national Filipino government. The MNLF was, from its early years, rife with divisions, with both elite political disagreements and local military formations not under the control of the central leadership. By 1977, the Moro Islamic Liberation Front (MILF) split from the MNLF. This and other fractures were caused by a complex mix of personal ambition, ideological disagreement, and ethnic suspicion (between the Muslim tribes). While the MILF has generally presented a somewhat more militantly Islamist and pro-Independence stance, it was willing to function in the diplomatic shadow of the MNLF for its first two decades and is generally believed to be willing to accept political compromises similar to those sought by its estranged partner.

A third insurgent movement, Abu Sayyaf, is smaller and more radical and has been responsible for a number of sensational kidnappings and attacks. The government deems it a criminal movement rather than political insurgency, and it has been condemned by mainstream leaders of both the MNLF and the MILF, although factions of both movements have been reported to cooperate with Abu Sayyaf.

Almost immediately after the beginning of hostilities in Mindanao, the MNLF and the Government of the Philippines began peace negotiations. These negotiations, along with unilateral reform measures taken by the government, have pointed toward some form of regional autonomy for three

decades, but they have not achieved peace. They have achieved, however, the creation of an Autonomous Region in Muslim Mindanao (ARMM). As currently constituted, the ARMM is the result of a 1989 law and a 1996 peace negotiation (the Jakarta agreement, which formally refers to the original 1976 Tripoli agreement). The 1996 agreement won only partial support. The MILF was not involved in the negotiations (although the government quickly engaged it in initially promising ceasefire and peace talks), and the Christian communities of Mindanao largely rejected its terms, winning important support from national politicians. The borders of the ARMM were initially set by plebiscite in 1989; a new plebiscite in 2001 led to the ARMM's expansion by a single province, but both plebiscites have been rejected by the MNLF.

1.2 Application of state structure and electoral system analysis

Assessment of the ARMM

Put very broadly, we identify two principle failures which have undermined the peace process. First, the government and the insurgents disagree about the borders of the autonomous region. All Filipino governments have insisted on the principle that individual provinces and cities join the autonomous region only on the basis of decision by plebiscite. The insurgents view this mechanism as ratifying the population movements (and land title transfers) of the 20th century and instead seek a Mindanao based on the historical borders of Muslim tribal influence – borders that would now include very large Catholic populations. Second, the various autonomous structures put in place have been designed by default with reference to other local government structures in the Philippines and so have failed in various ways: they have failed to provide incentives for marginal groups to engage in the legitimate political process, and they have failed to provide demonstrable improvements in governance. Neither of these failures can be addressed in their entirety by improvements to state structure or electoral systems, but reforms in these areas can be important partial solutions to both problems.

Borders of the ARMM

Both the insurgents and the government have reasonable interests to protect with regard to the borders of the ARMM. While the government is certainly correct that it would be undemocratic and ultimately unsustainable to insist that historically-Muslim but now Catholic areas be forced to join the ARMM, the insurgents are also correct to note that, especially given historical injustices in the area, the interests of Muslim communities need special protections. Protections for local minorities (Muslims in the areas which have rejected the ARMM, Catholics within the ARMM) can be achieved through special electoral guarantees for minority communities. In the Philippines, a tradition of special protections in local governments does exist, but it is normally expressed through appointments by the executive of “representatives” of sectoral groups, such as women, youth, or labor. As noted in the more extreme case of Zimbabwe, such appointments are unlikely to create either the reality or impression of genuine representation, meaning that marginal groups will continue to see the government as unresponsive to their needs and political views.

Improving political participation and governance in the ARMM

The relationship between the ARMM and the central government

At first glance, the ARMM may seem to be an example of strong federalism. It is established in the Constitution of the Philippines, which would seem to meet a central characteristic of federal government as defined by this paper (see Section 3). The constitutional provision, however, serves

merely to require the adoption by Congress of an organic act defining the structure of government and its legislative powers. In other words, the ARMM is dependent upon the national legislature for its existence and authorities, making it more an example of a local government in a unitary state than of a genuinely federal unit possessing some measure of devolved sovereignty. This is more than an academic distinction, as the ARMM's authorities have been modified by Congress on several occasions. Although these modifications have generally been in the direction of greater devolution of power, they have been made without consultation and even over local and insurgent objections, simply highlighting the dependent relationship of the ARMM.

The ARMM falls short of federal practice in other ways, as well. The ARMM is ensured participatory representation in the central government. For example, the ARMM currently consists of eight complete congressional districts electing members to the legislature. The ARMM is also promised participation at the executive level, including one member of cabinet nominated by the ARMM governor, participation by the ARMM governor in the National Security Council, and a special regional police and military command. The legislative representation in both chambers however, is simply an artifact of the system used by the Philippines to create constituencies. The ARMM as a unit is not guaranteed any special representation or legislative protection as described at Section 3.2 and 3.3. (Similarly, the existence of a special security region has not prevented direct central control of military operations in the ARMM. Although this does not itself undermine the federal nature of the state, it does point to a lack of national political commitment to the powers devolved to the ARMM.)

Finally, the ARMM has remained financially and bureaucratically dependent on the central state structures, leaving its government with little local authority.

Creating a more genuinely federal division of powers between the central government and the ARMM may be a starting point for improving local governance and achieving peace through an autonomous region, as seems to be the hope of most actors. Reforms in this direction can be balanced with appropriate protections for local minorities (namely, Catholic communities). Such reforms would, nonetheless, be difficult in a unitary state with highly centralized government powers. Dissatisfaction with the national government spreads far beyond the borders of Mindanao, however, and there has been substantial discussion of devolving some powers to local governments nationwide. Although truly federal arrangements have not figured largely in these discussions, a move away from unitary centralism may provide an opportunity for more far-reaching reform in the ARMM. The experience of the ARMM may also provide useful warnings and signposts for other efforts to devolve power to local governments in the Philippines.

Constitutional protections for the autonomy of the ARMM, perhaps including representation in the second house, matched with protection for local minorities, could begin to resolve the state relationship issued described here.

Government and elections in the ARMM

The government of the ARMM is patterned after other local governments in the Philippines. A governor and vice governor are elected by plurality, and a regional assembly is elected using the bloc vote (a “winner take all” system, as described at Section 8). Each congressional district elects three members to the regional assembly. Elections are to be held simultaneously every three years but have been subject to postponement and so have been held in 1990, 1993, 1996, 2001, and 2005. Postponements are at the discretion of the national congress, which must amend the organic act, highlighting the limited authority devolved to the ARMM, which does not control its own political calendar.

Direct election of the executive and a winner take all system in the legislature make political participation by new or marginal groups, including local minorities, difficult. As described above, the political life of Mindanao is heavily fractured, with divided insurgent groups, multiple ethnic and tribal identities, and worried local minorities. Winner take all politics give each of these groups incentives to resist political participation – resistance that has taken the form of continued insurgency in the cases of the MNLF and MILF and of lobbying against peace agreements involving the devolution of power in the case of local Catholic minorities. The effects of a winner take all system are also visible in the political party structure of Mindanao. The national ruling party holds both elected executive offices and 17 of 24 seats in the regional assembly. After the MNLF leader was defeated in the 2001 gubernatorial election, the insurgent group has not participated in electoral politics. Five Muslim parties have developed within the ARMM, but none have a presence throughout the region, and none are represented in the legislature.

Elections in the ARMM have been marked by severe fraud. The allegations of attempted vote rigging which led to the attempted impeachment of President Gloria Arroyo were centered in Mindanao, where some districts reported no votes for any other presidential candidates. Similar allegations have been made with regard to ARMM elections, with the main local observation group (the Citizens' Coalition for ARMM Elections) reporting widespread identity theft, voter intimidation, vote buying, ballot stuffing by local officials, and various other forms of fraud and abuse. The winner take all system of representation encourages this kind of behavior, as small differences in vote total can create tremendous changes in the composition of elected bodies (this is not the case in proportional systems). Over time, potential participants in the political process are simply discouraged by the influence of political machines and their capacity to manage elections, further undermining the attraction of legitimate politics and the credibility of the elected authorities.

Given the length of the peace process to date, its succession of false starts, and the heavily fractured nature of political organization in Mindanao, it is unrealistic to hope for a single rapid solution to the conflict. Instead, the solution must take the form of institutions which gradually attract greater participation and thus greater public confidence. The current winner take all plurality system cannot achieve this. Any reform in the direction of proportional representation will improve the political life of the ARMM. It will reduce the incentive for fraud and increase the incentive for political participation by marginal or fractional groups.

In addition, public and elite confidence in legitimate politics has been undermined by electoral fraud. Reform of electoral administration in Mindanao is necessary to persuade current combatants that they can compete fairly in legitimate politics and so to draw them out of insurgent activity. Such reform can take several forms, one of which may be the devolution of authority from the national electoral management body (the Commission on Elections, or COMELEC) to an independent electoral institution serving only the ARMM. Such an institution may also serve as a testing platform for electoral administration reform in the Philippines as a whole – a pressing demand given the allegations of fraud in the most recent presidential elections.

1.3 Overall conclusion

Electoral reform in the Philippines

Electoral reform may contribute to a solution of both conflicts in the Philippines, and reforms are overdue from all other points of view as well. The nature of the conflicts all points in the same direction: better guarantees for representation of the conflicting parties. In particular, the question of representation for minority groups, which has so far been discussed in the context of local

minorities in Mindanao, is an issue of general importance. In particular, meaningful representation for all groups may be an important part of the political solution to the more widespread communist insurgency in order to create confidence that an election will give a fair representation. This could therefore be one of many measures to attract the communists into the electoral process.

The Constitution of the Philippines requires that 20 percent of the seats in the principle chamber, the House of Representatives (HoR), be elected under a list proportional system to allow the representation of “national, regional, and sectoral parties and organizations.” “An Act Providing For The Election Of Party-List Representatives Through The Party-List System” from 1995 provides the implementing mechanism for this requirement. The Act attempts to limit the 50 available seats to smaller groups, which would be unable to win seats in the single member plurality constituencies. Under the Act, only the less prominent parties may participate. The top five parties (from the 1995 election) cannot propose lists.

Each voter has two ballots: One for the regular constituency election and one for the party list. The list based seats are distributed as follows:

1. The parties shall be ranked from highest to lowest based on the number and percentage of votes garnered during the elections;
2. Only a maximum of three seats may be allowed per party. Seats are allocated at the rate of one seat per 2% of votes obtained; and
3. Unallocated seats shall be distributed among the parties which have not yet obtained the maximum 3 seats, provided they have mustered at least 2% of votes [pending legislation would reduce this threshold to 1.8%]. The variance of percentage in excess of 2% or 4% (equivalent to 1 or 2 seats that have already been obtained, respectively) shall be ranked and be the basis for allocating the remaining seats.

This rule may be impossible to follow if the number of lists is high. However, so far it has functioned, since only few lists (11 in 2001) won more than 2% of the votes. As another consequence of this small number of successful parties (and of the complex rule for the distribution of seats) only 29 of the 50 seats were filled in 2001.

The system described here is very unusual and can give very random results. First, the decision on which parties cannot participate in the list election is a highly political one. An electoral system should be neutral to all actors and it is the actual voting behavior which should determine the allocation of seats. Naming parties as part of the rules should never be done.

The purpose of the system seems to have been to compensate for the effects of the plural system, which favor the big parties, by repairing the system in such a way that new unreasonable features are introduced. In this particular case, there are a number of systems which could have given the same effect in a neutral manner and without all the odd side-effects. The most obvious choice would be a mixed system like the German, where some of the members are elected in single member constituencies and the rest according to List PR system, which would compensate for the overrepresentation of big parties.

Although such reform of the HoR is not a demand of the Mindanao insurgents (and may not be a specific demand of the communist insurgents), it would open legitimate political competition to a broader range of actors, perhaps providing avenues for resolving or defusing political tensions at the national level without resort to insurgent violence. The current system, by creating what is, in effect, a representative ghetto for marginal groups (who can win, at most, three seats), does not hold the promise of genuine national political influence and so is unlikely to achieve the same objective of providing a legitimate avenue for political participation.

Conclusions

Both out of democratic principle and in order to achieve a sustainable governing formula, reforms to state structure and electoral systems should be undertaken according to a participatory democratic process, such as the one outlined at Section 2. The design and creation of the ARMM, though, has been an elite affair, with the national congress passing laws with little public participation. Even the peace negotiations between government and insurgents have tended to be partial, including only some principle stakeholders (leaving out, for example, important insurgent groups and local minorities). An elected constituent assembly with a mandate to propose reform in the direction of a federal devolution of power to a more representative ARMM government may create the political conditions for the gradual inclusion of all insurgents and other actors in legitimate politics.

Such a solution may be difficult to achieve through peace negotiations, as it would remove authority for the final political settlement from the elite negotiators and pass it to an elected body. Such a change in approach, however, may well be the way to break a three decade long logjam on the establishment of an autonomous region in Mindanao and the end of the insurgency.

An electoral reform may be one critical element to create trust in representative democracy and to create conditions for a peace process including all combating parties.

2 Sudan

2.1 Historical background

Sudan has been the victim of bloody and long-lasting civil conflict almost continuously since its inception in 1954. The longest-running of Sudan's civil wars (and the longest civil conflict in Africa) pit the Christian/Animist populations of the south against the largely Muslim populations and government of the north (a caricature which, of course, oversimplifies the real borders of the conflict and the identity of its protagonists). This conflict was formally concluded by the signing of the Comprehensive Peace Agreement (CPA) between the Government of Sudan and the Sudan People's Liberation Movement/Army (SPLM/A) in January 2004. The CPA contains provisions for the border areas of the Southern Blue Nile and Abyei (which is populated by southern tribes but lies along the migration routes of northern tribes and which sits over large petroleum reserves), but not for the ongoing conflict in Darfur or for the lower intensity conflicts in the Nuba Mountains, Eastern and Northern Sudan. The CPA also does not address directly the conflicts within current Sudanese politics – namely, the effort of the ruling National Congress Party (NCP) to retain power – but, as shall be addressed in this study, the electoral requirements of the CPA bear directly upon these politics.

The CPA is in reality a complex library of documents which require the production of still more documents by a myriad of commissions and governmental bodies. For our purposes, the most important documents are the Agreed Texts, the Implementation Modalities of the Protocols on Power Sharing (both are parts of the CPA), and the Interim Constitutions of Sudan and Southern Sudan (both were adopted as per the requirements of the CPA). The agreement lays out the following path:

- A “pre-interim” period of six month starting with the signing of the CPA to allow for a

cessation of hostilities, preparations for a permanent cease-fire, the establishment of a constitutional framework for the interim period, and the establishment of the institutions needed to implement the agreement during the interim period.

- An interim period of six years starting from the end of the pre-interim period. During the interim period, Sudan is to be governed as a federal state according to agreements on the devolution of powers and sharing of resources contained in the CPA and reflected in the interim constitutions. For the first four years of the interim period, the governments (at all levels of the federal structure) are to be controlled according to power-sharing formulae in the CPA. At the end of the fourth year (mid-2009), elections are to be held for all levels of government.
- At the conclusion of the interim period (mid-2011), separate referenda are to be held in Southern Sudan on independence and in Abyei on membership in either Northern or Southern Sudan.

This study will review state structure and electoral process issues both for the interim period and, looking forward, for the post-referenda state or states.

2.2 State structure

State structure in the interim period

The CPA clearly requires a federal structure for Sudan. The levels of government are to include a national government, an autonomous Government of Southern Sudan (GoSS), and 26 states. In addition, the states are charged to “promote and empower local government” in both the Interim Constitutions of Sudan and Southern Sudan. The federalism described in the CPA and the Interim Constitutions is quite strong, with several features deserving mention:

- The existence and prerogatives of the federal units, especially the GoSS, are clearly established in both the CPA and the constitutions, placing them beyond the reach of normal national legislation. In fact, the CPA serves as a kind of super-constitution, the amendment of which would only be possible by agreement between the contracting parties (one of which, the SPLM/A, is very largely the GoSS).
- The national legislature is bicameral, with a powerful second chamber (the Council of States) with two members from each state, elected by the state legislatures. As described in Section 3.3, a powerful second chamber based on the principle of equal treatment of regional units is a strong defense of federal prerogatives.
- The CPA (in Part V of the agreed texts) enumerates in great detail the powers of the national government, the GoSS, and the states, reserving substantial authority to the latter two levels of government. These enumerations are repeated in the Interim Constitutions. Importantly, all three levels of government have the power to raise revenues through taxes, licenses, and debt issuance and all three are guaranteed a share of oil revenues.

The federal system described in the CPA and the Interim Constitutions is in the best tradition of state structure for highly divided societies. The devolution of meaningful power, guaranteed through constitutional (and super-constitutional) arrangements, is an appropriate mechanism to address the very large number of ethnic, tribal, religious, linguistic, and other group identities in Sudan and to address the very different economic, environmental, and other conditions faced in different parts of this vast country. A federal framework may prove useful, for example, in the resolution of continuing conflicts in Darfur, the Nuba Mountains, and Eastern and Northern Sudan. It may also prevent the

escalation of group identity conflicts within the GoSS, which are already apparent in the appointment of GoSS leadership and in the activities of the Ugandan Lord's Resistance Army.

The implementation of this federal system will require close monitoring. In particular, it will be important to track the establishment of effective governmental authority in the GoSS and its constituent states, as no governments existed at these levels at the time of signing the CPA. The energy with which the GoSS addresses the creation and empowerment of not only its own bureaucratic structures but of those in the states will be an important signal of the real level of devolution of power expected. Similarly, the national government may be reluctant to devolve power to the northern states, especially given the current hostilities or tensions in several of those states. The failure to reach agreement on administration of the national capital as required by the CPA is not promising in this regard.

The CPA contains several power sharing requirements for the interim period. These include a Presidency divided between a President from the north and two Vice-Presidents, including one from the south. A party formula also defines the division of ministries between the political parties, although the NCP has reportedly stymied the implementation of this component of the CPA. Finally, the CPA contains requirements for the introduction of southerners into the civil service.

State structure post-referenda

The national and GoSS constitutions are explicitly interim. While they contain some important provisions for the post-interim period (for example, Article 118 of the national constitution describes the tenure of the National Legislature if Southern Sudan votes for unity or independence), the Interim Constitutions and the CPA are silent on the establishment of a permanent constitutional order (including state structure) after the interim period. As argued in Section 2, a democratic process for the drafting, adoption, and ratification of a constitution is important both normatively and as a measure to enhance the legitimacy and thus stability of the constitutional settlement. Regardless of the outcome of the referenda in the GoSS and in Abyei, transparent and democratic processes should be undertaken beginning in 2011 in Sudan or its successor states.

The Constitutional Review Commission, created by the CPA to draft the interim constitution, was expanded at the last minute to include representatives from opposition parties in the south and the National Democratic Alliance in the north, making the interim national constitution drafting process more inclusive than the CPA negotiations, but still far from fully transparent and democratic. The minor parties have complained, for example, that the bulk of the drafting was done by the major parties, and especially the NCP, prior to their inclusion in the process.

The interim period will clearly provide a useful frame of reference for deciding future state structure issues. Sudanese voters and political elites will have an opportunity to judge the early workings of a federal model and to decide whether to strengthen, weaken, scrap, or otherwise change the model. While it is clearly too early to judge or forecast these decisions, the federal model does seem, as argued above, well-suited to Sudanese circumstances. This study will thus highlight a few specific issues within the federal model which will require attention in a permanent constitutional settlement. The study will also note concerns about the presidential form of government in Sudan.

Federalism

The CPA and both Interim Constitutions require that “residual powers” (those not specially enumerated) be “dealt with according to its nature,” in other words, on an ad hoc basis. This is an artful construction for the interim period, in which negotiated power sharing is the essential

requirement for stable government. It will create confusing legal dilemmas in the future, however, as there is no obvious standard for when “a matter” “requires a national standard,” “is usually exercised by a state or local government,” or “is susceptible to Southern Sudan regulation.” These legal dilemmas can be addressed through jurisprudence (as described in the U.S. and German cases at Section 3.5) or through a clear statement of constitutional principle. An example of the later is found, incongruously, in the Interim Constitution of the GoSS, which states, “Each state of Southern Sudan shall have residual executive and legislative competence over matters within their borders that are not exclusive to the National Government or the Government of Southern Sudan.” The post-conflict situation in Sudan in 2011 may make a clear standard preferable or may point to the continued flexibility of ad hoc solutions.

The existence of intermediate levels of administration between the national and state governments may also be reopened. Regardless of the decision on independence made by Southern Sudan, other regions of Sudan may find it useful to mediate their relationship to the national government through a regional level. If so, the process for the formation of regions should be addressed constitutionally. More broadly, there may be a need to rethink the appropriate size and design of the federal units.

Finally, while the Interim Constitution of the GoSS seems strongly committed to federalism (as evidenced by the clause on the residual powers of states referenced above), it contains important lacuna. First among these is the lack of a second chamber, parallel to the national Council of States, for the representation of federal units. As noted in section 2.1, Southern Sudan is split along many group identity lines, and without a strong practical guarantee of the viability of federal structures, it may see internal conflict regardless of its future national status.

Presidential form of government

The interim period will have a presidential form of government, with a power sharing agreement of a president and two vice-presidents until elections, after which power sharing is expected to continue. This system is understandable in the peace agreement context, but it may not be desirable for a country as diverse as Sudan or for one with such a rich tradition of despotism. As the death of Dr. John Garang has demonstrated, a power sharing structure which hinges on one or a small handful of personalities is inherently unstable. As the Lebanese experience demonstrates, the division of executive positions according to a set formula of group identity makes transcending the conflicts of those group identities exceptionally difficult.

A parliamentary model softens some of the “winner-take-all” aspects of an elected presidency without resorting to set group formula. It is also more supple in reflecting changes in demographic or in the nature of popular identification with groups or political causes. While power sharing arrangements (expressed through institutionalized quotas or otherwise) can make sense in a new and fragile peace, if prolonged, they can work against political change. As the nature of political disagreements change, the quotas or other power sharing arrangements cannot change with them.

2.3 Elections and referenda under the CPA

The CPA and Interim Constitutions call for national, GoSS, and state executive and legislative elections in 2009 and referenda in the GoSS and Abyei in 2011. In addition, both Interim Constitutions call for states to prepare local elections, although no timeline is specified. Sudan has a population of over 40 million and an eligible voting population most likely exceeding 25 million. It is the largest country in Africa in landmass, with exceptionally poor physical communications and so tremendous logistical challenges. It has severe weather (Sudan’s first elections, in 1953, were

postponed due to the onset of the rainy season). As described above, it has a large number of group identities, all of which will expect representation in governmental bodies. It still suffers from a number of insurgencies and civil conflicts, and in many areas nominally at peace the rule of law and police order have not been reestablished. In short, the elections required by the CPA will be an exceptional political and operational challenge. A pre-election assessment is desperately needed in order to begin planning for the three years remaining prior to the first election; this report cannot substitute for an on-the-ground assessment, but it can highlight several critical issues for consideration.

Systems of representation

Legislative elections

The CPA and Interim Constitutions leave the system of representation for legislative elections vague. For the National Assembly, the requirement is simply “free and fair elections,” with the size and composition of the Assembly to be determined by the electoral law. The Interim Constitution of the GoSS is somewhat more specific, requiring:

The Southern Sudan Legislative Assembly shall consist of:

- (a) members directly elected to represent territorial constituencies;
- (b) women, who shall constitute at least twenty- five percent of the total membership; and
- (c) such number of representatives of other categories as may be determined by law.

The language from the GoSS Interim Constitution can be taken to require quotas, for example for women or identity groups. It could also be taken to require the appointment of assembly members through mechanisms other than direct elections (for example, executive appointment of tribal chiefs or others). Precedent for such unelected members exists in recent Sudanese election law. While the former interpretation (quotas) would be reasonable and even desirable, the latter interpretation (unelected members) would undermine the democratic principle. In addition, as described in the case of Zimbabwe, appointed members are more likely to serve and be seen as representatives of the executive appointment authority than of the identity groups they nominally represent.

The tradition of Sudanese elections (including, most recently, the 2000 parliamentary elections), has been for single member constituencies and simple plurality elections. While not specifically required by the CPA or the interim constitutions, the emphasis in these documents on the importance of census information for the electoral process seems to indicate that a similar system is under consideration (census data will be most important if single member constituencies must be drawn or to create group identity quotas).

Although it is often useful to refer to a country’s electoral tradition – voters and political elites may better understand and better trust accustomed forms – plurality elections in single member constituencies would be poorly suited to Sudan’s requirements. Such a system is not able to reflect political identities as fractured and varied as those in Sudan. Great effort would go into drawing constituencies for particular identity groups, meaning that groups marginalized by the current power sharing arrangements would likely be marginalized in the future – and would certainly believe themselves to be underrepresented. Plurality elections are also more susceptible than proportional systems to fraud, intimidation, vote buying, and other forms of abuse, because a small number of votes can change the disposition of a large number of races. It is very likely that plurality elections in Sudan would result in two de facto one-party states, with the SPLM/A dominating the south and the NCP dominating the north, leaving little room for other political voices, which will thus be dissatisfied with the government and perhaps willing to resort to violence. Such an outcome would

run counter to the official government objective of making a unified Sudan attractive to the south prior to its referendum. Regardless of the results of the referendum, such a result in 2009 elections would be a poor basis for the post-interim Sudan or its successor states.

In addition, single member constituencies are administratively substantially more difficult, requiring data for delimitation of constituencies, complex voter eligibility determinations, and difficult logistics for the management of many separate elections. Placing such an additional burden on the already exceptionally difficult process of election management in Sudan may be too much, leaving open the possibility that the elections will fail to produce an accepted result.

A recommendation on a specific system will require consultations with Sudanese political actors, but list proportional representation in constituencies with compensatory seats is a reasonable starting point for discussion. Such a system would leave open the possibility of gender and other quotas, which are foreseen in the GoSS Interim Constitution.

Presidential elections

The CPA and Interim Constitutions require that both the national and GoSS presidents be elected by an absolute majority in a first round of elections or face a second round against the second place candidate. While this runoff system is preferable to election by pure plurality (which could result in a candidate winning the powerful position of the presidency on the strength of limited support), it does raise the possibility of a second round of elections, which would create an immense administrative burden. A move to Alternative Vote (AV, sometimes called instant runoff voting), see Section 8.3, would allow for a more nuanced presentation of voter preference while avoiding a runoff election.

Gubernatorial elections are also foreseen at the state level, but the constitutional requirement that the governor be “elected by the people in [residents of, in the case of GoSS] that state” could perhaps be met by indirect election by the legislature, which would set a useful precedent for a less presidential form of government, as argued in 2.4.

Electoral management bodies

National authorities

The CPA and Interim Constitutions create several electoral management bodies. A National Electoral Commission (NEC) is to be established with broad powers over elections to national, GoSS, and state elections, including elections within the state legislatures to the Council of States. There is also to be “an ad-hoc Commission to monitor and ensure accuracy, legitimacy, and transparency of the Referendum...which shall also include international experts.” It is not clear which body would conduct the Abyei referendum. Several considerations should be paramount in establishing these electoral bodies:

- The national Interim Constitution calls for the NEC to be composed of “seven to nine independent, competent, non-partisan, impartial and representative national personalities.” The members are to be appointed by the presidency, but the CPA has a broader set of guarantees for the independence of the commission, calling upon the National Constitutional Review Commission to “detail the mandate and provide for the appointment and other mechanisms to ensure the independence of the [NEC].” The independence of the NEC should rest on more than the goodwill of the presidency, an issue which can be revisited in the electoral law by providing a more participatory appointment process and

- other guarantees.
- Although there are good political reasons for creating two separate electoral commissions, their operations should be merged insofar as is politically possible in order to avoid very costly redundancies in election preparations. This could mean the creation of a single NEC with an executive office and a special commission for referenda purposes. If politically acceptable, perhaps the NEC could simply be mandated to serve as the referendum commission as well.
- Although the elections are three and five years off, respectively, both the general election and the referenda will be difficult to prepare, and the electoral management bodies should be created as quickly as possible. The NEC is already late according to the CPA implementation schedule, and the Southern Sudan Referendum Act and Commission should be established no later than summer 2007, according to the implantation calendar.

International involvement

The referendum commission is to include “international experts.” It is not clear if these are to be members (voting or non-voting) of the commission, executive officers, or advisors. Serious thought should be given to both a robust technical assistance or executive role for international experts in both electoral commissions as well as a visible international presence on the commissions themselves. Given the technical complexity of the operations, a strong international presence is likely to be invaluable. More importantly, an international presence in the commissions can vouchsafe the credibility of the electoral process.

A strong international presence would be in line with recent experience in the Balkans, Timor, Afghanistan, and Iraq. It would also be in line with Sudanese experience. Sudan’s first elections, in 1953, were also some of the first elections held under international supervision. An international commission headed by Indian election official Mr. Sukumar Sen managed the first elections to the satisfaction of the international community and Sudanese parties. This should not be taken to mean that direct international management with large international staffs (as in the Balkans, Timor, or Afghanistan) is the necessary or desirable solution. A lower level of technical assistance, such as the model used in Iraq, may be preferable. A decision between these and other models can only be made on the basis of a detailed operational assessment and the desires of the political actors.

Voter registration

Voter eligibility determinations will be important, especially for the two referenda. Eligibility criteria in the CPA and Interim Constitutions must be expanded upon and standards of proof agreed.

Other factors

The legal framework for the 2000 presidential and parliamentary elections in Sudan was not unreasonable. It included an electoral commission and, like the CPA and Interim Constitutions, reasonable paper protections for voters and other participants. Nevertheless, the opposition felt incapable of joining the electoral process because of NCP control of the machinery of state and media. Issues such as rights of association, access to media, and abuse of state resources will need to be addressed if more competitive elections are desired.

2.4 Conclusions

Progress in preparing for the electoral processes required by the CPA is currently stymied by the same factors complicating the implementation of the CPA in general: NCP fears about losing power and SPLM/A disarray after the death of Dr. John Garang. The recommendations in this study assume a level of good will and capacity on all sides in implementing the CPA and preparing for elections; short of that, they would require active international participation. A dangerous scenario exists whereby the SPLM/A accepts a devils' bargain, allowing undemocratic national elections in exchange for a continued commitment to the 2011 referenda. This could lead to two one-party states, or to a democratic south next to a despotic north, or to continued fighting on both sides of the new border as marginalized groups in both successor states resort to war to win power not available through legitimate politics. A similarly dangerous scenario would be the adoption of electoral laws and institutions without the full and informed participation of the SPLM/A and other political actors. Given the current poor state of SPLM/A engagement in Khartoum, this may well happen without robust international engagement.

3 Sri Lanka

3.1 Historical background

During the British rule of Ceylon (Sri Lanka), the colonial government used the standard tactic of favoring a minority identity group, making local allies for the administration. Ethnic and religious tension between the majority Sinhalese (who are primarily Buddhist) and the minority Tamil (primarily Hindu) was expressed in political terms and conflicts even before the founding of the modern Sri Lankan state in 1948. These tensions continued through the early history of the state, which was politically dominated by the Sinhalese majority and which quickly undercut the privileged position of the Tamils under British administration. By the 1970s, ethnic tension was palpable the Sinhalese-led government struggled between policies of accommodation and repression in an effort to avoid more violent conflict.

A growing Tamil youth movement began to agitate for an independent state in the 1970s. The ruling factions' first responses were violent, allowing or encouraging Sri Lankan armed forces and party-affiliated militia to retaliate fiercely against the youth movement. In a series of anti-Tamil riots in 1977, 1981, and 1983, the security forces played a progressively more chauvinist role, which of course also increased the influence of Tamil radicals. In 1979, the government also passed the Prevention of Terrorism Act, which allowed secret detentions without trial for up to 18 months.

At the same time, however, the government did make halting efforts to accommodate Tamil concerns. In particular, the constitution of 1978 made three concessions which could have been important to resolving the ethnic conflict short of war. First, the constitution overturned the "Sinhala Only Bill" of 1956, which had made Sinhalese the only official language of the country, setting off ethnic riots and marking an important turn in the deterioration of group relations. (In 1956, the Communist Party leader, speaking against the bill, argued "one language, two countries; two languages, one country.") By recognizing Tamil as an official language, the new constitution hoped to undue the damage of this language movement. Second, the constitution introduced proportional representation, which should have allowed the greater participation of minority parties in the political process (whether representatives of identity groups such as the Tamils or otherwise, in particular

helping represent minorities outside their own geographical heartland). Third, the constitution extended the scope of and protections for “fundamental rights,” which, if implemented, would have created a political space for minority opinions and organizations (again, whether built around identity groups or otherwise). As will be described at Section 3.1, however, these changes were made in a largely non-consultative process, and so in their details were often not viewed as concessions by Tamil leaders.

These mixed and confused policies failed to prevent civil war, which erupted in 1983 as the Liberation Tigers of Tamil Eelam (LTTE) began a campaign for an independent Tamil state. That civil war, still ongoing, has cost more than 60,000 lives over two decades and has corroded the fabric of Sri Lankan political life, leaving a nation which is more violent, less democratic, and less stable, even outside the immediate violence and instability of the civil war. Constitutional reform, including changes to state structure and the system of representation, has been a political issue in Sri Lanka almost continuously since 1972. Poorly managed reform processes have contributed to the state’s current civil war and political malaise. A negotiation process, supported by Norway, led to the signature of a ceasefire agreement between the Sri Lankan government and LTTE in 2002. Norway has also led a monitoring mission to monitor the fulfillment of the agreement. The ceasefire has led to a welcome reduction of hostilities, but further talks on arrangements for a long-term peace have been halting.

This study will review that state structure and systems of representation now in place and possibilities for their reform; it will also review the constitutional reform processes used in Sri Lanka to date.

3.2 State structure

Presidential system

Sri Lanka (then still Ceylon) was founded with a Westminster system of parliamentary government in 1948. In 1978, the structure of the state was changed on the basis of constitutional amendment to a French model, with a very strong elected president as head of both state and an elected parliament delegating power to a cabinet. The change was made for a number of reasons, not least of which was the ambition of the party leader (of the United National Party, or UNP) who expected to be (and was) appointed to serve as the first powerful president. There were also substantive considerations, including stability and continuity of government. Government power had bounced between the two major national parties (the names of the parties sometimes change as a result of coalition agreements, but at their core they are the UNP and the Sri Lankan Freedom Party, or SFLP), and an elected president with a term different from the parliament was seen as a way to stabilize government policy. This was deemed a critical objective given the highly centralized power of the Sri Lankan state and the then current model of economic development, which prioritized consistent planning and central leadership. (The importance of economic policy to the reformed executive structure is demonstrated by the fact that two ministries were specifically assigned to the president: defense, which is always a powerful post, and “plan implementation.”)

Election of a single executive post is, by its nature, winner-take-all. The decision to institute an elective presidency in Sri Lanka was, however, based on an assessment that it could be done in a way which would encourage power-sharing and conciliation. This was by using the Alternative Vote (AV, see Section 8.3) for the election of the president. Unlike the parliament, which at the time was elected in first past the post single member constituencies and so could be dominated by a plurality of voters, the AV would require that the president be elected with a majority of votes – even if they were second or third (rather than first) preferences. It was expected that the two major national parties

would split the Sinhalese vote, meaning that second preference, either from Sinhalese voters or from minority voters, would decide the election. In theory the parties would be encouraged to nominate candidates who could appeal to voters outside their own core supporters and therefore the system could promote moderation and conciliation. By forcing presidential candidates to pursue second and third preferences, it was hoped that the office would become a factor for conciliation. In practice, Sri Lankan presidents have been elected on the basis of a majority of the first preference votes, and so the AV preferences have not had a direct effect. Some academics have argued, however, that the pursuit of second preferences has still been important to the construction of multi-ethnic elite coalitions.

It is difficult to argue that the office of the presidency has achieved either of these policy objectives: government consistency or conciliation. On the first count, although the president does serve for six years, he or she has often been forced into “cohabitation” with an opposition controlled parliament. This condition is uncomfortable in France, which has both experience and institutions to manage the resulting intra-governmental conflicts, but it has been seriously damaging in Sri Lanka. In order to avoid facing an opposition assembly, President Kumaratunga in 2001 suspended parliament and eventually created a coalition which put her government into an embarrassing “probationary period.” The president’s brother and political ally threatened that the president would prorogue parliament and call for elections every twelve months until a government of her party was returned. The eventual cohabitation governments were hard pressed in addressing the most serious issues of their responsibility, such as the implementation of peace agreements with the LTTE. Regarding conciliation, the need for the president’s party to seek control of the parliament and the ambition of parliamentary leaders to seek the presidency has seemed to create new mechanisms for the promotion of “ethnic outbidding” as the major parties court the Sinhalese vote.

Moreover, in the 1980s and in the constitutional reform and parliamentary elections of 2000 and 2001, the presidency has served as a somewhat undemocratic force, pushing or breaking the constitutional limits on its power. Given this experience and the general danger posed by a winner take all executive in deeply divided societies, the reform or dissolution of the office of a strong elected presidency should be an important element of any constitutional reform discussion.

Federal structure

Reform of the state structure away from its current unitary and centralized design is acknowledged by most major political actors as an essential component to any solution to the civil war, but finding the right balance for the devolution of powers has been difficult. The normal challenge of state design has been compounded in this case by the tensions between Sinhalese political actors – when in opposition, each major party has proven willing to disavow federal solutions which it proposed and supported while in power, simply to deny its opponents the ability to claim a major accomplishment. A number of solutions have been attempted, including the dramatic failure of the provincial council system under Indian peacekeeping. It is not the purpose of this study to lay out the correct compromise, which can of course only be done by negotiation between the actors. The theoretical section of this paper, however, addresses the essential questions which must be addressed in deciding the scope of powers devolved and the mechanisms for protecting the federal solution. Several points can be made with regard to possible improvements in future federal experiments. First, the provincial councils were dependent on the central government for resources and were, unsurprisingly, under-resourced. Second, the provincial powers were both extremely limited and highly dependent on the central authorities (power over roads, for example, has been interpreted to include class D roads or poorer). Finally, the provincial councils had no strong protections at the centre, such as clear constitutional guarantees or a second parliamentary chamber. A successful federal solution will most likely require improvements in each of these areas.

The protection of minority groups in a federal structure can take several forms. First, despite the fact that a federal Sri Lanka is likely to be composed of one very large unit and one very small one (as is the case in the federation of Serbia and Montenegro), a second chamber of the national parliament should allow equal representation of the two units. The second chamber should have both a clear mandate and the constitutional powers to preserve the authorities of the federal units against central encroachment. Protection of minorities must further extend to the federal units, where local minority groups will require protected representation. This may be possible by creating a sufficiently proportional system of representation for the federal units' elections (including elections to the second chamber of the national parliament, which should be winner-take-all). Some smaller minorities, such as the Muslims, may require additional protections, however.

3.3 System of representation

The current system and its discontents

Sri Lanka's current system of representation replaced first past the post in single member constituencies as part of a new constitution in 1978, only months after the constitutional amendments which introduced the president with strong executive powers. It is a system of list proportional representation in 22 constituencies which elect 196 members (the constituency magnitudes range from 4 to 20). In each constituency, the party with the largest number of votes receives a one-seat bonus in addition to its proportional share of the seats. The constitution was later amended to expand the parliament by 29 members who are elected on the basis of the national vote totals. (These members are not elected to compensatory seats, see Section 10.1; they do not balance the disproportionalities of the constituency elections.) A threshold of 5 percent of the vote must be met to win a seat in any constituency. The candidate lists are open – voters can express up to three preferences for candidates, and the candidates with the most preferences win seats. Candidates winning these national seats are named after the election by the winning parties, although the parties are urged to use the seats to balance the ethnic composition of the parliament.

Although bitter complaints were issued upon its adoption that it was designed to maintain the then ruling party in power, these complaints seem to be more about the process of adopting the constitution than about the system itself, which is reasonably proportional, creating better opportunities for small parties than did the former system. PR has also led to several important improvements. Most strikingly, PR has created more representative and consistent parliaments. The following table shows the election results for the two major parties in 1972 and 1977:

Year	Party	% of votes	% of seats
1972	SLFP	36.9%	60.3%
	UNP	37.9%	11.3%
1977	SLFP	29.7%	4.8%
	UNP	50.9%	83.3%

As these figures demonstrate, the first past the post system could both award a large majority to the second place party and allow massive changes in government power on the basis of relatively small changes in the popular vote. The list PR system does not suffer from these flaws. In addition, Amita Shastri of San Francisco State University has demonstrated that the PR system has led to parliaments much closer to ethnic balance than those elected under first past the post, mainly as a result of elite coalition formation. Muslims, in particular, are now better integrated into legitimate politics. Although Tamils are still marginalized, this is mainly due to the violence in their areas and

intimidation from the LTTE; the PR system could accommodate their participation.

Since the 1990s, there have been repeated efforts to amend the constitution and change the system of representation. These have always failed because the ruling parliamentary parties have failed to build coalitions large enough to garner the 2/3 parliamentary majorities necessary to revise the constitution. Complaints about the system of representation have focused on several issues. First, there seems to be a fairly widespread feeling that the 22 constituencies are too large, breaking the link between the representatives and their constituents. Second, the system has been blamed for the tremendous increase in electoral violence and fraud – in particular, the fact that candidates of a single party compete for voter preferences is noted as a factor in electoral misconduct. Third, there is widespread dissatisfaction at the fact that candidates can win seats from the national list even though they have been defeated in their constituencies. Finally, although not discussed in public as much as the first three issues, the requirement for a 2/3 majority for constitutional changes has stymied federal arrangements in peace processes because the opposition Sinhalese party always has an incentive for ethnic outbidding, blocking the proposed reform of its opponents. Some governments seem to have hoped that a majoritarian system would make a 2/3 majority and thus federal reforms easier to achieve.

Alternatives for reform

Since 2000, most discussion of reform of the system of representation has focused on a German model, combining first past the post in single member constituencies with national party list seats. If implemented correctly, this system might be even more proportional than the current model, especially given the bonus seats and the national but not compensatory seats now awarded. As such, such a reform would still leave room for small and minority parties, which would be an essential requirement for workable government in deeply-divided Sri Lanka. Constituencies with local majorities of Tamils, Muslims, and other minorities might also provide them with greater confidence in the central government. Nevertheless, the German model would have some important complication, including the establishment of acceptable constituencies (prior to 1978, constituencies varied in population by as much as a factor of three and systematically underrepresented minorities).

Any serious effort at electoral reform should also consider other options, such as less radical reforms to the current list PR system. These could include smaller constituencies, removing the bonus seats in the constituencies, adding compensatory seats at the national level, and changes in the rules governing the open lists in the constituencies and the party appointment of members to national seats. More radical reforms could also be considered, such as preferential voting (AV as one of the elements of a mixed system or Single Transferable Vote), which has often been argued to work well in deeply divided societies. A more proportional system nationwide would benefit identity groups, in particular the Tamils and the small minorities, in that a vote cast outside their heartland areas would count the same as a vote cast in the areas where they are concentrated. It would thus reduce the politicization of demarcation of constituency boundaries and give more rights to minorities wherever they live.

As important as the reform options themselves is realism about what they can achieve. The current system of representation is realistic about what it can achieve. The system of representation and the electoral management system in Sri Lanka are not perfect, but both are quite good. Violence and fraud have entered the system not because of the content of the 1978 constitution or its amendments, but through other doors. The brutality of the civil war, the despotism of the 1980s, and of the presidential form of government are more the causes of the current poisonous political environment, and it is in the solution to these problems that the beginning of other improvements lies.

3.4 The reform process

The constitutional reform process in Sri Lanka has not followed the transparent and consensual model outlined in this paper. Instead, ruling parties have tried to force change in the face of strong opposition both from other national parties and from minority identity groups. The 1978 constitution was drafted by the ruling party and adopted despite non-participation from the Tamil community and an eventual boycott from the other major parties (which agreed to consider constitutional amendments, but not a new constitution). The federal reforms of 1987 were similarly adopted without opposition input, which in part explains their failure, as the opposition was able to manipulate Sinhalese fears against the reforms. The attempted constitutional amendments of 2000 were debated with tools including opposition roadblocks to prevent parliamentarians from voting and government offers of cash, luxury cars, houses, foreign visas, and ambassadorial positions to attract opposition parliamentarians. The voting itself has been described as a “circus.”

Successful reform in Sri Lanka will require a delicate balance of negotiation between the government and the LTTE, inclusion of opposition parties and other minority identity groups, protection of minorities within the other groups’ areas, and democratic legitimacy through a referendum or other legitimate means of adoption. The shortcuts tried since the 1970s are understandable, but they are clearly also failures.

3.5 Conclusions

Sri Lanka’s civil war has cost not only 60,000 lives, but the credibility of democratic governance in the country. It is promising that Sri Lankan politicians and civil society leaders have identified important aspects for improvement, such as the devolution of powers from the current, highly centralized, unitary state. Electoral reform may be less of a solution to the very real problems of Sri Lankan democracy than has been promised by its advocates, but the reform proposals under consideration are reasonable. Less heartening are the political dynamics which have led to the failure of similar reforms over three decades. Overcoming these political dynamics will require more inclusive processes than those attempted thus far. These will be exceptionally difficult to arrange, but also less likely to fail.

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