

Chapter 3

The Electoral Framework and Administration

The Constitution

The Constitution of Lesotho came into force on 2 April 1993 and was amended in 1996 and 1997.

The Constitution protects basic civil liberties, including freedom of speech, association, and the press; freedom of peaceful assembly; and freedom of religion. It also provides for the separation of powers among the three branches of Government, the Executive, the Legislature and the Judiciary.

The National Assembly Electoral Act (2011)

The National Assembly Electoral Act (2011)¹ is the principal legislation dealing with the conduct of elections in Lesotho.

The Act covers the method of registration of voters, registration of political parties, nomination of candidates, conduct of election campaigns, conduct of elections at polling stations and counting of votes as well as election petitions.

The Act also includes an Electoral Code of Conduct, which outlines the responsibilities and guidelines for the behaviour of all key stakeholders, including the IEC itself and political parties.

The electoral system

The Kingdom of Lesotho uses a Mixed Member Proportional (MMP) model consisting of a combination of First Past the Post (FPTP) and Proportional Representation (PR) systems. The Senate in March 2000 approved the fourth Amendment to the Constitution by which a formula for representation in Parliament was adopted. Subsequent negotiations (brokered by SADC with support from the UNDP and Commonwealth Secretariat) led to the adoption of the MMP system of parliamentary representation. Under this system, 80 of the seats are allocated in single member constituencies, where the winner takes all, under the First – Past – the Post system. The other 40 seats are distributed by proportional representation on a party list system – which provides compensatory seats to correct the imbalances of first-past-the-post.

It is the Group's observation that the electoral system still poses challenges which the next government will need to address. In its preference for a single vote, in our view the system

¹ Hereafter referred to as 'the Electoral Act'

² The Council of State is a body made up of the Prime Minister, the Speaker of the National

has introduced some unintended consequences, especially for smaller parties and independent candidates. The major issue arises from the requirement that parties field candidates in constituency seats, to avail themselves of votes for proportional representation seats. It is far more difficult for smaller parties and independent candidates to acquire the financial and other resources to field candidates in more than a handful of seats. It seems to us that the MMP system is designed to ensure parliament reflects the people and the will of the people. This is a challenge for the next parliament of Lesotho.

MMP works successfully when the proportionality determined by voters is not disturbed by Members of Parliament changing parties or crossing the floor. It may be time for the next parliament to visit this question and make appropriate amendments to stop practices that alter the proportionality determined by the electorate. The Commonwealth Observer Group feels strongly that this issue should be urgently addressed because it is fundamental to Lesotho's MMP system.

A new feature in the Electoral Act is that the proportional representation list has to be a zebra list, wherein, the names of a man and a woman are alternatively presented. The intention of the zebra list is to increase the number of women in parliament.

The law now caters for campaign funds and political party funds to political parties.

Independent Electoral Commission (IEC)

The 1997 amendments to the Constitution established an Independent Electoral Commission (IEC) and empowered the IEC to have overall responsibility for administering the National Assembly Elections including the registration of political parties, voter registration, voter education, undertaking constituency boundary delimitation, training election officials and the conduct and supervision of elections.

The IEC is comprised of a Chairperson who has held, currently holds or is qualified to hold, high judicial office and two other members who either possess the same qualifications as the Chairperson, or who have considerable experience or competence in administration or in the conduct of public affairs. The appointment is made by the King on the advice of the Council of State.² The Council of State solicits candidates from the all registered political parties. IEC members are not allowed to be office-bearers of a political party, a member of a local authority nor in public office, other than a Judge of the High Court or the Court of Appeal.

The Director of Elections is the executive arm of the IEC and is appointed by it in consultation with the Public Service Commission. The Director is directly answerable to the IEC.

² The Council of State is a body made up of the Prime Minister, the Speaker of the National Assembly, the Attorney General, two judges, the Commander of the Defence Force, the Commissioner of Police, a Principal Chief, a member of the legal profession and a representative of the Opposition.

Section 136 of the Electoral Act provides for measures to safeguard the independence of the IEC. These include the requirement for members and officers of the Commission to perform their functions impartially and independently; that members of the Commission shall not be eligible for nomination or appointment to any other public office; that they may not give support to or oppose any political party or candidate participating in the elections; and that they may not place in jeopardy the credibility, impartiality or integrity of the Commission.

That the IEC refers legal matters through the Attorney General, who is also a member of the Council of State, and secures its funding in accordance with Section 147 of the Electoral Act through the Minister of Law and Constitutional Affairs, has caused some concern that the IEC may not be truly independent.

The Commonwealth Observer Group believes that the IEC should be substantially strengthened and made responsible directly to Parliament which should also set its budget. The IEC should be led by a single full-time independent Commissioner who is appointed with the agreement of both sides of the House. The Commissioner should be responsible for all the activities of the IEC including staff, work programme and reporting. These measures we believe will position the IEC to meet its critical role of conducting credible and transparent elections, and be a trusted institution in Lesotho's constitutional arrangements.

Elections to the National Assembly

The Constitution and Electoral Act provides that candidates shall be qualified to be elected as a member of the National Assembly if s/he:

- is a citizen of Lesotho; and
- is registered in some constituency as an elector in elections to the National Assembly and is not disqualified from voting in such elections; and
- is able to speak and, unless incapacitated by blindness or any other physical cause, to read and write either Sesotho or English well enough to take an active part in the proceedings of the National Assembly.
- Is not disqualified under Section 59 of the Constitution nor for any reasons as provided for in Section 40(2) of the Electoral Act.

Voter eligibility and voter registration

The Electoral Act provides that in order for an elector to be registered, s/he must be a citizen of Lesotho, who has attained the age of 18 years.

A person is not qualified to vote if s/he:

- acknowledges allegiance, obedience or adherence to a foreign power or state;
- is under the sentence of death imposed by a Lesotho court;
- has been convicted of an offence
 - Under Parts 1 to 3 of Chapter 11, except sections 156 and 160;
 - And 5 years have not elapsed from the date of conviction

- Is declared to be of unsound mind under the laws of Lesotho.

The Electoral Act stipulates that voter registration is compulsory by law and is a continuous process. With a view to motivating voter registration, the IEC carried out extensive voter education and facilitated numerous mobile stations which issued instant voter identification cards. The IEC indicates that it was able to register about 1.1 million voters.

Every good election starts with a reliable voter register and the integrity of the current voter register remains a concern to us. We raised these concerns with the IEC and we note some of the challenges they faced to clean the voter register. These challenges include removing deceased persons, and identifying and removing duplicates in sufficient time before the voter register was published in the gazette.

The compulsory registration of deaths through the Ministry of Home Affairs is a recent legal requirement. The IEC developed a rural verification mechanism with the support of local Chiefs to confirm the identity of registered voters and eliminate deceased persons from the voter register. It is the view of the Observer Group that the verification mechanism to identify deceased persons should be more robust.

Concerns about the registration of underage persons were raised with us. The second report of the monitoring committee indicates that 47 cases were reported, 7 cases were confirmed and their registrations cancelled.

As stipulated in the Electoral Act, the IEC also undertook the delimitation of boundaries. The IEC informed our Group that the delimitation of boundaries was prompted by demographic shifts which altered the size of the constituencies thus necessitating bulk transfers of the electorate. We note the efforts of IEC to conduct extensive consultations and workshops with communities and political parties prior to the delimitation process in 2010. We are nevertheless of the view that the next Parliament should consider clarifying the criteria used for boundary delimitation within the Electoral Act.

Despite the laudable efforts of the IEC to produce a clean and reliable register, more work needs to be done to improve it prior to the next election. We sought, and received, assurances from the IEC, that there was little chance of double voting. There were only a handful of voters who turned up to vote and could not cast their vote for any reason in the polling stations we observed.

We understand that the voter register serves several purposes, including the delimitation of electoral boundaries, identifying where a voter is registered and as a major tool for party organisers. Given this, it is critical that the IEC gives priority to a clean and reliable voter register for the next elections. We believe they now have sufficient experience to further improve the quality of the voter register and remove any doubts concerning its integrity. A reliable voter register will also provide a credible perspective on voter turnout.

Voter education

The IEC utilised an extensive voter education programme which started with the process of boundary delimitation in 2010 and continued until Election Day. They partnered several civil society organisations to implement voter education throughout the ten districts. Civil society organisations deployed educators throughout the country who employed several methodologies including house-to-house, public gatherings and activities, workshops, leaflets, and candidate debates.

On Election Day, both voters and electoral officials showed themselves to be well versed in the procedural requirements of the voting process. Voters too, seemed to have understood the steps to voting, without the need for polling officials to talk them through the steps on the day.

It is the view of the Group that voter education is not solely the business of the IEC, but the responsibility of all key national institutions in Lesotho. We are also of the view that voters should also be made aware of the reasons and criteria used for bulk transfers between constituencies. Considering that there is a high level of suspicion among the electorate about the electoral system, we recommend that the IEC provides better clarity regarding the delimitation of boundaries.

Advance voting

The Electoral Act provides for advance voting for a limited group of individuals generally engaged in official duties as follows:

1. A public officer employed in the service of the Government of Lesotho in another country;
2. A dependent or an employee to a person mentioned above;
3. A public officer who will be outside Lesotho on official duty on Election Day;
4. A candidate or agent;
5. A person carrying out election duty;
6. A person performing the functions of election observer, journalist, medical personnel, or security personnel on the day of election.

We were able to observe advance voting in Maseru. The process observed did not greatly vary to our observations on Election Day. Generally, we found that a small number (fewer than a hundred people) were expected to cast their vote at the advance polling stations. Most of the registrants for early voting were police officials and military officials.

Currently, advance voting is available in special circumstances to a small number of people. We are aware that some people were unable to be in their constituencies on Election Day and therefore could not exercise their franchise. In many other jurisdictions internationally, this problem is addressed by making advance voting available over a longer period. We recommend the next parliament considers this option to ensure that voters who will be out

of their constituencies on Election Day can cast their vote easily.

Electoral code of conduct

The Electoral Code of Conduct³ promotes conditions conducive to the conduct of credible and transparent elections, adherence to democratic principles of tolerance, and a climate wherein political parties can operate without fear, coercion, intimidation or reprisals. All registered political parties and candidates nominated for election must commit themselves to the Code.

If a political party registered with the IEC contravenes the Code, it is liable to one or more, or a combination of, sanctions as specified in the Electoral Act, Section 122(5).

We find that while the Electoral Act empowers the IEC to take actions against violations of the Electoral Code of Conduct, the vagueness of the Act in specifying the appropriate sanctions for specific violations, leaves unnecessary room to question the weight of any sanction that the IEC might apply.

Conflict resolution mechanisms

The Electoral Act caters for alternative dispute resolution mechanisms. On receiving a written complaint concerning the contravention of the Code of Conduct, the Director of Elections refers the complaint for determination by a tribunal appointed by the IEC to hear and determine such complaints. The IEC informed us that the tribunal has heard three cases in the run up to the 2012 election. There is also a Panel that hears complaints about the use of government resources. The IEC informed our group that this Panel had thus far heard two cases on the alleged use of government vehicles for campaigning.

We were also briefed by the IEC on the Commonwealth-sponsored conciliation and alternative dispute resolution mechanisms that have been a recent addition to the electoral process. We are aware that this system is designed to resolve disputes locally and reduce the number of complaints brought to the tribunal. This mechanism was trialled in the period leading up to the 2012 election and we look forward to reports from the IEC on its effectiveness.

³ Schedule 2, National Assembly Electoral Act (2011)