ARTICLE

THE NEVER-ENDING STORY OF LAW AND THE ELECTORAL SYSTEM IN LESOTHO

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ABSTRACT

While electoral discontent has been the enduring feature of constitutional democracy in Lesotho since independence, disagreement over the electoral system is a fairly recent phenomenon. At the time the country gained independence from Britain in 1966, the electoral system was not necessarily one of the topical issues in the pre-independence constitutional negotiations. The major issues were the powers of the monarch, the office of prime minister, the command of the army and similar matters. It was taken for granted that the country would use the British-based plurality electoral system. The country used this system until the early 2000s, when the electoral laws were reformed to anchor a new mixed electoral system. When the new electoral laws were ultimately passed in 2001, the country transitioned from a plurality electoral system to a two-ballot, mixed-member proportional system. By this time, the electoral system had acquired prominence in the politico-legal discourse in Lesotho. In the run-up to the 2007 elections, the bigger political parties orchestrated the manipulation of the electoral laws, which culminated in clearly distorted electoral outcomes. The manipulations motivated further reforms in the run-up to the 2012 elections, which resulted in the single-ballot, mixed-member proportional system. The purpose of this article is to evaluate critically how electoral laws have anchored electoral system reforms throughout the various periods in Lesotho's post-independence history. The article contends that, while the country has been courageous, unlike most of its peers in introducing far-reaching changes to the electoral system, the reform of the electoral laws has not been so helpful in attaining the higher objectives of political inclusivity, constitutionalism and stability in Lesotho.

Keywords: electoral system; electoral law; Lesotho; constitution; elections; proportional voting system

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INTRODUCTION

Electoral discontent has been the enduring feature of constitutional democracy in Lesotho since independence; discord over the electoral system is a fairly recent phenomenon. At the time the country attained independence from Britain in 1966, the electoral system was not necessarily one of the topical issues in the pre-independence constitutional negotiations (Weisfelder 1977). The question of the electoral system in Lesotho became central in academic and policy discourse from 1993, when the country returned to electoral politics (Southall 1994; Mahao 1998). At that time, the newly adopted constitution of 1993 envisaged the majoritarian electoral system that was inherited from Britain at independence. The pluralistic model was tested only twice: in the 1993 elections and during the tumultuous 1998 elections (Fox and Southall 2004). Thereafter, the country transitioned to a mixed electoral system in the form of mixed-member proportional (MMP) voting. The major reason for jettisoning the constituency-based electoral system in favour of a mixed system was that the former tends to be exclusionary and exaggerates the electoral weight of the winning party. Mahao (1998) identifies further motivations for change from the plurality model as being the obscureness of rules and problems of legitimacy.

The introduction of the proportional leg to the electoral system was meant to remedy these underlying defects. This objective was attained through the legislative reforms of 2001 that ushered in the Fourth Amendment to the Constitution of Lesotho (2001) and the consequent changes to the National Assembly Election Act (1992). These legal reforms to the electoral system envisaged a two-ballot model of MMP. The new model was first tested with the remedial election of 2002 in which the country experienced relative stability after the election without any major electoral discontent being experienced (Makoa 2007). The second, and probably the real, test for the new system came with the 2007 snap elections. The clear deficiencies in the legal infrastructure were exploited in 2007, when the major political parties connived with smaller parties to circumvent the spirit of the electoral system. This mischief necessitated the reform of the law yet again. The law reforms were introduced in 2011 in the run-up to the 2012 snap elections: the electoral law was altered to introduce a one-ballot system with a view to forestalling parties' attempts to commit the chicanery and manipulations of 2007. Indeed, the mischief was forestalled, but a new phenomenon of coalition politics emerged in Lesotho following the indecisive 2012 elections: a new mischief became apparent with the 2012 elections when the party with the most votes and seats in parliament, the Democratic Congress (DC), was not part of the new government. This anomaly recurred in the snap elections of 2015, in which the second most elected party, with the most constituency seats – the All Basotho Convention (ABC) – was excluded from the government.

What has been becoming apparent is that, since the start of the reforms in 2001, the law has not been able to sustain the desired reforms. The purpose of this article, therefore, is to critically analyse the electoral reforms, the mischief they were seeking

to remedy and the resultant consequences. It adds to the mounting analysis of electoral politics in Lesotho by introducing a legal perspective that has hitherto been missing from the emerging body of analysis of Lesotho's puzzling electoral system (Elklit 2002; Matlosa 2003; Matlosa 2006; Makoa 2007; Kapa 2009; Rich, Banerjee and Recker 2014). The article contends, in the final analysis, that whereas the law may be of vital instrumentality, the answers to the political challenges confronting Lesotho's electoral politics are many and complex. The crisis-induced electoral reforms have served only to contain momentary conflict and as a result have been shown to have been shortlived.

CONCEPTUALISING THE CONFLUENCE OF LAW AND ELECTORAL SYSTEMS

The intersection between law and electoral systems constitutes the most controversial relationship between law and politics. Although this controversy usually plays itself out at a philosophical level (Austin 1955), it also has practical implications. Although electoral systems have disproportionately attracted students of political studies rather than those of constitutional theory, there is a growing body of academic opinion that the subject belongs to both disciplines (Shugard and Carey 1992; Taagepera 1998). Constitutional theory is concerned not only with the substantive powers wielded by organs of state but also with the procedures by which individuals are voted in and out of office. To that extent, therefore, constitutional law is both substantive and procedural.

The electoral system as the model for electing political representatives (Faure 1994) occupies the centre stage of the procedural aspects of constitutional law. The idea of creating procedural frameworks within which public functionaries discharge their sustantative functions has, in constitutional studies, been called 'procedural constitutionalism' (Mohau 2014). Accordingly, the electoral system is the central plank of constitutionalism to the extent that it deals with those matters of the Constitution such as the rules concerning '[the] franchise, the method of voting, the frequency of elections and the manner in which the number of votes is translated into the number of representatives in the legislature' (Currie and De Waal 2001, 134). Therefore, in that respect, the law not only creates the electoral system; it also has far-reaching causal implications for the broader political system. For one thing, it influences the party system and political posturing by political players. In addition, the electoral laws deal with a fairly wide array of issues that include ballot structure, election type, electoral formulas and the size of the legislature. The causal effect of electoral laws is instructively espoused by Grofman and Lijphart, who put forward the view that

> … election rules not only have important effects on other elements of the political system, especially the party system, but also offer the practical instrument for political engineers who want to make changes in the political system. (2003, 2)

Owing to the element of law found in electoral systems, Sartori can dare to say that 'electoral systems are the most specific manipulative instruments of politics' (1968, 273). Because of the malleable nature of rules generally, electoral systems have in turn acquired a manipulative nature in politics. The manipulative effect of law and electoral systems can be demonstrated by two examples, one from the United States and another from Lesotho. In North Carolina in 1993, the state created a voting district plan that contained a second-majority black district in the north-central region. The plan was challenged in the case of *Shaw v Reno*[1] by the same North Carolina residents on the ground that the state had created unconstitutional racial gerrymandering[2] in violation of the Fourteenth Amendment to the Constitution of the United States. The US Supreme Court held that the scheme was irrational on its face and that it could be understood only as an effort to segregate voters into separate districts on the basis of race. Clearly, the legal rules were used to manipulate the electoral system in order to attain racial ends.

In Lesotho in the run-up to the 2007 parliamentary elections, the bigger parties, including the then ruling Lesotho Congress for Democracy (LCD), manipulated the poorly drafted rules of the mixed electoral system to maximise their gains. The at that time newly formed All Basotho Convention (ABC) and the ruling LCD, aware of the possibility of a reduced electoral majority due to the nature of the mixed electoral system, formed decoy pre-election pacts with smaller parties in order to maximise their votes in both the proportional and the constituency legs of the MMP electoral system. The nature of the pacts was such that ABC allied with the Lesotho Workers Party (LWP) and LCD allied with the National Independent Party (NIP). The smaller parties contested only the proportional representation (PR) seats and the bigger parties contested in the constituencies. Supporters of the bigger parties were sensitised to use the PR ballot to vote for the smaller decoy parties and to use the constituency ballot to vote for bigger parties. The revealing aspect of these pacts was that, on the PR list of smaller parties, the majority of candidates came from the bigger parties. The larger parties used this grand scheme to manipulate the electoral rules to attain political ends precisely because the rules had been poorly drafted. As will appear later in this article, unlike with the Supreme Court of the United States in the *Shaw* case,[3] the High Court of Lesotho could not be purposive in the manner in which it dealt with the manipulation; the court became unnecessarily pedantic and as a result sanctioned the manipulation.

In the final analysis, it is apparent that electoral laws provide for the complex confluence of constitutional theory and political theory. This intersection often eludes practitioners on both sides of the spectrum. Lesotho has not been an exception – courts of law in Lesotho have consistently treated electoral cases solely through the prism of pedantic legalism, whereas political practitioners and political scientists often short-

1 113 Ct 2816 (1993).

2 The practice of manipulating the boundaries of an electoral constituency so as to favour one party or class.

3 *Shaw v Reno* 113 Ct 2816 (1993).

circuit the draftsmanship of electoral rules to attain certain political ends. The result, as will more fully appear in the discussion that follows, is always a disconnection between the manner in which the electoral law has been drafted and the end that the law seeks to attain.

MISCHIEF OF CONSTITUENCY-BASED MODEL AND URGE FOR REFORM

Lesotho as a former colony of Britain has used the constituency-based electoral model since independence. For some reason, the electoral system was not one of the topical issues of the pre-independence negotiations; indeed, the hotly contested issues were the monarchy, the powers of the prime minister, the army and related matters. Despite the glaringly disproportional nature of the representation of political parties in the parliament that resulted from the 1965 election, the electoral system never became an issue in Lesotho until the advent of the 1993 constitutional dispensation.

As it is apparent from Table 1 below, one mischief that is the characteristic feature of the plurality model used by Lesotho since independence is latent: the party that ended up in government (the BNP) did not necessarily command the majority of the popular vote. However, the 'first-past-the-post' nature of the system gave it an edge based on a hair's breadth majority.

Table 1: Lesotho election held on 29 April 1965: results

Political party	Votes	% votes	Seats	% seats
Basotholand National Party (BNP)	108 162	41.6	31	51.7
Basutoland Congress Party (BCP)	103 050	39.7	25	41.7
Marema-Tlou Freedom Party (MFP)	42 837	16.5	4	6.7
Marema-Tlou Party (MTP)	5 697	2.2	0	0.0
Independents	79	0.0	0	0.0
Total	259 825	100.0	60	100.1

Source: Lodge, Kadima and Pottie (eds) 2002

When the new Constitution was adopted in 1993, it replicated the constituency-based model as it was under the independence Constitution. Section 57(1) of the 1993 Constitution provides that Lesotho shall 'be divided into constituencies and each constituency shall elect one member to the National Assembly'. The 1993 election was contested on the basis of this model and the election was won overwhelmingly by the Basutoland Congress Party (BCP), which won all 65 constituencies and got 100 per cent representation in parliament despite its 74 per cent representation in the popular vote.

Table 2: Election held on 27 March 27 1993: results

Political party	Votes	% votes	Seats
Basotho Congress Party (BCP)	398 355	74.7	65
Basotho National Party (BNP)	120 686	22.6	0
Marema-Tlou Freedom Party (MFP)	7 650	1.4	0
Others	6 287	1.2	0
Total	532 978	99.9	65

Source: Lodge, Kadima and Pottie (eds) 2002

This disproportion accorded with the common criticism of constituency-based electoral systems: that they tend to exaggerate the electoral strength of ruling parties. In the aftermath of the 1993 elections an academic and policy debate emerged in Lesotho about how the pure majoritarian electoral system distorted the electoral outcomes and therefore that it was a fertile ground for political conflict (Mahao 1998). Matters came to a head in 1998, when the country went to a second election under the pure constituency-based system. The election was won by the newly formed LCD, which was an offshoot of the BCP. But the mischief of disproportionality persisted, this time resulting in electoral violence. The LCD won 79 out of 80 constituencies and gained approximately 98 per cent of the representation in the National Assembly despite its overall support being only 60 per cent (Lodge et al 2002). The opposition parties disputed the election outcome, the basis of their dispute being that the election had been rigged. It would seem that the actual cause of the dispute was the inherent unfairness of the plurality system: that it gave the winning party almost 100 per cent of the seats in parliament. As Southall and Fox (1999, 669) pointedly contend

> the opposition's objections were largely spurious but the unbalanced nature of the LCD's victory – a product of the first-past-the-post electoral system – was a major cause of the wider crisis.

The consequences were dire, because the country experienced the worst political violence since the return to electoral democracy in 1993. For the first time, the country accepted that the constituency-based model was the source of conflict and that the resultant political settlement should be that the newly formed Independent Political Authority (IPA) should, among other things, 'review the Lesotho electoral system with a view to making it more democratic and representative of the people of Lesotho'.[4] So it was apparent that the country had indentified the constituency-based electoral system as the cause of political conflict in Lesotho. The greatest weakness of the system was that it was exclusionary and exaggerated the electoral weight of the ruling party.

4 Section 6(*d*) of the IPA Act 1998.

It is important to note that the disproportionate nature of the electoral outcome in itself is not the only mischief that has beset electoral politics in Lesotho under the constituency-based electoral model. There are certain theoretical presumptions regarding the model that were either deliberately manipulated or misconceived. The fact that under the plurality systems the contest for election is presumed to be by individuals in the designated geographic units (constituencies) has always been a puzzle in Lesotho.

In 1997, at the height of internal strife within the ruling BCP, the then Prime Minister Ntsu Mokhehle formed a new party, the LCD, in parliament, and it so happened that the new party constituted the majority of the members of the National Assembly in terms of section 87(2) of the Constitution of Lesotho. In line with British conventions, the section provides that the Prime Minister is chosen from among the members of the National Assembly and must enjoy the support of the majority of the members of the National Assembly. The main question that confronted the country at the time was the role of the political party in parliament under a constituency-based electoral system. This is because one of the fundamental tenets of a constituency-based electoral system is that 'candidates contesting an election in constituencies stand in their own right as individuals and not as political parties even if their candidature is endorsed by parties' (Matlosa 2004, 27). The High Court of Lesotho, in the case of *Mokhehle v Qhobela*,[5] adopted this approach when interpreting section 87(2). The court stated forthrightly that

> BCP as a political party does not feature prominently. Its members are recognized by the use of the term political party in the Constitution. The party does not feature by law in making or the unmaking of the Prime Minister. (*Mokhehle v Qhobela*)

Prime Minister Mokhehle therefore quit the party that had won the elections with an overwhelming majority in 1993 to form a new party in parliament, the LCD, with the majority of the members of parliament while still retaining his prime ministerial office. Clearly this was a manipulation of the electoral system to achieve personal political ends. The Prime Minister had always associated himself with the BCP and arguably thought that the BCP was the governing party until the end of the electoral term of five years. It was only when matters turned bitter internally that he manipulated the Constitution to survive what was clearly an ouster for him within the party. So it could be observed that during the period between 1993 and 1998, when Lesotho was still using the majoritarian electoral system, two distinct mischiefs of the system became manifest. The first was that the system was exclusionary in nature and therefore arguably a breeding ground for the electoral conflict and political instability that punctuated electoral politics during that brief stint under the constituency-based model.

The second mischief was that the system harboured the myth that political parties are so influential in the Lesotho landscape that they are able to make or unmake the office of the Prime Minister, the apex of political power in Lesotho. The myth only imploded

5 CIV/APN/75/97.

in 1997, when the High Court of Lesotho in the *Mokhehle v Qhobela* case[6] confirmed that political parties are tantamount to mere informal groupings under the constituency-based electoral system. This suggested that the members of parliament were more in the nature of individuals than of members of political parties. This exposition clearly left a very bitter taste in some political circles. The challenge that resulted from it was that, while members of parliament were individuals under the constituency-based models, the reality was that the political parties were more influential in society than individuals. In fact, the political parties practically determined who held political power in Lesotho. Therefore, an electoral system that cannot resonate with the political realities of the country is a breeding ground for conflict and discord.

FIRST ROUND OF ELECTORAL REFORMS AND EMERGENCE OF NEW MISCHIEF

Following the large-scale political violence in the wake of the 1998 elections (Matlosa 1999), a general consensus emerged that the country had to introduce electoral reforms in order to make the electoral system 'more democratic and representative of the people of Lesotho'.[7] While during the IPA negotiations consensus was reached to change the electoral system, there were marked differences about the type of new system that would be suitable for the country. Political interests played a role in the disagreement, most prominently those between the then ruling LCD and the opposition. The LCD seemed not to be convinced that the majoritarian electoral system should change fundamentally because of its monumental dominance of the political landscape at the time. As a result, the opposition parties supported a system that would be majorly proportional. Therefore the

> LCD-preferred option was not the MMP system but the parallel (or mixed member majority – MMM) system, where only a fraction of the seats are allocated by PR which means that it is not a genuine PR system. (Elklit 2008, 13)

That notwithstanding, MMP voting, which is a much more proportional model (Reynolds, Reilly and Ellis 2005), was adopted. This settlement led to two fundamental changes to the electoral law in Lesotho. The first was the introduction of the Fourth Amendment to the Constitution of Lesotho (2001). In keeping with the political settlement, the preambular statement of the Amendment stated that its purpose is to amend the Constitution to 'establish a mixed member proportional system for the election of members to the National Assembly'. This new model replaced the first-past-the-post (FPTP) model, which was seemingly so embedded in the political culture of the country as it had been used since the debut of electoral democracy in 1965. This led

6 CIV/APN/75/97.

7 IPA Act, 1998.

to the 80-member National Assembly being expanded to 120.[8] All 120 members were to be elected in terms of the MMP system in which 80 members were electable in respect of each constituency and 40 members were to be elected according to the principle of proportionality. The cardinal principle of the MMP model is contained in section 57 of the constitutional amendment, which states that

> forty members [are] to be elected to party seats in accordance with the principle of proportional representation applied in respect of the National Assembly as a whole.

The introduction of this principle meant that although the majority of the seats of the National Assembly were still based on the plurality model of the past, the country had shifted from the plurality model to the proportional model. As Elklit pointedly contends,

> the MMP system is however a genuine PR system as all seats are included in the conscious attempt to reach a proportional result through the use of [a] strong compensatory mechanism. (2008, 13)

This paradigmatic shift has not always been fully internalised by political practitioners in Lesotho: it is still strongly believed that since there are many constituency seats in the National Assembly, the system is fundamentally majoritarian. The animating constitutional principle for the electoral system lies in the allocation of the 40 proportional seats: proportionality is not only applied to them; it is applied 'in respect of the National Assembly as a whole'. This says that when the 40 compensatory seats are allocated to parties, due regard must be given to how the political parties have fared in the constituency leg of the arrangement. Because of this fundamental principle, therefore, political parties cannot opt out of either of the two legs of the arrangement. It would seem that the National Assembly Election (Amendment) Act of 2001, which operationalised the constitutional amendment, somewhat overlooks this underlying principle of the MMP system. Section 49B of this Act provided that a political party intending to contest elections *may* 'nominate candidates for election by proportional representation'. Clearly, the section was couched in permissive as opposed to peremptory language. This gave political parties the option of not submitting party lists and only contesting the elections in the constituencies, or vice versa. This was contrary to the overarching principle of proportionality envisaged by the Constitution. As will more fully appear later in this article, this inconsistency between the electoral law and the Constitution was later to become the breeding ground for the challenges to the new arrangement. On top of the permissive nature of the electoral law, it also allowed the use of two ballots as opposed to one, which gave complete freedom to the voters to opt out of either of the two theoretically inseparable aspects of the electoral system.

The new arrangement was tested for the first time in the 2002 elections, and it produced a relatively acceptable outcome (Fox and Southall 2002). But its real test was to come in the 2007 snap elections. The political landscape in the run-up to those

8 Section 56 of the Fourth Amendment to the Constitution of Lesotho (2001).

elections was changed slightly as the defection of the ABC from the LCD in 2006 posed a real threat to the longstanding hegemony of the LCD. The LCD was therefore forced to improvise a survival mechanism in order to continue its electoral dominance. It therefore took advantage of the permissive nature of the electoral law and decided to form a decoy alliance with a smaller party, the National Independent Party (NIP). The nature of the alliance was such that the LCD would not submit a party list and it would contest only those constituencies where it had unchallenged strength (Likoti 2009). In turn, the NIP would submit a list of LCD candidates. The trick the parties employed was to maximise their chances of success in both the constituencies and the proportional seats. The LCD had learned in 2002 that, in line with the principle of 'proportionally applied to national assembly as a whole', the 40 proportional seats were only compensatory. In terms of the new arrangement, if a party has constituency seats equal to or more than its proportional entitlement in the National Assembly as a whole, it is not allocated a compensatory seat because it does not need compensation in principle. The LCD was accordingly aware that its constituencies, unlike the case in the 2002 election, might be reduced because of the debut of the new challenger, the ABC. So it devised the strategy of cleverly appearing as though it was not participating in the proportional election and the NIP was not participating in the constituencies – so much so that during the allocations they both got their full complements of seats in a parallel manner. The trick was tempting to the new debutant, the ABC, so much so that it emulated the LCD–NIP alliance. With the same purpose in mind, it also formed a competitive decoy alliance with the Lesotho Workers Party (LWP). The 2007 elections were therefore contested by these two decoy alliances formed by the two biggest parties.

Clearly, the scheme was intended to circumvent the spirit of the animating principle of MMP as envisaged in the Constitution, namely, that 40 PR seats and 80 constituency seats are not allocated in a parallel manner. Whereas the 80 seats are clearly won from the constituencies, the 40 PR seats are allocated to political parties represented in the National Assembly as a whole. They are used to compensate political parties for their entitlement in the whole National Assembly, and the party that does not need compensation will not participate in the allocation of 40 PR seats. Therefore, by insisting on not contesting either of the two legs of the system, the two alliances were pushing the system more towards MMM as opposed to its true nature as MMP. The parties had cunningly studied the lacunae in the electoral law and exploited them to their full advantage. Unfortunately, the LCD–NIP alliance was the only true beneficiary of the manipulation because the LCD had won more constituency seats and the NIP had garnered more proportional seats. As a result, when they got into parliament, the overall picture was that the LCD was disproportionately represented in the National Assembly. Elklit covers this disproportionality instructively:

> This *hypothetical* calculation demonstrated that the LCD/NIP arrangement had secured an *additional* 20 seats for the two parties – had they run together they would probably only have garnered 62 seats (61 constituency seats + 1 compensatory seat) instead of their current allocation

> of 82 seats (LCD 61 constituency seats 21 + NIP compensatory seats … The computations also showed that ABC/LWP actually *lost* two seats because of this circumvention …. (2008, 16)

This distortion became the basis for the post-election discontent of 2007. Consequently, the other smaller party in the National Assembly, the Marematlou Freedom Party (MFP), instituted a case in the High Court of Lesotho challenging the allocation of PR seats in the 2007 elections. The case was not based on the constitutionality of the electoral law to the extent that it permitted parties to opt out of the two aspects of the electoral system. Instead, the MFP wanted the court to force the Independent Electoral Commission (IEC) to adopt the hypothetical calculation as opposed to the one used by the IEC which was based on the permissive nature of the electoral law. In other words, the MFP wanted the LCD and the NIP to be treated as separate entities. The net effect was that the LCD gained its 61 constituency seats and the NIP its 21 proportional seats. The same happened with the ABC/LWP scheme. Contrarily, the hypothetical allocation was based on the animating principle from the Constitution and it treated the two decoy alliances as single entities (Matlosa 2008).

Since the case was not brought to challenge the constitutionality of the electoral law, the court simply looked at the Act, found that it is couched in permissive language and accepted the IEC calculation as opposed to the hypothetical calculation that treated the two alliances as single entities for the purposes of allocating the 40 PR seats. The court held that

> [a] fair reading of this section indicates that (a) a political party has discretion – it is under no obligation – to present a party list under the PR system and (b) a political party is not prohibited under law to form any alliance or pact … and (c) the Independent Electoral Commission is not enjoined to treat … any alliance as a single entity unless such alliance contested the constituency seats as single entity. (*Marematlou Freedom Party v IEC* at paragraph 53[9])

Clearly, the court was technically correct in finding that the Act was couched in permissive language, but it became overly legalistic and formalistic. It was apparent that following the Act as it was had led to a clear mischief – that the Act was defeating the spirit of the Constitution. Therefore, in interpreting the sections of the Act *in toto*, the court ought to have been purposive and permitted itself to be guided by the spirit of the broader constitutional edifice. Had the court followed this interpretive path, the outcome would have been different. Moreover, the electoral Act would have been interpreted in such a way that the spirit of the Constitution would have been left intact. Consequently, the literal and legalistic path that the court had elected to follow served to legitimise the decoy alliances' undermining of the spirit of the Constitution. In the result, the outcome of the case could not, and did not, settle the protracted political conflict that followed the 2007 elections.

9 *MFP v IEC* CIV/APN/116 of 2007.

The mainstay of the opposition parties' argument was that the LCD's majority in the government had been unduly exaggerated and that the NIP had been given the status of the official opposition ahead of the ABC despite its being a 'single entity' with the LCD. Consequently, the ancillary issue of who the Leader of the Opposition would be also emerged as a contentious matter: when the opposition parties convened in parliament to nominate the leader of the ABC as the official Leader of the Opposition, the Speaker refused to recognise him on the basis that their alliance ought to have been registered as such. Indeed, this position was not necessarily correct but, following the decision of the court in the *Marematlou* case,[10] if the parties were treated as single entities, NIP with 21 seats was bigger than the ABC with only 17 seats in the National Assembly. The manipulation of the electoral laws therefore had a ripple effect not only on the party system but even in parliament. Furthermore, the entire political system came under threat by protests in the form of parliamentary 'sit-ins', street protests and 'stay-aways', which ultimately led to the intervention of the Southern African Development Community (SADC) to broker a solution to the impasse (Weisfelder 2015).

INTRODUCTION OF FURTHER REFORMS AND EMERGENCE OF NEW MISCHIEF

Having learned from the unfortunate experience of the 2007 pre-election alliances, there was general consensus among the political players that further changes needed to be introduced into the electoral system. Indeed, this time, the idea was not to replace the electoral system but rather to protect it from the machinations similar to those of 2007. The central plank of the new reforms was to compel the parties to stand in both PR and constituencies with a view to fulfilling the true purpose of the MMP. The other ancillary issues on the reform agenda were balloting, multiple-party candidacies and the plight of independent candidates.

What had happened in 2007, which was rather strange, was that during the formation of the decoy alliances the candidates in one election stood under the banners of two political parties. There were candidates who stood, for instance, under the banner of the LCD in a constituency election and at the same time appeared on the list of NIP, yet they still insisted that the two were separate entities in the eyes of the law. The same happened with the ABC–LWP alliance. In fact, this anomaly was permissible under the old legal regime. In 2011, the National Assembly Electoral Act of 2011 was introduced to replace the old one. In terms of section 47 of the new Act, multiple candidacies are clearly prohibited. Parties under the new legal regime are obliged to ensure that their lists do 'not include candidates who contested constituency election and/or office bearers from a different political party'.[11] Furthermore, the new Act has changed the permissive nature

10 *MFP v IEC*, CIV/APN/116 of 2007.

11 Section 47(4)(*c*) of the National Assembly Electoral Act of 2011.

of the language relating to the submission of PR lists into a peremptory one: the word *may* has been replaced with the word *shall*. In line with this, any political party intending to contest proportional representation seats *shall* submit a list of PR candidates. But even then the law is still not watertight. The new section 47(1) provides that a 'political party intending to contest proportional representation elections *shall* nominate and submit a list of nominated candidates to the Director in the prescribed manner' (emphasis added). The section seems to be still limited to 'proportional representation elections'. Effectively, the new law has made it compulsory to submit a list only if a party intends to contest the 40 PR seats. While section 47(1) has replaced the word *may* with *shall*, it does not seem to prohibit political parties from opting out of the PR election: a political party can still decide to contest only the constituency elections.

Instead, in order to force political parties to contest both the constituency and the proportional seats, the Act introduced a one-ballot system to replace the dual-ballot system. Under the new legal regime a voter is given one ballot to elect both the constituency representative and the party contesting the PR elections. Even so, the one-ballot system has not completely shut the door to political parties that may intend to contest only in the constituencies without submitting the PR list for the purposes of being allocated any of the 40 compensatory seats. In any event, that is what independent candidates are doing. What does appear difficult for parties under the new law is that, owing to the one-ballot system, the parties may no longer contest only PR elections without contesting constituencies, as the two smaller parties did in 2007. Nevertheless, if political parties were to decide to be manipulative, as they had been in 2007, the new law seems to be of little help in preventing them from doing so.

Moreover, the demise of the second ballot has introduced two controversies. The first controversy arises from the fact that the new one-ballot system has effectively indirectly undermined the notion of independent candidates, leaving them in limbo. Clearly, independent candidates are the touchstones of the constituency leg of the electoral system (Maope 2008) because, theoretically at least, at the constituency level candidates contest elections as independents regardless of their party endorsements. Furthermore, the Constitution enshrines a right to stand for election either indirectly or collectively.[12] In that sense, independent candidature seems to be imbedded in the Constitution, to the extent that the electoral-law regime cannot be expected to be inconsistent with this constitutional injunction.

Faced with this dilemma, the drafters of the new electoral law created a second controversy: the interpretation section of the new Act provides that a political party 'for purposes of proportional representation elections includes an independent candidate'. When defining 'independent candidate' the Act provides that it means 'a candidate in constituency elections whose candidature is not sponsored by a political party'.

Furthermore, the law provides for the 'conversion of votes', since the system now uses a single ballot. After a ballot has been used at constituency level to elect

12 Section 20 of the Constitution.

the constituency candidates, the same ballot is converted into a party ballot and then counted with other ballots countrywide to arrive at the party's total vote. The law does not provide for the separation of independent candidates and party candidates at the constituency level. Section 55 of the Act simply and generally provides that 'during general elections, constituency votes shall be counted both for the candidates and be converted into party votes'.

This controversy regarding the independent candidates resulted in a court case in the aftermath of the 2015 general elections. In *Basotho Democratic National Party v Independent Election Commission & Other*s,[13] the question of independent candidates was the main issue. What had happened during the allocation of seats in the 2015 general election was that the IEC had excluded independent candidates in the calculation of 'total party vote' for the purposes of calculating the 'quota of votes'. The BDNP contended that the electoral law does not seem to provide for the exclusion of independent candidates in calculating the 'total party votes' and the 'quota of votes' in terms of Schedule 3 of the Act. Thus, the BDNP contended that, had the independent candidates been so included, the quota could have changed in its favour – which would have entitled it to a seat in the National Assembly.

Both the High Court and the Court of Appeal dismissed the BDNP's contention. The Court of Appeal, confronted by this interpretative dilemma created by the poor draftsmanship of the electoral law, abandoned the literal interpretation of the Act and became purposive. In the end, the Court of Appeal found that the IEC was correct in excluding independent candidates in the calculation of the quota of votes for the purposes of allocating the 40 PR seats.

It would seem that the Court of Appeal was correct in abandoning the literal principles of interpretation because that would have led to a clear absurdity: if independent candidates are treated as political parties, as the Act clearly suggests, they could be allocated PR seats – which is certainly not the purpose of this electoral system. In terms of the precepts of the system, proportional seats are for political parties and independent candidates are the vestiges of the old scheme that has been intentionally retained in the new hybrid scheme. The court was therefore correct in looking into the purpose of the scheme rather than the literal drafting of the Act. This is the approach that could have saved the electoral system in 2007 in the *MFP v IEC*[14] case relating to decoy alliances. In that case, contrarily, the High Court clearly abandoned the purpose of the scheme and resorted instead to pedantic legalism.

Thus, it would seem that under the new regime, independent candidates are now the problem nobody wants to deal with. During the drafting stage it was contended that killing the second ballot would clearly result in what could be called an 'independent candidates dilemma' (Nyane 2010). It would seem that in the enthusiasm to curb the 2007 mischief a sound aspect of the electoral law was eliminated when trying to solve

13 C of A (CIV) 49 of 2015; [2016] LSCA 8.

14 CIV/APN/116 of 2007.

the problem surrounding the independent candidates: the new law could simply have outlawed the decoy alliances outright without killing the second ballot. The dual-ballot system gives MMP as the hybrid system its full potential. As such, it maximises the benefits of the MMP. One of the clear benefits, in addition to avoiding the independent candidate dilemma, is the freedom it gives voters: under the dual-ballot system the voter could vote for the party candidate and punish the party, or vice versa. That benefit is no more. The voter is now compelled to elect both the candidate and the party.

Another mischief, which is not necessarily unique to the new scheme but has haunted the MMP since its adoption in 2001, is the question of the proliferation of splinter parties. Since the adoption of this model, the rate of splintering has been high – arguably at a rate higher than at any time since independence. The reason is not difficult to fathom: the system contains incentives for smaller parties. Indeed, if one considers the historical fact of single-party domination which the country has experienced since 1993, encouraging multi-partyism remains a novel idea. But exploiting it is equally hurtful to democracy. The negative result is that both parliament and the government experience bouts of instability due partly to party defections, which are arguably incentivised by the electoral system itself.

Perhaps the country may consider moving to a threshold-based MMP such as that of its forerunner, New Zealand. In that system, a party should win at least one constituency seat or a certain percentage of the total votes in order to participate in the allocation of the 40 PR seats (Palmer and Palmer 2004). New Zealand uses a 5 per cent threshold. Perhaps Lesotho could use 0.8 per cent as the threshold, considering the overall voting population in the country, which is comparatively smaller – the average number of voters nationwide is 550 000. The quota – obtainable by dividing the total number of votes cast nationally by 120 (the total number of seats in the National Assembly) – for this voting population is approximately 4 500. Therefore, a party that ordinarily gains one compensatory seat has 0.8 per cent of the overall vote. It is contended that 0.8 per cent should be the threshold for participation in the allocation of compensatory seats.

The system should further penalise those below the threshold by requiring them to forfeit their electoral deposits with a view to discouraging the proliferation of political parties. The current quota system does not attain this end. Instead, it encourages the formation of more political parties, because any political party that participates in the elections is almost assured of a seat in the National Assembly. When those parties are represented in government, it gives democracy a bad name. For example, in the aftermath of the 2015 elections, seven parties coalesced to form the government. In that seven-party coalition, only two parties had at least a constituency or 2 per cent of the total vote. None of the other five parties that formed the government had a constituency, and their electoral strength was below 2 per cent. The smallest party in that government, the Lesotho People's Congress (LPC), had a mere 0.35 per cent of the total vote.

Table 3: Parties that won seats in the 2015 National Assembly election

Party	Votes		Seats			
	No	%	Constituency	Compensatory	Total	%
Democratic Congress (DC)	218 573	38.76	37	10	47	39.17
All Basotho Convention (ABC)	215 022	38.13	40	6	46	38.33
Lesotho Congress for Democracy (LCD)	56 467	10.01	2	10	12	10.00
Basotho National Party (BNP)	31 508	5.59	1	6	7	5.83
Popular Front For Democracy (PFD)	9 829	1.74	0	2	2	1.67
Reformed Congress of Lesotho (RCL)	6 731	1.19	0	2	2	1.67
National Independent Party (NIP)	5 404	0.96	0	1	1	0.83
Marematlou Freedom Party (MFP)	3 413	0.61	0	1	1	0.83
Basutoland Congress Party (BCP)	2 721	0.48	0	1	1	0.83
Lesotho People's Congress (LPC)	1 951	0.35	0	1	1	0.83
Others	12 353	2.18	0	0	0	0.00
Total	563 972	100.00	80	40	120	100

Source: EISA 2015

The BDNP, which went to court to challenge the allocation of seats, had gained 0.34 per cent of the total vote. The phenomenon of having five parties in government that individually could not attain even a mere 2 per cent of the total vote casts the shadow of a crisis of legitimacy over a government. But perhaps this is one outcome of the

system that was not foreseeable. The first glimpses of the crisis occurred in 2012, when the country was entering into coalition politics. At that time, the government, with a hair's-breadth majority of just one seat, was made up of a coalition of three parties. The biggest political party, the DC, had been elbowed out of government. The grievance at the time was that this situation was happening for the first time since the advent of electoral democracy in Lesotho: that a party with the most seats in parliament and the biggest total party vote was not in government. When assessed against the strict technical makeup of the system, the grievance would seem to have been misplaced; but the outcome of the 2015 election has pushed the impasse to its logical conclusion. It is now apparent that the system has given rise to another nettle nobody wants to grasp – 'the government of losers'.

2017 ELECTORAL PACTS AND CONTINUATION OF ELECTORAL SYSTEM MANIPULATION

In June 2017 Lesotho held its third general election since 2012. The election came as a result of the vote of no confidence in the government which comprised a coalition of seven political parties. Since it has always been clear that the election would not produce an outright winner – an outcome that has been recurring since the 2012 elections – three main political parties in government had signed a pre-election pact intended to enhance their electoral prospects (Ntsukunyane 2017). The three parties were the DC, the Lesotho Congress for Democracy (LCD) and the Popular Front for Democracy (PFD). In terms of the pact, the parties identified what they deemed to be the strongholds of each of the partners and agreed that in a constituency identified as a stronghold for one of the partners none of the other partners would field candidates but would encourage their voters to vote for the partner that had fielded the candidate. As for the PR, each party in the pact submitted its individual party list. It would seem that the pact concerned only the constituency elections. Out of the 80 constituencies countrywide, the DC took 54, the LCD 25 and the PFD 1.

The principal question arising from this electoral arrangement was whether it was permissible in terms of the letter and spirit of the electoral law and the Constitution. As demonstrated earlier, section 47 of the National Assembly Electoral Act of 2011 does not seem to prohibit the parties fielding candidates in only certain constituencies and then submitting the PR list. The effect is that a political party is at liberty to choose the number of constituencies it is going to contest. What the law has made compulsory is the submission of a party list if it intends to contest PR seats (section 47(1)). Furthermore, the introduction of the one-ballot system means that the only way a party will gain PR seats is by standing in the constituency election. Therefore the requirement of the new electoral law is that it is compulsory for a political party to stand for election in both legs of the electoral system – the proportional and the constituency legs. This new scheme was intended to remedy the pre-2007 election mischief, where the bigger parties had

stood in one leg (constituency) with a view to leaving the other leg of the system open to manipulation.

The main spirit of the electoral system, which has remained constant since the introduction of the MMP in 2001, is embodied in section 57 of the constitutional amendment: the 40 PR seats are allocated 'in accordance with the principle of proportional representation applied in respect of the National Assembly as a whole'. The design is that 40 PR seats are compensatory to political parties, regard being had to their overall entitlement in the National Assembly.

The pre-2017 electoral pacts bear testimony to the main theme of this article: that the electoral law has consistently failed to capture this spirit: while the pacts seem to be in accordance with the letter of the electoral law, the spirit of the scheme is adversely affected. The purpose of this system is to measure the electoral strength of each party individually and then compensate it based on its individual strength in the National Assembly. With this arrangement, the partnering parties have 'reserved' for one another the voters in what they termed 'strongholds'. The net effect is that voting patterns in those 'stronghold' constituencies are contrived and bloated instead of being genuine. Consequently, the parties' allocation of PR seats was equally going to be manipulated. Table 4 below demonstrates that the PFD was the main beneficiary because in its 'stronghold' it managed to win a constituency and significantly improved its national party vote in comparison to that in 2015. In a similar manner, the DC's national vote dropped significantly because, among other factors, it did not contest the election in all 80 constituencies countrywide. It also lost its status as the biggest political party in the country, largely because it 'reserved' its voters for both the LCD and the PFD in 26 constituencies jointly.

It is contended here that the machinations of the three parties that formed the pre-election pacts in the run-up to the 2017 election are effectively not any different from the manipulations that were committed by the two biggest parties, the LCD and the ABC, in the run-up to the 2007 elections. The common theme for both schemes is that parties coalesce to distort individual party strength with a view to enhancing their electoral prospects.

Table 4: Allocation of seats after the 2017 elections in Lesotho

Political party	Total party votes	Party allocation of total seats	Constituencies won	Compensatory Seats
All Basotho Convention	235 729	48	47	1
Alliance of Democrats	42 686	9	1	8
Areka Ea Baena	1 393	0	0	0
Basotho Congress Party	3 458	1	0	1
Basotho Democratic National Party	1 818	0	0	0
Basotho National Party	23 541	5	0	5
Basotho Thabeng ea Senai	279	0	0	0
Basotholand African National Congress	684	0	0	0
Community Freedom Movement	322	0	0	0
Democratic Congress	150 172	30	26	4
Democratic Party of Lesotho	2 801	1	0	1
Hamore Democratic Party	1 311	0	0	0
Lekhotla La Mekhoa Le Meetlo	1 024	0	0	0
Lesotho Congress for Democracy	52 052	11	1	10
Lesotho People's Congress	2 335	0	0	0
Lesotho Workers Party	1 711	0	0	0
Majalefa Development Movement	1 024	0	0	0
Marematlou Freedom Party	2 761	1	0	1
Movement for Economic Change	29 420	6	1	5

National Independent Party	6 375	1	0	1
Popular Front for Democracy	13 143	3	1	2
Reformed Congress of Lesotho	3 986	1	0	1
Sehlabaka Remaketse Edwin	37	0	0	0
Senkatana Social Democracy	246	0	0	0
True Reconciliation Unity	817	0	0	0
Tsebe Social Democrats	402	0	0	0
White Horse Party	139	0	0	0
Total Votes	579 666	117	77	40

Source: Adapted from Independent Electoral Commission website <iec.or.ls>

CONCLUSION

This article has sought to demonstrate how the story of the electoral system and the law in Lesotho has haunted the country's electoral democracy. It has been demonstrated that the country has been moving from one system involving mischief to another in its quest to perfect the electoral system. One reason for this mischief-after-mischief solution is that the reforms in Lesotho have been crisis-based: the only incentives for reform are triggered by conflict or a crisis. The country has never soberly commissioned broad-based consultations about the nature of the electoral regime it needs. Instead, the electoral systems in Lesotho have been the brainchild of different political sides in conflict: a certain expert or two who simply drafted the decisions of the political parties into law. The disadvantage of this approach is that it is limited to the crisis that the country experiences at a particular point in time. It has been demonstrated that the new reforms based on the National Assembly Electoral Act of 2011 have embedded shortfalls to such an extent that the country has still not been spared the manipulations common in Lesotho's electoral politics.

The author therefore recommends that a review of the electoral system in Lesotho be undertaken. While the current electoral system seems to enjoy a fair amount of support in the country, there are still parties that are not content with the current system in general. Those views can be tested only in an open process designed specifically to

test the multivariate views about the electoral system in the country. While the process of the wholesale review of the electoral system seems to be a long-term project, in the interim the country may consider reinstating the dual-ballot system. That will at least solve the dilemma of the independent candidates' having been placed in limbo. The problem of decoy alliances in the style of 2007 can be solved by outlawing them outright, because they are contrary to the spirit of MMP as envisaged by the Constitution (Elklit 2008). As Bochsler (2017, 406) pointedly contends:

> Both in Lesotho and in Venezuela the largest parties (those winning most district mandates) split their lists, using one party label for their district candidates and a different label for their PR lists. Therefore, voters did not even have the [option of] voting for the same party in both tiers. Such a strategy can easily be prevented through a minor modification of the electoral rules ….

The problem of smaller parties' enjoying immense influence in government can be resolved by introducing the threshold of '0.8 per cent or 1 constituency'. The article further recommends the promulgation of regulations in terms of the Act that will foreclose on the minute avenues of escape for manipulative political parties.

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