



## ESSAY

# SECRECY AND TRANSPARENCY IN LESOTHO'S GENERAL ELECTIONS

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The twin concepts of secrecy and transparency are central to any discourse on the freeness and fairness of elections, because they are universally accepted yardsticks of the degree to which elections can be said to be legitimate. Without challenging this truism, this paper explores these concepts as both theoretical constructs and as manifested in empirical situations. It will highlight their ideological function and argue that they have an alienating effect in practice. The article will also attempt to show how secrecy and transparency have helped to shape Lesotho's electoral process and the mode of its management, and will also discuss the issues and questions that it raises. Next, the most critical issues in any debate concerning Lesotho's elections and their management are raised, followed by the recommendation of an ideal way of managing elections to serve the interest of voters better. Lastly, the paper demonstrates the danger of depoliticising elections and relegating them to the legal sphere, which only the courts of law are competent to interpret.

## Introduction

Competitive elections are a hallmark of all democratic systems of government. The central issue in any election is whether the voting and related processes are both secret and transparent. These two criteria are acknowledged worldwide as standards for assessing the conduct of elections as free and fair. Secrecy and transparency are also criteria that confer legitimacy on elected governments. In other words the authenticity of any regime that has won national elections is reliant on the conditions under which voters cast their ballots.

Lack of secrecy and transparency in the electoral process has led international and local election observers to reject the outcome

of elections in Africa and elsewhere. For example, Zimbabwe's presidential elections, held in March 2002, were declared not free and fair by some international observers. The Commonwealth Observer Group concluded that the elections were conducted under conditions which did not 'adequately allow for free expression of will by electors'.<sup>1</sup> The Southern African Development Community Parliamentary Forum Observer Mission also indicated that the elections 'could not be said to adequately comply with the norms and standards for Elections in the SADC region'.<sup>2</sup> This said, however, most elections held in Africa have been sloppily conducted and have consequently either barely met these criteria or failed to do so. Not surprisingly, a major cause

of conflict and civil wars on the continent is disputed election results. The Angolan civil war, which resumed after the 1992 elections; Madagascar's recent political turmoil, which eventually led to the ousting of the president; and the current problems being experienced in Ivory Coast are classical examples.

Disputes over the fairness of elections have occurred in both homogeneous and heterogeneous nations. For example, Lesotho, which has a homogeneous population, is one of the countries that are susceptible to this problem. Every election held in the country since independence has been attended by a dispute of some kind. In every case, the outcome has been rejected by the losing political parties on the grounds that the electoral process failed to meet one of the criteria mentioned above. While the complainants have lost the cases they have brought to the courts to challenge the election results, it is clear that the conduct of elections ought to be such that it does not provide any grounds for allegations that they were not run properly.

In the case of Lesotho, disputes over election results have been accompanied by calls for the opening of the ballot boxes in order to confirm that the results were as declared by the electoral office, and that those results reflect how the electorate has voted. This suggests that a section of the voting population, whatever its size, is increasingly sceptical both of secrecy and the secret ballot's ability to guarantee that the elections are free and fair. It signals the need for either expanded definitions of the concepts of secrecy and transparency, or their reconceptualization. Some of the voters believe that, as defined at present, secrecy is inversely related to transparency whenever the country goes to the polls. In other words, secrecy in reality means no transparency, and vice versa. Yet this does not reveal the full nature and depth of another, related, flaw in Lesotho's electoral system, which is its alienating effect on the voters. The dominant role given to secrecy and transparency is central to this alienation.

This paper explores the twin concepts of secrecy and transparency as used in relation to electoral processes and elections in Lesotho, demonstrating their ideological function and

the ways in which they have shaped the country's electoral policy and its management of elections. It argues in particular that these concepts have been used to shield the electoral officers from public political scrutiny, which denies the voters control over, and ownership of, both the elections and the voting process. Thus, not owned or controlled by the voter, elections and the electoral process become the property of those who run or manage them. In other words, they are a force external to, and confronting, the voter.

### Conceptual framework and literature review

Secrecy and transparency, as noted earlier, are integral to the theory of political representation or representative democracy. *Representative democracy* has been defined as a regime 'in which the people do not rule directly but through elected and accountable representatives'.<sup>3</sup> This is differentiated from the ideal form of democracy, which is a system 'consisting of small number of citizens, who assemble and administer the government in person'.<sup>4</sup> But over time, the two types of democracy have been collapsed into one, so that 'except in very small communities, democracy necessarily means representative democracy...'.<sup>5</sup>

Representative democracy has some distinctive features, which include the following: that free and fair elections in which citizens' votes weigh equally are held periodically; that all citizens have suffrage; and that they are free both to oppose the government and to compete for public office.<sup>6</sup> This type of democracy has also been dubbed *liberal democracy* because liberalism, with its stress on individual rights and liberties, provides its theoretical underpinning. A democracy based on such precepts follows a form of rule by the people in which individual rights and liberties are defined and protected.<sup>7</sup> Representative democracy has gained so much currency in political science discourse that people are prone to forget that it is not democracy in its pure or ideal form (direct democracy), as practised in the city-states of ancient Greece.

There are many factors that have led to the popularisation of representative democracy.

Prominent amongst them is the impracticability of direct democracy owing to increases in the population and the territorial expansion of nation-states. Representative democracy, therefore, has become the most rational form of government because it is 'capable of embracing and confederating all [the] various interests and every extent and territory of [the] population'.<sup>8</sup> Leaving aside the ideal type, representative democracy is regarded by liberal scholars as the most workable kind of regime. They argue that it is the only form of government that is capable of taking the aspirations of the general citizenry into account, especially after the collapse of communism in the late 1980s and the ascendancy of neo-liberalism as the reigning ideology worldwide.

One of the requirements of representative democracy is competitive elections, as alluded to earlier. However, it is noteworthy that elections alone cannot make any political system democratic: it 'does not [only] require elections, and ... the mere existence of elections does not prove the existence of a democratic political system'.<sup>9</sup> Elections also have to meet the standard criteria of being free and fair.

While the concepts of freeness and fairness are not above criticism, and therefore need to be defined a little more widely, they nevertheless represent generally accepted criteria for any electoral process to be regarded as a true representation of the will of the voters. A free electoral process is one that espouses basic freedoms. These include the right to vote in secret and the right to complain about perceived irregularities in any part of the process.<sup>10</sup> Electoral fairness, on the other hand, occurs when, amongst other things, an open and transparent counting of the votes is observed.<sup>11</sup> But the need for transparency in a democracy is not limited to the counting of votes: rather it is one of the major determinants of how democratic a system is. However, as noted in the foregoing section, this paper will argue that, as operationalized in Lesotho, the ideologies of secrecy and transparency deny the voters ownership and control over both the elections and the electoral process.

## **The functions and significance of elections**

Elections perform varied functions in a political system. They provide a means of choosing rulers, and of allowing voters direct participation in that choice.<sup>12</sup> Elections also make democracy possible in large bodies, where direct participation in decision-making is not feasible.<sup>13</sup> In addition, they are mechanisms for changing governments, or extending and renewing the mandate of the previous regime. However, this does not tell us about the significance and/or the implications of elections. Yet without an understanding of these we can hardly explain the election-related conflict that is a dominant feature of Africa, particularly Lesotho. In the latter, elections are always controversial.

History reveals that in multi-ethnic countries, elections can be a means of perpetuating the domination of certain groups and the exclusion of minorities. In such countries political parties are based on ethnicity, which guarantees the party representing the largest ethnic group success in competitive elections. Even in societies where ethnicity is not an issue, elections tend to be used to achieve ends other than the simple choosing of a ruler. Whether this is irrational or not is a moot point.

In the case of Lesotho, the dominant motive behind the way party members vote is to deny power to the rival party, and often to inflict a humiliating defeat on it.<sup>14</sup> In a majority of cases, Lesotho voters have 'no idea as to the vision of the candidate for whom they voted'.<sup>15</sup> The deep political cleavage between the country's political parties is not markedly different from that between their tribally-based counterparts elsewhere in Africa. Lesotho's party system has been described as follows:

The party system has clearly had profound implications for politics and political development in Lesotho, shaping these and boxing the nation into rigid and mutually antagonistic blocs, albeit with virtually no ideological divide. For the individual members ... the blocs, in turn, engender a sense of

belonging and identity.<sup>16</sup> The 1993 general elections were seen by voters as a means of settling political scores more than a decade old.

Many voters wished to punish the Basotho National Party (BNP) while rewarding the Basotholand Congress Party (BCP). These motives had nothing to do with critical national issues such as economic development, or even the ideological differences between the major contestants.<sup>17</sup> Given this situation, voters in Lesotho have not necessarily voted for parties whose programmes were more likely to promote and protect their interests. They seem to defy the assumptions of the *rational choice* theory of representation, which are that man is a rational creature who can identify his own interests and opinions and the wider claims of the community; that he will use his vote intelligently; and that he is entitled to share in the selection of representatives.<sup>18</sup>

On the contrary, experience has shown that worldwide, people are more strongly influenced in their voting decisions by party affiliations or long attachment to a particular political party, a phenomenon that is often bequeathed by families. It is very difficult for voters to change their affiliation, once committed, to another party in a subsequent election. In previous elections in Lesotho, 'the voters who were not voting for the first time have constantly voted for the same political parties'.<sup>19</sup> Whether or not this phenomenon will remain unchanged for long is a matter for conjecture.

### **What transparency and secrecy mean and do**

Democracy is incompatible with a lack of transparency or an absence of openness, for the simple reason that without this public availability of information, accountability would be hard to achieve. However, democracy is also contingent upon the use of a secret ballot. This has a historical explanation. Secrecy has traditionally been seen as a means of protecting individual voters from pressure and intimidation by political elements that might be ready to use such methods to gain

power. A secret ballot is supposed to ensure the independence of voters. It is also a way of forestalling the propensity of voters to know their chances of determining the electoral outcome (and therefore being open to bribery).<sup>20</sup> This means that how each person casts his vote should be his secret, to prevent any form of intimidation or interference.

Yet the paradox here is whether it is possible to have both secrecy and transparency at the same time. The two are incompatible. Something that is a secret cannot at the same time be transparent or open, and the reverse is also true. It is nevertheless common in contemporary debates over the electoral process for the two concepts to be conflated, as if they were compatible or synonymous. This paradox gives rise to problems. In the case of Lesotho, secrecy shields election outcomes from voters' scrutiny, and in this way undermines the principle of accountability that should be the linchpin of the electoral process and indeed of democracy. The electoral commissioners, although they are public agents charged with the responsibility of managing a process of such profound consequence as elections, are not accountable to the voters. In other words, there is no scope for the public to test the efficiency and integrity of the commissioners who conduct the elections.

### **Issues for debate**

In debates about elections and the electoral process in Lesotho, the slogans of secrecy and transparency form part of the ideological framework. These concepts have persuasive and normative appeal for the entire electorate. While the secret ballot has been defended as a critical ingredient of democracy for the reasons adduced above, it has been inverted in Lesotho. Secrecy does not protect the other democratic rights of the voter, such as the right of each individual to know more than just how he has cast his vote. For instance, it denies the voter the right to know how those managing the electoral process have conducted the elections.

Owning only his vote and having no control or influence over the electoral officials, a Mosotho voter is alienated from the electoral

process itself. Elections occur as an external phenomenon that is inaccessible to the citizens, despite public pronouncements by the electoral commission that the method delivers not only free and fair but also accessible elections.<sup>21</sup> It is not clear, for example, how elections can be made accessible when the ballot papers are printed outside the country. It is also difficult to comprehend how the process can be dubbed transparent when the people who voted cannot scrutinize it. A voter is merely a source of one vote, and cannot make any other significant contribution to the electoral process, as he has ceded his rights to the courts of law. These are, ironically, not entitled to intervene to determine the genuineness of election results independently. Admittedly, part of the freeness of any electoral process is 'freedom to complain'.<sup>22</sup> But this alone is not enough: there should be some effort made to ensure that election-related complaints are addressed. In many African countries, including Lesotho, the election process is so bureaucratized that it is virtually inaccessible to political parties, let alone the ordinary voter.

The national electoral laws of African countries do not give clear definitions of secrecy and transparency, even though these are used as popular slogans. In the case of Lesotho, even the Interim Political Authority (IPA), established after the 1998 political crisis to prepare for problem-free new elections, failed to say exactly what transparency means, despite its specific mandate to create conditions conducive to the holding of free and fair elections.<sup>23</sup>

The Lesotho Independent Electoral Commission (IEC) has, by the same token, been no better at solving this problem, even though it adopted the following as its vision: "[W]e responsibly deliver acceptable, free, fair and transparent elections".<sup>24</sup> However, the IEC has not made any attempt to define any of these loaded terms. This leads to another problem, and indeed a serious dilemma for the voter and his party: how to frame and present a complaint against some aspect of the electoral process or the outcome of the election as a case to a court of law. In so doing he is expected to define what the law has barely attempted to explain. Further complications

are that irregularities and contraventions of the electoral law are treated by the courts as civil claims, which often makes them too costly for individuals to pursue. Thus the thrust of Lesotho's electoral legislation is to forestall complaints or to block claims that may be legitimate. Without a clear definition of transparency and its accompanying indicators, which can be applied to actual observable circumstances, it becomes even more difficult to make sense of what the term means in debates over Lesotho's elections.

The constitution of Lesotho (as amended) provides for the establishment of the independent electoral commission referred to above. Its members, including the chairman, are appointed by the King in accordance with the advice of the Council of State.<sup>25</sup> Their removal from office is similarly the prerogative of the King, again acting on the recommendation of the same Council. Such an advice comes from a tribunal established under section 66 (12) to investigate the need for such removal, which is based on the inability by the member of the commission to carry out his duties 'due to infirmity of the body or mind or any other cause'.<sup>26</sup> In principle, therefore, all three commissioners can be sacked simultaneously for the same reasons. This arrangement implies that the IEC is accountable to the King through the Council of State. However, the Council is a dormant body that lacks power and has no specific, independent role. In other words, it has to be told about a specific issue requiring its attention, and instructed what its decision should be. The Council of State cannot identify a problem independently, or decide on its own how to address it, because it has no authority to intervene in any political, legal or social matter, being neither a political authority nor a legal institution.

Indeed the Council of State maintains a rather strange relationship with the IEC. While it can advise the king to remove one or all of the IEC commissioners, it does not oversee the activities of the IEC. Hence it cannot discipline the commissioners. Yet this is not surprising, given that the Council of State is appointed rather than elected. Therefore, like the IEC, it is not amenable to popular

control and influence. For a similar reason, not even parliament can influence the body. The Council of State is not a sitting institution, meeting only at the behest of the Prime Minister, who convenes its meetings as he deems necessary. The Council rarely met between 1993 (when the country returned to multi-party democracy) and December 2002–January 2003.

The point being made here is that the Council of State cannot protect the nation against the IEC. Neither can the King or the tribunal set up apparently as a disciplinary organ. Our contention in this paper is that a democratic electoral process needs not only to offer freedom to vote but also to protect the voter against the IEC and the courts of law. It is not enough that these have been constructed as independent, neutral bodies. In fact these constitute the very issues that need to be debated. The questions of trust and legality or constitutionality are irrelevant to a meaningful debate on these issues. The points that should be debated are: first, whether the voter should control and own the election process (hence his own vote). Second, the level of political accountability of the IEC, and to whom it should be accountable should be decided. Third, the protection of the voters from the IEC and the courts of law, and who should undertake it, should be raised. The fourth issue is the right of citizens to demand the auditing of elections. To some observers, 'Lesotho's Constitutional rule merely gives the voters a chance to choose their rulers without giving them control and leverage over the state and elected representatives'<sup>27</sup>. The current electoral system denies voters control and ownership of the process through which they appoint their representatives.

## The implications

Secrecy and transparency, which constitute an ideological framework within which elections are conducted in Lesotho, have shaped both the electoral system and the relation between the voter and his vote. For the voter, secrecy means not just casting his ballot outside the view of fellow voters and the electoral officers and indeed observers. It also means the voter

has no right to know about the conduct of those managing the elections. This depoliticizes the elections, reducing them to a legal process that is prohibitively expensive. Because of this arrangement, an election, which is an essentially a political event, becomes a prisoner of law, or is simply subordinated to the law. This has various consequences. For example, political arguments are regarded as irrelevant to electoral disputes, for the matter placed before the court is governed by the legal principle that it is sub judice. This means the end of politics and hence of democracy, for democracy cannot be defined separately from politics.

Transparency, on the other hand, has been taken to mean simply that voters stand in visible queues, get the ballot papers in the view of all who are in the voting hall, and after filling them in, throw them into the ballot box in the presence of the polling officers and agents of the political parties. But this is the first and the last time the voter sees his ballot paper. It no longer belongs to him, but to the electoral officers and the courts. This shatters the myth that an election is a means of empowering the voter. If anything, all an election enables him to do is vote for the candidate of his choice. It gives him no power over the election process and the institutions that manage it.

Lesotho's electoral system enfranchises the nation without giving the populace the power to control the related institutions. This is because, according to the electoral officers, these institutions and the elections managed by them ultimately belong in the realm of law – that is, they are defined and seen as institutions that are not political, so that they cannot be challenged or confronted as political bodies can. Put differently, the voter is alienated not only from the electoral process but also from his own vote. He has no power over the phenomenon that he has constructed or set in motion – the electoral process. In the Marxian sense of alienation, the process has an independent existence. Thus, what is essentially a 'man-made product ... assumes ascendancy or dominance over man'.<sup>28</sup>

The ideology of secrecy in particular precludes any political solution to electoral disputes. This can have dire consequences, as Lesotho's experience shows. As electoral

disputes are invariably matters for the High Court to adjudicate, most of those that are raised before the elections drag on into the polling day and the period following the elections, owing to the slow and tedious pace of court processes. For example, in the case of Lesotho, a dispute referred to arbitration by the High Court six or more months prior to the disputed May 1998 elections was settled only in June 1998. In the run-up to the 1998 elections, the IEC was called on to provide a provisional voter's list, but it failed to do so until the complainants asked the High Court to intervene.<sup>29</sup> A similar problem occurred in the aftermath of the 2002 general elections: the demand of the BNP that the ballot boxes should be opened so as to clear up some doubts about the results is still pending arbitration to this day. These demands led to a split in the IEC. One of its members was reported to be supporting the BNP's demand for a forensic audit. His stance, which was in sharp contrast to that of his colleagues, was that the ballot boxes should be opened to avoid the unnecessary expense that would be incurred if the matter was taken to court.<sup>30</sup> This commissioner was suspended and eventually dismissed from office for supporting the demand. This example was a test of the IEC's stated mission to protect democracy by conducting dispute-free and transparent elections.

It is now acknowledged by many election analysts that elections alone, however free and fair, are not sufficient to be used as the only tool for testing the prevalence of democracy. Other means are also required. The people themselves, for instance, can be better judges of what is and what ought to be the case through seeing and touching. Also, any test of Lesotho's commitment to democracy or democratic character should extend to the institutions managing and overseeing the democratic process. This would make it possible to gauge their commitment and accountability, their competence, and the appropriateness of these systems to Lesotho's volatile but dynamic political system.

Any election process that aims only to churn out a government or to send people to parliament, as Lesotho's electoral process does, must be questioned. The reason is that it

hardly addresses the fundamental challenge of democracy—the maximization of political and social gains. This is impossible in a system that alienates and disempowers the electorate. Democracy means popular empowerment, whereas at present Lesotho's political system clearly allows only participation. The system has failed to bring stability to the country, and among the reasons for this is its thrust. Its main concern is with building and strengthening institutions that control and direct the electoral process, instead of assisting the population to steer the country's political life—to control the relevant institutions.

Since democratisation implies and in practice means the development of society, the Lesotho's electoral system militates against this important value in that it limits people's involvement in the system. A glaring example of this is the production of the ballot papers. These are printed outside the country by foreign companies whose names are not known to the electorate or their parties. Whether or not there is no infrastructure for that purpose in Lesotho is not the issue here: rather it is that these companies will never impart the technology and skill used to produce ballot papers to Lesotho and its people. Yet the damage goes further. Having the ballot papers printed abroad nurtures and keeps alive the mutual suspicion and hatred that have been the salient feature of Lesotho's politics since independence, thus making reconciliation difficult or even impossible. In sum, the use of external printers does little to reconcile the divisions in the Basotho nation, for it implies that only someone outside can create and keep secrets for them; that they should not trust one another; and that they should stay out of the process of preparation for the elections because if they knew its secrets, they would misuse that knowledge. The way the electoral system works should be reopened for debate, as one of the steps it is necessary to take in the nation's search for peace.

## Conclusion

The concepts of secrecy and transparency are central yardsticks to the assessment of any elections. However, they must be used with

great caution in debates over elections because of their serious implications, such as their ideological function and ambivalent meaning. In the case of Lesotho, these implications include the alienation of the voter from the electoral process and his own vote; lack of control by the voters over the institutions managing elections; and an absence of accountability on the part of these institutions, particularly the IEC and the Council of State. This makes democracy elusive, since it is denied at levels that are basic to the process of securing representation and participation. Democracy means the right and opportunity to see how the electoral officers conduct the elections and to verify claims made about the latter. More importantly, Lesotho's electoral process must be freed from the courts of law, for these cannot solve election-related disputes. They can only arbitrate and pass judgements, regardless of the political consequences. In Lesotho the problem is not law as such, but rather the suspicion that the law has been used to limit the transparency of the electoral process and render it inaccessible to the voters. This is because the law says citizens should not know more about the electoral process than how they voted.

## Notes

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22. Hague et al, op cit, p 99.
23. See Lesotho's Interim Political Authority Act No. 16 of 1998, Section 4 (a).
24. See Lesotho's Independent Electoral Commission, <www.iec.org.ls>
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26. The Constitution of Lesotho, Section 95 (2).
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