

Introductory Note on the 1993 Constitution of Lesotho

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I. Origins and Historical Development of the Constitution

A. A Brief Historical Background

Lesotho has a chequered but turbulent history. In 1820, Moshoeshoe I (1786 –1870) established the Basotho nation with a capital at Buthe-Buthe (which laid the foundations for the eventual Kingdom of Lesotho), shifting in 1824 to Thaba Bosiu (mountain at night), then known as Basutoland. Thaba Bosiu proved to be an impregnable fortress. It was successfully defended against an Amangwane army in 1828; against the Batlokoa during Moshoeshoe's absence while he was on a cattle raid in 1829; and against the Ndebele of Mzilikazi in 1831. For strategic reasons and mainly for protection against the Voortrekkers (today's Afrikaners), the Basotho became allies with the British Cape Colony in 1843. During the period that followed, many wars and conflicts took place between the Basotho, the Afrikaners, and the British. This occurred against the backdrop of increased colonialization in Africa by Britain and shifts in possession of the Free State region between the Afrikaners and the British. Eventually, the British annexed Basutoland in 1868.

Direct British rule of Basutoland was firmly established on 2 February 1884 and continued until the attainment of independence on 4 October 1966. The British Resident Commissioner proposed, as an alternative to the national '*Pitso*' (open air assembly), the formation of a National Council which would be composed almost entirely of chiefs and which would advise him and the Paramount Chief on policy matters. The Council was finally accepted and implemented by Paramount Chief Lerotholi (1891-1905) in 1903. The change of title from Paramount Chief to King occurred in 1966 with the independence of the country.

In 1903, Basutoland National Council was established, consisting of 100 members. Five were nominated by the Resident Commissioner, Mr. Herbert Sloley, who was the President of the Council, and 94 were nominated by Motlotlehi Moshoeshoe II, besides himself. The Council was a purely unelected advisory body in a very restricted field, and had no legislative or executive power. Popular demands for election grew progressively more insistent and on 14 September 1959 the first Constitution was introduced, which established a Legislative Council (known as the Basutoland National Council), an Executive Council, and a College of Chiefs. Provision was also made for the introduction of local government. The membership of the new Council was restricted to 80, half of whom were to be elected. The other half was made up of 22 principal ward chiefs *ex officio* and fourteen nominees of Motlotlehi Moshoeshoe II. The elected element was to continue to be elected indirectly by the district councils, but a democratic feature was

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introduced by confining the right to vote to those members who had obtained their seats by election. The germs of a democratization process can be found in this document.

On 19 September 1961, the Basutoland National Council passed the following motion (No. 62):

That the High Commissioner be requested to invite Motlotlehi Moshoeshe II to appoint a Constitutional Commission after consultation with the leaders of political parties, which shall, without prejudice to the generality of his powers of appointment, include representatives of the Chieftainship and main political parties to review the working of the 1959 Constitution in the light of the experience gained ...

Thereafter, early in 1962 the Basutoland Constitutional Commission appointed a thirteen-member Constitutional Commission. On 27 August 1962, Professor D.V. Cowen, formerly of the University of Cape Town, was appointed as the Adviser to the Commission and prepared the first draft. The Commission submitted its report on 3 October 1963. It approved a Westminster-style constitution with a cabinet government headed by a Prime Minister. Parliament would be fashioned with a bicameral legislature consisting of 60 seats in the Lower House elected by universal adult suffrage, while the Senate would consist of the 22 principal and ward chiefs as well as eleven members nominated by the monarch. The King was to enjoy few powers, which included at least one significant residual power set out in Section 68(4)(c):

if the office of Prime Minister is vacant and the King considers that there is no prospect of his being able within a reasonable time to find a person who is the leader of the political party or a coalition of political parties that will command the support of a majority of the members of National Assembly, he may dissolve Parliament.

No vacuum was left, because Section 68(5) provided for simultaneous passage of a resolution of no confidence and naming of the next Prime Minister. However, the possibility of the King exercising real power was retained in an exigency arising out of a vacancy created in the office of the Prime Minister.

The Constitution was accepted by Britain, and it enjoyed widespread support. Election for the first government was held in 1965 and the country declared its independence in 1966.

In the 1970 election, the Basotho Congress Party (BCP) won 35 seats to the Basotho National Party's (BNP) 23 and one seat of the Marematlou Freedom Party (MFP). However, the Prime Minister, Leabua Jonathan, refused to accept defeat and, encouraged by a South African government disturbed by King Mokhehe's 'radicalism', he suspended the Constitution and declared a state of emergency. King Moshoeshe II was initially placed under house arrest but was later allowed to go into exile in the Netherlands. These developments merely served to narrow further the domestic political support base of the BNP, and entrenched the regime's relationship of dependence *vis-à-vis* the Pretoria government. Though the King was allowed to return to Lesotho in 1971, Jonathan ruled the country without any recourse to representative institutions. Mokhehe's supporters staged an abortive coup in 1974 and then fled into exile to begin an underground war against the Jonathan government.

By 1979, the BCP had split once more. One faction negotiated its return to Lesotho and the other, under Mokhehle, prepared to accept Pretoria's help to form a military wing, the Lesotho Liberation Army, which launched a number of nuisance raids into Lesotho from South African soil over the next few years. There was a brief lull in 1980 following a temporary rapprochement between Maseru and Pretoria, but an upsurge in unrest in South Africa and suspicions that Lesotho was harboring bases for the African National Congress (ANC) saw a resumption of destabilization, culminating in a bloody raid on Maseru in 1982. Lesotho's general election of September 1985 deteriorated into farce when all five opposition parties withdrew to allow the BNP a clean sweep without a single vote being cast.

Late in 1990, the tensions between King Moshoeshoe and Major General Justin Metsing Lekhanya came to a head. The King, now representing himself as a champion of democracy, refused to return home unless the military government stood down. Lekhanya responded by passing a decree deposing Moshoeshoe and installing in his place his eldest son, the 27-year old Prince Mohato Seeiso. The latter was sworn in as King Letsie III, though he was never formally crowned, which was an omission of considerable symbolic significance. While Moshoeshoe's removal was designed to limit the political influence of the monarchy, it ensured that the crown itself would remain a political issue. It also gave freedom to Moshoeshoe, now officially Chief Bereng Seeiso, to attack the government of the day after his eventual return in July 1992. By then, Lekhanya had departed the scene. At the end of April 1991, he was forced to resign by soldiers angry at being offered no more than a 22 per cent pay increase. The new head of the government was Colonel (later Major-General) Elias Rameama, another member of the Military Council. He appears to have accepted the new appointment somewhat reluctantly. The bloodless coup that removed Lekhanya had also revealed differences within the army about the modalities of return to civilian rule. Rameama lifted the ban on party political activity late in 1991, and tried to organize elections for the following year. On the recommendation of the Commonwealth-appointed electoral officer, however, the elections were postponed in November 1992, because of administrative and delimitation problems, and again in January 1993. They were eventually held on 27 March 1993, although the delay fed public suspicion that the army was using technical excuses to prolong or avert the transition. The 1993 elections were eventually contested by thirteen parties and seven independent candidates. Of these, only the BCP and BNP fielded candidates in all 65 constituencies. The royalist MFP was the only other significant contender.

B. Birth of the 1993 Constitution

In Lesotho, the Constitution was born out of a democratic initiative in the form of a National Constituent Assembly Order, 1990 (No. 4 of 1990), issued on 14 May 1990, which established a National Constituent Assembly to consider and make recommendations regarding a suitable constitution for Lesotho. The Order also repealed and replaced the Lesotho Order, 1990. The Assembly was inaugurated on 28 June 1990 by Queen 'M'amohato, who exhorted the members to work hard for peace, justice, freedom, unity, and national reconciliation, because that opportunity, at the beginning of the final decade of the 20th century, might be the last chance to bring about normal political life in Lesotho.

On 12 July 1990 the Assembly resolved to use the Constitution of 1966 as a framework for the new constitution. Eventually, the Assembly prepared a draft constitution that revised the Lesotho Independence Constitution of 1966. The earlier Constitution had an insignificant popular

element, although it had been processed through the Basutoland Constitution Commission in 1963, chaired by W.P. Stanford, and it was submitted to the Basutoland Council because it was simply a constitution set out as a Schedule to the Lesotho Independence Order, 1966, under Section 3. It came into force immediately on 4 October 1966, and had 139 sections and two schedules. That Constitution was drafted by Professor D.V. Cowen. It was His Master's Voice.

The National Constituent Assembly had 110 members of whom, *inter alia*, seventeen were members of the government, twenty were district development councillors, 22 were principal chiefs, twenty were recognised politicians, ten were representatives of public interests appointed by the Military Council, eight were from the armed forces, and ten were from urban councils. The President was Dr. J.T. Kolane, who later became the Speaker of the National Assembly after the general election held in 1993. The Assembly had some degree of a representative character, although more than 80 per cent of its members were nominated and only indirect election for district representatives took place.³

The Assembly began its work on 28 June 1990 and introduced some major changes of far-reaching consequences into the new draft constitution. Eventually, the Assembly recommended the establishment of a National Constitution Commission to seek the views of the people of Lesotho on the draft constitution. The National Constitution Commission, consisting of 22 members, was chaired by Dr. J.T. Kolane. The draft constitution was published in January 1992 (LG 1992). The Assembly prepared the final draft for adoption in 1993 (LG 1993).⁴

The process of demystifying the perfumed corridors of power gradually resolved the contest of the crown, the sword, and the pen, and the last words of wisdom were spoken by the people of Lesotho in the electoral verdict in March 1993. In May 1998, a pluriform multi-party election was again held.

II. Fundamental Principles of the Constitution

The fundamental governing principles of the Lesotho Constitution are guided by the leading lights of time-tested democratic freedoms, as reflected by public opinion in the matters of governance and mirrored through public participation in the electoral process. The unitary form of government is strengthened by units of local government right down to the village level, where tradition and customary practices loom large. The country is geared towards ushering in an era of modernity while retaining traditional values. Articulation of these values is revealed in the text of the Constitution.

A. Constitutional goals, values and principles

The Constitution has packaged diverse thoughts, opinions, ideas, and aspirations of the composite cultural ethos of Lesotho society into a well-designed and appealing framework with a contemporary outlook. The ideals set out in the text are crafted as jewels that glow against the backdrop of bringing into being the promised land of new hope. The Constitution is thus aimed at addressing historically evolved injustices inherited from the heroic struggles of the past by

³ W.C.M. Maqutu, *Contemporary Constitutional History of Lesotho* (on file with author) 15.

⁴ Published in an Extra-Ordinary Gazette on 5 February 1993.

planting fruit-bearing trees to ripen into democratic results, and resolving the long-standing social and moral issues of a country emerging from an era of conflict by ushering in an age of solidarity for peace and development. The values expressly articulated in the Constitution, and the principles upon which the text was drafted and on which the Kingdom will survive, with doses of democratic governance, have been designed to function on an operational scale and are reflective of the symphony of orchestrated constitutionalism.

B. Constitutional goals

Constitutional goals are ordinarily spelled out in the preamble to the constitution. Surprisingly, the Constitution of Lesotho has no such key. It is an open book. There are two possible explanations for the absence of a preamble in the Constitution. One is that it was bypassed during the hurried drafting process, and the other is that it was considered unnecessary. However, it is not impossible to trace the goals of the Constitution from its text.

Bearing this in mind, the constitutional goals can be summarised as follows:

1. To secure and fortify the Basotho Identity as a modern nation;
2. To endow the society with cultural distinctiveness enriched by democratic values, social justice, and economic rights, and to uphold fundamental human rights and freedoms;
3. To found a democratic state with a constitutional monarchy limiting the powers of the King;
4. To guarantee that the government is based on popular sovereignty;
5. To ensure that every citizen enjoys equal protection of the law;
6. To progressively realise economic rights improving the quality of life;
7. To throw open equal opportunity for the personal growth of each person;
8. To strengthen unity among the people; and
9. To secure for the country an equal space in the comity of nations.

The realization of these goals depends not on the enforcement of constitutional provisions. Government policy and its implementation, together with the development of such policies, policy action research, and the revision of policies in view of changing scenarios are essentially supported by the pillars of the Constitution. Human rights are vertically and horizontally integrated into the Constitution. Lesotho is a signatory to several international covenants and instruments covering human rights.

The Lesotho Constitution has ensured a set of sixteen human rights, which is one more than were provided by the earlier Constitution. The right to participate in government is a novel addition in the new Constitution, which means that people have the right to vote as well as the right to compete for public positions.

Implementation policies and plans are supported by various substantive provisions of the Constitution itself. The following are some examples.

The Constitution consists of 166 sections. Section 1 declares Lesotho to be a sovereign democratic kingdom. This constitutional declaration is significant in several respects since it is

rare in modern times for a democracy to coexist with a monarchy, side by side in written fabric, and the kingdom continues. Lesotho is therefore known as the ‘Kingdom in the sky with a King on the ground’. The King of Lesotho symbolises the *unity* of the Basotho nation. This stands in sharp contrast with the British monarchy, where the King or Queen is regarded as a symbol of national *identity* and the focal point of loyalty.

Democracy as an entrenched constitutional value is referred to in various provisions. The funding of political parties is allowed and the legislative framework is permissive.

Section 20 entitles every citizen to vote or stand for election on the basis of universal and equal suffrage and by secret ballot. Section 20(1)(b) provides for universal and equal suffrage, which means equal weight is to be given to all voters. Elections serve a cathartic function, and the Constitution provides for periodic elections to be held. Participation by secret ballot is significant because under this method voters can make their choice freely and express it fearlessly, as it remains confidential.

Equal protection under the law is axiomatically included in the relevant provisions of the Bill of Rights, as is the goal of improvement of the quality of life, especially in the elevation (for example, in Sections 26 and 27) of socio-economic needs to the level of objects of enforceable fundamental rights.

C. Constitutional Norms and Values

The Lesotho Constitution is value-based and fits within the ‘eternal clause’, since the time when the non-discrimination principle was adopted and practiced by the King in the dispensation of justice. Thus human dignity, equality, and freedom underpin the Constitution as core values, and they are sustained by the ground-level reality of no death penalty being carried out.

D. Constitutional Principles

A constitution is designed to serve as a text of some permanence, but also to evolve with the times. The functionalist approach to constitutional interpretation has done nothing more than to take this notion into account and give it the status of first principle. However, amendments are possible, which constitute an in-built mechanism for change. The aspect of permanence is embodied by the sanctity of some basic principles which can be altered only after following a rigorous procedure. The following are the core principles upon which the Constitution of Lesotho is founded:

- supremacy of the Constitution,
- the rule of law,
- separation of powers,
- participatory government,
- democratic and elected governance at national and local levels, and
- social justice.

E. Supremacy of the Constitution

Constitutional supremacy means that the constitution takes precedence over all other laws in a particular country. Constitutional interpretation in the new constitutional order has been articulated in the text of the Lesotho Constitution. The Constitution categorically and succinctly makes this clear, leaving no room for doubting its supremacy in the hierarchy of law. Section 2 declares that '[t]his Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.'

F. Rule of law

The rights to equality and to equal protection of the law are guaranteed rights. In Lesotho, the Public Service Act, 1995 (Act); the Public Service (Amendment) Act, 2005; and the Code of Good Practice, 2005, which has been replaced by the Code of Good Practice, 2008 (L.N No.194 of 2008), with Part I dealing with the Code of Conduct, constitute the basic framework through which the rule of law is guaranteed in practice. Part II sets out the General Rules of Conduct. Clause (j) stipulates that a public officer must not commit a criminal offence involving dishonesty or which brings the public service into disrepute.

III. Fundamental Rights Protection

A. Introduction

The fundamental rights are recognised, guaranteed, and reinforced by the provisions in the Constitution of Lesotho. Laws limiting these rights generally must pass strict scrutiny to be upheld as constitutional. The enforcement of protective provisions is explicitly provided in Section 22 of the Constitution. Section 22(2) reads

(1) If any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

B. The spectrum of rights

Fundamental rights are sacrosanct and cannot be transgressed by legislative method. In *Molapo v. DPP*, Ramodibedi J., emphasising the importance of human rights jurisprudence, observed that 'in my judgment any violation of human rights regardless of the degree thereof deserves to be stamped out in a just democratic society that prides itself with a Bill of Rights entrenched in the constitution such as Lesotho is ...'.⁵

⁵ 1997 (8) BCLR p. 1154 (Lesotho), p. 1160, para. D.

Sections 4-20 in Chapter II of the Constitution provide for the protection of sixteen fundamental human rights and freedoms, subject to certain exceptions and derogation under Section 21. Section 22 provides for the enforcement of these protective provisions, which can be regarded as equivalent to judicial review. In Chapter II, Section 4 of the Constitution declares the entitlements to sixteen fundamental human rights to every person in Lesotho, which is remarkable since no distinction has been made between citizens and non-citizens. These are

- (a) the right to life;
- (b) the right to personal liberty;
- (c) freedom of movement and residence;
- (d) freedom from inhuman treatment;
- (e) freedom from slavery and forced labour;
- (f) freedom from arbitrary search or entry;
- (g) the right to respect for private and family life;
- (h) the right to a fair trial of criminal charges against a person and to a fair determination of a person's civil rights and obligations;
- (i) freedom of conscience;
- (j) freedom of expression;
- (k) freedom of peaceful assembly;
- (l) freedom of association;
- (m) freedom from arbitrary seizure of property;
- (n) freedom from discrimination;
- (o) the right to equality before law and equal of the law; and
- (p) the right to participate in government.

The right to participate in government is a new addition from the earlier Constitution of 1966. Freedom of assembly and association is now separated into two distinct freedoms: freedom of peaceful assembly (Section 4(1)(k)) and freedom of association (4(1)(l)). The word 'peaceful' has been added to the right to assembly to restrict the right to unarmed and non-violent approaches to political agitation and airing of other grievances.

1. Right to life: Section 5

Section 5(1) of the Lesotho Constitution declares that '[e]very human being has an inherent right to life. No one shall be arbitrarily deprived of his life.' The wording of the Section sounds like the reproduction of a declaration announced to the entire world. By contrast, the South African Constitution simply says that '[e]veryone has the right to life', which is short, sharp, and simple. This one-liner is imbued with clarity, simplicity, and beauty. The second part of Section 5 is negatively framed in order to prohibit the arbitrary deprivation of life by the State. The Section enjoins a duty on the State to protect the lives of citizens from the circumstances of arbitrary episodes falling into one or more of the above categories. The sagacity of human rights is in honoring human life and human dignity.

No derogation from Section 5(1) is possible, even in times of public emergency under Article 4(2) of the International Covenant on Civil and Political Rights (ICCPR). Death resulting from

the lawful act of war is an exception. The other exception provided in Section 5(d) of the Constitution is the execution of a death sentence imposed by a court on conviction for a criminal offence under the laws of Lesotho.

1.1 Meaning of 'life'

The word 'life' has not been defined anywhere in the Lesotho Constitution. Significantly, Section 299 of the Criminal Procedure and Evidence Act, 1981 does not allow the execution of a death penalty of a convicted woman if she is pregnant. Section 299(1) reads

Where a woman convicted of an offence punishable with death alleges that she is pregnant, or where the court before which a woman is convicted thinks fit to do so, the court shall, before sentence is passed, determine whether or not the woman is pregnant on such evidence as may be led by either the woman or the Crown.

Section 299(2) provides '[w]here the court before which a woman is convicted of an offence punishable with death is satisfied that the woman is pregnant, it shall pass on her a sentence of imprisonment instead of a sentence of death.' Remarkably, this is not a case of temporary reprieve or conditional or deferred sentence until termination of the pregnancy by delivery of the child. In other words, there can be no death sentence for a pregnant woman.

1.2 Death penalty not abolished

The death penalty was institutionalized in Lesotho on the strength of General Proclamation 2B of 1884. The Second Optional Protocol to the ICCPR has not been signed by Lesotho, and the death penalty was retained in the 1993 Constitution. It was reinstated under military law in 1996. Murder, rape, and treason are capital crimes in Lesotho. The penalty was also retained in Section 32(a)(vii) of the Sexual Offences Act No. 3 of 2003.

However, there is *de facto* abolition in Lesotho, since the last death sentences were imposed by the courts on four accused, three of whom were tried separately and sentenced to death for the same murder.⁶ However, the last execution took place on 25 November 1995. Lesotho is a nation of only two million people, and violent crimes and ethnic conflicts are rarely seen. Thus the death penalty could have been completely abolished in the Constitution.

Furthermore, the death penalty has not been imposed in many previous cases of treason. In 1974, Mr. Justice Mapetla CJ found the accused in *Mofelehetsi and Others*⁷ guilty of high treason for trying to overthrow the government but did not pass a death sentence on the grounds of a mitigating factor. Commentators, such as Thompson,⁸ have noted that King Moshoeshoe had a reputation for justice and clemency and an intense dislike of capital punishment. The story goes that once he spared the life of the cannibal chief who caught and devoured the King's own grandfather and transformed him into a loyal and law-abiding citizen.

⁶ See *R v Nkosi* (CRI/T\1Q\91).

⁷ C of A (CRI) No. 1 of 1975.

⁸ L. Thompson, *Survival in Two Worlds: Moshoeshoe of Lesotho 1786-1870* (Oxford Clarendon Press, 1975) 212.

2. Right to personal liberty: Section 6

The Constitution states, in Section 6(1), that every person, regardless of race, sex, or creed, is entitled to personal liberty and shall not be arrested or detained save as may be authorised by the law. These are some of the exceptions:

- (a) in execution of the sentence or order of a court in respect of a criminal offence of which he has been convicted;
- (b) in execution of the order of the court punishing him for contempt of that court or tribunal; and
- (c) in execution of the order of a court made to secure the fulfillment of any obligation imposed on him by law.

According to Section 6(6), ‘any person who is unlawfully arrested or detained without reasonable cause shall be entitled to compensation from that other person or from any other person or authority on whose behalf that person was acting’.

There is no conscription in Lesotho.

3. Freedom of movement and residence: Section 7

In the context of Lesotho, this right means the freedom to spread one’s wings within the length or breadth of the country without any hindrance on any ground such as ethnicity, religion, creed, colour, etc. The relevant provision in Section 7(1) iterates that ‘[e]very person shall be entitled to freedom of movement, that is to say, the right to move freely throughout Lesotho, the right to enter Lesotho, the right to leave Lesotho and immunity from expulsion from Lesotho.’

4. Freedom from inhuman treatment: Section 8

This Section prohibits torture or inhuman or degrading punishment or other treatment. Section 8(2), however, is an attempt to salvage pre-Constitution laws even if they are found to be inconsistent with or in contravention of the constitutional provision laid down in Section 8(1). This appears to be bestowing an act of charity, on the one hand, and taking it away in broad terms, on the other.

Lesotho has a judicial tradition of looking at acts of torture, inhuman treatment, and degrading punishment with abhorrence. In *Khabang Sello’s Case*,⁹ the court held that assault of a detainee or suspect is not authorised by law. In *Nkau Matete v. Minister in Charge of Police*,¹⁰ the court declared detention to be illegal when interrogation did not take place in accordance with the law. It is very clear that even in the case of lawful detention, the court can request production of the detained person in order to see that he or she has not been subjected to any kind of torture or inhuman treatment, especially when the prisoner is held *incommunicado*.¹¹

⁹ 1980 LLR 158.

¹⁰ CIV/T/248/82 and C of A (CIV) No. 24 of 1987.

¹¹ Masefatsane Moloi, C of A (CIV) No. 1 of 1982.

5. Freedom from slavery and forced labour: Section 9

Freedom from slavery is a stated principle. Forced labour is explicitly prohibited by this section, and is followed in practice.

6. Freedom from arbitrary search and entry: Section 10

This right forms the genus of the right to privacy, which is not separately and specifically identified in the Constitution of Lesotho. The right to privacy is recognized in piecemeal forms, part of which can be found in other provisions, such as Section 14(1), which entitles every person to freedom from interference with his or her correspondence. Also in common law, the right to privacy is considered to be part of the independent personality right arising out of '*dignitas*'. This right, in fact, protects the person rather than his or her property, home, or office. Legislation authorising search and seizure is subject to constitutional scrutiny. Basically, the Police and Criminal Evidence Act, 1984; the Regulation of Investigative Powers Act, 2000; the Proceeds of Crime Act, 2002; and the Criminal Justice Act, 2003 empower police to make search and seizure.

7. Right to respect for private and family life: Section 11

As stated above, there is no separate and exclusive right to privacy recognised by the Constitution. However, the right appears in fragmentation in several respects, most specifically in relation to communications and correspondence, as mentioned, in Section 14(1). Section 11 upholds the right to private and family life and one's home. Together, these Sections cover three of the four areas of privacy, except for private life (as discussed above), subject, of course, to the restrictions or limitations which may be imposed in the interests of defence, public safety, public order, public morality, or public health, or for the purpose of protecting the rights and freedoms of other persons.

The Marriage Act of 1974 states that 'every person has a right to enter into the marriage contract voluntarily – no person may be compelled to marry against his or her wish'. This is also covered by Section 34(1) of Part II of the Laws of Lerotoli. This states that 'a marriage shall be deemed to be complete when there is agreement between the parties to the marriage'. Section 34(3) of Part II of the Laws of Lerotoli prohibits marriage with a fictitious person (*lebota*) and to a person already deceased (*lebitla*), which is contrary to custom.

8. Right to fair trial: Section 12

Section 12(2) states that every person charged with a criminal offence shall:

- (a) be *presumed* to be innocent until he is proved or has pleaded guilty;
- (b) be *informed* as soon as reasonably practicable, in a language that he understands and in adequate detail, of the nature of the offence charged;

- (c) be *given* adequate time and facilities for the preparation of his defence;
- (d) be *permitted* to defend himself before the court in person or by a legal representative of his own choice;
- (e) be *afforded* facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
- (f) be *permitted* to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge. (emphasis added)

Some of the fairness features are found in the customary law practices: for example, the rights to tender evidence and to examine witnesses were part of the proceedings in customary courts, known as the *Lekhotla*. The merits of impartiality are also greatly respected, as adopted in the lofty adage ‘hate the sin, not the sinner’ (*Ha ke nyatse Moroa ke nyatsa Moqheme*).

One of the most important decisions on fair trial in Lesotho is the case of *Swissborough Diamond (Pty) Ltd v. State & Ors*¹² (*Swissborough* case), where the judge categorically emphasised fairness of trial, once it has begun, to keep the process free from legislative measures or administrative action.

The Law Reform Commission, established in 1997, tasked itself with drafting a bill for the trial of criminal cases, with a view to reducing the congestion of pending court cases by introducing innovative reforms to criminal procedures. The Speedy Court Trial Act, 2002 has had only marginal impact, which points to the necessity of establishing a judicial training institute, which has already been mooted. The government has also shown its commitment to human rights, particularly with regard to prisoners, and it has passed the Prisons Bill in relation to the protection of prisoners. This Bill serves to accommodate the principles enshrined in the Minimum Standard Rules for the Treatment of Prisoners¹³ and other regional and international instruments.

9. Freedom of conscience: Section 13

Section 13 of the Lesotho Constitution upholds the principle of freedom of conscience. Section 13(1) declares that

[e]very person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of, freedom of conscience, including freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in

¹² 1991-96(1) LLR 27(CA).

¹³ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

10. Freedom of expression: Section 14

Section 14(1) states that

Every person shall be entitled to, and (except with his own consent) shall not be hindered in enjoyment of, freedom of expression, including freedom to hold opinions without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

Lord Acton stated that '[e]verything secret degenerates, even the administration of justice, nothing is safe that does not show how it can bear discussion and publicity'.¹⁴ Freedom of expression can find ventilation in many modes or media. With the advancement of technology, it will embrace more and more means of expression. Even without technology, a primitive man or woman has ways and means of expressing ideas and emotions which can be active, passive (as silence is also a form of speech), reactive, creative, recreative, procreative, artistic, and politic. It is impossible to make an exhaustive catalogue, but illustrative examples suggest the possibilities.¹⁵

10.1 Freedom of speech

Freedom of speech is understood today to be a multi-faceted right that includes the right to express and disseminate information and ideas in three distinct forms: the right to seek information and ideas; the right to receive information and ideas; and the right to impart information and ideas.

10.2 Freedom of the press

There is no separate freedom of the press in Lesotho. It has to be sourced from the freedom of speech. The government generally respects freedom of speech and of the press, both of which are provided for in the Constitution. However, a 1938 proclamation prohibited criticism of the government and provided for penalties for seditious libel. In recent years, extremely high fines have been handed down by the courts in libel cases against publications and radio stations known for criticising the government, forcing some to the verge of closure. It is clear that criticism and caricature of public figures are tolerated in a democracy, and the press in Lesotho enjoys a wide range of freedom, but it has occasionally overstepped this by attacking a private individual. The

¹⁴ Letter dated 23 January 1861, published in Abbot Gasquet, *Lord Acton and his Circle* (1906), Letter 74.

¹⁵ Expression can be made in any language including body language, signs, symbols, signals, sirens, hints, gestures, postures, caricatures, cartoons, drawing, painting, writing, acting, dancing, singing, crying, laughing, smiling, whispering, whistling, calling, shouting, winking, nodding, coding, praying, chanting (hymns) shaking, bowing, hugging, lapping, dressing, addressing, messaging, wearing, bearing, tearing, fisting, decorating, lighting, coloring, snapping, tapping, thumbing, clapping, exercising, sporting, advertising, exhibiting, demonstrating, parodying, mimicry, puppetry, mapping, wrapping, crafting, weaving and, among others, beating a father of a new-born baby boy with a stick is culturally correct in Lesotho.

courts have found no difficulty in holding the press liable for defamatory statements injurious to reputation. Thus, in *Makhotso Ttali v. Setsomi sa Litaba & Others*,¹⁶ Majara J. observed that

[w]ith regard to the freedom of press which finds its roots within the fundamental freedom of expression, there are plethora of authorities wherein there is a general consensus that it is in the public interest that the media should enjoy the freedom to publish information that serves to inform the public. The press is allowed to enjoy wider latitude especially where the subject matter involves political and/ or public figures.

11. Freedom of peaceful assembly: Section 15

Freedom of assembly is the freedom to associate with, or organise, any groups, gatherings, clubs, or organisations that one wishes to assemble in furtherance of the objectives of their association. It is interesting to note that Chapter 15 of the 1963 Report of the Basutoland Constitutional Commission, under the rubric of human rights and freedoms, recommended a right to freedom of peaceful assembly and association in Section 143(10). This was ignored during the drafting of the 1966 Constitution to the extent that it had to be 'peaceful'. By dropping the word peaceful, the Constitution indirectly asserted a legal right to an armed assembly. Fortunately, this was avoided in the new Constitution by a new wisdom that confined the freedom to peaceful assembly. It is probably still possible to be peaceful and armed, especially when possession of arms is lawful. However, picketing towards the public in an intimidating manner is not lawful and is not protected in law. In any case, an assembly that is a threat to person, property, security, or order is not supported by any law.

12. Freedom of association: Section 16

The right to freedom of association is guaranteed in many international human rights treaties.

The Colonial Master and Servant Act, 1856 of the Cape Colony did not recognise the right of workers to form a union or to join any trade union. In 1942, the High Commissioner promulgated the Trade Unions and Trade Disputes Proclamation No. 17, which permitted the formation and registration of trade unions. This Proclamation was repealed and replaced by the Trade Unions and Trade Disputes Law No. 11 of 1964.

In the post-independence period, Lesotho ratified three important International Labour Organization (ILO) Conventions on freedom of association: the Right of Association (Agriculture) Convention No. 11 of 1921; the Freedom of Association and the Protection of the Right to Organise Convention No. 87 of 1948; and the Right to Organise and Collective Bargaining Convention No. 98 of 1949. The Lesotho Labour Code (Order No. 24 of 1992), which came into force on 1 April 1993, extended the right of association to workers and employers in all sectors of the economy, including agriculture.

Section 16(1) of the Constitution, together with the provisions of the Public Service Act, 1995, set out the right of association. Section 16(2) provides for some restriction on specified grounds. Chapter III of the Constitution, under Section 31, sets out the steps required to be taken to

¹⁶ CIV/T/42/01, p. 16.

encourage the formation of independent trade unions to protect workers' rights and interests and to promote sound labour relations and fair employment practices. Section 31 of the Public Service Act provides for the formation of staff associations and prohibits joining any trade union registered under the Labour Code. The Mounted Police Service Act also specifically prohibits members of the police force from belonging to trade unions, but allows them to establish a staff association charged with promoting professional efficiency and the interests of its members, and they have done so.

13. Freedom from arbitrary seizure of property: Section 17

In the Lesotho Constitution, there is no fundamental right to property. The land belongs to the nation. Thus this right is negatively framed so as only to protect possessory rights and interests related thereto. Section 17(1)(c) of the Constitution provides for prompt compensation in case of expropriation. This is a remarkable provision. But the reality at the ground level tells a different story. One report says 'that the whole process of land acquisition and compensation is very unfair and dispossessed land owners keep on coming back and like Oliver Twist, ask for more.'¹⁷ Section 17(4) provides for twelve grounds for expropriation of private property. In case of compulsory acquisition of private property, the affected party has a right of direct access to the High Court for the purpose of (a) determination of his right or interest; (b) the legality of the taking of possession or acquisition of the property; (c) the interest or right and the amount of any compensation to which he is entitled; and (d) obtaining prompt payment of that compensation. In *AG & Another v. L. Moletsane & 4 Ors.*¹⁸ the Court of Appeal ordered compensation for taking over private property in terms of the constitutional obligations.

In the *Swissborough* case,¹⁹ the issue of the right to property and its sanctity was dealt with squarely, although it was decided based on the then existing Human Rights Act, 1984, which is now subsumed in the new Constitution. A company was granted five mining leases with a right to prospect and mine minerals on certain specified fields. These leases were subsequently revoked on the strength of the Revocation of Specified Mining Leases Order, 1992, which also provided, in effect, that the validity of such cancellation would not be questioned by any court in Lesotho and no compensation was to be paid. Leases are instances of incorporeal property, and depriving the company of its property conflicted with the freedom from arbitrary seizure of property now enshrined in Section 17 of the Constitution, which has made provision, *inter alia*, for compensation as a condition for acquisition of private property. Section 22 of the Constitution secured this right by way of enforcement by court action through application to the High Court, which is empowered to make appropriate orders, issue process, or give directions.

14. Freedom from discrimination: Section 18

Borena ha-bo-khethe, which means the King or Kingship does not discriminate, is the hallowed tradition of the Basotho people and is an age-old wisdom. It has found reflection in Section 18 of

¹⁷ P. McAulsan, Report of the Review of Law and Practice on the Compulsory Acquisition of Land and Compensation payable thereof in Lesotho (1996) p. 11.

¹⁸ C o A (CIV) No. 25 of 2005.

¹⁹ 1991-96(1) LLR 27 (CA).

the Constitution. Section 18(3) pinpoints the grounds of discrimination on which a law can be challenged as being discriminatory on its face as well as in terms of its effect. The term 'discriminatory' has been accorded a wide meaning, as follows:

according different treatment to different persons attributing wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to person of another such description.

Section 18(4) has created a somewhat curious discussion as to whether discriminatory practices can be rooted out without constitutional amendment that is supposedly doubly entrenched. But it is clear that Section 18(4) is an exceptional provision that does not require a special majority followed by a referendum for its amendment. Discriminatory laws are generally abhorred by the courts as they offend the principle of equality and justice.

15. Right to equality before the law and equal protection of the law: Section 19

Remarkably, the Lesotho Constitution emphasises adherence to the principle of 'equal protection of the law'. But it does not diminish the strength of the fibre of the constitutional canvas, because in *S. Fatane & Ors v. The Crown*²⁰ the court held that the disproportionate penalty in the Stock Theft Act was unconstitutional. The minimum sentence for a first sentence in a stock theft case was 25 years' imprisonment under the Stock Theft Act, 2000 (as amended by Stock Theft (Amendment) Act, 2003), thus removing all discretion of the courts in sentencing. The court found that the minimum sentence prescribed was higher than the average sentences of 15 to 20 years' imprisonment for murder.

16. Right to participate in government: Section 20

The right conferred by Section 20 of the Constitution is wide enough to cover and ensure popular participation in the affairs of the State. This right is broad-based and allows every citizen three separate rights: (a) to participate in the conduct of public affairs directly or through chosen representatives; (b) to vote or stand for election at periodic elections under the Constitution under a system of universal and equal suffrage and secret ballot; and (c) to have access, on general terms of equality, to the public service.

16.1 Participation in public affairs

'Public affairs' refers to activities such as lobbying governments and other spheres of civil society for the purpose of advancing public policy outcomes. The Standing Orders of the National Assembly permit the attendance of members of the public and the press as spectators in

²⁰ No. 3 of 2004.

the sittings of the House under the rules made by the Speaker, and the Clerk of the House is entrusted with the responsibility to ensure that such rules are complied with.

16.2 Right to vote and the right to contest elections

The right to vote and the right to contest elections are well recognised rights in Lesotho. The representation of diverse groups of professional and occupational backgrounds in its Parliament is an indication that it is not beyond the reach of the ordinary citizens of the country to participate in government.

There is no bar on candidates contesting election without joining any political party. One can contest as an independent candidate. This stands in contradistinction to what was experienced in Tanzania. In *Rev. Christopher & Ors v. AG*,²¹ the right of a candidate to contest as an independent was recognized, and while the case was still pending in the Court of Appeal, the Tanzanian government hurriedly introduced the Eleventh Constitutional Amendment Act, 1994 (Act 34 of 1994) seeking to modify the right of the citizen to participate in national public affairs, contained in Article 21 of the Constitution, by inserting a phrase to the effect that participation must be through political parties.

16.3 Access to public service

Access to public service in Lesotho has been implemented by a legislative framework. The Public Service (Amendment) Bill, 2007 is set to make further improvements in providing services.

17. State of emergency: Section 23

According to Section 23 of the Constitution, a state of emergency can be declared in a time of war or other public emergency which threatens the life of the nation. A state of emergency can be declared by the Prime Minister, acting in accordance with the advice of the Council of State, by proclamation published in the gazette. The declaration lapses at the expiration of fourteen days unless approved by both Houses of Parliament. Under Section 23(5), a resolution of Parliament may extend the duration of the state of emergency up to a maximum period of six months at a time. According to Section 21(1), derogation of fundamental human rights and freedoms, especially those contained in Sections 6, 18, and 19, are constitutionally possible on the ground of subsistence of a state of emergency.

18. Access to court: Section 22

The term ‘access to court’ is quite different from ‘access to justice’, which is much broader in spectrum. Access to court is guaranteed by Section 22 of the Constitution and its extolled position has to be seen in the light of the *Swissborough* case. In the United States, the right to judicial review has been judicially invented. However, access to justice in Lesotho is clogged by bottlenecks and practical impediments imposed by delay and distance to the courts. According to local practitioners, High Court judges do not routinely observe a monthly schedule setting out

²¹ Civil Case No. 5 of 1993 (H.C.), Dodoma (unreported).

the dates when cases are to be heard, judgments reserved, and when they are to be delivered. This results in systemic delays. The Law Society of Lesotho has been fighting against the endemic delays in the delivering of judgments by the High Court.

The Court of Appeal is the highest court in Lesotho. The Chief Justice of the High Court is *ex officio* entitled to sit in the Court of Appeal, which sits occasionally. This has created tension between the two, forcing resignations at the instance of the executive.

C. Application of constitutional provisions

Constitutional provisions are often silent regarding their application and implementation, and are simply linked as a whole to the constitution's coming into force from a certain date. Some constitutions are explicit, such as Kenya's, which has created a Constitution Implementation Commission (CIC) to oversee this mandate. The Lesotho courts have applied constitutional provisions in many of their landmark judgments in recent times, especially in relation to the right to equality, where the constitutional provision *vis-a-vis* has come into conflict with customary law.²²

D. Limitation and interpretation

The Constitution of Lesotho contains a provision setting out legal limitations on the exercise and protection of the rights contained in Chapter II. Section 4(1) specifically provides that the various rights provided for in Chapter II are 'subject to such limitations ... designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest'. Section 4(2) specifies that the provisions of Chapter II apply to 'persons acting in a private capacity' as well to 'the Government of Lesotho'. The effect of this provision is to require ordinary people as well as government officials to comply with the 'Protection of fundamental human rights and freedoms' provisions set out in Chapter II.

Reasonable restrictions

It is clear that some restrictions on freedom of speech may be compatible with democracy, and might even be necessary to protect the democratic ethos and values. The nose for news is a natural instinct for a media person. Media is also the means for airing views and the channel for the flow of information. But these tributaries are required to be streamlined according to well-established principles of law. Thus reasonable restrictions on freedom of speech can be imposed by the law of the land on many justifiable grounds.

IV. Separation of Powers

A. Horizontal distribution of authority: the executive and the legislature

1. Executive power

²² See eg *Mokhothu v Manyapelo and ors* (CIV/APN/397/2012); *Ndlovu v Ramochela* (No. 4144/2000, unreported).

The Prime Minister of Lesotho has a wide range of powers of appointment, which include:

1. Power to appoint, reshuffle or dismiss Ministers;
2. Power over ministerial conduct;
3. Power to make other appointments;
4. Power to set government business;
5. Power over flow of information;
6. Power in international relations; and
7. Power to recommend the dissolution of Parliament

The Prime Minister of Lesotho (*Tona Kholo*) appears to be more powerful than elsewhere, as the Constitution clearly envisages a predominant role for him in leading the nation to the path of prosperity. The executive style is forged in a new mould so as to result in a new synthesis leading to a prime ministerial government in Lesotho. A Prime Minister is traditionally regarded as *primus inter pares*: first among equals. Other 'titles' that have been used in the past to describe the Prime Minister are the 'keystone of the Cabinet arch' and 'a sun around which planets revolve'.

2. Legislative power

The power to make laws has been conferred on Parliament by Section 70 of the Constitution. Parliament is empowered to delegate powers to a person or authority for making rules, regulations, orders, by-laws, or other instruments having legislative effect. It is clear that Parliament cannot abdicate its power to make supreme legislation. The mode of exercising legislative power is provided in Section 78. Certain limitations have been imposed on the powers of the Senate by Section 80. Each House is empowered to regulate its own procedure and also to make rules for the orderly conduct of its proceedings under Section 81.

Section 77(6) empowers the Lesotho Parliament to pass laws with retrospective effect. This means Parliament can pass laws retrospectively even in areas that concern criminal law: either by criminalising an act which has already been committed, or increasing the terms of punishment, or diluting the law of evidence to secure conviction, to the detriment of the concept of personal liberty. This provision conflicts with and directly contradicts Sections 4(1)(b) and 4(1)(h) of the Constitution, which guarantee the right to personal liberty and the right to a fair trial of criminal charges, respectively. How can there be any fair trial when criminal charges are framed on the strength of a retrospective law?

This power was also present in Section 63(6) of the 1966 Constitution, and the new Constitution did not modify it. This is a type of power enjoyed according to the rationale of parliamentary sovereignty that prevails in England, which is guided by the principle of supremacy of parliament. This is not tenable under a written Constitution that declares itself as the supreme law of the land.

B. Vertical distribution of authority: the provinces and local government

1. The provinces

Lesotho has a unitary governance system with ten administrative districts and no federating units. This is understandable considering the size of the territory and the population of the country. There are well-defined administrative structures at the district levels, although the degree of autonomy is limited.

2. Local government

The traces of local government in Lesotho in the modern sense can be found way back in 1943, when the Basutoland Council (BC) introduced district councils composed of two elected representatives (later increased to four). In 1959, Local Government Proclamation No. 52 was promulgated to establish district councils with an organizational set-up empowered to make by-laws and to function within the legal framework. The principal and ward chiefs were made *ex-officio* members of the district councils. They had wide-ranging powers and functions, from initiating social and economic activities to collecting taxes and licensing and providing local services. The district councils were disbanded in 1968 and their powers and functions were transferred to different government departments and the offices of the chiefs. Thereafter the Urban Council Act, 1983 was enacted, which was partially implemented by the Maseru City Council. Development committees were set up under the Development Committees Order 9 of 1986, which was amended in 1991 to provide for three layered structures at village, ward, and district levels.

But the real difference in terms of democratic decentralization took place only in 1997, when the Local Government Act was introduced to institutionalise elective bodies at the community, rural, and urban levels under Section 4 of the Act. The Local Government Elections Act, 1998, as amended by the Local Government Elections (Amendment) Act, 2004, provided for an elaborate structure, procedure, rules, and regulations for the election process pertaining to local government election. This new creativity was envisaged to bring into operation 128 community councils (CCs), nine district councils (DCs), and the Maseru Municipal Council (MCC). The district councils are elected by the community councils for the administrative districts (Butha-Buthe, Leribe, Mafeteng, Maseru, Mohale's Hoek, Mokhotlong, Qacha's Nek, Quthing, and Teyateyaneng). Lesotho held its first ever local government elections on 30 April 2005. The elections were a major step towards institutionalising grassroots democracy through the direct and active involvement of the Basotho in their own governance. A total of 139 local authorities, elected under the Westminster-type single member constituency model, were installed to lead their communities in tackling their development and related challenges.

Under the Chieftainship Act of 1968 it is the responsibility and duty of every chief to contribute towards the stability, safety, peace, and tranquillity of the people under his or her charge. Chiefs have specific functions as prescribed under the Constitution of Lesotho; the Chieftainship Act, 1968; the Animal/Livestock Theft Act, 2003; and the Administration of Offenders and Provision of Evidence Act, 1981.

2.1 Functions

The functions of local councils are provided for under Section 5 of the Local Government Act, 1997 and are clearly spelt out in the first and second schedule of the Act. These functions form

the basis by which Councils can plan, budget, and appropriate resources. There are 27 functions identified in Schedule I to the Act and they are being progressively decentralised.

Their functions include:

- Helping people identify lost items, including livestock;
- Upholding the rule of law;
- Preventing crime;
- Charging offenders;
- Protecting community development projects;
- Working towards peace and tranquility;
- Serving as the first contact person for the community in cases of crimes;
- Keeping records of births, deaths, and marriages of his/her people; and
- Acting as the custodians of Basotho culture and traditions.

2.2 Village Development Councils (VDCs)

According to Section 107 of the Constitution, all land in Lesotho is vested in the Basotho nation. Sections 108 and 109 define the power and principle of regulating and guiding the allocation of land by law. Land in Lesotho traditionally belongs to the people as a whole. The King as head of state is vested with the responsibility of allocating land on behalf of the nation.

The Land Act of 1979 grants village development councils (VDCs), established by the Village Development Councils Order, 1991, the authority to administer the allocation of arable lands to individuals by issuing a permit known as 'Form C'.

The chief of the area is an *ex-officio* member of the VDC. In addition to the chief, the VDC has seven other members who are elected by the adult population residing in the respective areas. Half of the members, that is, four of them, constitute the quorum for a legally valid meeting. A chairman is elected by the members in terms of Section 2A of the Development Councils (Amendment) Act 7 of 1994. According to Section 12 of the Act, land in rural areas for agricultural purposes is allocated by a majority decision of the VDC.

C. Role of the judiciary

The separation of power in Lesotho under the Constitution is total. The courts are empowered to adjudicate without any interference from outside or within. However, there have been attempts to influence the judiciary: first by packing the courtroom, and then by subtle inquiries. There is also a mindset working against judgments that are not favorable to the government and seeking to undo the effect of such verdicts, which is regarded as an attack on the independence of the judiciary. Otherwise, by and large, the judiciary has been functioning with a laudable sense of independence. The judiciary is staffed by judges who are supposed to be 'lonely clouds'. So, at the end of the day, it is the judge himself or herself whose personality and philosophy determines the level of independence that the judiciary can enjoy, collectively and individually, in strengthening the democratic fervor of justice.

V. Constitutional Adjudication

A. Judges and the judiciary

Independence of the judiciary is, irrationally, disliked by the ruling class. The idea of independence of the judiciary is an essential attribute of checking the correctness of executive and administrative decisions and it is therefore not an abstract concept but a living faith which must derive its inspiration from the constitutional charter, and its nourishment and sustenance from constitutional values.

The subordinate courts, staffed by magistrates in Lesotho, came about in 1964 by amendment to the Subordinate Court Proclamation of 1938. Earlier, under Section 2-3 of the Proclamation, every district officer or any administrative officer in charge of the district or his assistant could hold a subordinate court, which had review powers *suo motu* or, at the instance of an aggrieved party, over all judgments of the Basotho customary courts under Section of 26 of the Proclamation.

The High Court Proclamation 57 of 1938 established the High Court to act as the Supreme Court of Basutoland, replacing the Resident Commissioner's Court. The independent status of the High Court was firmly recognised in the 1966 Constitution and was supported by the High Court Act of 1967.

The 1993 Constitution is a real breakthrough for the independence of the judiciary. A parallel can be found in the judicially determined pronouncement in *The Law Society of Lesotho v. The Prime Minister*,²³ which nullified the appointment of an Acting Judge that had been an attempt to undermine the judiciary's independence by 'packing the courtroom'.

1. Judicial Service Commission

In Chapter XI of the Constitution, Part 6 provides for the creation of a Judicial Service Commission under Section 132, and the powers of appointing judicial officers have been conferred on the Commission under Section 133 of the Constitution. This provision was also an important feature in the 1966 Constitution. The Commission is headed by the Chief Justice, as Chairman. There are three other members: the Attorney General, the Chairman of the Public Service Commission or his nominee, and a member appointed from amongst persons who hold or have held high judicial office who are appointed by the King in accordance with advice of the Chief Justice. The last-mentioned member's appointment is free of political taint, which augurs well.

The Judicial Service Commission Rules, 1994 (No. 102 of 1994)²⁴ provide for regulations governing appointments and disciplinary procedures for the Judicial Service Commission. Like many other African countries, *puisne* judges are appointed on the recommendation of the Judicial Service Commission. In *JOALE & Law Society v. Prime Minister*²⁵ an attempt to bring the

²³ Court of Appeal (CIV) No. 5/1985 (unreported).

²⁴ Published in the Government Gazette Extraordinary, 1994-10-21, Vol. XXXIX, No. 89, pp. 947-956.

²⁵ No. 3/2005 (unreported).

subordinate courts under administrative control failed after successful litigation through the courts that vigorously defended the independence of the judiciary.

2. Appointment and removal

The Chief Justice and other *puisne* judges can be removed on the ground of inability or misbehaviour in terms of Section 121(3)-(7) of the Constitution.

B. Constitutionalism

Constitutionalism means the limitation of government by law as prescribed by a written constitution. A written constitution consists of a compilation of rules by which the citizens of a nation agree to live together and which outline the basic format and structure of government. Democratic constitutionalism culminates in a document founded on the ideals of individual freedom, the public interest, and limited governmental power, creating a framework for governance in line with the democratic ethos and values. The Constitution of Lesotho easily meets the criteria for constitutionalism and was, to a large extent, drafted consistently with it. Thus an independent judicial review process has been built into the body of the Constitution by design.

C. Interpretation and independence

The Constitution provides for an interpretation clause under Sections 24, 43, and 154. The judiciary is free to apply the rules of interpretation within the bounds of constitutional limitation. Several provisions ensure that cases are decided without any interference.

D. Political disputes and democracy

Political disputes necessarily require a political solution that results in strengthening the democratic culture and practices, which are healthy for the progress of the nation. The courts routinely reject political disputes and refuse to entertain them in any jurisdiction. In recent times, political disputes arising out of the differences between coalition partners were mediated by the Southern African Development Community ('SADC') and South African leaders, and were resolved by agreeing to a snap poll. The election results settled the issue conclusively, although destabilising factors are always at work when coalition partners are composed of strange bedfellows who find it difficult reconcile their views. Any democracy is always on trial, and it is by experiment that a nation achieves a mature level of democracy, which is unfolding in Lesotho.

E. Constitutionality of legislation

Testing the constitutionality of legislation cannot be undertaken lightly, although the court does have the power to declare a piece of legislation as constitutional and valid. The doctrine of

judicial restraint is being observed in judicial conclusion rather than activism, which depends on the times and the temperament of the nation's progress in terms of its economic goals. Lesotho is close to achieving the goal of the right to water for her people, which can be considered as a significant milestone in a country where people are sparsely populated in far-flung villages.

VI. Federalism/Decentralisation

Lesotho is a tiny nation with a unitary form of governance, and as such there are no federating units. Powers are shared at two-tier levels. There are ten districts with district administration running administrative affairs. The institution of the Office of the Ombudsman has been constitutionally entrenched to address issues relating to maladministration within the system.

Section 134 of the Constitution states that

(1) There shall be an Ombudsman who shall be appointed, subject to the provisions of subsection (2), by the King acting in accordance with the advice of the Prime Minister for a term not exceeding four years.

(2) A person holding the office of Ombudsman may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be removed except in accordance with the provisions of subsection (3).

Section 106 of the Constitution has created local authorities through parliamentary measures. The section states:

(1) Parliament shall establish such local authorities as it deems necessary to enable urban and rural communities to determine their affairs and to develop themselves. Such authorities shall perform such functions as may be conferred by an Act of Parliament.

(2) Any enactment which provides for the establishment of a local authority and in force immediately before the coming into operation of this Constitution shall continue in force subject to repeal or modification by Parliament.

Section 107 declares that the land of Lesotho is vested in the Basotho Nation:

Without prejudice to any allocation of land that was made before the commencement of this Constitution and was subsisting immediately before such commencement or to any interests or rights in or over land that were otherwise vested in any person immediately before such commencement and without prejudice to any allocation of land or any grant of any interest or right in or over land that may, in accordance with the provisions of this Constitution and, subject thereto, of any other law, be made after the commencement of this Constitution, all land in Lesotho is vested in the Basotho Nation.

VII. International Law and Regional Integration

Lesotho is signatory to a number of international instruments. Lesotho belongs to the dualist stock rather than to the monist tradition. There is no direct reference to international law in the Constitution. Accordingly, international law and domestic law are viewed as two distinctly separate legal systems. Hence, domestication of international law by an Act of Parliament is necessary before international law can be applied. This of course excludes customary international law, which is binding on all states. Lesotho has domesticated many international obligations by passing legislation, for example concerning rights of children and women.

Lesotho is a full member of the United Nations (UN) and many other international and regional bodies and organizations. Lesotho is member, *inter alia*, of the African Development Bank (AfDB), the African Union (AU), the International Atomic Energy Agency (IAEA), the International Bank for Reconstruction and Development (IBRD), the International Civil Aviation Organization (ICAO), the International Red Cross and Red Crescent Movement (ICRM), the International Development Association (IDA), the International Fund for Agricultural Development (IFAD), the International Finance Corporation (IFC), the International Federation of Red Cross and Red Crescent Societies (IFRCS), the International Labour Organization (ILO), the International Monetary Fund (IMF), Interpol, the International Olympic Committee (IOC), the International Organization for Migration (IOM), the Inter-Parliamentary Union (IPU), the International Telecommunication Union (ITU), the UN, the UN-African Union Mission in Darfur (UNAMID), the UN Conference on Trade and Development (UNCTAD), the UN Educational, Scientific and Cultural Organization (UNESCO), the UN High Commissioner for Refugees (UNHCR), the UN Industrial Development Organization (UNIDO), the World Trade Organization (WTO), the Universal Postal Union (UPU), the World Health Organization (WHO), the World Intellectual Property Organization (WIPO), the World Meteorological Organization (WMO), and the World Trade Organization (WTO). Lesotho has not accepted compulsory International Court of Justice jurisdiction.

Lesotho is also a signatory to the Cotonou Agreement. The country is also part of the many 'strings of the spaghetti bowl', such as the South African Customs Union (SACU) and the South African Development Community (SADC). Established in 1910, the SACU is the oldest existing customs union in the world. SACU revenue constitutes a substantial share of the state revenue of Lesotho.

VIII. Final Remarks

Lesotho has a duality of customary and general laws. Customary law is made up of the customs of the Basotho, written and codified in the Laws of Lerotoli, while general law consists of Roman-Dutch law imported from the Cape and the Lesotho statutes. The codification of customary law came about after a council was appointed in 1903 to advise the British Resident Commissioner on what was best for the Basotho in terms of the laws that would govern them. Until this time, the Basotho customs and laws had been passed down from generation to generation through oral tradition. The Council was then given the task of codifying them and came up with the Laws of Lerotoli, which are applied by customary courts today (the *Lekhotla*, local court).

The legal system in Lesotho is based on English common law and Roman-Dutch law. Judicial review of legislative acts in the High Court and the Court of Appeal is possible under the 1993 Constitution. The Constitution is minted in the image of the Westminster model. This instrument is a powerful tool for heralding change in the right direction for national prosperity and the welfare of Lesotho's people. A constitution can be good, but may also be faulty or imperfect. But eventually, the drivers of change carry the people towards their destination. Too many political parties and a fragmented political landscape are contributory factors that are clouding the vision of this nation. Frequent fracas among political actors who are destabilising the country and corroding the values of good governance, as well as military interference, have attracted recurring interventions from South Africa and the SADC. This disturbing trend could be reversed by demilitarisation.

In Lesotho, customary law has culturally embedded discriminatory provisions against women. Constitutional provisions have not addressed this issue quite satisfactorily. Changes have been ushered in at a slow pace, but there is a long way to go.

Lesotho is a box of paradoxes and is classically saddled with a bundle of contradictions. Lesotho is registered as having one of the best performing literacy rates in Africa (79.4 per cent, with 88.3 per cent for females, in 2015).²⁶ It is one of the highest ranking countries in terms of the Women Empowerment Index worldwide.²⁷ Lesotho records very high in terms of closing the gender gap and empowering women in key areas including education, politics and economic participation.²⁸ According to the World Economic Forum (WEF) global gender gap report 2014, Lesotho ranks 38th in the world in terms of closing the gender gap.²⁹ However, violence against women is not uncommon. The practice of *bohali* is sometimes pointed out as a source of conflict operating to the disadvantage of women in post-marital relationships. *Bohali* is a Basotho customary marriage practice in Lesotho where the family of the groom gives cattle to the family of the bride as part of the marriage agreement in return for the bride's reproductive abilities.³⁰ The quantum of the *bohali* is influenced by factors such as the woman's family background and her level of education.³¹ Women's rights activists have raised serious concerns with this practice. They contend that it leads to abuse of women as men believe that once they have paid *bohali*, they have 'bought' the woman and can do with her as they wish.³² It has also been argued that the practice of *bohali* 'makes it difficult for women to divorce their husbands' since under the relevant custom, divorce cannot be effected until the *bohali* is returned by the family of the

²⁶ See Central Intelligence Agency, *The world factbook* available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2103.html#t> (accessed 30 April 2016).

²⁷ D Sanchez 'Lesotho No. 1 for empowerment of women, index says', *Afk insider*, May 3, 2016 available at <http://afkinsider.com/8186/lesotho-no-1-in-region-for-empowerment-of-women-index-says/> (accessed 30 April 2016).

²⁸ *Ibid.*

²⁹ World Economic Forum, *The Gender Gap Report*, http://www3.weforum.org/docs/GGGR14/GGGR_CompleteReport_2014.pdf (accessed 30 April 2016).

³⁰ S. Rosenberg & R.F. Weisfelder, *Historical Dictionary of Lesotho* (Scarecrow press, 2013) 78.

³¹ *Ibid.*

³² N. Itano, *No place left to bury the dead: Denial, despair and hope in the African AIDS pandemic* (Atria books, 2007) 42.

bride.³³ There are however contentions that *bohali* does not mean the sale of the woman as such, the man does not have any proprietary right in the woman in the sense of property under the law.³⁴ The practice has also been argued by traditionalist as being for the purpose of dignifying the woman – implying that she is highly valued.³⁵

Recent statistics show that Lesotho's spending on its military has decreased from about 3.2 percent of its GDP in 2010 to 1.9 percent of its GDP in 2012.³⁶ This is lower than Swaziland who, based on 2012 figures, spends about 3.1 percent of its GDP on its military.³⁷ Lesotho has, in the past few years, made significant efforts in decreasing hunger. Based on a 2015 computation of Global Hunger Index (GHI) by the International Food Policy Research Institute (IFPRI), its GHI has decreased to about 23.5 as against 30.5 ten years ago.³⁸ This figure is still classified as 'serious' based on the GHI severity scale.³⁹ The vice of corruption is eroding the economic vitals of this tiny nation, which is in abject poverty, and it is a major impediment to constitutional progress. Progressive constitutionalism has miles to go in Lesotho.

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³³ *Ibid.*

³⁴ Rosenberg (n 29) 78.

³⁵ Itano (n 31) 42.

³⁶ Basotho Military Budget available at <http://militarybudget.org/lesotho/> (accessed 30 April 2016).

³⁷ Swazi Military Budget available at <http://militarybudget.org/swaziland/> (accessed 30 April 2016).

³⁸ Global Hunger Index 'Lesotho' <http://ghi.ifpri.org/countries/LSO/> (accessed 30 April 2016).

³⁹ Based on the IFPRI methodology, GHI is calculated based in categories of ≤ 9.9 ; 10.0-19.9; 20.0-34.9; 35.- 49.9; and $50.0 \leq$ signifying low; moderate; serious; alarming and extremely alarming respectively. See Global Hunger Index 'Methodology' <http://ghi.ifpri.org/methodology/> (accessed 30 April 2016).

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