



# REPORT ON THE INDEPENDENCE OF THE JUDICIARY IN THE KINGDOM OF LESOTHO

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SADC Lawyers' Association Regional Working Group on the  
Independence of the Judiciary in the Kingdom of Lesotho.

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## LIST OF ABBREVIATIONS AND ACRONYMS

AG	-	Attorney General
DPP	-	Director of Public Prosecutions
JSC	-	Judicial Services Commission
PSC	-	Public Services Commission
SADC	-	Southern African Development Community
SADC LA	-	Southern African Development Community Lawyers' Association
UN	-	United Nations
UNHRC	-	United Nations Human Rights Committee
Working Group	-	SADC LA Working Group on the Independence of the Judiciary

# EXECUTIVE SUMMARY

The report gives a brief background to the Kingdom of Lesotho's independence and how its history led to its current court structures. An analysis of the strengths and weaknesses of the current court structure is provided which includes details on the the selection, appointment, and removal of judges. The funding of the judiciary and the key functionaries and entities which should contribute to the independence of the judiciary is also discussed.



## Main Challenges



Disputes and in-fighting



Ad hoc Court of Appeals & lack of permanent judicial appointments & poor remuneration of judges



The use of foreign judges



Lack of sufficiently qualified judicial candidates



No access to judicial training



Lack of financial independence for the judiciary, resources and structure



Negative public perception of the judicial institution



Parliamentary Supremacy or Royal Prerogative



## Recommendations



A clear and defined hierarchy of authority in the court system.



Attractive salaries and conditions of service to encourage appropriate candidates to serve in the judiciary.



Encourage qualified attorneys from private practice



Appropriately qualified judges who are dedicated to ensuring the independence and impartiality of the judiciary.



Continuing judicial education.



An independent judicial services commission with adequate autonomy to run the affairs of the judiciary outside other branches of government.



A fair, independent and impartial judicial appointment mechanism that is not politically influenced & a judiciary representative of all the people of Lesotho .



Adopt an approach based on Constitutional Supremacy



## 1. Background

SADCLA commissioned a research to assess the state of the independence of the Judiciary in Lesotho, establish clear indicators for measuring the same and present recommendations to entrench independence of the Judiciary through the constitutional reform process of Lesotho. A Technical Working Group on the Independence of the Judiciary and Legal Profession with specific reference to the Lesotho case (the Working Group) was established and tasked to analyse the Constitution of Lesotho to ascertain any possible challenges and threats to the independence of the judiciary in the Kingdom of Lesotho in comparison with regional best practice. The Committee is comprised of several legal professionals and experts in Constitutional law. The Working Group consists of the following members:

- Justice Zak Yacoob, former South African Constitutional Court Judge and Committee Chairperson.
- Ms. Vimbai Nyemba, Deputy President of the SADC Lawyers Association and Deputy-Chairperson of the Committee.
- Mr. Stanley Nyamanhindi, Chief Executive Officer of SADC Lawyers Association.
- Dr Jeanne-Mari Retief, Human Rights Consultant CALIBRICS Consultancy.
- Ms. Soretha Venter, Human Rights Consultant CALIBRICS Consultancy.
- Ms. Chipso Nkhata, Human Rights Lawyer in Zambia.
- Ms. Maxine Nkomo, Human Rights Lawyer at SADC Lawyers Association and Project Lead for the Working Group.
- Mr. Bright Gunde, Human Rights Lawyer at SADC Lawyers Association.
- Mr. Dave Tinashe Hofisi.

The Working Group aims to recommend a practical implementation plan to be adopted by Lesotho for purposes of addressing possible challenges or threats to judicial independence. The objectives of the Report are to record the information and evidence gathered by the SADC Lawyers Association fact-finding mission to Lesotho, to identify issues that impact the independence of the Lesotho Judiciary, and advocacy and other implementation mechanisms to address it.

## 2. Judicial independence in context

Judicial independence is the ability of a judge to decide a matter without pressure, inducement, fear, or favour. It is also the ability of the judiciary, as an institution, and courts not to be subject to improper influence, be it from other spheres of government, private, or partisan interests.<sup>1</sup> An independent judiciary promotes fundamental human rights by ensuring that the rights of individuals within its jurisdiction are respected and protected. It is a cornerstone of the rule of law and ensures that important checks and balances are in place to ensure democratic systems.<sup>2</sup>

Judicial independence is therefore vital to upholding fundamental rights as guaranteed in international human rights instruments and ensuring adherence to the national Constitution and the guarantees it provides to citizens. Judicial independence specifically speaks to the appointment process of judges, judge experience and qualifications, security of tenure, rules and procedures relating to removal of judges, the degree to which the Executive and legislative spheres of government practically interfere with judges, and judicial decision-making.<sup>3</sup>

Liberty is also severely affected in the absence of proper separation of powers between the Judiciary, Legislature and Executive.<sup>4</sup> The judiciary must have the power to independently scrutinise laws which the Legislative authority passes to ensure it does not violate the Constitution or infringe upon fundamental rights. Similarly, when the Executive enforces laws and administrative policies the Judiciary ensures these adhere to constitutional standards and are not prejudicial to fundamental rights.<sup>5</sup>

Judicial capture should also be strongly guarded against to ensure the protection of judicial independence. During judicial capture judicial officers are subjected to the control of an authority, other than the law, during the performance of their judicial functions. In most

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<sup>1</sup> Ramjathan-Keogh K "The importance of promoting judicial independence in the Southern African region" *Goal 16 of the Sustainable Development Goals: Perspectives from Judges and Lawyers in Southern Africa on Promoting Rule of Law and Equal Access to Justice* (December 2016) at 10 available at <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book.pdf> (accessed 12 February 2021).

<sup>2</sup> Ramjathan-Keogh (2016) 10.

<sup>3</sup> Ramjathan-Keogh (2016) 10.

<sup>4</sup> Ojwang J B *Constitutional Development in Kenya* (1990) Acts Press 151.

<sup>5</sup> Nkhata C M "Comparative analysis on judicial independence between Zambia and Lesotho" 2020 SADC LA Resource 2-4.



cases, the judiciary is captured through the executive branch of government. Such capture is done by the ruling elite as a strategic way of protecting their political hegemony. Alternatively, judicial capture is done through the executive by certain (often internal) commercial forces, as a means of protecting and advancing their business interests. If not addressed, judicial capture will lead to the collapse of the rule of law and the democratic system, as courts will no longer be able to enforce the law. It is the role of judicial officers, lawyers, and civil society to resist and undo judicial capture. Some indicators pointing towards judicial capture are:<sup>6</sup>

- (a) ***Issuance or attempts to issue retrogressive practice directives by judicial leaders*** - Practice directives which undermine the individual independence of judges or the institutional independence of the judiciary.
- (b) ***Arbitrary case allocation*** - Case allocation based on non-legal considerations and tendencies to allocate politically sensitive cases to specific judicial officers who are renowned for, or prone to, loosely interpret or enforce the law.
- (c) ***Retrogressive court decisions in sensitive legal matters*** - A pattern or consistent negative approach to how courts deal with sensitive matters. For example, how judicial officers deal with bail applications by Human Rights Defenders or members of the opposition. Another example is how courts deal with cases where certain persons have a commercial interest. In countries like Zimbabwe and Zambia, for example, one should possibly investigate how commercial cases involving cartels or to in which Chinese companies have an interest in, are dealt with by courts.
- (d) ***Bribery*** - Bribery of judicial officers and senior court managers by members of the executive, cartels, or commercial forces.
- (e) ***Improper relationships involving judicial officers*** – Business or commercial relationships which undermine the institutional or individual autonomy of judicial officers, for example, land allocations without security of tenure (Zimbabwe). Political associations or affiliations which undermine judicial autonomy i.e., judicial officers attending political parties and events, judicial officers who are members of political parties, or participate in processes of political parties.
- (f) ***Legislative/Constitutional rules which subordinate the judiciary to the executive*** – Rules and laws which allow the executive to dictate judicial selection and appointments, allow

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<sup>6</sup> "SADC LA Indicators" (2021) SADC LA Lesotho Fact-Finding Mission.

the executive to tamper with security of tenure for judicial officers, allow Judicial underfunding, or practices that usurp the jurisdiction of the courts by allowing arbitrary determination of judicial salaries and conditions of service by the executive.

- (g) ***Threats against the judiciary or judicial officers*** - Indirect or direct threats against judicial officers who are perceived to be independent and impartial, and where those threats appear to have resulted in judicial partiality.
- (h) ***Improper public pronouncements*** - Improper public pronouncements or statements by judicial officers, which show partiality and acquiescence to certain political and economic interests.

### 3. Layout of the report

The researchers mainly relied on desktop research for the purposes of this report. The outcomes of the Working Group Fact-Finding Missions, along with legislative and research findings sourced and produced by the SADC LA Secretariat. The nature of this report required the researchers to heavily rely on and refer to international practices and best standards. For these purposes, the researchers considered primary and secondary resources. Primary resources consulted included Lesotho and foreign legislation, Lesotho case law and International and Regional Treaties, Conventions and Guidelines. Secondary resources used included the SADC Lawyers Association Fact Finding Mission Report, renowned Human Rights Body reports such as the United Nations, Human Rights Watch and Freedom House.

To properly inform the reader of the judicial independence issues in Lesotho it was necessary to provide a brief background to Lesotho, how independence came about, and how the judicial institution flowed from the latter.

Thereafter, the report speaks to the Lesotho judicial framework, with specific reference to the provisions that constitute, and speak to, judicial independence. A discussion of best practices follows to shed light on the challenges and threats in the Lesotho judicial system.

Best practices provide the background to the discussion on threats and challenges identified in this report and how these may be addressed. Consideration of comparative examples from neighbouring countries and their judicial frameworks is also included. Finally, conclusions and recommendations are made based on the discussions in this report.



It was challenging to obtain accurate and up-to-date local resources for Lesotho. The researchers specifically note the difficulty experienced in finding legislation and other legal documents related to Lesotho. The Constitution of Lesotho, for example, was last amended in April 2020 with several other amendments before then, yet there is no updated version of the Constitution available to the public, that could be found. Several on-line legal resource platforms were consulted and still few documents could be found. In addition, the Lesotho Government website does not tender much information and individual departmental websites, such as one for the Department of Justice, does not exist. Not only does this pose a challenge to researchers, but it also renders the exercise and enforcement of rights by citizens nearly impossible and does not promote access to justice, transparency, or ultimately democracy.

#### 4. Historical context to the Lesotho Judiciary

The 1966 Lesotho Constitution gave the Judiciary more power over administrative acts and provided it with independence from other spheres of government.<sup>7</sup> Unfortunately, the 1970 *coup*-led to the temporary suspension of the Constitution which severely impacted judicial independence. The Judicial Services Commission, for example, was effectively bypassed and judges were appointed on the sole recommendation of the Prime Minister.<sup>8</sup>

In 1991 Lesotho revised its Constitution with minimal public participation which led to the technical restoration of some judicial power. It had minimal practical effect, however, because the remnants of in-country conflicts and the overall disrespect for the rule of law greatly affected other democratic institutions.<sup>9</sup>

A further issue with the new Constitutional incorporation was the remnants of outdated practices and processes which were never amended. This seems to still create great confusion around many aspects of the Judiciary and ultimately influences the proper functioning of the Judiciary. The two Westminster constitutional doctrines continue to be instituted, for

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<sup>7</sup> Ellett R "The Politics of Judicial Independence in Lesotho" (2012) *Freedom House Report* at 21 (Hereafter the Freedom House Report) available at <https://freedomhouse.org/sites/default/files/Politics%20of%20Judicial%20Independence%20in%20Lesotho.pdf> (accessed 11 February 2021).

<sup>8</sup> Freedom House Report (2012) 21.

<sup>9</sup> Freedom House Report (2012) 21.

example: The doctrine of Executive or Royal prerogative and the doctrine of Parliamentary sovereignty. Colonial-era judicial practices have also obstinately persisted. For instance, the bizarre assertion that Lesotho's legal system is a dual system, one for natives and one for Europeans, has its origins in colonialism. This is a concerning for a Kingdom that became independent in 1966.<sup>10</sup>

Since 2002 there have been some positive changes but unfortunately, the Judiciary remains fragile with little respect for its independence and the rule of law. The Executive still seems to dominate many important facets of the Judiciary which ultimately influence independence, such as the appointment of judges.<sup>11</sup>

## 5. Provisions that speak to Judicial Independence in Lesotho

The Lesotho Constitution<sup>12</sup> speaks to various facets of the judiciary including: How it is constituted, how it functions, how it is funded, its powers, and various officers of the court. For purposes of this discussion, it is also important to take note of the Lesotho Administration of the Judiciary Act<sup>13</sup> which essentially confers both administrative and financial autonomy on the Judiciary. The Act also formally establishes a Judicial Service.<sup>14</sup>

Section 118 of the Lesotho Constitution provides that the judicial power of the Kingdom is vested in the courts which consist of the Court of Appeal, the High Court, subordinate courts, and courts-martial. It also provides for additional tribunals that may exercise judicial functions as established by parliament from time to time.<sup>15</sup>

What follows is a summary of the overall judicial framework and constitutional provisions that speaks to judicial independence. It is important to note that the researchers aim to provide a solid background of the existing frameworks that could support judicial independence in this

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<sup>10</sup> 'Nyane H "Judicial reforms in Lesotho: A case for changing the base and the superstructure" 2019 1 *Transformation Resource Centre Occasional Paper* 10 available at <http://trc.org.ls/wp-content/uploads/2019/09/JUDICIAL-REFORMS-IN-LESOTHO-A-CASE-FOR-CHANGING-THE-BASE-AND-THE-SUPERSTRUCTURE.pdf> (accessed 11 February 2021).

<sup>11</sup> Freedom House Report (2012) 21.

<sup>12</sup> Constitution of the Kingdom of Lesotho of 2 April 1993 (Lesotho Constitution).

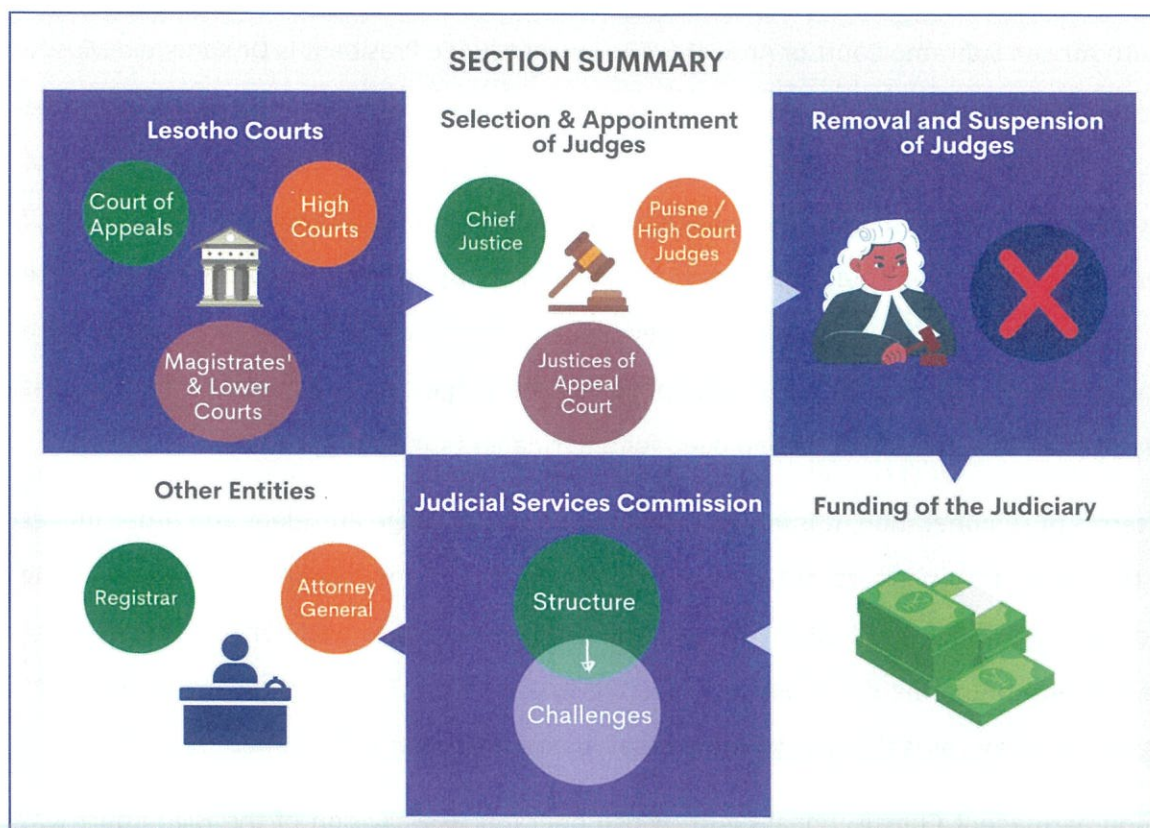
<sup>13</sup> Lesotho Administration of the Judiciary Act 16 of 2011 (Administration of the Judiciary Act).

<sup>14</sup> Shale I "The law and legal research in Lesotho" (November 2014) GlobaLex Online par 27 available at [https://web.archive.org/web/20141227195809/https://www.nyulawglobal.org/globalex/Lesotho1.htm#\\_The\\_Justice\\_System](https://web.archive.org/web/20141227195809/https://www.nyulawglobal.org/globalex/Lesotho1.htm#_The_Justice_System) (accessed 10 February 2021).

<sup>15</sup> Section 118(1)(d) of the Lesotho Constitution.



section, however lacking it may be. The sections that follow on best practices and challenges identified will delve deeper into an analysis of these existing provisions to better illustrate the existing threats in the Lesotho system.



## 5.1. *The establishment of the various courts*

### 5.1.1. *The Court of Appeals*

Contrary to its neighbour, South Africa,<sup>16</sup> Lesotho does not have a permanent Constitutional Court. The Court of Appeals is the final appellate court in Lesotho.<sup>17</sup> The Court of Appeals therefore has supervisory jurisdiction over all courts in Lesotho and over any adjudicating authority.<sup>18</sup> Both the Court of Appeals and the High Court have the authority to hear constitutional matters.<sup>19</sup>

<sup>16</sup> Section 166 of the Constitution of the Republic of South Africa of 1998.

<sup>17</sup> Section 123(4) of the Lesotho Constitution. Section 123(2)(a)-(c) provides that the Lesotho Court of Appeal comprises of the Judge President, Justices of Appeal, the Chief Justice and the puisne judges of the High Court.

<sup>18</sup> Shale (November 2014) par 28.

<sup>19</sup> Freedom House Report (2012) 23.

The Court of Appeals is only in session twice a year and is considered an *ad hoc* court. Judges travel to the seat of the judiciary in Maseru and depart once the sessions are complete.<sup>20</sup> By 2014, Judge President Ramodibedi was the only permanent member of the court who was a Lesotho citizen. All the other judges were retired judges from South Africa, mostly from the South African Supreme Court of Appeal.<sup>21</sup> The current Judge President is Dr Kananelo Mosito KC and the other judges remain non-permanent, foreign judges who only serve when the court is in session.<sup>22</sup> Due to this *ad hoc* structure the court delivers judgments at the end of each session, and efficiency applauded by the International Community of Jurists (ICJ Report).<sup>23</sup> The ICJ also noted that Judges of the Court of Appeals reported their case load to be extremely light, that they dealt with few appeals from civil trials, and mostly dealt with motion appeals. Therefore, it was the opinion of the Judges at the time the ICJ report was released in 2014, that there was no need for a permanent Court of Appeals.<sup>24</sup>

In terms of remuneration, it is important to note that the Judge President and other Judges of the Court of Appeals do not earn permanent salaries. They receive a stipend or sitting allowance for each court sitting completed. They also receive additional allowances for reading and preparing documentation for the proceedings. Their allowances are also not regulated by law, as is the case with the Chief Justice and other Judges of the High Court.<sup>25</sup>

A non-permanent Constitutional Court, which operates as a division of the High Court was created in 1993 but it is not provided for in the Lesotho Constitution or by any Act of

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<sup>20</sup> Justice Ngcobo S Justice Nganunu JM Justice Ramadhani ASL "The Crisis in Judicial Leadership in the Kingdom of Lesotho: Report of the High-Level Mission of the International Commission of Jurists to the Kingdom of Lesotho" (2014) *International Commission of Jurists* at 14,16 (hereafter the "ICJ Report") available at <http://www.icj.org/wp-content/uploads/2014/10/Lesotho-Crisis-judicial-leadership-Publications-Mission-report-2014-ENG.pdf> (accessed on 10 February 2021).

<sup>21</sup> ICJ Report (2014) 15.

<sup>22</sup> The researchers had difficulty confirming if South African judges still made up most of this non-permanent bench of Justices of the Court of Appeals. However, the SADC LA fact-finding mission did speak to the fact that there is drive to "africanise" the court and provide more opportunity for foreign judges from other countries. Implications seem to be that the current non-permanent bench may consist of mostly SADC judges, but this cannot be absolutely confirmed. What is certain though, is that Lesotho does still heavily rely on foreign judges to serve as Justices of the Court of Appeals.

<sup>23</sup> ICJ Report (2014) 16.

<sup>24</sup> ICJ Report (2014) 16. It is also important to place the titles of judges in the Lesotho judiciary into perspective. Normally the Chief Justice would be at the helm of the highest court in the land. However, in Lesotho the titles have been swapped around. Therefore, the Chief Justice refers to the head of the High Court and the Judge President refers to the head of the Court of Appeals.

<sup>25</sup> ICJ Report (2014) 15-16.



Parliament.<sup>26</sup> The Court started operating in 2000 after specialised rules for this court (basically an exact copy of the rules of the South African Constitutional Court) were adopted.<sup>27</sup> It does seem strange that it is referred to as the Constitutional Court when in fact, it was not created by the Constitution nor made provision for in any other legislation. It is also curious that such a significant court is brought to life by rules and is considered as a mere branch of the High Court. It does however wield immense powers and is able to invalidate laws and administrative action.<sup>28</sup>

#### 5.1.2. *The High Courts*

The High Court of Lesotho is established by section 119 of the Lesotho Constitution. It is endowed with unlimited original jurisdiction to hear and determine any civil or criminal proceedings.<sup>29</sup> The court has revisional powers and the Constitution provides for parliament to confer additional powers to it through legislation.<sup>30</sup> The High Court also has two additional divisions being the commercial and land divisions.<sup>31</sup> It further has the authority to form an *ad hoc* Constitutional Court in panels of three or five judges if needed, as discussed in 5.1.1 above.<sup>32</sup>

The King, on the advice of the Prime Minister, appoints the Chief Justice and other Judges of the High Court. There are a total of eleven Judges in the High Court.<sup>33</sup> Judges seem to be mostly recruited from registrar and magistrate ranks because lawyers from private practice are not amenable to the unfavourable salaries of Judges. According to the ICJ this severely impacts the competency of judges.<sup>34</sup> A further lack of proper facilities and resources, combined with intense work pressure, leads to a delay in passing judgments.<sup>35</sup> The ICJ also noted the following complaints received from High Court Judges during their mission:

(a) Judges are overworked.

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<sup>26</sup> 'Nyane (2019) 10.

<sup>27</sup> 'Nyane (2019) 10.

<sup>28</sup> 'Nyane (2019) 10.

<sup>29</sup> Shale (November 2014) par 29.

<sup>30</sup> Shale (November 2014) par 29.

<sup>31</sup> Shale (November 2014) par 29.

<sup>32</sup> Freedom House Report (2012) 23.

<sup>33</sup> The ICJ Report (November 2014) 16.

<sup>34</sup> The ICJ Report (November 2014) 17.

<sup>35</sup> The ICJ Report (November 2014) 17.

- (b) There is a lack of proper facilities.
- (c) The Chief Justice does not attend to Judge complaints.
- (d) Poor salaries.
- (e) General lack of leadership.
- (f) A lack of invitations from the Judge President of the Court of Appeals to sit in the Appeal Court.
- (g) Allegations were made regarding the then Judge President<sup>36</sup> who allegedly made “unfair persistent criticism” of the work of the judges.<sup>37</sup>

#### 5.1.3. *The Magistrates and lower courts*

The Magistrates’ Courts of Lesotho are creatures of statute which are presided over by judicial officers employed as magistrates or civil servants.<sup>38</sup> Further specialist courts are also provided for and are all creatures of statute.<sup>39</sup> These specialist courts include: the labour court, local courts, the small claims court, the commercial court, and customary courts.<sup>40</sup>

#### 5.2. *Selection and appointment of judges*

The appointment and removal of the Chief Justice and other Judges is regulated by the Constitution of Lesotho and grants the King, subject to guidance and advice of the Prime Minister, the power to appoint. Depending on the circumstance the Judicial Services Commission (JSC) and the Chief Justice can also provide guidance, but they only act in an advisory capacity and the final discretion to appoint or not vests in the King.

The King’s discretionary powers to appoint was tested in the recent matter of *White Horse Party v the JSC and others*.<sup>41</sup> In this case a political party (White horse Party, hereinafter referred to as ‘WHP’) brought an application before the Constitutional Division of the High Court requesting, amongst others, that the King’s failure to appoint puisne judges according to the JSC’s recommendations was unconstitutional.<sup>42</sup> The Court found that WHP failed to

<sup>36</sup> The ICJ Report was published in 2014.

<sup>37</sup> The ICJ Report (November 2014) 17.

<sup>38</sup> Shale (November 2014) par 30.

<sup>39</sup> Shale (November 2014) par 30-32.

<sup>40</sup> Shale (November 2014) par 33.

<sup>41</sup> *White Horse Party v. Judicial Service Commission and Others* [2020] LSHC22 Case No. 16/2020.

<sup>42</sup> *White Horse Party v. Judicial Service Commission* (2020) at 2.



prove that it had *locus standi in judicio* and that the Court had the requisite jurisdiction. This was because the matter did not raise a Constitutional question.<sup>43</sup> Despite not proving standing and jurisdiction, the Court felt it would be in the interest of justice and the public to adjudicate on the merits of the Applicant's case. It subsequently found that the recommendation made by the JSC did not adhere to the Constitutional requirements for JSC decision making because the required committee quorum was not established at the time the recommendation was made. The Court found that on 20 August 2020, a meeting of the JSC was convened to discuss the nomination of puisne judges. Only the Acting Chief Justice, as the Chairperson, and the Attorney General attended and participated in his meeting. The two other members of the Commission did not attend or participate. Five candidates were selected, and their names were submitted to His Majesty pursuant to section 120(2) of the Constitution. The King subsequently rejected the recommendations citing that the JSC was not properly constituted when making the recommendations.<sup>44</sup> The Court considered the provisions of the Constitution<sup>45</sup> as well as the JSC Rules<sup>46</sup> and agreed that 'for a decision to qualify as a valid decision of the Commission it must have the agreement, assent, approval, or accession of the majority of the four members.'<sup>47</sup> Therefore, the King did not have to consider the JSC recommendations for appointment of puisne judges. This decision was handed down despite the dire conditions of the judiciary i.e., overburdened, and understaffed.<sup>48</sup>

With the above as background to the discussion of judge appointments the legal framework of selection, appointment, suspension, and removal of judges in Lesotho follows.

#### 5.2.1. *The Chief Justice*

Section 120 of the Lesotho Constitution<sup>49</sup> deals with the appointment of judges to the High Court and empowers the King, on the advice of the Prime Minister, to appoint the Chief Justice.<sup>50</sup> Should the office of the Chief Justice become vacant (or the incumbent temporarily

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<sup>43</sup> *White Horse Party v. Judicial Service Commission* (2020) at 5-13.

<sup>44</sup> *White Horse Party v. Judicial Service Commission* (2020) at 16-21.

<sup>45</sup> Sections 120(1) and (2), 132(1), (9) and (10) of the Lesotho Constitution.

<sup>46</sup> Rule 5 of the Judicial Services Commission Rules.

<sup>47</sup> *White Horse Party v. Judicial Service Commission* (2020) at 17 - 19.

<sup>48</sup> It must be noted that the Court did not make a finding on the interpretation of 'advice' and the weight it would ultimately carry in the selection and appointments made by the King.

<sup>49</sup> The Lesotho Constitution.

<sup>50</sup> Section 120(1) of the Lesotho Constitution.

cannot fulfil his duties) the King may appoint one of the judges of the Court of Appeals one of the puisne judges, or another person qualified to be appointed as a judge of the High Court. Before the appointment is made, the Prime Minister must consult with the incumbent Chief Justice, if possible.<sup>51</sup>

For purposes of a replacement judge, the candidate can be appointed even if he or she has reached the retirement age of 75. The replacement may furthermore continue to act <sup>52</sup> even if the actual incumbent is able to assume or resume duties. The acting judge can also continue to act as Chief Justice until such time as he or she has delivered judgement required or concluded proceedings before him or her.<sup>53</sup>

#### 5.2.2. *Puisne or High Court judges*

Puisne, or lower ranking judges, are appointed below the Chief Justice. The King appoints them, on the advice of the Judicial Service Commission.<sup>54</sup> Therefore, the Chief Justice does not have any input, save for his or her role in the Judicial Service Commission, into the appointment of judges serving under him or her.

Should the office of a puisne judge become temporarily or permanently vacant the King may, on the advice of the Chief Justice, appoint a duly qualified person. The King's decision should be made after receiving advice from the Judicial Service Commission. In this replacement case too, the new candidate can be appointed even if he or she has already reached the retirement age.<sup>55</sup>

Puisne judges can be appointed for a specific period or until the appointment is revoked by the King, in accordance with the advice of the Judicial Service Commission. However, despite the expiration or revocation of the appointment, the acting judge may continue to act as same for as long as is required for him or her to deliver judgement or complete proceedings commenced before him or her.<sup>56</sup>

To be appointed as a judge of the High Court a candidate must:<sup>57</sup>

...hold or have held office as a judge of a court with unlimited jurisdiction in civil and criminal matters which is part of the Commonwealth, in a country outside the Commonwealth and as prescribed by parliament or in a court having jurisdiction in hearing appeals from such court

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<sup>51</sup> Section 120(4) of the Lesotho Constitution.

<sup>52</sup> Section 121(8) of the Lesotho Constitution.

<sup>53</sup> Section 120(4)(a) & (b) of the Lesotho Constitution.

<sup>54</sup> Section 120(2) of the Lesotho Constitution.

<sup>55</sup> Section 120(5) of the Lesotho Constitution.

<sup>56</sup> Section 120(6) of the Lesotho Constitution.

<sup>57</sup> Section 120(3) of the Lesotho Constitution.



and in addition, the candidate must hold the qualification required by the Legal Practitioners Act 1983, or subsequent legislation, to act as a legal practitioner in Lesotho for not less than five years.

#### 5.2.3. *Justices of the Court of Appeals*

The Judge President of the Appeal Court is appointed by the King, on the advice of the Prime Minister. The Justices of Appeal in the other hand, are appointed by the King, on advice of the Judicial Service Commission.<sup>58</sup>

Should the office of the Judge President of the Court of Appeals become temporarily or permanently vacant the King may, on advice of the Prime Minister and in consultation with the President, appoint a duly qualified alternative despite the candidate having reached the prescribed age.<sup>59</sup> Despite the expiration or revocation of the appointment, the acting Judge President may continue to act for as long as is required to deliver judgement or complete proceedings commenced before him or her.<sup>60</sup>

The temporary or permanent replacement of a Justice of Appeal is like that of the puisne judges except that the Judicial Service Commission must consult the President before advising the King.<sup>61</sup>

The Chief Justice, High Court judges, and judges of the Court of Appeal must vacate their posts when they reached the prescribed retirement age. They may however remain in office to pass judgement or complete proceedings previously commenced before him or her.<sup>62</sup>

The qualification requirements for a Justice of Appeal are like those of the puisne judges save for having to have held the “specified qualifications” for seven years instead of five.<sup>63</sup>

The Constitution provides the King with a discretionary power to appoint judges. Consultation with the Prime Minister or Judicial Services Commission is only required when Puisne Judges

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<sup>58</sup> Sections 124(1) & (2) of the Lesotho Constitution.

<sup>59</sup> Section 124(4)(a) of the Lesotho Constitution.

<sup>60</sup> Section 124(4)(b) of the Lesotho Constitution.

<sup>61</sup> Section 124(5) and (6) of the Lesotho Constitution.

<sup>62</sup> Sections 121(1) and (2) read with sections 125(1) and (2) of the Lesotho Constitution.

<sup>63</sup> Section 124(3) and (6) of the Lesotho Constitution.

are to be appointed. Therefore, the selection and appointment power of all other judges ultimately vests solely in the King. This situation threatens the independence of the judiciary.

### *5.3. Removal and suspension of judges*

The Chief Justice or any other judge of the High Court or Court of Appeals can only be removed from office if they are unable to perform their functions or for misbehaviour.<sup>64</sup> Lesotho Constitution further speaks to the removal process and provides that the request to remove a judge should be referred to a tribunal by the King, after said tribunal has advised the King that a removal is warranted.<sup>65</sup>

The Prime Minister submits the removal referral to the King if it concerns the Chief Justice or Judge President. On the other hand, the Chief Justice and the Judge President submit the removal referral to the King if it concerns puisne judges or Justices of Appeal. The King then proceeds to appoint a tribunal that cannot consist of less than 3 members. The duty of the tribunal is to enquire into the matter, report on the facts, and advise the King on what action should be taken.<sup>66</sup> The King must appoint the tribunal after it is selected by the Prime Minister in the event of an inquiry into the Chief Justice or President and the latter two in the event of an enquiry into a puisne judge or a Justice of Appeal as the case may be.<sup>67</sup>

Once an inquiry has been referred to the tribunal, the King may suspend the Chief Justice, Judge President, Justice of Appeal or puisne judge on the advice of the Prime Minister. If the inquiry is referred to the King by the Chief Justice or Judge President and is directed at a Justice of Appeal or puisne judge, he may suspend on the advice of either the Chief Justice or Judge President. The King may revoke the suspension at any time, upon the advice of the Prime Minister, Judge President, or the Chief Justice as the case may be.<sup>68</sup>

The Constitution provides the King with the authority to remove judges. The Constitution provides the King discretionary power to initiate procedures against judges and to appointment the appropriate disciplinary tribunal overseeing the removal process. The King

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<sup>64</sup> Section 121(3) read with section 125(3) of the Lesotho Constitution.

<sup>65</sup> Sections 121(4) and (5) read with sections 125(4) and (5) of the Lesotho Constitution.

<sup>66</sup> Section 121(5) read with section 125(5) of the Lesotho Constitution.

<sup>67</sup> Section 121(6) read with section 125(6) of the Lesotho Constitution.

<sup>68</sup> Section 121(7) read with section 125(7) of the Lesotho Constitution.



merely needs to consult the Prime Minister in this instance. Once again, all the power ultimately vests in the King which threatens democratic processes, due procedure and ultimately the independence of the judiciary.

#### *5.4. Funding of the judiciary*

There are no specific provisions that prescribe the funding of the judiciary.<sup>69</sup> Section 118(3)<sup>70</sup> only stipulates that the government will assist the judiciary in protecting its independence, dignity, and effectiveness of the courts. Furthermore section 17 of the Administration of the Judiciary Act only provides that:<sup>71</sup>

The funds of the judiciary shall consist of such monies as may be appropriated by Parliament for the purposes of the judiciary.

The fact that the judiciary is solely reliant on the Executive for its funding and at the mercy of the Executive for the allocation of its budgets negates the independence of the judiciary.

#### *5.5. The Lesotho Judicial Services Commission*

##### *5.5.1. The structure of the JSC*

The Lesotho JSC only has four members: The Chief Justice who is the Chairperson of the Commission, the Attorney General, the Chairperson of the Public Service Commission (PSC), or his appointed representative, and a member appointed by the King acting in accordance with the advice of the Chief Justice. Such an appointed member must hold or must have held high judicial office.<sup>72</sup> The functions of the Commission include:

- (a) To attend to the appointment, disciplining and removal from office of judicial officers<sup>73</sup> to whom the JSC Act applies.<sup>74</sup>

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<sup>69</sup> Nkhata (2021) 2-4.

<sup>70</sup> The Lesotho Constitution.

<sup>71</sup> Researchers found reference that Lesotho received funding for the appointment of judges from the SADC and European Union. However, we could find no clear evidence or information on the amount of this grant, conditions of the grants and if any positive progress were made with the monies received.

<sup>72</sup> Section 132 of the Lesotho Constitution.

<sup>73</sup> Section 5(2)(a) -(e) of the Judicial Service Commission Act 7 of 1983. Judicial officers include the Registrar or Assistant Registrar of the Court of Appeals, Registrar or Assistant Registrar of the High Court, Magistrates, Judicial Commissioner, or such other officers as may be prescribed by the Minister in the gazette.

<sup>74</sup> Section 5(1) of the Judicial Service Commission Act 1983 read with Section 133(1) of the Lesotho Constitution.

(b) To advise the King on the appointment of the chairman and other members of the Public Service Commission.<sup>75</sup>

Essentially, all members of the JSC are appointed by the King of Lesotho as the Head of State. In terms of the Constitution, the Chief Justice is appointed by the King, acting in accordance with the advice of the Prime Minister.<sup>76</sup> The Attorney General is also appointed by the King, acting on the advice of the Prime Minister.<sup>77</sup> The Chairman of the JSC is appointed by the King acting in accordance with the advice of the JSC.<sup>78</sup> Therefore, all members of the JSC are appointed by the King with the Prime Minister playing a leading role in the appointment process. This gives the impression that there is a lack of independence and that there is executive control over the institution. The Freedom House Report<sup>79</sup> underscores the need for the JSC membership to be broadened to include the legal profession and civil society to strengthen the independence of the institution. The legal profession, civil society and the judiciary are decidedly under-represented on a body that is supposed to deal with judicial matters and independence. This also creates the impression that the judiciary has decidedly little decision-making power over its own institution.

#### *5.5.2. Main difficulties experienced by the JSC.*

Despite the constitutional protection of the security of tenure of judges, the events that took place in Lesotho in recent years, following changes of government, suggest that the security provided lies on very unsteady ground.<sup>80</sup>

During 2013, less than a year after the Prime Minister had taken over as the Head of Government, the then Prime Minister of Lesotho Dr. Tom Thabane, recommended the suspension and subsequent impeachment of the Chief Justice of the Court of Appeals to the

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<sup>75</sup> Section 136(1) of the Lesotho Constitution.

<sup>76</sup> Section 120(1) of the Lesotho Constitution.

<sup>77</sup> Section 140 (1) of the Lesotho Constitution.

<sup>78</sup> Section 136 (1) of the Lesotho Constitution.

<sup>79</sup> The Freedom House Report (2012) at 9.

<sup>80</sup> Section 121 and 125 of the Lesotho Constitution provides for circumstances under which a Judge of the High Court or the Court of Appeal may be removed from office. Sections 121 (3) and 125 (3) specifically provide that a Judge (of the High Court and Court of Appeal respectively) can only be removed from office for inability to perform the functions of their office or for misbehaviour. Such removal may only be done in accordance with the provisions of the Constitution.



King. Chief Justice Michael Ramodebedi subsequently resigned without appearing before the impeachment tribunal. Following this resignation in 2015 the King, on the advice of Prime Minister, appointed Justice Kananelo Mosito to the position of Chief Justice of the Court of Appeal. This was barely a month before the national elections which took place in February 2015. Following the elections, Dr. Thabane was replaced by Dr. Pakalitha Mosisili as the Prime Minister and Head of Government. The new Prime Minister Dr. Mosisili, commenced the process to remove Chief Justice Mosito as the President of the Court of Appeals. During February 2016 Chief Justice Mosito was suspended pending an impeachment enquiry.<sup>81</sup>

Although the latter does not relate to the appointment and removal of a member of the JSC, it does speak to the efforts to remove judges in line with the appointment and will of the Executive, giving the impression that unlike the constitutionally entrenched security of tenure, the tenure of these judges were linked to the ruling government. This in turn negates the independence of the judiciary by creating the impression that for one to survive in the judiciary, one must align with the government of the day.<sup>82</sup>

The independence of the Acting Chief Justice, who was also the chairperson of the JSC, was questioned during the SADC LA fact-finding mission. It was alleged that interparty issues were brought to court and that the Acting Chief Justice involved herself in matters. This gave the impression that politicians involved themselves in judicial matters and created a public perception that the judiciary was highly polarized by politics. Stakeholders interviewed expressed concern about the Acting Chief Justice downgrading the office and believes that she was motivated to take over cases to target her perceived enemies in open court. There were concerns that her appointment could be confirmed.<sup>83</sup>

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<sup>81</sup> Makonese M "Appointment processes for Judicial Services Commissions (JSCs) and their Role in Promoting Independence of the Judiciary in Southern Africa: A Focus on Law Society/Bar Association Representatives on the JSCs" 2017 *Southern African Development Community Lawyers' Association* at 26 (hereafter the SADC LA Report) available at <https://www.sadcla.org/content/appointment-processes.pdf> (accessed 15 February 2021).

<sup>82</sup> The SADC LA Report (2017) at 27.

<sup>83</sup> Fact finding mission conducted by SADC LA in 2021.

### 5.6. *The special powers of the Registrar*

The Registrar has an extremely wide berth of power in Lesotho and serves on the JSC. He is not only the Chief Administrator<sup>84</sup> of the judiciary but also the Chief Accounting Officer who regulates and oversees the funds and the expenditures of the judiciary.<sup>85</sup> For purposes of the latter duties he is assisted by a Judicial Administrator, reporting directly to the Registrar, who is endowed with broad financial powers in preparing the overall judicial budget and keeping the accounting records.<sup>86</sup> Not only does the Judicial Administrator have financial powers, he has overall supervisory authority over the judicial staff.<sup>87</sup> It seems that the Deputy Registrar is tasked with the duties more commonly associated with that of the Registrar.<sup>88</sup>

### 5.7. *The Attorney General*

The Attorney General (AG) is a public service office and is responsible for providing legal advice to Government, exercising the ultimate authority over the Director of Public Prosecutions (DPP), taking the necessary legal measures for the protection and upholding of the Constitution and other laws of Lesotho, exercising or performing any of the rights, prerogatives, privileges or functions of the State before courts or tribunals, and performing such other duties and exercise such other powers as may be conferred on him or her by the Constitution or any other law.<sup>89</sup> The Constitution also provides for the independence of the Attorney General by stating that-

the Attorney-General shall not be subject to the direction or control of any other person or authority.<sup>90</sup>

The King is responsible for the appointment of the AG on advice of the Prime Minister. The AG and can only be removed from office if he or she are unable to perform their functions or for misbehaviour.<sup>91</sup> The Lesotho Constitution further speaks to the removal process and

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<sup>84</sup> Section 6(1) of the Administration of the Judiciary Act.

<sup>85</sup> Section 6(3) of the Administration of the Judiciary Act.

<sup>86</sup> Section 10(b) of the Administration of the Judiciary Act.

<sup>87</sup> Section 10(c) of the Administration of the Judiciary Act.

<sup>88</sup> Section 8 of the Administration of the Judiciary Act.

<sup>89</sup> Section 98(1) and (2) read with section 99 of the of the Lesotho Constitution.

<sup>90</sup> Section 98(4) of the of the Lesotho Constitution.

<sup>91</sup> Section 140(1) and (5) of the Lesotho Constitution.



provides that the request to remove the Attorney General should be referred to a tribunal by the King, after said tribunal has advised the King that a removal is warranted.<sup>92</sup>

The Prime Minister submits the removal referral to the King and advises on an investigation into the matter. The King must then proceed to appoint a tribunal that cannot consist of less than three members. The duty of the tribunal is to inquire into the matter, report on the facts, and advise the King on what action should be taken.<sup>93</sup> The King must appoint the tribunal after it is selected by the Chief Justice.<sup>94</sup>

Once an inquiry has been referred to the tribunal, the King may suspend the AG on the advice of the Prime Minister and the King may revoke the suspension at any time, upon the advice of the Prime Minister, Judge President, or the Chief Justice as the case may be.<sup>95</sup> The prescribed age at which the AG must vacate office is 55 years.<sup>96</sup>

As stated above the JSC of Lesotho is heavily composed of executive role players which hinders its independence. This is supported by the fact that the AG sits on the JSC and the fact that the AG, in turn, also serves as part of the Council of State.<sup>97</sup> An entity responsible for assisting the King in executing his executive duties and responsibilities.<sup>98</sup> In addition, the AG has certain executive privileges such as the right to address both Houses of Parliament, attend the National Assembly or the Senate, and to take part in the proceedings of either House of Parliament. However, he may not vote on any matters before either Houses.<sup>99</sup>

Considering the process of appointing and removing the AG, his or her duties and responsibilities, and the powers and privileges bestowed upon him or her by the Constitution, the position (despite enjoying Constitutional independence) is an executive orientated position which jeopardises the independence of the JSC on which it serves.

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<sup>92</sup> Sections 140(6) and (7) of the Lesotho Constitution.

<sup>93</sup> Section 140(7) of the Lesotho Constitution.

<sup>94</sup> Section 140(7) of the Lesotho Constitution.

<sup>95</sup> Section 140(8) of the Lesotho Constitution.

<sup>96</sup> Section 140(9) of the Lesotho Constitution.

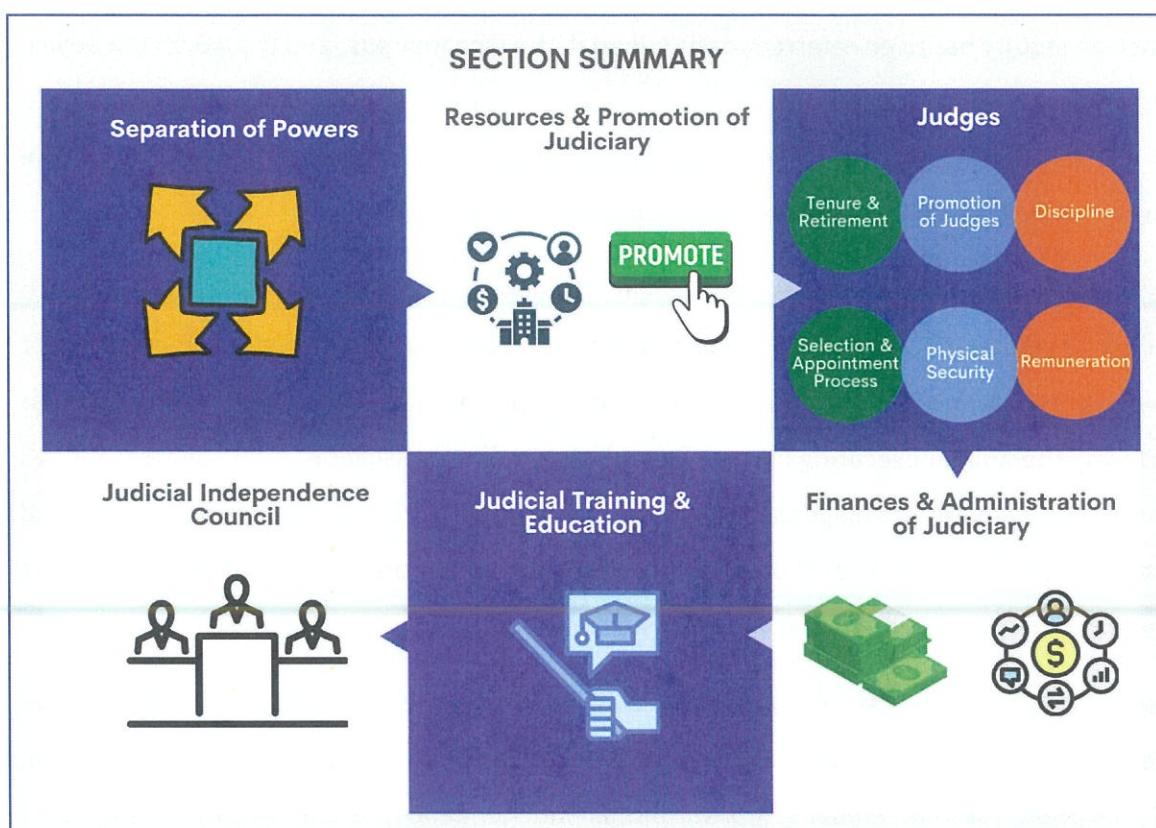
<sup>97</sup> Section 95(2)(d) of the Lesotho Constitution.

<sup>98</sup> Section 86 read with section 95(1) of the Lesotho Constitution.

<sup>99</sup> Section 76(2) of the Lesotho Constitution.

## 6. Best practices and guidelines for judicial independence

Various regional and international instruments provide best practices and guidelines to ensuring an independent judiciary. The Kingdom of Lesotho is a member state to the United Nations and therefore it has a duty to give effect to international instruments, treaties, and principles that affect or speak to the member states. This section therefore deals with a range of best practices and guidelines that are applicable to the Kingdom of Lesotho by way of international or regional instruments.



### 6.1. Separation of powers

According to a Freedom House Report<sup>100</sup> it is imperative that the basis of judicial independence be a strong existence of the separation of powers in the constitution, this is due to the prevalent and continued abuse of executive power in sub-Saharan Africa. It is the duty of the judiciary, as guardian of the constitution, to ensure that the exercise of public

<sup>100</sup> See in general the Freedom House Report (2012).



power is legal and that the court is protected from undue interference from either the Legislature or the Executive branch.<sup>101</sup>

Since the 1993-Constitution, exclusive judicial authority has been vested in the judiciary contrary to its predecessor which was silent on this question. Section 118(2) of the Lesotho constitution protects judicial independence, however there is no strong or explicit separation of powers clause in the Lesotho Constitution.<sup>102</sup>

#### *6.2. Promotion of the independence of the judiciary and adequate judicial resources*

Judicial independence must be enshrined in the Constitution or at the highest possible legal level to ensure protection, in law, of the judiciary.<sup>103</sup> This legal basis must genuinely and effectively protect the judiciary from other powers and guard its independence from other spheres of government.<sup>104</sup> The Basic Principles on the Independence of the Judiciary<sup>105</sup> provide that it is the duty of government and its institutions to respect and promote the independence of the judiciary and further note that a competent, independent, and impartial judiciary is essential for upholding the Constitution and the rule of law.<sup>106</sup>

Individual judges should have both personal and substantive independence. The former speaking to terms and conditions of judicial service that ensure Judges are not subject to any Executive control. The latter meaning that when exercising his or her judicial functions the Judge is only subject to the law and his or her own conscience.<sup>107</sup> Therefore, there must be a

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<sup>101</sup> The Freedom House Report (2012) 93.

<sup>102</sup> The Freedom House Report (2012) 34.

<sup>103</sup> Article 26 of the African Charter on Human and Peoples' Rights of 1986 (hereafter the Banjul Charter) provides that "State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

<sup>104</sup> Article 2-1 of the Universal Charter of Judges of the International Association of Judges adopted in 1999 as amended in 2017 (hereafter the Universal Charter of Judges) available at [https://www.unodc.org/res/ji/import/international\\_standards/the\\_universal\\_charter\\_of\\_the\\_judge/universal\\_charter\\_2017\\_english.pdf](https://www.unodc.org/res/ji/import/international_standards/the_universal_charter_of_the_judge/universal_charter_2017_english.pdf) (accesses 12 February 2021).

<sup>105</sup> Article 1 The United Nations Basic Principles on the Independence of the Judiciary of 1985 (hereafter the UN Basics Principles on the Independence of the Judiciary) available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> (accessed 12 February 2021).

<sup>106</sup> *Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels* Resolution of the General Assembly of 24 September 2012 67<sup>th</sup> Session A/RES/67/1 available at <https://undocs.org/A/RES/67/1> (accessed 12 February 2021).

<sup>107</sup> Section 1 of the International Bar Association Minimum Standards of Judicial Independence of 1982 (hereafter the IBA Standards) available at <https://www.icj.org/wp->

symbiosis in the relationship between Parliament and the judiciary taking into account the respect for Parliament's primary law making responsibility on the one hand, the judiciary's responsibility for the interpretation and application of the law on the other.<sup>108</sup> It is evident that the legislative function is the primary responsibility of Parliament, but Judges can aid in the interpretation of these pieces of legislation. Courts therefore must have the power to declare legislation unconstitutional or invalid.<sup>109</sup>

The Executive also plays an important role in protecting and promoting the independence of the judiciary and its Ministers should not pressure judges (either in public or private) or make statements that adversely affect the independence of individual judges or the Judiciary as a whole.<sup>110</sup> Undue pressure or interference can also manifest in judicial decisions. Therefore, judicial decisions handed down by the courts should not be subject to arbitrary revision.<sup>111</sup> Judges must have the jurisdictional power to review administrative actions and to punish individuals for contempt of court. A well-functioning judiciary must be endowed with vast powers to resolve disputes among citizens, and among citizens and the state. If most of this power is vested in administrative bodies (under the control of the Executive or Legislature) it undermines the proper functioning of the judicial system.

To ensure true independence of the judiciary and to guard against undue interference the judiciary should have jurisdiction over all issues of a judicial nature. It should also have exclusive authority to decide whether an issue submitted for its judgment falls within its

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[content/uploads/2014/10/IBA\\_Resolutions\\_Minimum\\_Standards\\_of\\_Judicial\\_Independence\\_1982.pdf](#) (accessed 12 February 2021).

<sup>108</sup> Principle II (a)-(b) of the Commonwealth Principles on the Three Branches Government (Latimer House) of 2003 adopted in 2009 (hereafter Commonwealth Principles) available at <https://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf> (accessed 12 February 2021). The objective of these Principles is to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values.

<sup>109</sup> Principle I(1) of the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence of 1998 (hereafter the "Latimer House Guidelines") available as an Annex at <https://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf> (accessed 12 February 2021).

<sup>110</sup> Section 16 of the IBA Standards.

<sup>111</sup> Article 4 of the UN Basic Principles on the Independence of the Judiciary. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law. Principle 2.1 of the Bangalore Draft Code of Judicial Conduct of 2001 (hereafter the Bangalore Principles) available at [https://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf) (accessed on 12 February 2021) (the Bangalore Code) provides that "a judge shall perform his or her judicial duties without favour, bias or prejudice."



jurisdiction, as prescribed by law.<sup>112</sup> After all, the importance of a competent, independent, and impartial judiciary cannot be underestimated. It is essential to the protection of human rights as all other fundamental rights ultimately depend on the proper administration of justice.<sup>113</sup> After all the function of the judiciary is to interpret and apply national constitutions and legislation, and to consider international human rights conventions and international law, to the extent permitted by the domestic law of the country.<sup>114</sup>

A Judge should therefore be able to assess the facts of each case without interference and in accordance with his or her understanding of the law. The Judge must be able to execute this function without influence, inducement, pressure, or threat.<sup>115</sup> Therefore, the Judge must also not have inappropriate connections with the Executive and Legislature or appear to be so connected.<sup>116</sup>

Apart from the above, there is also a duty on the Judge (as an individual) to uphold the status and independence of the judiciary. Judges should therefore not use the prestige of the judicial office to advance their private interests, or to convey or permit others to convey the impression that anyone is in position which affords them the opportunity to improperly influence the Judge in the performance of his judicial duties.<sup>117</sup> Article 1 of the Universal Charter of Judges provides:

The independence of the judge is indispensable to the impartial justice under the law. It is indivisible. It is not a prerogative, or a privilege bestowed for the personal interest of judges, but it is provided for the Rule of law and the interest of any person asking and waiting for an impartial justice. All institutions and authorities, whether national or international, must respect, protect, and defend that independence.<sup>118</sup>

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<sup>112</sup> Article 3 of the UN Basic Principles on the Independence of the Judiciary. Section 4(f) of the Principles on the Right to a Fair Trial in Africa also provides that “there shall not be any inappropriate or unwarranted interference with the judicial process nor shall decisions by judicial bodies be subject to revision except through judicial review, or the mitigation or commutation of sentence by competent authorities, in accordance with the law.”

<sup>113</sup> Preamble to the Bangalore Principles.

<sup>114</sup> Principle IV of the Commonwealth Principles.

<sup>115</sup> Principle 1.1 Bangalore Principles.

<sup>116</sup> Principle 1.3 of the Bangalore Principles. Principle 2.2 of the Bangalore Principles further provides “A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.” Also see Principle I (5) of the Latimer House Guidelines.

<sup>117</sup> Principle 4 of the Bangalore Principles.

<sup>118</sup> Article 1 of The Universal Charter of Judges of the International Association of Judges of 1999 as amended in 2017 (hereafter the Universal Charter of Judges) available at

### 6.3. *Tenure, security, conditions of service and remuneration of Judges*<sup>119</sup>

#### 6.3.1. *Tenure and retirement*

Judges must have a guaranteed tenure until their age of retirement, unless they are unfit to continue service.<sup>120</sup> A judge's appointment must therefore be free from time limitations and if a legal system provides for a time limitation, the conditions of appointments must ensure that judicial independence will not be endangered by such limitation.<sup>121</sup> The Judge further has a right to retirement with an annuity or pension in accordance with his or her professional category.<sup>122</sup> After retirement, the Judge is free to perform other activities within the legal profession, provided that it is not ethically inconsistent with his or her prior judicial duties. A Judge who exercises this right cannot be deprived of his or her pension.<sup>123</sup>

Although Judge tenure is guaranteed by the UN Principles, the promotion of judges is not clearly provided for. Principles 12 and 13 merely state that a promotional system should be based on objective factors, specifically on ability, integrity, and experience.<sup>124</sup> The UN Principles further support independent service of the judiciary by requiring that the assignment of cases within the court be kept a matter of internal judicial administration.<sup>125</sup>

#### 6.3.2. *Remuneration*

In addition to this, Judges should receive a level of remuneration that will utterly secure economic independence which, in turn, ensures a Judge's dignity, impartiality, and independence.<sup>126</sup> To ensure secure salaries a Judge's salary should also not be reduced during

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[https://www.unodc.org/res/ji/import/international\\_standards/the\\_universal\\_charter\\_of\\_the\\_judge/universal\\_charter\\_2017\\_english.pdf](https://www.unodc.org/res/ji/import/international_standards/the_universal_charter_of_the_judge/universal_charter_2017_english.pdf) (accesses 12 February 2021).

<sup>119</sup> Article 11 of the Basic Principles of the Independence of the Judiciary expressly provides that tenure, security, conditions of service and the remuneration should be adequately provided for by law.

<sup>120</sup> Article 12 of the Basic Principles on the Independence of the Judiciary. Section 4 (l)-(m) of the Principles on the Right to a Fair Trial in Africa. Part IV (b)-(d) of the Commonwealth Principles. Article 2-2 of the Universal Charter of Judges also provides that any change to the judicial obligatory retirement age cannot have retroactive effect.

<sup>121</sup> Article 2-2 of the Universal Charter of Judges.

<sup>122</sup> Article 8-3 of the Universal Charter of Judges.

<sup>123</sup> Article 8-3 of the Universal Charter of Judges.

<sup>124</sup> Principles 12 and 13 of the UN Principles.

<sup>125</sup> Principle 14 of the UN Principles.

<sup>126</sup> Section 14 of the IBA Standards. Article 8-1 of the Universal Charter of Judges.



his or her term of judicial service.<sup>127</sup> Remuneration should also not be dependent upon the results of the Judge's work or a Judge's performances.<sup>128</sup>

#### 6.3.3. *Physical security of judges*

Physical security of Judges is also important in protecting the independence of the judiciary. Ideally, security for the Judge and his or her family must be provided by the State. Furthermore, to protect the natural flow of judicial debates leading from the nature of judicial work, states must put adequate protective measures in place for the courts.<sup>129</sup>

#### 6.3.4. *Judicial selection processes and appointments*

The UN Principles<sup>130</sup> provide that judicial selection processes must safeguard against improper motives for judicial appointments. There must be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth, or status. The only acceptable exception to the latter is the requirement that a candidate for judicial office must be a national of the country concerned.

While the participation of the Executive and Legislature in judicial appointments and promotions does not threaten independence per se, it does leave room for encroachment on judicial independence if not properly regulated. Therefore, the final decision regarding appointments and promotions of judges must be vested in an independent judicial body that is mostly comprised of members of the judiciary and legal profession.<sup>131</sup>

The Lilongwe Principles<sup>132</sup> also underpin the guidelines for the selection and appointment of Judicial Officers, the Principles are listed below:

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<sup>127</sup> Article 8-1 of the Universal Charter of Judges.

<sup>128</sup> Article 8-1 of the Universal Charter of Judges.

<sup>129</sup> Article 2-5 of the Universal Charter of Judges.

<sup>130</sup> Principle 10 of the UN Principles.

<sup>131</sup> Section 3(a) of the IBA Standards. The only exception to this is provided for in section 3(b) which states that "appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily." Unfortunately, the latter is not the case in the Kingdom of Lesotho.

<sup>132</sup> Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers of 2018 at 3 (hereafter the Lilongwe Principles) available at [http://www.dgru.uct.ac.za/sites/default/files/image\\_tool/images/103/Lilongwe%20Principles%20and%20Guidelines%20on%20the%20Selection%20and%20Appointment%20of%20Judicial%20Officers.pdf](http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/Lilongwe%20Principles%20and%20Guidelines%20on%20the%20Selection%20and%20Appointment%20of%20Judicial%20Officers.pdf) (accessed on 13 February 2021) provides for regional principles and guidelines on selection and appointment of judges in Africa. These are principles and guidelines to assist Southern African jurisdictions in the development of legislation,

- (a) The principle of transparency should permeate every stage of the selection and appointment process.
- (b) The selection and appointment authority should be independent and impartial.
- (c) The process for the selection and appointment of judicial officers shall be fair.
- (d) Judicial appointees should exceed minimum standards of competency, diligence, and ethics.
- (e) Appointments of candidates should be made according to merit.
- (f) The appointment process should ensure stakeholder engagement at all relevant stages of the process.
- (g) Objective criteria for the selection of judicial officers should be pre-set by the selection and appointment authority, publicly advertised, and should not be altered during that process.
- (h) The judicial bench should reflect the diversity of society in all respects, and selection and appointment authorities may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench.
- (i) Candidates shall be sourced according to a consistent and transparent process.
- (j) The shortlisting of candidates shall be credible, fair, and transparent.
- (k) Candidates shortlisted for interview shall be vetted and stakeholders invited to comment on the candidate's suitability for appointment prior to interview.
- (l) Interviews should be held for the selection of candidates for appointment to judicial office.
- (m) The final selection (decision) to recommend for appointment shall be fair, objective, and based on weighing the suitability of the candidate for appointment against the criteria set for that appointment.
- (n) Formal appointment shall be made constitutionally and lawfully.
- (o) Provision shall be made for judicial officers to assume office timeously once appointed.

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policy and practice on the selection and appointment of judicial officers. The overriding purpose of the guiding principles and best practices is to promote the independence and integrity of the judiciary.



From the above Principles the Commission created the Lilongwe Guidelines<sup>133</sup> for the selection and appointment of Judicial Officers. As far as practicable these principles and guidelines should be applied to all judicial appointments, including short-term, acting, and contractual appointments, subject to variations in the constitutional and legislative frameworks governing such appointments. In jurisdictions where the appointment of contract judges remains an important supplement to the bench, measures should be taken to ensure that such candidates are appointed through the same process as permanent appointees. Where abridged appointment processes take place for the appointment of acting judges, the same principles of merit, fairness, transparency, and rationality of the appointment shall apply.<sup>134</sup>

In terms of transparency, the Lilongwe Principles<sup>135</sup> provide that appropriate records of each stage of the appointment and selections processes should be kept by the selection and appointment authority. These records should also be available to interested parties. This transparency requirement enhances the integrity of the process. As far as possible, this process should also promote record-keeping and transparency by developing legislation, policies, and practices.

The Lilongwe Principles also speak to the independence of the selection and appointment authorities.<sup>136</sup> It provides that the Chief Justice should represent the Judiciary on the selection and appointment authority. Furthermore, the selection and appointment authority must be independent, impartial, and not subject to the direction or control of any person, ministry, body, or organisation. It recommends a broad involvement from a wide range of representatives. It further provides for a comprehensive selection and appointment body, comprising one-third of judicial officers, as well as members of the legal profession, teachers of law, and lay specialists. There should also be fairness<sup>137</sup> at all levels of the selection and appointment process which ensures safeguards against abuse of discretion, arbitrary interference, and unconscious bias.

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<sup>133</sup> The Lilongwe Principles 4.

<sup>134</sup> The Lilongwe Principles 14.

<sup>135</sup> Principle (i) of the Lilongwe Principles.

<sup>136</sup> Principle (ii) of the Lilongwe Principles.

<sup>137</sup> Principle (iii) of the Lilongwe Principles.

It also provides that appointments should be made on<sup>138</sup> merit and that judicial appointees should exceed the minimum standards of competency, diligence, and ethics through a rigorous interviewing and vetting process. The criteria listed for admirable appointments which increase public confidence in the judiciary include:<sup>139</sup>

In order to be appointable, judicial officers should, at a minimum: (a) hold a recognised law degree; (b) hold an appropriate level of post-qualification experience; (c) be a fit and proper person; (d) be competent to perform the functions of a judicial officer; (e) possess good written and communication skills; (f) be able to diligently render a reasoned decision; (g) not have any criminal convictions, other than for minor offences; (h) not have any ongoing political affiliation after appointment.

The publication of criteria for the selection of judicial officers supports the principles of fairness and transparency. The Lilongwe Principles and Guidelines requires that the criteria should be pre-set (in line with the rule of law) by the selection and appointment authority, advertised at the opening of the recruitment process, and should not be altered during the process. Additionally, a set criterion acts as a guide to candidates and provides objective standards to hold the selection and appointment authority accountable.

The Lilongwe Principles<sup>140</sup> requires a minimum qualification criterion which candidates are expected to meet, if not exceed. It is proposed that this criterion should include:

- (i) academic qualifications, including, at minimum, a recognised law degree,
- (ii) a specified minimum level of post-qualification experience,
- (iii) ethical (fit and proper) standards,
- (iv) competence to perform the functions of a judicial officer including the appropriate personal skills, adequate cultural and legal knowledge, and analytical capabilities,
- (v) good written and communication skills, and
- (vi) an ability to make reasoned decisions, and to do so diligently.

Candidates should furthermore be fit and proper persons to hold judicial office.<sup>141</sup> The fit and proper requirement must consider the candidate's ability to uphold the provisions of the applicable Constitution and Judicial Code of Ethics. This is also guided by the Bangalore

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<sup>138</sup> Principle (iv) and (v) of the Lilongwe Principles.

<sup>139</sup> Principle (vii) and (viii) of the Lilongwe Principles.

<sup>140</sup> The Lilongwe Principles 7.

<sup>141</sup> The Lilongwe Principles 8.



Principles of Judicial Conduct.<sup>142</sup> The Lilongwe Principles also requires a candidate to immediately following appointment, remove themselves from all interests which may affect their ability to carry out their judicial duties. As a minimum requirement the Principles and Guidelines require appointees not to hold political office or have any active political affiliations or membership. It is advised that, dependent on domestic laws, candidates should not have any previous criminal convictions besides minor offences.

The selection and appointment of a bench that represents and reflects society in all respects, and suggests that the recruitment of appointable candidates who enhance the diversity of the bench are actively prioritised, is provided for.<sup>143</sup> Appropriate grounds to diversify the bench include diversity of academic, personal, social, and professional background, gender, race, culture, ethnicity, disability, geographical and regional representation, religion, language, and people who have worked with those groups and are thereby aware of specific issues or challenges experienced by the groups. Diversity of age groups on the bench may be considered to ensure continuity and progressive retirement.

Guidelines for the sourcing of candidates are also provided<sup>144</sup> which state that candidates for appointment may be sourced through applications, nominations, proposals, direct searches, or invitation to express interest and apply. The second guidelines notes that regardless of how candidates are sourced, no distinction may be drawn between candidates in the selection and appointment process once their names are sourced.

Guidelines for shortlisting provide that<sup>145</sup> objective criteria should be developed to guide the process for the shortlisting of appointable candidates. These criteria should be agreed and publicised before the shortlisting process and the body responsible for shortlisting should be made known to stakeholders and the candidates.

To ensure the legitimacy and accountability of the process, the Lilongwe Principles encourages meaningful engagement and participation from all relevant stakeholders during all applicable stages of the process.<sup>146</sup> It calls for vetting, stakeholder engagement, and

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<sup>142</sup> The Bangalore Principles.

<sup>143</sup> The Lilongwe Principles 8.

<sup>144</sup> Principle (ix) of the Lilongwe Principles.

<sup>145</sup> Principle (x) of the Lilongwe Principles.

<sup>146</sup> Principle (vi) and (xi) of the Lilongwe Principles.

comment after shortlisting but before interviewing. If the selection and appointment authority does not undertake the vetting process, it must not relinquish its function, and must have the final say on the weight to be attached to findings about the suitability of candidates.

Guidelines for interview and selection provide that<sup>147</sup> interview processes should be equal, fair, rigorous, respectful and permit candidates the opportunity to choose to respond to adverse comments made against the candidate. Records of interviews shall be made, kept, and available.

After short listing and interviews, the decision-making process must be fair, objective, and based on a weighing of the pre-set criteria. Emerging best practice is the use of a ranking and scoring process for assessing candidates. The selection and appointment authority are encouraged to meet before the interview process to decide mathematical weightings of the various criteria according to the needs of the position for appointment, and the needs of the judiciary. This creates practical reasons for their recommendations and promotes objectivity and fairness.<sup>148</sup>

The Lilongwe Principles and Guidelines requires that the appointment of judicial officers be made according to constitutional and national legislative provisions in a timeous fashion.<sup>149</sup>

The Lilongwe Principles and Guidelines further deals with the implementation and follow through of the appointments by calling for the appointing authority and the judiciary to coordinate and ensure that the appointee assumes office within a reasonable time. It proposes and a maximum period of six months for the appointee to finalise existing commitments and to take appropriate steps to resign from conflicting interests. Finally, it places a duty on the judiciary to ensuring that appointees are appropriately inducted which includes a compulsory period of training immediately post appointment as a best practice and encourages ongoing legal and skills development.<sup>150</sup>

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<sup>147</sup> Principle (xii) of the Lilongwe Principles.

<sup>148</sup> Principle (xiii) of the Lilongwe Principles.

<sup>149</sup> Principle (xiv) of the Lilongwe Principles.

<sup>150</sup> Principle (xv) of the Lilongwe Principles.



In addition to the Lilongwe Principles the Cape Town Principles<sup>151</sup> provide guidance on selection and appointment of judges and note that the main aim of any system of judicial appointments must be to identify and secure the appointment of persons who are independent, impartial, has integrity, possess professional competence, and may own any additional attributes that may be stipulated for positions that require specific expertise or leadership.<sup>152</sup>

The process of selection and appointment should be fair and inspire the best candidates from any background to seek a judicial career, and that overall uplifts public confidence in the judiciary.<sup>153</sup>

Appointment to judicial office must be open to all suitably qualified candidates without discrimination on the prohibited grounds recognised in international human rights law and applicable domestic law. Under certain circumstances, measures may be required to remedied past or present patterns of unfair disadvantage or exclusion affecting actual or potential candidates based on race, gender, or other personal characteristics.<sup>154</sup>

#### 6.3.5. *Promotion of judges*

Requirements for the promotion of Judges must also speak to objective factors and particularly take into account a prospective Judge's ability, integrity and experience.<sup>155</sup> Similarly, disciplinary, suspension or removal proceedings should be subject to an independent review to promote impartiality, integrity, and fairness.<sup>156</sup> This review must be

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<sup>151</sup> Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges of 2016 (hereafter the Cape Town Principles) available at <https://www.icj.org/wp-content/uploads/2014/10/Cape-Town-Principles-February-2016.pdf> (accessed 16 February 2021). These are a set of principles that aim to provide practical guidance to constitution-makers, legislators and existing judicial service commissions or equivalent bodies. It classifies ways in which processes for the selection and appointment of judges can strengthen the independence of the judiciary and the rule of law and attempts to adapt to suit national legal systems and is in line with the Bangalore Principles and Guidelines.

<sup>152</sup> Principle 1 of the Cape Town Principle.

<sup>153</sup> Principle 2 of the Cape Town Principles.

<sup>154</sup> Principle 3 of the Cape Town Principles.

<sup>155</sup> Article 13 of the UN Basic Principles on the Independence of the Judiciary. The Preamble of the Bangalore Principles also speak to the competence of judges.

<sup>156</sup> Article 20 of the UN Basic Principles on the Independence of the Judiciary. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

conducted by a permanent institution composed mainly of members of the judiciary should the power to discipline be vested in an institution other than the Legislature.<sup>157</sup>

International standards prescribe some standards in terms of promotions, suspensions, and transfers of Judges. Judges should not, for example, be assigned to another post or promoted without their express agreement and unless it is duly provided for by law.<sup>158</sup> To further give effect to this provision the decision to transfer Judges between courts should ultimately vest in a judicial authority and be subject to the judge's consent.<sup>159</sup> If part-time Judges must be considered their appointment process must also be transparent, with proper safeguards.<sup>160</sup>

#### 6.3.6. *Judicial disciplinary procedures*

Disciplining Judges is a serious matter with far-reaching on the independence of the judiciary and the overall integrity of the institution. Therefore, disciplinary proceedings towards judges must be based on relevant, objective reasons and be carried out according to the due process of law.<sup>161</sup> It must be conducted in a way that does not compromise a Judge's independence and should therefore be carried out by independent bodies that consist of mainly other Judges.<sup>162</sup>

Unless it can be proven that there was malice or gross negligence on the part of the Judge in handing down judgment, disciplinary action cannot be instituted based on a Judge's interpretation of the law, his assessment of facts, or weighing of evidence. The Judge also has the right to challenge the disciplinary judgment before an independent body. Disciplinary action against a judge can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure.<sup>163</sup>

The Executive should have limited participatory rights in the discipline of judges which should be confined to the referral of complaints against judges and the initiation of disciplinary

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<sup>157</sup> Section 31 of the IBA Standards.

<sup>158</sup> Article 2-2 of the Universal Charter of Judges provides that even if this is prescribed by law, it may only be brought about by disciplinary proceedings, "under the respect of the rights of defence and of the principle of contradiction."

<sup>159</sup> Section 12 of the IBA Standards. Such consent shall not be unreasonably withheld by the Judge.

<sup>160</sup> Section 25 of the IBA Standards.

<sup>161</sup> Which affords the Judge the right to have access to the proceedings and to have legal representation.

<sup>162</sup> Disciplinary action against a judge can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure. Article 7-1 of the Universal Charter of Judges also provides that disciplinary sanctions should be proportionate.

<sup>163</sup> Article 7-1 of the Universal Charter of Judges.



proceedings. The Executive should not be allowed to adjudicate disciplinary matters because the power to discipline or remove a judge must be vested in an institution, which is independent of the Executive.<sup>164</sup>

The UN Principles allows for the removal or suspension of judges only in the case of incapacity or behaviour that renders them unfit to discharge their duties.<sup>165</sup> It further requires that complaints against the judicial and professional capacity of a judge be processed expeditiously and fairly under an appropriate procedure, which allows the judge the right to a fair hearing. The initial examination of the matter should be kept confidential unless otherwise requested by the judge.<sup>166</sup>

Disciplinary, suspension or removal procedures should be measured against established standards of judicial conduct and the process should be subject to an independent review. The latter does not apply where it is a decision of the highest court and those of the legislature in impeachment or similar proceedings.<sup>167</sup>

#### *6.4. Finances and administration of the judiciary*

The State must provide the judiciary with the means necessary to equip itself properly to perform its functions.<sup>168</sup> To do so, the judiciary must be able to advocate for, and motivate its needs in terms of budget, material, and human resource needs.<sup>169</sup> The funds allocated to the judiciary must be properly utilised and safeguarded from alienation or misuse. The availability of funding to the judiciary should not become a weapon be used as a means of exercising improper control over the institution.<sup>170</sup> Therefore States have a duty to endow judicial bodies with adequate resources for the performance of its functions.<sup>171</sup>

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<sup>164</sup> Section 4 (a) of the IBA Standards.

<sup>165</sup> Principle 18 of the UN Basic Principles on the Independence of the Judiciary.

<sup>166</sup> Principle 17 of the UN Basic Principles on the Independence of the Judiciary.

<sup>167</sup> Principle 19 read with Principle 20 of the UN Basic Principles on the Independence of the Judiciary.

<sup>168</sup> Section 10 and 13 of the IBA Standards. Article 7 of the UN Basic Principles on the Independence of the Judiciary. Principle II (2) of the Latimer House Guidelines.

<sup>169</sup> Article 2-4 of the Universal Charter of Judges.

<sup>170</sup> Principle II (2) of the Latimer House Guidelines.

<sup>171</sup> Section 4 (v) of the Principles on the Right to a Fair Trial in Africa.

Representatives of the judiciary must be consulted before any decision is made which may affect the performance of their judicial duties.<sup>172</sup> Since internal administrative processes have an important impact on the latter it is crucial that the adjudication of these processes be primarily entrusted to judges.<sup>173</sup>

An independent judiciary is also built upon ethical principles and guidelines that form part of the internal administrative rules and procedures. Such principles deal with the Judge's professional duties and ethical behaviour. It should guide Judges in their actions and be captured in writing to formalise it and increase public confidence in the judiciary. It is only natural that Judges should play a leading role in the development of these ethical principles.<sup>174</sup> Therefore, once again, it is integral that responsibility for judicial administration must vest in the Judiciary, or at least jointly in the Judiciary and the Executive.<sup>175</sup>

#### *6.5. Judicial training and education*

Quality judicial training and education should be both a right and duty of any Judge. These training systems should be led and organised under the supervision of the judiciary.<sup>176</sup> It is also the State's duty to ensure that judicial officials have appropriate opportunity and access to education and training. To this effect States are required to establish specialised institutions for the education and training of judicial officials and to encourage comparative collaboration amongst judicial institutions across Africa. The duty of the State goes further than initial education and expands to continuous professional development throughout a Judge's judicial career.<sup>177</sup>

Judicial training should be organised, systematic, and ongoing. It should be administered under the control of an adequately funded independent judicial body and offer training on topics such as teaching of the law, judicial skills, and various social contexts. Judicial officers, with the assistance of specialists in the field, should develop and maintain the curriculum. These courses should not only be aimed at the judiciary but also to lawyers as part of their

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<sup>172</sup> Section 4 (v) of the Principles on the Right to a Fair Trial in Africa.

<sup>173</sup> Article 3-3 of the Universal Charter of Judges.

<sup>174</sup> Article 6-1 of the Universal Charter of Judges.

<sup>175</sup> Section 9 of the IBA Standards.

<sup>176</sup> Article 4-2 of the Universal Charter of Judges.

<sup>177</sup> Part B of the Principles on the Right to a Fair Trial in Africa.



ongoing professional development. This will ultimately aid in building a pool of suitably qualified future candidates for the judiciary.<sup>178</sup>

Each judicial system should also develop and adhere to a Code of Ethics and Conduct as a means of ensuring the accountability of judges. Training on this Code will also be essential to ensure that Judges are well versed in its context and what is expected of them.<sup>179</sup>

#### *6.6. Judicial Independence Council or similar entity*

Protecting the independence of the judiciary becomes difficult when there is a constant intermingling between different spheres of government and the judiciary. To avoid the serious traps that are created by the latter it is advisable for each judiciary to have a Judicial Council, or similar independent body. This body must be completely independent of other State powers and be comprised of mostly Judges who were duly elected to this body by their peers. To accurately represent civil society the body created can include members that are not Judges but to curb suspicion these members should not have any political ties. All members serving on the body must have the requisite qualifications, integrity, independence, impartiality, and skills.<sup>180</sup>

The power to recruit, train, appoint, promote, and discipline judges must largely vest in this independent body. The setting of appropriate salaries and benefits, implementing support structures for staff, and allocating resources and equipment must also be an essential function of this independent body. There can be no proper functioning of the judiciary if the latter is not properly seen to.<sup>181</sup> The criteria for judicial office and the process of selection should be in written form and published in a manner that makes them readily accessible to candidates for selection and the public at large. Such transparency provides a foundation for public confidence in the selection process.<sup>182</sup> It should be open to all qualified candidates to

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<sup>178</sup> Principle II (3) of the Latimer House Guidelines.

<sup>179</sup> Principle V (1) of the Latimer House Guidelines. The Guidelines also refer to a draft Model Code of Judicial Conduct which was in development. It notes that the Commonwealth should be encouraged to complete this Model and that the Commonwealth Association should serve as a repository of codes of judicial conduct developed by Commonwealth judiciaries. This, in turn, can be as a resource for other jurisdictions.

<sup>180</sup> Article 2-3 of the Universal Charter of Judges provides that no active member of Government or Parliament can serve on this independent judicial body.

<sup>181</sup> Principle II (2) of the Latimer House Guidelines.

<sup>182</sup> Principle 9 of the Cape Town Principles.

apply and should be widely advertised with sufficient time allowed for applications to be submitted.<sup>183</sup>

The commission must make its decisions about applications based on evidence and to the extent a candidate satisfies the criteria prescribed. The application process should include some form of self-assessment by the candidate against the prescribed criteria, and the submission of written work (such as judgments, legal opinions, or articles). External evidence, such as referees nominated by the candidate or from third parties, and interviews of each shortlisted candidate should be conducted. The commission should keep full records of the information obtained from all sources.<sup>184</sup>

Candidate interviews must be conducted in a manner that is respectful to and fair between candidates. Public interviews should be considered if it will promote the legitimacy of the selection process. The interview should be supplementary evidence to a candidate's suitability and not as replacing evidence received during the selection process.<sup>185</sup>

The commission's deliberation procedures should enable it to come to a reasoned decision in matters of selection. Deliberations should be private, but sufficient record must be kept. The successful candidates should be communicated to the final appointing authority, if any, without undue delay.<sup>186</sup>

The commission should make the decision on which candidates are appointed to judicial office, even when the formal power of appointment is vested in another branch of government. It should be the norm that a commission recommend a single selected candidate for a judicial vacancy, who must then be appointed to that position by the appointing authority.<sup>187</sup>

The independent body can be consulted by the Executive or Legislature on all possible questions concerning judicial status, ethics, the annual budget of the judiciary, the allocation

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<sup>183</sup> Principle 10 of the Cape Town Principles.

<sup>184</sup> Principle 11 of the Cape Town Principles.

<sup>185</sup> Principle 12 of the Cape Town Principles.

<sup>186</sup> Principle 13 of the Cape Town Principles.

<sup>187</sup> Principle 14 of the Cape Town Principles.



of resources to the courts, the operation of the organisation, and the functioning and public image of judicial institutions.<sup>188</sup>

Commissions committed to judicial affairs functioning independently from other institutions of government are entrusted with the selection of judges. To support the independence of the judiciary, these commissions must themselves be manifestly independent, and suitably composed and resourced. A commission will be most effective if it has a wide mandate, encompassing all levels of the superior court hierarchy and including temporary, acting, or part-time judges, where such positions exist.<sup>189</sup>

The commission's independence and recognition of the inherently constitutional nature of its functions must be protected and entrenched in a legal system as far as possible.<sup>190</sup> The commission should consist of a variety of members drawn from the judiciary and from a range of other institutional, professional, and lay backgrounds. The members should be appointed in proportion to safeguard against unjustified dominance of the commission by the executive or by members of parliament or representatives of political parties. It is further required that the membership of the commission should be appropriately diverse in terms of race, gender, professional and life experience, and other relevant considerations in the context of a particular society.<sup>191</sup>

Members of the commission should be independent in all matters of judicial selection, to avoid conflicts of interest and to follow the highest standard of ethics. To preserve individual independence, members should enjoy security of tenure, subject to appropriate limits, and should not be vulnerable to arbitrary termination of their membership. The ethical obligations of members may be reinforced by an oath or affirmation of office, a code of conduct, and provisions that temporarily disqualify members or former members from applying for judicial office.<sup>192</sup>

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<sup>188</sup> Article 2-3 of the Universal Charter of Judges.

<sup>189</sup> Principle 4 of the Cape Town Principles.

<sup>190</sup> Principle 5 of the Cape Town Principles.

<sup>191</sup> Principle 6 of the Cape Town Principles.

<sup>192</sup> Principle 7 of the Cape Town Principles.

The commission, as an independent institution, should be provided with a secretariat and a sufficient complement of staff with appropriate skills and experience to enable the commission to perform all its functions efficiently and independently.<sup>193</sup>

In exceptional cases, if express provision is made to that effect in the legal framework, depending on the judicial office in question and the context of a particular society, it may be justifiable to provide that the appointing authority has the right to choose from a list of selected candidates recommended by the commission, or that the appointing authority may reject or require reconsideration of a candidate or list of candidates recommended by the commission. The appointing authority should be required to provide reasons when exercising any power to reject, require reconsideration and the exercise of such powers may be confined to specified grounds. The total number of selected candidates in respect of any vacancy must be limited and no unsuccessful candidate should be eligible for appointment.<sup>194</sup>

The commission should be accountable for its decisions on individual applications for judicial office, by providing feedback and reasons on request, and the general performance of its institutional functions, through annual reports and other public interventions.<sup>195</sup>

The commissions decisions may be subject to examination by an independent ombudsman dedicated to judicial affairs with power to make findings and non-binding recommendations in the case of maladministration. Decisions of the commission should also be reviewable by the courts on established grounds of legality and constitutionality.<sup>196</sup>

## 7. Case Studies

### 7.1. *Zambia*

The Amendment Act to the Constitution of Zambia provides for a separation of powers and an independent judiciary.<sup>197</sup> It provides that the judiciary is only subject to the constitution,<sup>198</sup>

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<sup>193</sup> Principle 8 of the Cape Town Principles.

<sup>194</sup> Principle 15 of the Cape Town Principles.

<sup>195</sup> Principle 16 of the Cape Town Principles.

<sup>196</sup> Principle 17 of the Cape Town Principles.

<sup>197</sup> Constitutional Amendment Act 2 of 2016 to the Constitution of Zambia (Zambia Constitutional Amendment), section 122.

<sup>198</sup> Section 122(1) of the Zambia Constitutional Amendment.



but that persons holding public office cannot interfere with judicial functions carried out by a judge or judicial officers.<sup>199</sup> It also boldly provides for the financial<sup>200</sup> and administrative independence of the judiciary.<sup>201</sup>

The provisions go further to address judicial review and instances of contempt of court. The courts have broad jurisdiction to hear and determine civil, criminal, and constitutional matters.<sup>202</sup> It also includes an important transparency measure by providing that matters must be heard in an open court unless the law or the constitution provides otherwise.<sup>203</sup>

The Zambian Constitution, as amended, also provides a set court system with a list of the functioning courts within this system. To protect the independence of the judiciary and the integrity of the individual courts the jurisdiction, powers, classification, and grading of judicial officers must be done in accordance with the prescribed laws.<sup>204</sup> Section 119 and 120, read with section 122, therefore provide for the functional independence of the judiciary.<sup>205</sup>

The Judicature Administration Act<sup>206</sup> regulates the administration of the court system in Zambia. Section 3 provides for a Chief Administrator of the Judicature who is responsible for the day-to-day administration of the courts and the implementation of any resolutions of the Judicial Services Commission (JSC) if it relates to administration. According to the Act the latter duties of the Court Administrator include court finances, reporting, and the appointment of staff. The Chief Administrator is appointed by the President on the recommendation of the JSC.<sup>207</sup> The Act also delineates some responsibilities which are not to be considered administrative and will remain the responsibility of the Chief Justice. For example, with respect to the allocation of cases, section 10 provides that the Chief Justice will delegate a judge in each place where the High Court sits, who will be responsible for that work.

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<sup>199</sup> Section 122(2) of the Zambia Constitutional Amendment.

<sup>200</sup> Section 122(3) of the Zambia Constitutional Amendment.

<sup>201</sup> Section 122(3) of the Zambia Constitutional Amendment.

<sup>202</sup> Section 119(2) of the Zambia Constitutional Amendment.

<sup>203</sup> Section 119(3) of the Zambia Constitutional Amendment.

<sup>204</sup> Article 120 of the Zambia Constitutional Amendment.

<sup>205</sup> Nkhata (2021) 6-7.

<sup>206</sup> Judicature Administration Act 23 of 2016.

<sup>207</sup> The Act also delineates some responsibilities which are not to be considered administrative and will remain the responsibility of the Chief Justice. For example, with respect to the allocation of cases, section 10 provides that the Chief Justice will delegate a judge in each place where the High Court sits, who will be responsible for that work.

### 7.2. Zimbabwe

The Constitution<sup>208</sup> of Zimbabwe provides for a Constitutional Court, Supreme Court, High Court, Labour Court, Administrative and lower Courts.<sup>209</sup> The Constitution further confirms the Zimbabwean judiciary is only beholden to the Constitution and affirms the duty of government and its institutions to do everything in their power to protect and promote the independence of the judiciary.<sup>210</sup>

The Zimbabwe Constitution further gives clear direction on who the head of the judiciary declaring the Chief Justice to be the head of the judiciary, overseeing both the Constitutional and Supreme Courts.<sup>211</sup> It goes even further to lay out clear seniority for the other courts with the Judge Presidents of the High, Labour and Administrative courts being the heads of these respective courts.<sup>212</sup>

The Constitution also clearly speaks to the tenure of judges with Constitutional Court judges serving for a non-renewable term of 15 years, unless they reach retirement age before the term comes to an end. Section 186 specifically provides that all Judges will hold their tenure for life or until they reach the mandatory retirement age of 75.<sup>213</sup>

Section 114 deals with the functions of the AG and does not confer such broad rights upon the AG as the Lesotho constitution does. Similarly, the powers and functions of the Registrar are also significantly narrower than those conferred upon the Lesotho Registrar. Section 12 of the Constitutional Court Rules<sup>214</sup> limits the Registrar's functions to administrative duties and assistance with court processes.

### 7.3. South Africa

The Constitution<sup>215</sup> makes provision for a JSC and speaks to the remuneration and tenure of the judges.<sup>216</sup> Section 165 vests judicial authority in the courts and provides that they are only beholden to the constitution. It also provides that government and its institutions must work

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<sup>208</sup> Constitution of Zimbabwe as Amendment Act 20 of 2013 (hereafter Zimbabwe Constitution).

<sup>209</sup> Section 162 of the Zimbabwe Constitution.

<sup>210</sup> Section 164 of the Zimbabwe Constitution.

<sup>211</sup> Section 163(2) of the Zimbabwe Constitution.

<sup>212</sup> Section 163(3)-(5) of the Zimbabwe Constitution.

<sup>213</sup> Section 186(2) of the Zimbabwe Constitution.

<sup>214</sup> Constitutional Court Rules of Zimbabwe 61 of 2016.

<sup>215</sup> The Constitution of the Republic of South Africa 108 of 1996.

<sup>216</sup> Section 176 and 178 of the Constitution of South Africa.



to protect and promote the independence of the courts. It clearly speaks to seniority in providing that the Chief Justice is the head of the judiciary and that he/she is responsible for establishing the norms and standards for the exercise of judicial functions.<sup>217</sup>

The President, on the advice of the JSC and leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice. The President and Deputy President of the Supreme Court of Appeal are also appointed by the President, on the advice of the JSC.<sup>218</sup>

The Constitution is also clear on the tenure of Judges and provides, for example, that a Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first.<sup>219</sup> Judges of other courts hold office until they are discharged from active service.<sup>220</sup> There are, however, further qualifications relating to the tenure of judges in the Constitutional Court. If at the end of the 12-year term the judge has not completed a total of 15 years' active service, his term is extended until this service term has been completed. Similarly, if the Judge has reached the retirement age of 70 but has yet to fulfil his or her 15-year term, service will be extended until the 15-year mark or the age of 75 is reached.<sup>221</sup>

There are currently two separate systems for court administration and budgetary control in South Africa. The Constitutional Court Complementary Act<sup>222</sup> sets out the provisions for the Constitutional Court. The Act provides that the Minister of Justice, in consultation with the Chief Justice,<sup>223</sup> will appoint a Registrar, assistant Registrars and other officers and staff.<sup>224</sup> Further to this the Chief Justice assisted by an Executive Secretary, and in consultation with the Minister of Justice, appoints additional research and other staff that may be required to fulfil judicial functions.

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<sup>217</sup> Section 165(6) of the Constitution of South Africa.

<sup>218</sup> Section 174(3) of the Constitution of South Africa.

<sup>219</sup> Section 176(1) of the Constitution of South Africa. This section does provide for the possibility of an Act of Parliament extending the terms of office.

<sup>220</sup> The Judges Remuneration and Conditions of Employment Act 47 of 2001.

<sup>221</sup> Section 3(2)(a) of the Judges Remuneration and Conditions of Employment Act also provides for a discharge from active service if the Judge reaches the age of 65 years, has completed the 15-year term, and wishes to discontinue his or her service. The Judge may address this request to the Minister of Justice.

<sup>222</sup> Constitutional Court Complementary Act 13 of 1995.

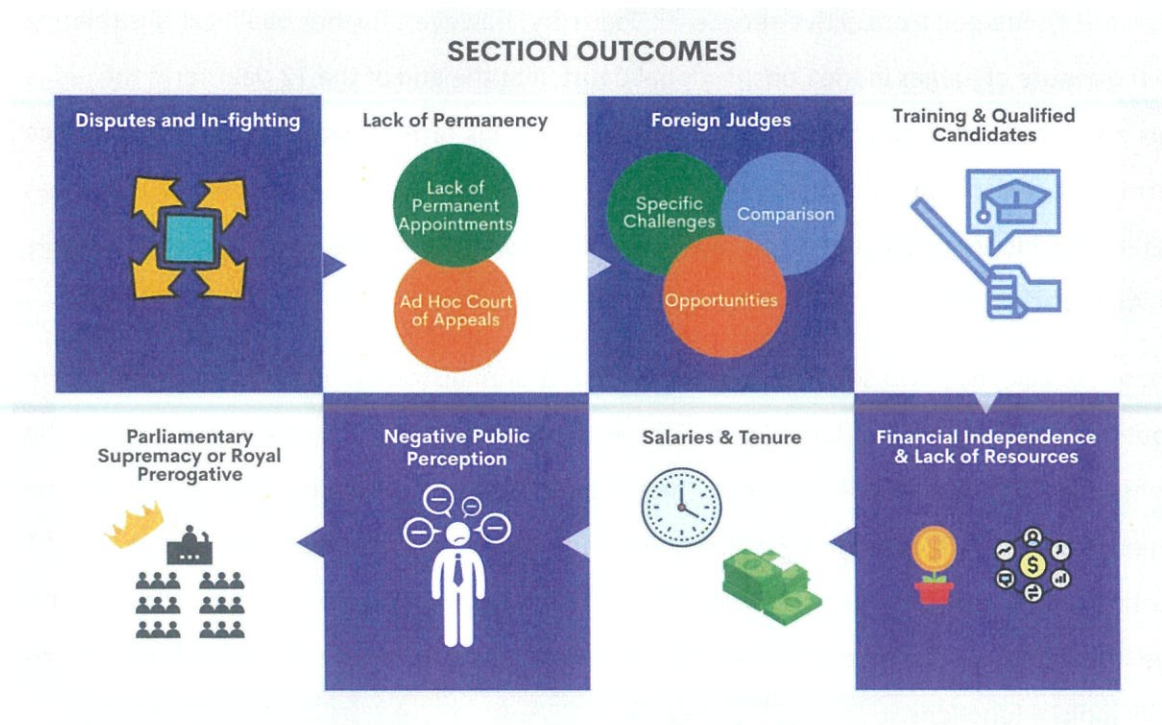
<sup>223</sup> Please note that the South African law has since been amended to reflect the Chief Justice as the head of the Constitutional Court. The President now refers to the Judge President of the Supreme Court of Appeal.

<sup>224</sup> Section 14(1) of the Constitutional Court Complementary Act.

Section 15(2) of the Act clearly deals with the judicial budget and how this budget is set. It provides that the budgetary needs of the judiciary will be determined by the Chief Justice, in consultation with the Minister of Justice. It will then be presented to Parliament by the Minister of Justice in accordance with prescribed budgetary processes for departments of state. It is clear from the phrasing of this section that the intention is for the Chief Justice to take the lead on determining the budgetary requirements for the judiciary and then discuss it with the Minister.

Sections 14 and 15 of the Act also make it clear that the administrative staff of the court report to the Chief Justice, owe their allegiance to the court, and are managed by the Chief Justice.

## 8. Most prevalent threats to the independence of the judiciary



In this section the researchers discuss many issues that intermingle and overlap, yet each threat identified has its own distinctive elements. It is impossible, for example, to discuss key issues with the finances of the judiciary without referring to secondary issues created by this primary threat like unfavourable salaries. The reader will note that there are many references to remuneration, availability of proper candidates for sitting Judges, and judicial training.



### 8.1. *Disputes and in-fighting*

There was a public dispute over the leadership of the Judiciary between the then Judge President of the Court of Appeals and the Chief Justice of the High Court. This dispute lasted from 2013 to 2014 and had a severe impact on the independence of the judiciary.<sup>225</sup> It eventually led to the Judge President of the Court of Appeals refusing to let High Court Judges sit on his bench.<sup>226</sup> The rapid escalation and the public nature of this dispute led to calls for the media and the Executive to intervene, with calls to revoke Judge President's decision. It is unfortunate that the Executive was called upon to intervene in this dispute given the sensitive balance that needs to be struck to ensure proper separation of powers. Involving the Executive in the internal affairs and disputes of the judiciary is a clear overlapping of powers between two branches of government that need to remain autonomous.<sup>227</sup> Not only does it threaten the separation of powers and the independence of the judiciary, but it also creates a threat to the rule of law.<sup>228</sup>

The inability of the judiciary to adequately resolve its own internal issues without the aid of other government branches and external forces, such as the media, is extremely worrying. The general lack of proper internal dispute resolution processes, codes of ethics, and codes of conduct further exacerbates this issue. It also creates the impression that the Judge President does not aim to place the independence of the judiciary and the protection of the rule of law above all else. Allowing himself and the institution he stands for to be riddled by public in-fighting over leadership is concerning.

To complicate matters the Constitution provides that the Chief Justice as well as the Judges of the High Court are *ex officio* members of the Court of Appeals. This is a legacy from colonialism that taints the right of appeal which provides that a person has the right to appeal and to be 'different court'. If the same Judges serve on both benches it has a severe impact on impartiality and integrity of the judicial system.

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<sup>225</sup> A full overview of this dispute is provided in the ICJ Report (November 2014) 27-47.

<sup>226</sup> ICJ Report (November 2014) 48.

<sup>227</sup> ICJ Report (November 2014) 48.

<sup>228</sup> ICJ Report (November 2014) 48.

Furthermore, the confusing arrangement of using the title of Chief Justice for purposes of a Judge serving as the head of a non-apex court is concerning. Usually, the Chief Justice is understood to be the head of the judiciary.<sup>229</sup> However, the Lesotho Constitution creates the office of Chief Justice as the leader of the High Court. Since this understandably caused some confusion regarding seniority Lesotho issued a Precedence Protocol in 2009 through which it indicated that the Judge President of the Court of Appeals ranked higher than the Chief Justice of the High Court.<sup>230</sup> This decision was simply motivated by the argument the Court of Appeals is the apex court and therefore the head of this court is logically senior to the head of the High Court.<sup>231</sup>

A further issue seems to be the continuous issue of separation of powers. There seems to be an intricate inter-mingling of various spheres of government in judicial affairs. The Judicial Inspectorate tasked with inspection of courts, for example, is comprised of members nominated by Parliament, the AG's office, the Law Society, the Ministry of Finance and Development Planning, and the Police.<sup>232</sup> This creates a lot of opportunity for undue influence with this important judicial oversight body being comprised of mostly the Executive and Legislative branches of government. Not only does this speak to the separation of powers, but it also speaks to undue influence by the Executive on the judiciary. The AG, for example, is ultimately appointed by the King on the advice of the Prime Minister. Yet he serves on the Judicial Inspectorate. This creates ample opportunity for political innuendos and undue influence.

## *8.2. Lack of permanent appointments and the ad hoc nature of the Court of Appeals*

The ICJ also mentioned the concern that then Judge President Ramodibedi was the only Masotho permanently appointed to the Court of Appeals since the declaration of Lesotho's independence.<sup>233</sup> The ICJ also noted a consensus among the then High Court Judges that more effort should be made to indigenise the Court of Appeals, even though no ill was held against the rotating South African judges. This once again raised the question about the unwillingness

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<sup>229</sup> 'Nyane (2019) 10.

<sup>230</sup> 'Nyane (2019) 10.

<sup>231</sup> 'Nyane (2019) 10.

<sup>232</sup> Section 24(1)(a)-(e) of the Administration of the Judiciary Act.

<sup>233</sup> ICJ Report (November 2014) 59.



of Lesotho lawyers to consider Judge appointments and the subsequent lack of competence of many High Court Judges.<sup>234</sup>

It is wholly undesirable to create a system within which it is more favourable to consider external judicial officers to in-country lawyers specialising in Lesotho law.<sup>235</sup> Not only does it create an issue with rotation and permanency in terms of the Court of Appeals, but it also affects the quality of judicial officers in the High Court. Candidates that lack proper experience are seemingly the only willing and available appointment options for one of the most important institutions in a democratic society built on the rule of law. A poor quality of Judges will inevitably lead to a general distrust in the judicial system which in turn, leads to disrespect for the institution.

Stakeholder interviews indicated that they are happy with the existing rigorous primary interviews, however once a person has been appointed as a judge promotion is done by way of 'hand-picking' with no clear terms or procedures for the promotion of judges.

### 8.3. *The special issue of foreign judges*

The appointment and removal of external or foreign judges are done in terms of sections 120(2) and (5) of the Lesotho Constitution, as in the case of the appointment of resident judges, and there is no separate procedure to follow. During May 2019, the appointment of a foreign judge, Justice Charles Hungwe, was challenged by several high ranking accused.<sup>236</sup> In essence the application dealt with the procedure followed and the executives' involvement in the recruiting and appointing of the foreign judge. The applicants relied on an affidavit made by the Chief Justice in another application<sup>237</sup> in which she explains that Justice Charles Hungwe was appointed after:

...the Government initiated efforts to recruit foreign Judges without following the Constitution. I warned them that the Constitution did not support their conduct as recruitment falls within the mandate of the Judicial Service Commission (JSC) and not the

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<sup>234</sup> ICJ Report (November 2014) 59.

<sup>235</sup> The ICJ also noted concerns with the recruitment process of Judges of the Court of Appeals. The appointment of these Judges did not appear to be adequately transparent since most were appointed from outside Lesotho on an *ad hoc* basis. See ICJ Report (November 2014) 60.

<sup>236</sup> *Mokhosi & 15 others v Justice Charles Hungwe & 5 others* (2019) 9 LSHC Cons Case No/02/2019.

<sup>237</sup> Constitutional Case NO13/2018 – at the time of this report the judgement was either undelivered in this matter or unreported.

executive arm of the state. I advised that they should leave the issue of recruitment with the JSC. This resulted in the Defence Counsel representing the accused persons in high profile cases informing me, during our meeting with the Director of Public Prosecution and the defence that, they will vigorously object to the appointment of such Judges. I relayed their concerns to the Government through the Minister of Justice.<sup>238</sup>

The Attorney General opposed the application and the Chief Justice's averments and set out the historical events leading to the recruitment of several foreign judges. He spoke to the Phumaphi Commission of Enquiry (the Commission) established through the facilitation and recommendation of the Southern African Development Community (SADC). Among the recommendations of the Commission was that the members of the Lesotho Defence Force implicated in human rights atrocities should be placed before the Courts of law and be prosecuted using best international standards. The applicants in the Mokhosi case were implicated in these atrocities.

The Court then proceeded to find the admission of the affidavits by the Chief Justice and Attorney General to be inadmissible for several reasons and since same formed the basis of the Applicant's motion declared the appointment of Justice Hungwe in line with the Constitution and void of interference by the executive.<sup>239</sup>

#### 8.3.1. *Specific challenges with foreign judges*

According to the SADC LA fact-finding mission<sup>240</sup> there is a perception that white judges were not valuable to the jurisprudence of the Lesotho judicial system. According to interviewees they wanted to 'Africanize' the appointment of foreign or external judges to avoid a monopoly by white South African judges. Thus, Lesotho has extended appointments of external judges to other SADC countries and to the exclusion of South Africa.

The appointment of other SADC judges has also been challenged as in the case of the Mokhosi matter, which were highly politicised and covered by the media.<sup>241</sup> Other potential

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<sup>238</sup> *Mokhosi v Justice Charles Hungwe* (2019) at 18.

<sup>239</sup> *Mokhosi v Justice Charles Hungwe* (2019) at 22 - 32.

<sup>240</sup> Fact-finding mission conducted by SADC LA in 2021.

<sup>241</sup> Rickard C "High-Ranking Accused In "Scurrilous" Bid to Remove Foreign Judges From Lesotho Cases" (16 May 2019) *AfricanLii* Online available at [file:///C:/Users/User/Sync/CALIBRICS/Clients/SADC%20LA/LESOTHO Independence%20of%20the%20Judiciary](file:///C:/Users/User/Sync/CALIBRICS/Clients/SADC%20LA/LESOTHO%20Independence%20of%20the%20Judiciary)



disadvantages include lack of local knowledge, lack of independence and of democratic legitimacy and fostering dependency and lack of incentives to develop local judging capacity.

Part and parcel to making judgements is the ability to take judicial notice of certain known and established facts. Foreign judges will often have limited knowledge of local history, socio-political values and attitudes, and the kinds of national social, economic, and political conditions that can affect the implementation of a court decision. In an appellate context, judges may need knowledge of community understandings to inform certain forms of evaluative judgment for example: about what is “reasonable” behaviour in terms of domestic law or about how to craft a remedial order in a complex case in a manner that encourage compliance and respect for the judgment.<sup>242</sup>

Like any temporary or acting judge, non-permanent foreign judges may be affected by of non-renewal if they deliver significant, or a significant amount of, unfavourable decisions against the government. Due to this, foreign judges may lack both actual and perceived independence and impartiality. The threats to actual independence may be reduced in situations where foreign judges have protected and secure financial benefits in their home jurisdiction and/or have the capacity to employ in a wide range of other interesting and meaningful work.<sup>243</sup>

Additionally, foreign countries may have current strategic or geo-political interests in the constitutional governance of another country. This may create the perception that the judges may be distinctly biased rather than impartial and motivated by foreign perspectives and strategic interests rather than the local public interest.<sup>244</sup> The latter may be increased where foreign governments or regional institutions provide financial support in respect foreign judges. Again, this financial influence may affect both the actual and perceived independence of foreign judges, where issues of interest or concern to the funders are at stake.<sup>245</sup>

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[/SUE%20PART/RESEARCH/External%20Judges/High-ranking%20accused%20in%20scurrilous%20bid%20to%20remove%20foreign%20judges%20from%20Lesotho%20cases%20%20African%20Legal%20Information%20Institute.html](#) (accessed 15 February 2021).

<sup>242</sup> Dixon R Jackson V “Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts” 2019 57 *Columbia Journal of Transnational Law* 317 available at <http://blogs2.law.columbia.edu/jtl/wp-content/uploads/sites/4/2019/07/f-Dixon-Hybrid-Constitutional-Courts-Online.pdf> (accessed 14 February 2021).

<sup>243</sup> Dixon *et al* (2019) 319.

<sup>244</sup> Dixon *et al* (2019) 320.

<sup>245</sup> Dixon *et al* (2019) 321.

Unfortunately, it is not uncommon for judges, who adjudicate constitutional challenges to the actions of other parts of the government, to face challenges of their own “democratic” legitimacy, additionally any constitutional court authorised to invalidate laws passed by a democratically constituted legislature may face similar challenges. This challenge may be increased where the holder of judicial office is a foreign judge. Foreign judges may, to an even greater extent than local judges, be perceived to lack the necessary degree of democratic legitimacy to carry out their role effectively. This is because the decision to have foreign judges sit as well as the selection or process of appointment of foreign judges may implicate democratic legitimacy concerns.<sup>246</sup>

Concerns about the democratic legitimacy of courts’ constitutional role may be reduced, if judges are appointed by a process providing for some stakeholder input, by employing staggered fixed terms with reasonable time limits to allow for new governments democratically elected over time to have participation into who sits on the bench.<sup>247</sup>

The appointment of foreign judges may cause a delay in the development and recruitment of indigenous judges, to the disadvantage of the country in which the court sits and may well prove to be potential disadvantage. By appointing foreign experienced and capable judges to the bench it may create the perception that funding is not required to fund the appointments of local judges and may cause governments to allocate scarce funds for human capital development to other areas. It may further discourage upcoming legal practitioners from pursuing careers other than domestic judging and undermine opportunities for local judges to gain appellate experience. Depending on foreign judges to create and promote the idea of an independent judiciary may well be too demanding, conveying the message that no local judge could prove to be independent. The appointment of temporary foreign judges at an early stage in a new court’s development, may very well prove more beneficial as opposed to a continuous and indefinite reliance on such judges.<sup>248</sup>

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<sup>246</sup> Dixon *et al* (2019) 321 to 322.

<sup>247</sup> Dixon *et al* (2019) 324.

<sup>248</sup> Dixon *et al* (2019) 325.



### 8.3.2. *Possible opportunities in continuing the tradition of foreign judges.*

Due to the small size of a jurisdiction, which makes it difficult to fill many key governmental roles, small domestic legal profession from which national judges can be drawn and which is exacerbated by low levels of economic development, a history of communist or military rule, or recent conflict some countries experience a gap in the number and level of experience of the judiciary. In addition, many low-income countries do not have the resources to train lawyers in large numbers or invest in high-quality legal education.<sup>249</sup>

Taking this into account, it is understandable that foreign judges may bring crucial insights regarding the legal knowledge about the ordinary workings of a court and how a new or fragile court might or should interact with the political branches of government. Foreign judges all contribute some knowledge about the practical workings of a court system in their home jurisdictions.<sup>250</sup>

Foreign judges, especially those with former judicial experience, may have a valuable capacity to contribute informal knowledge and guidance about how best to navigate institutional challenges. These legitimacy challenges may include having to overcome distrust of the judiciary due to replacement of a court widely seen as corrupt or incompetent or they may face a political context in which major political parties or players are cautious or even overtly hostile.<sup>251</sup>

Foreign judges may have two advantages over their local counterparts -1) they may have alternative financial security in their home jurisdiction, which make them less susceptible to direct personal pressure by the regime, and 2) should they be removed from office, they can generally leave the jurisdiction at limited cost to themselves and their family. This creates some form of protection from local political pressures, especially in authoritarian or quasi-authoritarian regimes.<sup>252</sup>

This in return creates a form of judicial independence which has important benefits for citizens and inhabitants within the jurisdiction, the political system, and the government itself. For citizens and other residents, it can mean there is a greater chance of independent

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<sup>249</sup> Dixon *et al* (2019) 304.

<sup>250</sup> Dixon *et al* (2019) 304.

<sup>251</sup> Dixon *et al* (2019) 305.

<sup>252</sup> Dixon *et al* (2019) 307.

and impartial enforcement of all constitutional guarantees—including individual and minority rights, for governments and business interests, judicial independence can mean that foreign investors are more likely to believe statements by governments that they intend to respect foreign investment contracts, even in an environment that is not generally committed to liberal, legalist values.<sup>253</sup>

In some small jurisdictions, established personal relationships between members of the local business, political community and government officials are prevalent. Foreign judges may offer additional independence and impartiality in the latter regard.<sup>254</sup>

Application of transnational legal sources can have a number of benefits: it can give a domestic court an opportunity to benchmark arguments against foreign courts in comparable cases; permit a court to learn from the doctrinal progresses or innovations of other courts addressing similar problems; and provide insights into the substantive content of constitutional principles through more careful reflection about the evolving content of those norms globally or domestically.<sup>255</sup> Local lawyers may possess limited expertise in comparative developments, and limited time and budget to research and brief such issues or consult foreign experts. Foreign judges, on the other hand, may have the capacity to contribute to greater comparative constitutional engagement, due to the ability to provide a source of reference and knowledge about foreign and international law. Some foreign judges have experience in multiple jurisdictions. A noteworthy feature of hybrid constitutional justice is that some judges have served on more than one foreign or transnational court, and thus bring overlapping sources of knowledge to bear in their role on each court.<sup>256</sup>

#### 8.3.3. *Comparison: Use of foreign judges*

Namibia, Zambia, and Mozambique seem to have overcome its legitimacy issues of appointing external judges by broadening the representation on the JSC to include, to some extent, the Judiciary, the Legislature, the Executive and civil society. Namibia goes further to provide that the Executive can only reject the appointment of external judges on good cause and that the JSC makes the recommendation. This increases transparency and fosters good relationships

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<sup>253</sup> Dixon *et al* (2019) 307.

<sup>254</sup> Dixon *et al* (2019) 307.

<sup>255</sup> Dixon *et al* (2019) 311.

<sup>256</sup> Dixon *et al* (2019) 312.



between the JSC and the Executive in the appointment of external judges which in turn promotes support and trust in the judiciary. It further seems that in other jurisdictions the appointment of foreign judges is the exception to the rule, and they are appointed as a supplement to the bench, and not as the serving bench, as is the case in Lesotho.

Finally, by having a JSC representing several branches and stakeholders, oversight is shared which renders the appointment of external judges managed and controlled to secure safety and tenure and to avoid intimidation or undue influence. It also allows for more strategic appointments that compliments the judiciary instead of rendering it dependant on external judges.

#### *8.4. A permanent Court of Appeals*

During the ICJ mission there seemed to be disagreement as to whether a permanent Court of Appeals was needed. Judges of the Court of Appeals claimed they had a light case load and that there was no need for permanency. The law society, on the other hand, complained about the lack of expeditiousness and fair administration of justice<sup>257</sup> and therefore expressed the urgent need for a permanent Court of Appeals. The lack of local lawyers with the requisite skills, experience, and competency to serve on the bench of the highest Appellate Court in the Kingdom also contributed to its non-permanent nature.<sup>258</sup>

Furthermore, the establishment of a permanent Court of Appeals has financial implications and would require enough appellate work to occupy Appellate Judges. However, Appellate Judges may not need to be a separate pool of permanent judicial officers. Sitting Judges of the High Court can be trained to deal with both trial and appellate work thereby assisting in the Court of Appeals when the need arises.

#### *8.5. Sufficiently qualified candidates and adequate judicial training*

There is a need for suitable candidates who can be considered for Judge appointments. However, the lack of sufficiently attractive remuneration packages is creating a challenging barrier to the recruitment of more in-country Judges who may not be as prone to serving their

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<sup>257</sup> ICJ Report (November 2014) 60.

<sup>258</sup> ICJ Report (November 2014) 61.

own agendas or advancing political and or corruptive influences from key players outside the judiciary.

Addressing the above ultimately leads to the question of sufficient resources in the judiciary if the goal is to attract skilled members of the legal profession. Main factors that need to be considered include: the competitiveness of salary packages, favourable conditions of service, quality judicial education and access to this training and education.<sup>259</sup>

The appointment of unqualified Judges exacerbates Judge or forum shopping. In the past, if there was a strong political interest a case, it was allegedly not uncommon for cases to be deliberately assigned to younger, inexperienced Judges.<sup>260</sup> On the other hand, there was a risk in assigning these cases to senior Judges who were believed to have inappropriate political ties.<sup>261</sup>

Another key concern with suitably qualified candidates and retention of these candidates relates to the promotion procedures. The past failures to promote Basotho High Court Judges to the Court of Appeal greatly contributes to this issue. However, since the tenure of Judge President Ramodibedi High Court judges have been used in the Court of Appeals. This practice certainly creates useful experience and exposure for High Court Judges and assists in judicial training.<sup>262</sup> Unfortunately the positive elements of this practice are greatly overshadowed by the opaque and arbitrary selection processes of the High Court Judges chosen to serve on the Appellate bench. Contributing to these concerning processes is the fact that Appellate Judges receive salary increases for their work on the Appellate bench. The lack of transparency in the selection process combined with increased remuneration has led to perceptions of bias and prejudice.<sup>263</sup>

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<sup>259</sup> ICJ Report (November 2014) 61.

<sup>260</sup> Freedom House Report (2012) 35. For example, some of the more junior judges have recently handled cases related to key political figures or involving internal political party disputes.

<sup>261</sup> Freedom House Report (2012) 35.

<sup>262</sup> Freedom House Report (2012) 37.

<sup>263</sup> Freedom House Report (2012) 38.



#### *8.6. Financial independence of the judiciary*

Since the enactment of the Lesotho Administration of the Judiciary Act in 2011 there has been an attempt to create a degree of financial independence for the judiciary<sup>264</sup> but the subsequent consolidation of the judicial administrative structure grants the Registrar unprecedented financial powers.<sup>265</sup> In addition to exercising control over the day-to-day functions of the judiciary, the Registrar is also the Chief Accounting Officer of the entire judiciary.<sup>266</sup>

The Judicial Administration Act also establishes a new Judicial Inspectorate essentially fulfilling the duties of a judicial ombudsman.<sup>267</sup> Ombudsmen typically have expansive review powers but lack the teeth to enforce sanctions or remedies. There is concern that the Judicial Inspectorate does not impactfully contribute to judicial independence since it falls under the jurisdiction of the Ministry of Justice.<sup>268</sup> Once again, there is a clear overlap between the Executive and the Judiciary which is ill-advised if judicial independence is to be truly protected, respected, and promoted.<sup>269</sup>

#### *8.7. Proper remuneration of Judges and security of tenure*

Judges receive an elaborate package of incentives with their standard salary package.<sup>270</sup> Unfortunately this frequently translates into government manipulation of remuneration packages.<sup>271</sup> The main issue here seems to speak to pension pay-outs and the government's unwillingness to increase remuneration packages citing a lower pension pay-out once the Judge retires.<sup>272</sup>

Long-term tenure greatly attributes to an individual Judge's promotion of overall judicial independence but a major concern in Lesotho is the high number of judges who have now

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<sup>264</sup> Freedom House Report (2012) 25.

<sup>265</sup> Freedom House Report (2012) 29.

<sup>266</sup> Freedom House Report (2012) 29.

<sup>267</sup> Freedom House Report (2012) 29.

<sup>268</sup> Freedom House Report (2012) 29.

<sup>269</sup> Freedom House Report (2012) 29.

<sup>270</sup> Freedom House Report (2012) 30.

<sup>271</sup> Freedom House Report (2012) 30.

<sup>272</sup> Freedom House Report (2012) 30.

passed retirement age and are still on the bench. After they pass the point of retirement their contracts become subject to the will of the Executive through ad hoc extension negotiations.<sup>273</sup>

#### *8.8. Lack of resources and proper structures*

Even though section 118 of the Lesotho Constitution provides for the provision of adequate resources to the judiciary, it seems to still struggle with a severe lack of resources.<sup>274</sup> In 2012, Freedom House conducted an in-country mission and drafted a report on the independence of the Lesotho judiciary. This Report indicated there was a perception that the judiciary deliberately received limited resources. This was a presumed Executive tactic to ensure that it could still assert a good degree of control and interference.<sup>275</sup> Should the Executive be able to control the courts' administrative processes and budget, the courts simply become an extension of the Ministry of Justice. Appointments are therefore made by the Executive which forces judges to "lobby politicians and Executive officials for funds for improvements and simple repairs to court buildings, for essential material for libraries, or for information technology."<sup>276</sup>

Poorly functioning administrative structures further weaken judicial independence since it aggravates communication difficulties between certain key institutions.<sup>277</sup> In 2005 it was reported, for example, that there was a serious lack of consultation and co-ordination between line ministries and various institutions throughout the Justice Sector.<sup>278</sup> Decisions taken by one institution that will have a direct impact on another institution are simply not pre-discussed and agreed upon.<sup>279</sup>

#### *8.9. Negative public perception of the judicial institution and lack of judicial security*

The public pays attention to how the judiciary is treated. If the public therefore observes poor treatment of the judiciary, it is perceived to be an undervalued part of the democratic process.<sup>280</sup>

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<sup>273</sup> Freedom House Report (2012) 35.

<sup>274</sup> Freedom House Report (2012) 25.

<sup>275</sup> Freedom House Report (2012) 25.

<sup>276</sup> Freedom House Report (2012) 26.

<sup>277</sup> Freedom House Report (2012) 26.

<sup>278</sup> Freedom House Report (2012) 26.

<sup>279</sup> Freedom House Report (2012) 26.

<sup>280</sup> Freedom House Report (2012) 32.



In the past there were several issues with the security of the judiciary.<sup>281</sup> Security gates in the court buildings were out of order, Judges had full time security guards to escort them during their workdays, and there were instances of security breaches at the Judges' personal residences.<sup>282</sup>

#### 8.10. *The principle of Parliamentary supremacy and Royal prerogative*

The principle of Parliamentary supremacy was confirming in *Khaketla v Honourable Prime Minister* and in *Tsang v Minister of Foreign Affairs*. The High Court held the following in the *Tsang*-case:

...the law of Lesotho is the same as the law of England and Republic of South Africa. An Act of Parliament is supreme. Once it has been properly passed by the Military Council the courts must give effect to it.

In addition to the principle of Parliamentary supremacy, is the doctrine of Royal or Executive prerogative which provides that the appointment of judges is a royal prerogative.<sup>283</sup> Therefore, the structure of the judiciary in Lesotho and the appointment of judges and judicial leaders, predominantly fall within the Executive's functions.<sup>284</sup>

### 9. The United Nations Human Rights Committee inquiry

In 2019 the United Nations Human Rights Committee (UNHRC) requested Lesotho to provide information on measures taken to strengthen the capacity of the judicial system in the following key areas:<sup>285</sup>

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<sup>281</sup> Freedom House Report (2012) 33.

<sup>282</sup> Freedom House Report (2012) 33. The attacks on Justice Mahase and Justice Majara led to a call for Judge security. The SADC Lawyers Association interviewed Justice Mahase and he noted "I informed the Chief Justice about my anxieties with respect to my personal security after the police had searched my residence, I also requested the Chief Justice to give me assurances about my personal security. I have had no response from the Chief Justice. I am sure that I am being followed around by strange people, their faces peep over the barrier surrounding my residence. My family members are also being followed around by strange men. With respect to security, none of the judges except the Chief Justice have official security at their residences. I am not sure if the judicial conditions stipulate that we are supposed to have security, we have however discussed the need for security, but nothing has been done.<sup>282</sup> Given the history of politically motivated assassinations and the increase in gun violence in Lesotho, 24-hour security for judges would seem to be a prudent measure. The potential threat of violence is of equal concern to actual violence. If a judge's security is not guaranteed, then she cannot be called upon to administer justice without 'fear or favour.'"

<sup>283</sup> 'Nyane (2019) 10.

<sup>284</sup> 'Nyane (2019) 10.

<sup>285</sup> *List of Issues prior to submission of the Second Periodic Report of Lesotho* United Nations Human Rights Committee 2 April 2019 CCPR/C/LSO/QPR/2 par 21-22 (hereafter the UN HRC List of Issues) available at

- (a) Development of a pool of qualified judicial candidates particularly at the highest judiciary level.
- (b) Lack of financial and human resources.
- (c) Delays in the administration of justice and a backlog of cases particularly before the High Court; and
- (d) The full dissemination and practical implementation of the Code of Judicial Ethics.<sup>286</sup>

The UNHRC further requested the Kingdom of Lesotho to respond to allegations that the Court of Appeals, as of 2019, had not scheduled sessions since 2016 and that the appointment of the Chief Justice of the Court of Appeals was unduly delayed. The UNHRC also asked if the Lesotho could confirm that the Court of Appeals would be made a permanent institution.<sup>287</sup>

Apart from the key areas the UNHRC addressed above it also requested information about practical measures to clarify if judges were able to benefit from permanent appointment status yet, if the appointment process of the Chief Justice of the High Court would be reviewed, if the composition of the JSC would be amended.

Reference was also made to allegations of high profile and political cases being judged with prolonged delays or with partiality and that legal practitioners, including lawyers and judges, may face intimidation in such cases.<sup>288</sup>

In response to the above Lesotho noted <sup>289</sup> that measures taken to strengthen the capacity of the judicial system form part of the Reforms Process and will be dealt with by the National Reforms Authority.<sup>290</sup> A lot of emphasis was placed on the word “development” and the fact this was a lengthy process. Lesotho confirmed that it did not have a Judicial Training institute

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[https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/LSO/CCPR\\_C\\_LSO\\_QPR\\_2\\_34541\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/LSO/CCPR_C_LSO_QPR_2_34541_E.pdf) (accessed 11 February 2021).

<sup>286</sup> The researchers conducted a detailed search for this Code but could not find a comprehensive Code of Judicial Ethics for Lesotho. Research opine that it may refer to a mixture of other sources like the Cape Town and Bangalore Principles.

<sup>287</sup> UN HRC List of Issues (2019) 21-22.

<sup>288</sup> UN HRC List of Issues (2019) par 22.

<sup>289</sup> *Second Periodic Report submitted by Lesotho under Article 40 of the Covenant pursuant to the Option Reporting Procedure* United National Human Rights Committee International Covenant on Civil and Political Rights 22 April 2020) CCPR/C/LSO/2 (hereafter Lesotho Response to UN HRC) available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhshIm43xrngtfZ4DjpX%2F0kGLCKq5obVlrgCMsXxGn8YTXtlwM%2FnIviXesVITD0wHsiPpi8ofPcjC5dx%2BWjZBOFX3INGL2Mir1Q9IJQDxNFSrc> (accessed 11 February 2021).

<sup>290</sup> Lesotho Response to UN HRC (2020) par 150.



and that there was no budget put in place to refer candidates and judges to training opportunities in neighbouring countries.<sup>291</sup>

Lesotho further noted that although the Administration of the Judiciary Act provides for a separate judicial budget, it may not be sufficient. Reference was made to the severe human resource constraints and logistical constraints of the High Court. The continued temporary existence of the Court of Appeals was also referred to as an issue.<sup>292</sup>

Measures taken included a continuous appeal to the Executive to provide funding for the recruitment of more Judges of the High Court. It was noted however, that government's drive to decentralize the High Court and split it into two regions was yielding good results with the Northern region complex being completed.

To reduce delays in the administration of justice and backlog of cases, the High Court Rules were also amended to include the Court Annex Mediation which requires that cases start with mediation to encourage early settlement.<sup>293</sup>

It was further confirmed that The Code of Judicial Ethics<sup>294</sup> was being disseminated upon recruitment of judicial officers at all levels. In-house training, emphasising the importance of judicial conduct was also emphasized. Lesotho referred to the case of *Lesupi and Another*<sup>295</sup> to indicate the implementation of judicial ethics.<sup>296</sup>

Lesotho further admitted to the delays in Court of Appeals sessions due to the delayed appointment of the Judge President of the Court whose appointment was contested in the courts of law. However, the Court of Appeal successfully began instituting regular sessions again in 2017.

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<sup>291</sup> Lesotho Response to UN HRC (2020) par 151.

<sup>292</sup> Lesotho Response to UN HRC (2020) par 152.

<sup>293</sup> Lesotho Response to UN HRC (2020) par 154.

<sup>294</sup> The researchers could not find any reference to this Code nor could the researchers locate a codified Code of Judicial Ethics for Lesotho.

<sup>295</sup> *Lesupi and Another v The Crown C of A* [2012] LSCA 8 (CRI)10/2011. In this case serving magistrates were charged with defeating or obstructing the ends of justice because they inserted a false entry into the pre-trial remand record for a pending criminal case. They were both found guilty by the trial court (High Court) and they appealed against their conviction. Lesupi lost the appeal while the other was exonerated.

<sup>296</sup> Lesotho Response to UN HRC (2020) par 156.

It was also confirmed that a restructuring of the Judiciary was in progress and a new structure was approved which provided for the creation of a permanent Court of Appeals.<sup>297</sup> The Administration of the Judiciary Act was also mentioned which provides for autonomous and accountable administration of the judiciary, a judiciary service, a budget for the courts and other incidental matters. It was also confirmed that although judicial officers were appointed by the JSC the appointment of the Chief Justice and the President of the Court of Appeals was still based upon the Prime Minister's recommendation to the King.<sup>298</sup>

Lesotho confirmed that Judges enjoy security of tenure and are appointed on permanent and pensionable terms.<sup>299</sup> Ongoing national institutional reforms were confirmed, which were based on the Phumaphi Recommendations. The recommendations for the national dialogue on reforms included a review and variation in the process of the Appointment of the Chief Justice, High Court Judges and of the Judges of the Court of Appeal and other Judicial Officers.<sup>300</sup>

Lesotho also spoke to the Southern African Development Community (SADC) recommendations that so-called political cases be tried by solicited foreign Judges, however, the defendants contested the appointment of foreign Judges alleging that they are not impartial. They therefore advocated to be tried by local Judges and this legal battle caused a delay in trials.<sup>301</sup>

## 10. Recommendations

Non-interference with the functioning of the judicial system is, as discussed in this report, is integral to the independence of the judiciary. The principle of separation of powers is a cardinal rule and essential to the proper functioning of the judiciary. It is imperative that the judiciary functions independently from the Executive and Legislature. To ensure this independence and integrity it is vital that the Constitution and other laws of a country

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<sup>297</sup> Lesotho Response to UN HRC (2020) par 157-158.

<sup>298</sup> Lesotho Response to UN HRC (2020) par 159.

<sup>299</sup> Lesotho Response to UN HRC (2020) par 160.

<sup>300</sup> Lesotho Response to UN HRC (2020) par 161.

<sup>301</sup> Lesotho Response to UN HRC (2020) par 162.



explicitly speak to and enforce due separation of powers. The Executive and the Legislature simply cannot interfere in the way judiciary carries out its functions.<sup>302</sup>

We now make the following recommendations for purposes of strengthening, promoting, protecting, and practically respecting the independence of the judiciary in Lesotho.

#### 10.1. *Proper separation of powers*

Throughout this report reference has been made to the importance of the separation of powers when attempting to constitute an independent judiciary. From the discussions in this report, many issues with the Lesotho judiciary either stem from or contribute to a poor or complete lack of separation of powers.

Therefore, the Constitution should provide for clearer and stronger separation of powers. Although the 1993 Constitution of Lesotho vests exclusive judicial authority in the judiciary,<sup>303</sup> it still lacks a clear or explicit separation of powers clause. Only section 118 speaks broadly about the protection of judicial independence.<sup>304</sup> Section 118(2) is the closest the Lesotho Constitution comes to defining the separation of powers and appears rather weak in comparison to the South African constitution, for example.<sup>305</sup> It is recommended that section 118 of the Lesotho Constitution be amended to allow for more real judicial independence by adding the following illustrated in italics:

118(1). The judicial power shall *exclusively* be vested in the courts of Lesotho which shall consist...

*The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour, or prejudice.*

*No person or organ of state may interfere with the functioning of the courts.*

*Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility, and effectiveness of the courts.*

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<sup>302</sup> Nkhata (2021) 6-7.

<sup>303</sup> Freedom House Report (2012) 33-34.

<sup>304</sup> Freedom House Report (2012) 33-34.

<sup>305</sup> Freedom House Report (2012) 33-34.

*An order or decision issued by a court binds all persons to whom and organs of state to which it applies.*

*The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.*<sup>306</sup>

The inclusion of a section promoting institutional independence and separation of powers, will also be integral, such as:

*The Constitutional Court, the Supreme Court of Appeal, and the High Court of Lesotho each has the inherent power to protect and regulate their own process, and to develop the common law, considering the interests of justice.*

## 10.2. Strengthen the Judicial Services Commission

There is a clear lack of practical independence in terms of the JSC. Strengthening the composition, roles, functions, and powers of this Commission is crucial. Although the JSC is protected from outside interference in the performance of its duties, it still presents a glaring threat to the independence of the JSC if the composition process is biased or potentially biased. Selecting the members who serve on the JSC through potentially biased practices impacts the overall, practical independence of the judiciary. It is important that the judiciary be truly independent in practice, and not just seemingly independent on paper.<sup>307</sup>

According to the SADC LA fact-finding mission stakeholders stated that the JSC composition and required quorum for it to make decisions are too weak and needs to be reconsidered.<sup>308</sup> Based on the experiences, resistance and challenges and opportunities discussed above the following recommendations are made:

- (a) The JSC should be an independent and widely representative commission that is tasked with the appointment and removal processes for judges. The commission through its composition and members must inspire confidence that due process will be followed and that all decisions will be made based on law, procedure, and fact and not out of political considerations.

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<sup>306</sup> Sections 165(2) – (6) of the Republic of South Africa, 1996.

<sup>307</sup> Nkhata (2021) 6-7.

<sup>308</sup> Fact Finding mission conducted by SADC LA in 2021.



- (b) The aim of the JSC must be to identify and secure the appointment of persons who are independent, impartial, have integrity, possess professional competence, and have any additional attributes that may be stipulated for positions that require specific expertise or leadership.
- (c) The JSC's process of selection and appointment should be fair and inspire the best candidates to apply and should be without discrimination unless fair discrimination is required to justify past wrongs and is in line with international standards.
- (d) The JSC should be clearly independent, suitably composed, and resourced, and its protection should be entrenched not only in the Constitution of Lesotho, but also subservient legislation.
- (e) The JSC should be composed of a greater number of members and that are drawn from the judiciary and from a range of other institutional, professional, and lay backgrounds. The members should be appointed in proportion to safeguard against unjustified dominance of the commission by the Executive or by members of parliament or representatives of political parties.
- (f) The JSC should employ a process of candidate interviews which is respectful and fair and will promote the legitimacy of the selection process.
- (g) The JSC's deliberations should be private to avoid interference but should be sufficiently recorded.
- (h) One of the most crucial recommendations are that the JSC should be the decision-making authority in the selection and appointment of candidates and should the appointing authority, the Kind in Lesotho's case, refuse or refer a candidate back for reconsideration it should not be lightly or without proper reason. Only in exceptional circumstances should the appointing authority be allowed to choose from a list of selected candidates recommended by the commission, and
- (i) The JSC should be accountable for its decisions and same may be subject to examination by an independent ombudsman.

### *10.3. Process for the appointment and removal of judges*

There is also a genuine need to carefully review and revise the procedure for the removal of judges as contained in sections 121 and 125 of the Lesotho Constitution. There seems to be a

lot of opportunity for potential Legislative and Executive interference in the functioning of the judiciary, which should be addressed. Specific instances identified include the retirement age of judges and the lack of practical rules in this regard which could open the door to the establishment of *ad hoc* committees that determine the tenure of judges. Security of tenure can be further guaranteed by drafting and implementing grounds, conditions, and process for the dismissal of a Judge. It will once again be pivotal that these procedures be free of political manipulation.

The Prime Minister's extensive powers in appointing and removing the Chief Justice should be addressed. This is a clear violation of the doctrine of separation of powers and creates the impression that the ultimate authority on the appointment or removal of the Chief Justice vests solely in the King and his Prime Minister. The JSC, once properly constituted, should be the body that recommends the proper candidates for appointment, and possible reasons for removal, to the King.

It is also crucial that there be an objective and transparent method of appointing members of the judiciary. Rules of procedures for appointment, tenure and removal of Judges must be drafted and implemented. This will aid in ensuring that the right people hold judicial office and that appointments are done in accordance with due process under the law. Appointment of Judges by politicians is simply not good practice and undermines the independence of the judiciary. Judges appointed in such a manner are often required to pledge their allegiance to the political party that appoints them, further damaging the public perception of judicial independence.

The best way to ensure the fair and transparent appointment of Judges remains the practice of appointment through an independent judicial body like the JSC. However, this will serve no purpose if the JSC remains improperly constituted, as is the current case in the Kingdom of Lesotho. Ideally these processes should be codified and the JSC should consider the high-quality criterion based on a candidate's qualifications, experience, skill, integrity, and impartiality.

The Constitutional appointment process in Lesotho relies heavily on the executive who ultimately has the power to appoint. A weak separation of powers and the lack of subservient



and complimentary legislation jeopardise the independence of the judiciary. Due to this, and in line with the above, the following recommendations are made.

The Constitution of Lesotho must be amended, and subservient legislation should be passed in Lesotho which:

- (a) Sets out a qualifying criterion for judges which, amongst others, considers a candidate's criminal record and political compliance.
- (b) Sets out a minimum base criterion which the JSC can add to base on the relevant opening on the bench. This criterion can set a standard qualification, minimum years' experience required, level of writing skills, and command of the official court language.
- (c) Increased transparency in the application process by including stakeholder engagement.
- (d) A judicial Code of Ethics to set the criterion for assessing the 'fit and proper'-standard of candidates.
- (e) Set minimum conditions of service and tenure along with guaranteed remuneration for judges and continuous education.
- (f) Manages and exposes conflicts of interest of candidate judges, especially political conflicts.

The Constitution can be amended to allow for less executive interference by adding a clear separation of powers and by placing as much power in the Prime Minister and the King regarding the hiring or termination of a judge. The system of appointment of judges must be reviewed.

#### *10.4. Remuneration and promotion of Judges*

Judicial independence can be further secured by considering competitive salaries and favourable conditions of service for judges. It will at least contribute to the impartiality and independence of judges since they may be less likely to bow to financial influence and manipulation.

The professional progression of judges must also be prescribed by law to ensure that promotions are not based on corrupt actions. A judge's integrity and good performance must determine their professional progression. Their connections to powerful individuals or institutions should not play a role and corrupt practices should not be rewarded.

It is recommended that the Lesotho Constitution be amended to include security of remuneration for judges by including sections such as:

*Conditions of service and tenure of members of judiciary*

- (1) Judges are entitled to the salaries, allowances and other benefits fixed from time to time by the Judicial Service Commission with the approval of the President given after consultation with the Minister responsible for justice and on the recommendation of the Minister responsible for finance.*
- (2) An Act of Parliament must provide for the conditions of service of judicial officers other than judges and must ensure that their promotion, transfer and dismissal, and any disciplinary steps taken against them, take place--*
  - (a) with the approval of the Judicial Service Commission; and*
  - (b) in a fair and transparent manner and without fear, favour, or prejudice.*
- (3) The salaries, allowances, and other benefits of members of the judiciary are a charge on the Consolidated Revenue Fund.*
- (4) The salaries, allowances, and other benefits of members of the judiciary must not be reduced while they hold or act in the office concerned.<sup>309</sup>*

### **10.5. Hierarchy of courts**

It is recommended that Lesotho consider the creation of a formal hierarchy of courts with the South African structure as a guiding example. However, there were calls to incorporate similar Constitutional principles to those of Zimbabwe during the SADC LA fact-finding mission.<sup>310</sup>

Laws that clearly prescribe the powers and functions of each court, the relationship between different courts, and the relationship between courts and other branches of government enhance the separation of powers and mitigate possible conflicts of interest.

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<sup>309</sup> Section 188 of the Constitution of Zimbabwe Amendment (No. 20) Act 2011.

<sup>310</sup> Phoofolo HE "Lesotho judicial independence: Report on the fact-finding mission" SADC LA. Mr Phoofolo attending a meeting of the judiciary in Lesotho as a member of the SADC LA. The purpose of his attendance was to gain a better understanding of the issues with judicial independence in Lesotho, the in-country concerns, and provide information to the SADC LA which will enable them to produce recommendations on the strengthening of judicial independence in Lesotho.



#### 10.6. *Foreign judges*

The appointment of foreign or external judges is dealt with in the same manner than those of resident or local judges. Based on the previous experiences, challenges and opportunities identified above it is recommended that –

- (a) Foreign or external judges be appointed on an ad hoc basis for the purpose of supplementing the bench in respect of experience and knowledge,
- (b) An independent JSC be placed in charge of recruiting, selecting, and appointing foreign judges,
- (c) Foreign or external judges be appointed for the purpose of knowledge transfer,
- (d) Foreign or external judges be appointed on a temporary basis and
- (e) A transparent appointment process be followed specifically for the appointment foreign or external judges.

#### 10.7. *Funding of the judiciary*

Section 118 (3) of the constitution highlights the importance of financial and other support that is needed to preserve judicial independence and operational efficacy.<sup>311</sup> It is apparent that the government is currently failing to meet its constitutional obligations towards the Lesotho judiciary as it pertains to Section 118 (3). It is recommended that the JSC be properly constituted and that it should draft a financial plan for the Judiciary for the next three years. Financial specialists should be brought in to assist the Judiciary with this so it may present a comprehensive plan for its resource needs to government.

#### 10.8. *Conflicts of interest*

Judges must be safeguarded against possible conflicts of interest. Therefore, the law must prescribe the acts that create potential conflicts of interest for judges and are therefore not allowed during a judge's term of service e.g., prohibiting judges from practicing law or having any working links and associations with legal practitioners during their tenure in office.

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<sup>311</sup> Freedom House Report (2012) 33-34.

#### 10.9. *Establishment of a permanent Court of Appeals or Constitutional Court*

The establishment of a permanent and separate Constitutional Court may address various issues. It could firstly create work opportunities for the judicial staff because a well-staffed court perceived to be efficient and independent may attract a greater number of cases. Secondly, it may assist in judicial training and possibilities of further specialisation of judges if the handling of constitutional matters is encouraged.<sup>312</sup>

The creation of a permanent Court of Appeals will also serve to assist the judiciary with difficulties it is currently facing. First and foremost, it may address the issues surrounding the appointment of temporary judges from other countries. Judges serve on a rotational basis and do not want to permanently reside in Maseru. Creating a permanent Court of Appeals may make service in this Court less appealing to foreign judges.<sup>313</sup>

### 11. Conclusion

Apart from the already weak Constitutional Court, the Constitution provides for a weak Bill of Rights, weak constitutional review remedies, and so on. A strong Bill of Rights and strong constitutional review remedies are the global drivers of strong judicialism. Therefore, judicial reform will start with reconfiguring the broader theory underwriting the inter-branch relationship. This will call for the courage to replace Westminster as the animating model of the inter-branch relationship with the local model, which comprises the specific national lessons of the country together with modern constitutional patterns.<sup>314</sup>

It is recommended that this report be presented to relevant stakeholders within the Lesotho government to test their appetite for reform. To ensure full value is obtained from this report, it is recommended that a proper advocacy strategy is developed as well as a concept document detailing proposed Constitutional and legislative reforms, taking into consideration the willingness of the Lesotho government, civil society, and other stakeholders. This will also allow for further stakeholder engagement and contribution when drafting the proposed amendments which in turn will promote buy-in, implementation, and compliance.

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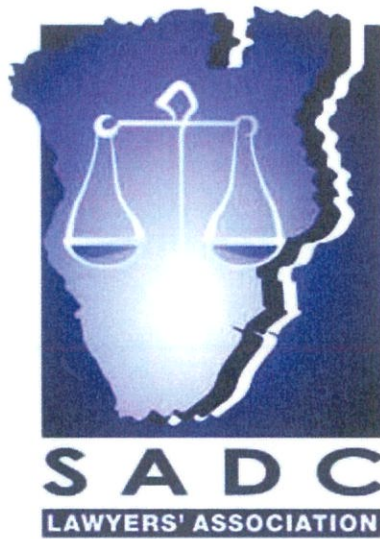
<sup>312</sup> Freedom House Report (2012) 23.

<sup>313</sup> Freedom House Report (2012) 24.

<sup>314</sup> Nyane (2019) 12.



Finally, despite its weaknesses and shortcomings, one cannot be blind to the fact that the government of the Kingdom of Lesotho has made at least some efforts in promoting democracy and judicial independence. Successes, no matter how small or slow, should be recognised and should be used to propel further progress and growth.



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