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THE CRISIS OF REPRESENTATIVE DEMOCRACY IN LESOTHO: REFLECTIONS ON THE RULE OF LAW, CONSTITUTIONALISM AND GOOD GOVERNANCE

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List of Abbreviations

AC	Appeal Case
AD	Appellate Division
BCLR	Butterworths Constitutional Law Reports
BCP	Basotho Congress Party
BNP	Basotho National Party
CC	Constitutional Court
CIV/APN	Civil Application
CLR	Commonwealth Law Reports
ICC	International Criminal Court
JAE	Journal of African Elections
LCD	Lesotho Congress for Democracy
LDF	Lesotho Defense Force
LLR	Lesotho Law Reports
SCA	Supreme Court of Appeal
UN	United Nations
ZACC	Constitutional Court of South Africa
ZASC	Supreme Court of Appeal of South Africa

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Declaration

I declare that this is my own work and that I have not copied the work of any previous student from this university or any other university. All sources used have been clearly cited.

Dedication

I dedicate this to my parents for their endless, unconditional love and support. The most important role in my life is to make you proud of me. I love you both so much.

Acknowledgments

I would first like to thank the all mighty God for everything that he has done for me from birth till now even in my darkest, most challenging times and for giving me the strength to finish this paper. I would also like to pass my sincere gratitude to my supervisor Professor Mhango for his kindness and understanding during this study and further for his guidance, legal wisdom and insightful comments. I literally started my research with his guidance. He showed me my mistakes and never made me feel any less and for that reason I will never forget what a wonderful person you are Prof. I would further like to pass my sincere gratitude to the National University of Lesotho for enrolling me into its institution to study law and all my lecturers in the Faculty of Law, who have given me knowledge about law since I was just from high school when I arrived at NUL in 2015 with no knowledge of the law at all. I would also like to thank my parents, my dad Seele Joseph Mokhitli and my mum 'Mamokhitli Mary Mokhitli from the bottom of my heart who are the pillar behind my education for their constant support, love and care from the moment they brought me into this world and further for their encouragement and support while I was in the process of writing this paper. I would also like to thank my sister Mpoli Juliet Mokhitli for being a wonderful big sister by having interest in this paper and giving me some encouragement. I would also like to thank my late paternal grandfather Ts'eliso Abiel Mokhitli, (God rest your soul *Mokoena e motle*) who always told me that education is the key to success and that I should work hard to achieve greatness and success in life. Lastly I would like to thank myself for the sleepless nights I spent while writing this paper and also for the encouragement and hope I instilled in me even when I had none. Writing this paper was very difficult. I really had no idea what I was writing but I pushed myself and used my brain to think and come up with ideas.

Abstract

Democratic government serves two purposes. Firstly, a living constitution is required by a government to be able to maintain a civil society, which is the main occupation of constitutionalism and the rule of law. Secondly, the rule of law vouchsafes rights and freedoms. Hence, the rule of law enforced by the courts is the factor that controls the constitution and increasingly this includes controlling the government, both legislature and executive. The purpose of this study is to investigate why Lesotho has had so much conflict, instability, poor governance and breakdowns of democracy with the main focus being on the events that occurred from 2014 to 2015, a period where there was lawlessness in the country. There was an attempted coup by the military and massive human rights violations such as the right to life under section 5(1) and freedom from inhuman treatment under section 8(1) protected under the Constitution of Lesotho 1993. It will examine reflections on the rule of law, constitutionalism and good governance which are major strands of modern constitutional democracy. It will state that a cornerstone for good governance in Lesotho is through judicial review of administrative, executive and legislative action. It will examine judicial review as developed in the Republic of South Africa and state that there are some important lessons for Lesotho.

CHAPTER 1: INTRODUCTION

1.1 Introduction

The Kingdom of Lesotho, a constitutional monarchy, gained independence from Britain in 1966. However, after more than 50 years of independence, the situation of leadership in the country remains discontent. Since attaining independence, there has been a blatant disregard of the rule of law and constitutionalism which has seen the rights of citizens being violated with impunity. The country has been marked by coups, attempted coups and assassinations and ever-increasing control by the military. Factions within the military have jostled for power, frequently employing unlawful means. Recently, the country also transitioned into an era of coalition politics, making the development of constitutional democracy to take a fresh turn. From 2012 to date, Lesotho has had three coalition governments with the first two being dissolved before completing a five-year constitutional term.

The purpose of adopting the current Constitution of Lesotho 1993 was to break a long haul of non-constitutionalism combined with military rule. The constitution therefore introduced a new order based on popular government and multi-partyism as opposed to militarism and one-party dictatorship, rule of law as opposed to arbitrariness and hope as opposed to despondency.[1] The Constitution of Lesotho 1993 proclaims that: "Lesotho shall be a sovereign democratic Kingdom[2]… the constitution shall be the supreme law and if any other law is inconsistent with the constitution that other law shall be null and void to the extent of its inconsistency.[3]

This emphasises the supremacy of the constitution. It also establishes the country as a sovereign democratic Kingdom.[4] Having established the country as a democracy, the constitution further establishes itself as the 'supreme law of Lesotho'. So, the confluence of these two sections read together establishes the Kingdom as a constitutional democracy. As such, it calls for a sensitive balance between majoritarianism (democracy) and restriction (constitutionalism). Madison the federalist argued that:

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[1] Hoolo 'Nyane, *Development of Constitutional Democracy: 20 years of the Constitution of Lesotho,* Lesotho Law Journal, 2014, vol. 21, at pg 59

[2] This is in terms of Section 1(1) of the Constitution of Lesotho 1993. The section is taken *verbatim* from the same section of the Constitution of Lesotho 1966.

[3] Section 2 of the Constitution of Lesotho 1993

[4] Section 1(1)

> In a republic or representative democracy (government by elected representatives of the people), the greatest threat to liberty would come from an unrestrained majority. This threat could be overcome by constructing constitutional limits on majority rule in order to protect minority rights.[5]

This calls for some form of constitutional limitation on governmental power. Also a Greek philosopher Plato had in his work *Laws*[6] said:

> Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off, but if law is the master of government and the government is its slave, the situation is full of promise and men enjoy the blessings that the gods shower on the state.[7]

Lesotho is both a participatory and representative democracy. Section 20 of the constitution clearly establishes these two strands conjointly-none has more constitutional superiority over the other[8]. The section provides that: "every citizen of Lesotho shall enjoy the right to take part in the conduct of public affairs, directly or through freely chosen representatives".[9] Despite the purport of section 20, most of the emphasis is placed on representation (election) against participation. This is because representation has proven easier through electoral route. For example the court in the case of *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others*[10] stated that public participation in government decision-making processes, as envisaged by the constitution, is supposed to supplement and enhance the democratic nature of general elections and majority rule and not conflict with or even overrule or veto them.

In Lesotho since regaining constitutional democracy in 1993, popular governance has taken the route of representative democracy which has proven to be very problematic. There has been instability caused by many factors which have questioned the role of elected representatives Instability has been caused by constant military rebellion, assassinations and massive human rights violations. This has led to representative democracy crisis in Lesotho. All this has been as

[5] James Madison, *Federalist N0.10 and 15,* (1787), The Independent Journal , New York Packet, Daily Advertiser
[6] IV 715d
[7] Plato, *Laws: book IV 715d,* (Tom Griffith tr. and Malcolm Schofield ed.), 2016, Cambridge: Cambridge University Press
[8] The right to participate in government
[9] This is in terms of section 20(1) of the Constitution of Lesotho 1993
[10] 2008(10) BCLR (CC) at para50

a result of a blatant disregard of the rule of law. The principle of the rule of law is a pathway for balancing constitutionalism and democracy.

The principle of the rule of law demands that government and its officials shall rule by law and be subject to it. It also expresses the principle of legality. This was stated in the case of *Fedsure Life Assurance Ltd. and others v Greater Johannesburg Transitional Metropolitan Council and Others*[11] where the court provided that: "It is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law-to the extent at least that it expresses the principle of legality-is generally understood to be the fundamental principle of constitutional law". The case of *Affordable Medicines Trust and Others v Minister of Health and Others*[12] also raised some issues concerning the rule of law and the principle of legality. The case was about a constitutional challenge to certain aspects of a licensing scheme introduced by the government. In terms of the scheme, health care providers, such as medical practitioners and dentists, would not dispense medicines unless they had been issued with a license to dispense medicines by the Director-General of health. The scheme also regulated the premise from which medicines were dispensed. The challenge was directed at the powers of the Director-General to prescribe the conditions upon which licenses would be issued out. The applicants challenged the constitutional validity of certain provisions of the Medicines and Related Substances Act and regulations made under that Act. In the first place they contended that the provisions of the Act which conferred the power on the Director General to determine the conditions upon which a license was to be issued was too broad and gave the Director-General un-circumscribed arbitrary legislative powers and therefore was against the principle of legality. In the second place they contended that the linking of the license to specific premises falls outside the authority to regulate practice of the medical profession and again it was against the principle of legality. Finally, they attacked the regulations made under the Medicines and Related Substances Act on the ground that they were vague and thus authorised the Director-General to make decisions that are arbitrary and therefore it was against the principle of legality. The court held that these provisions were not authorised by the National

[11][1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458,(14 October 1998) at paras59-59. See also the case of *The President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) where the Constitutional Court held that the legislature may not enact a law that applies retrospectively or that targets a particular individual or group. Also the case of *Dawood, Shalabi and Thomas v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at pg 966 para47, the court emphasised the importance of the rule of law.

[12] 2006 (3) SA 247 (CC)

Drugs Policy of the Department of health and therefore were invalid because they went beyond the powers conferred upon the Minister by the statute.

From this case, it suffices to say that the principle of legality requires that to exercise public power, one must have a legal source to do so.[13]

The principle of constitutionalism presupposes the limit on the government power.[14] Limitation on government power comes in three ways: structural limitation, procedural limitation and substantive limitation which will be discussed in detail later in this study. Democracy is government by the people for the people in which supreme power is vested in the people and exercised directly by them or by their elected representatives under a free electoral system.[15] When viewing the three through a blended lens, where there is government by the people for the people (democracy) and there is limit on that government power (constitutionalism) and the power is legitimate where lawful (rule of law), then representative democracy will be said to be a just and reasonable democracy where citizens' rights are respected and democracy will indeed be for the people.

Therefore, the purpose of this study is to investigate why Lesotho has had so much conflict, instability, poor governance and breakdowns of democracy with the main focus being on the events that occurred from 2014 to 2015, a period where there was lawlessness in the country which led to representative democracy crisis. The study will focus on how to achieve sustainable constitutional democracy through reflections of the rule of law, constitutionalism and good governance with a view that judicial review of legislative, executive and administrative action is an effective mechanism. It will examine judicial review as developed in the Republic of South Africa and state that there are some important lessons for Lesotho

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[13] For example the Constitutional Court of South Africa in the case of *Minister of Education v Harris* 2001 (4) SA 1297 (CC) held that the Minister could not impose legally binding obligations on independent schools unless there was a law authorising him to do so. In *Fedure Life Insurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) at para58 the court endorsed the principle of legality where it said:

> It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We indeed merely hold that fundamental to the interim Constitution is the principle of legality.

[14] De Smith, S.A., *The New Commonwealth and its Constitutions*, London: Stevens & Sons, 1964 at p108

[15] Hall Klinger, *Problem Solving in Our American Democracy*, American Book Company, New York, 1958 at p59. The author also emphasised that people are free to criticise as well as praise their government.

1.2 Historical Background

Lesotho gained independence from Britain in 1966. Ever since then, conflict has been systematic in the country. It experienced a short period of constitutional rule from 1966 to 1970. It also endured 23 years of undemocratic government (including 7 years of military rule) from 1970 to 1993. The country gained independence under the leadership of Chief Leabua Jonathan of the Basutoland National Party (BNP) who became the first Prime Minister. BNP had won the 1965 elections under a universally accepted Constitution of 1965 which later became the constitution of independent Lesotho in 1966 with minor modifications. In 1970 elections were held and it now seems in disputed that BNP lost elections.[16] Prime Minister Jonathan refused to accept the outcome of the election, repealed the constitution, declared a state f emergency and seized power aided by the Police Mobile Unit, which was a special riot squad as Lesotho had no army.[17] This became the first fatal blow since independence. This was the beginning of undemocratic order in the country. It resulted in the country not having proper elections where all laws enacted were not under the power of the constitution because it was repealed. Through his act, the Prime Minister seized power and was consequently forced to maintain himself in power through the army created by him.[18] However, in the end Jonathan was toppled by the same army through the use of guns in 1986. The section of the army that was largely responsible for toppling Jonathan was also toppled by another section of the army in 1990 and ruled until 1993 when the current Constitution of Lesotho 1993 was adopted. Even though the country returned to constitutionalism and electoral democracy after 23 years of undemocratic government, Lesotho still faces a major setback when it comes to the representatives of the democratic Kingdom. The majority of citizens usually end up feeling aggrieved and disappointed in government resulting from the unconstitutional acts of their representatives. The events which happened in the past although not identical are similar to what happened in Lesotho from 2014 to 2015 where there was an attempted coup by the military which would have been an unconstitutional change of government and later in 2015 some assassinations and unlawful detainment and torture of some major factions in the military, a period where there was lawlessness in the country.

[16] See the case of *Mokotso v His Majesty The King and others* CIV/APN/384/87. In this case the learned Chief Justice dealt exhaustively with the constitutional history of Lesotho and other important constitutional issues.
[17] W.C.M Maqutu, *Contemporary Constitutional History of Lesotho*, Mazenod, Lesotho, 1990 at p13 Prime Minister Jonathan claimed he had repealed the constitution to deal with the lawlessness he alleged existed during and after elections.
[18] Ibid

1.3 Statement of the problem and research questions

The main research problem the dissertation seeks to address is that Lesotho's form of governance through representative democracy is not consistent with established democratic norms. There has been massive abuse of public power evident by constant alliance with the military to commit certain transgressions an example being the unconstitutional events that occurred from 2014 to 2015. This was a period where there was lawlessness in the country where there was an attempted coup by the military which would have been an unconstitutional change of government, assassinations of some major members of the military and unlawful detainment and torture of some of the members of the military. All this was a clear violation of the constitutional right to life under section 5(1) and freedom from inhuman treatment under section 8(1) protected under the Constitution of Lesotho 1993 hence as a result, government officials failed to adhere to the principles of the rule of law and constitutionalism.

1.3.1 Research questions

The following research questions will be addressed:

- What is a representative democracy?
- Is Lesotho a representative democracy?
- Is the rule of law and constitutionalism essential in modern representative democracies and if they are, on what basis?
- If Lesotho is a representative democracy, has it been effective or not?
- If representative democracy has not been effective in Lesotho has there been disregard of the rule of law and constitutionalism?
- What informs such disregard of the rule of law and constitutionalism in a representative democracy like Lesotho?
- What negative impact has the disregard of the rule of law and constitutionalism had on Lesotho and its citizens?
- What are the most effective ways of improving respect for the rule of law, constitutionalism for the promotion of good governance in Lesotho?

1.4 Guiding Hypothesis

The rule of law and constitutionalism are foundations for representativeness in a constitutional democracy. The concept of the rule of law requires that those who exercise public power must not use their power arbitrarily. Constitutionalism requires that government should have sufficient power to govern the country but that power must be limited to prevent abuse and human rights violations.

1.5 Research methodology

The study will be based on a desktop research making use of generally available literature. It will be critical, analytical and comparative in nature. The purview of this study centres on exploring written, expert opinion on the subject matter and archival sources on the rule of law, constitutionalism and democracy for the purpose of drawing conclusions regarding whether or not these principles are practised in Lesotho. The sources are drawn in an attempt to establish both causes and consequences of the disregard of these principles with a view of making recommendations to improve the situation.

1.6 Conceptual framework

The key concepts relevant to the research problem are: rule of law, constitutionalism, democracy, good governance and judicial review.

1.7 Objectives of the study

The objective of this study is to examine whether Lesotho's governance practices are consistent with established democratic norms. The study focuses on possible ways of achieving sustainable, local-driven development in the country of Lesotho where constitutional democracy and ethical leadership will not be an option but an imperative.

1.8 Limitations of the study

It would be trying to achieve the impossible to try and cover the crises that keep facing representative democracy in Lesotho as a result, the study restricts itself to the events that occurred from 2014 to 2015 where there was lawlessness in the country and examines the challenges that faced the rule of law, constitutionalism and democracy during that period.

1.9 Literature Review

In his article titled *Development of Constitutional Democracy in Lesotho: 20 years of the Constitution of Lesotho,* Hoolo 'Nyane contends that in a Constitutional Democracy like Lesotho, there should be a sensitive balance between the majority and restriction. I agree with his argument to say that the majority should be restricted because this will protect the rights of the minority. He further argues that this threat could be overcome by constructing constitutional limits on majority rule in order to protect the minority rights. He also argues that constitutional democracy in Lesotho has emphasised on representative over participatory because it has been easier through electoral route. However, representative democracy has faced many obstacles. I make this point because of the struggles Lesotho has faced due to an uneasy union between the majority and lawful limitation.

Sage in his paper titled *Democracy, Constitutionalism and the Rule of Law: Beholden to Constituent Power* contends that there is a direct relationship between the three concepts because a government that is committed to democracy and constitutionalism will also respect the rule of law. This shows a balance between the majority and restriction.

In a book titled *Pursuing Good Governance: Administrative Justice in Common-law Africa,* different experts from African countries have contributed chapters deliberating the importance of judicial review in pursuing for good governance. Judicial review of administrative, legislative and executive decisions is a cornerstone for good governance

Sewpersadh and Mubangizi in their article titled *Judicial Review of administrative and executive decisions: overreach, activism or pragmatism,* state that in South Africa, judicial review has been effective because the courts have shown an excellent appreciation of the doctrine of separation of powers by reflecting principles of the constitution such as the principle of rule of law and legality in their system of review.

2. Chapter Synopsis

Chapter I is an introductory chapter including literature review

Chapter II conceptualises the three concepts of the rule of law, constitutionalism and democracy individually and points out some of the evident gaps of their practices in Lesotho which have

contributed to most of its unstable democracy with the main focus being on unconstitutional events that occurred from 2014 to 2015.

Chapter III examines the concept of good governance and state that a cornerstone for achieving good governance in Lesotho is through judicial review of administrative, legislative and executive action. It will examine judicial review as developed in the Republic of South Africa and state that there are some important lessons for Lesotho.

Chapter IV deals with the conclusions and recommendations

CHAPTER 2: CONCEPTUALISISNG THE RULE OF LAW, CONSTITUTIONALISM AND DEMOCRACY AND ADDRESSING EVIDENT GAPS OF THEIR PRACTICES IN LESOTHO

2.1Introduction

The idea that rule of law and constitutionalism is the foundation of modern states and civilisations has recently become even more inspiring than that of democracy[19]. The rule of law is not an arid legal doctrine but is the foundation of a fair and just society, a guarantee of responsible government, and an important contributor to a stable democracy, as well as offering the best means of securing peace and co-operation. The institutions fashioned by the constitution-parliament, executive and judiciary-are intended to bring about a form of government that will guarantee that constitutional democracy and freedom are not empty promises. A government committed to democracy and constitutionalism will tend to respect the rule of law, there is a direct relationship between the three[20].

The purpose of this chapter is to develop an idea that the three separate theories of the rule of law, constitutionalism and democracy face difficulties when redistributing power and are not yet fully adhered to by the representatives in government of Lesotho. It will delve into a detailed study of the three concepts separately and address evident gaps of their practices in Lesotho with the main focus being on unconstitutional events that occurred from 2014 to 2015. It will first begin by delving deeper into the rule of law and constitutionalism so as to understand their importance in modern democracy and then end by stating how representative democracy in Lesotho has failed to adhere to these principles

2.2 The Rule of Law

According to the United Nations (UN) system, the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights, norms and standards. It

[19] It is because the rule of law and constitutionalism are fundamental in advancing democracy.
[20] Ivan Sage, *Democracy, Constitutionalism and the Rule of Law: Beholden to Constituent Power,* (LLB Degree thesis, Victoria University of Wellington, Faculty of Law, 2014) at p4

requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.[21]

The above definition seems to be very broad but it arguably has a profiling impact on the understanding of the doctrine of the rule of law in modern times.

British scholar Albert Venn Dicey may not lay a claim to the invention of the doctrine of the rule of law but he is credited for profiling and shaping the essence of the rule of law as it is understood today[22]. Dicey formulated the doctrine into the trilogy of constitutive principles. The first principle is that law must always reign supreme as opposed to arbitrariness (supremacy of the law). In contemporary constitutional jurisprudence this principle has been explained by Chaskalson P of the Constitutional Court of South Africa in the case of *Pharmaceutical Manufacturers: In re the Ex Parte Application of the President of the Republic of South Africa*[23] where he remarked that: "It is a requirement of the rule of law that excise of public power by executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement".

This principle of supremacy of the law is normally conflated with the principle of legality. Legality requires the government, legislatures and the courts to act in accordance with legal principles and rules.[24] However, rule of law and principle of legality do not necessarily mean the same thing. Legality is much narrower and a minimalist conception of the rule of law. This means that public power must be derived from the law, and actions must be sanctioned by law.[25]

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[21] Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*: United Nations Security Council, S/2004/616. Available online at <https://www.un.org/ruleoflaw/> (accessed on February 6, 2020).

[22] A.V. Dicey was a British jurist and Constitutional Law theorist who wrote *Introduction to the Study of the Law of the Constitution* (1885) 10th edition 1959. He argued for the impartiality of the courts and insisted that even those in the highest position of power were exempt from law and he gave law the highest position in society.

[23] 2000 (2) SA 674 at para36

[24] See Currie I and De Waal J, *The New Constitutional and Administrative Law,* Vol.1 Juta. Lansdowne, 2001 at p77

[25] Currie and De Waal (supra) at p76

Also, by way of introduction, the High Court of Australia in the case of *Coco* v *The Queen* (1994) 179 CLR at 427 said the following in respect of the principle of legality in its narrow context:

Dicey's second principle envisages equality before the law.[26] Dicey says this principle emphasises the impartiality of the law. It means there shall be no distinction between classes of people. He states that there must be equality before the law or subjection of all classes of people to the ordinary law of the land.

Dicey's third principle speaks to the respect for individual rights and liberties.[27] Dicey states that many constitutions of the states guarantee their citizens certain rights (fundamental human rights). According to him, documentary guarantee of such rights is not enough. Such rights can be made available in the courts of law.

It suffices to say that Dicey's theory of the rule of law through these principles has formed an important part of the modern conception of the rule of law. Governments are not granted wide discretionary powers. Their powers are controlled by just laws and individuals are also subjected to those laws. The courts of law should be the ones who guarantee enforcement of those laws in order to protect fundamental human rights.

2.2.1 The rule of law in history

The rule of law has been an important idea in any political tradition for thousands of years and it is impossible to grasp and evaluate modern understanding of it without fathoming its historical heritage. For the past has yielded an astonishingly rich accumulation of ideas, which still guide the present theory and practice, glimpse to that is very important.

> The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient if they do not specifically deal with the question because, in the context which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.

The passage has been taken as an authority of the principle of legality in that narrow context where the courts, when interpreting the statutes should operate within the principle of legality and have legally justifiable reasons to declare that it was the intention of the legislature to interfere with fundamental human rights.

[26] In Lesotho this principle appears under section 19 of the Constitution of Lesotho 1993. The section reads as follows: "Every person shall be entitled to equality before the law and to equal protection of the law".

[27] See Bradley, AW. and Ewing KD., *Constitutional and Administrative Law,* 12th ed. Longman, Harlow, 1997. Bradley and Ewing contended that: "The rights of individuals were secured not by guarantees set down in a formal document but by the ordinary remedies of private law available against those who unlawfully interfere with his or her liberty, whether they were private citizens or not".

2.2.1.1 Aristotle (c. 350 BC)

Aristotle outlined the rule of law in his work titled *Politics.*[28] In his work he studied different governments in Greece's many city-states and identified different kinds of constitutions and classified them as either being true or defective. He stated that true forms of governments are those that are constituted in accordance with strict principles of justice and that perverted forms of governments are those which regard only the interests of the rulers and therefore are despotic. Aristotle believed that tyranny is the very reverse of a constitution. He said law had to be supreme over all. He further stressed that such laws must uphold just principles so that true forms of government will have just laws. He further said that rulers must be the servants of the law because law is order and good law is good order.[29]

Aristotle's work has arguably contributed to the understanding of the rule of law today. His discussion on constitutions negating tyrannical rule and laws upholding just principles where rulers will be servants of the law continue to influence modern jurisprudence.

2.2.1.2 The Magna Carta (1215)

In the year 1215, civil war in England between powerful barons and King John ended when the barons forced the King to sign a document called the Magna Carta.[30] The charter set out the feudal rights of the barons and contained some important clauses that the king could continue to rule but must keep to the established laws and customs of the land.[31] For example under chapter 12 the king could not levy taxes without parliamentary support and also under chapter 39, the clause recognised freedom of men and their equality under the law and their right to fair trial. The Magna Carta was the first written document which compelled an English king to act in

[28] Aristotle (c.384 B.C to 322 B.C.) was an Ancient Greek Philosopher and scientist who is still considered as one of the greatest thinkers in politics, psychology and ethics.

[29] This is available online at <https://plato.stanford.edu/entries/aristotle-politcs/> (accessed on February 10, 2020). I have only highlighted a few points on the subject matter but for further reading a lot of translations of Aristotle's book have been made over the years. See Barnes, Jonathan, ed. *The Complete Works of Aristotle: The revised Oxford Translation.* Princeton: Princeton University Press, 1984, Aristotle, *The Politics* (Jowett, Benjamin tr. And Jonathan Barns (ed.) Princeton: Princeton University Press, Aristotle, *The Politics and The Constitution of Athens*, Edited by Stephen Everson. Cambridge: Cambridge University Press, 1996, Aristotle, *The Politics of Aristotle.* (Translated by Peter Simpson), Chapel Hill: University of North Carolina Press, 1997 to name a few

[30] The Magna Carta is translated to mean the Great Charter.

[31] For example some important clauses were found under chapter 12 and 39 of the charter.

accordance with the rule of law. Some of these general rights and liberties have become part of constitutions today and have influenced democratic governments all over the world.

2.2.1.3 John Locke (1689)

John Locke was an English natural right political philosopher who depicted the nature of man and the state of nature in a different way. Unlike Thomas Hobbes, who believed that man by nature is evil and self-oriented, Locke started his premise that claims human decency where most men respect the lives, liberties and estates of others. Locke's social contract theory is that each individual contracts with others to form a political community by agreeing to transfer to the community as a whole, his rights to execute the law of nature. The agreement also involves obedience to the majority will which is taken to represent the whole community and that such contract is the only kind which will eventually provide lawful government.[32] John Locke also argued for the rule of law as just and rightful politics, not only in the constitution but also in the legislature. Locke said that the rule of law begins at the foundation of government itself. He argued that citizens consent to or constitute a government so that their natural liberty may be secure and so that they may be ruled by a government that is profoundly lawful. Locke said the constitution is a "fundamental positive law" and the legislative power governs by making general rules of justice-that is by "established laws", not to be varied in particular cases.[33] John Locke is arguably the most influential philosopher of modern times. John Locke pioneered the ideas of natural law, social contract and lawful government that proved essential in modern times.[34]

2.2.1.4 Baron de Montesquieu (1748)

Montesquieu's work on the rule of law is best known in connection with his insistence on the separation of powers of the judiciary from the executive and legislative branches of government. In his book *The spirit of laws,* Montesquieu enunciated and explained this theory of separation of powers. Firstly, he wrote that if the legislative and executive powers are combined in the same organ, the liberty of the people gets jeopardised because it may lead to arbitrary exercise of these powers. Secondly, he wrote that if judicial and legislative powers are combined in the same

[32] John Locke, *Two Treatise of Government* (1689), (ed. Peter Laslett), Cambridge: Cambridge University Press, 1988

[33] Ibid

[34] The key message from this text is that political power originates from the will of the people so as to protect themselves and their property. Governments that neglect their duties to defend their people are therefore illegitimate.

organ, the interpretation of laws become meaningless because the law makers would also act as the law interpreters and therefore they would never detect any errors in their laws. Thirdly, he wrote that if judicial power is combined with the executive power and is given to one organ, the administration of justice becomes meaningless because the judiciary would not be able to scrutinise unlawful executive decisions. Lastly, he wrote that if all the three branches are combined and their power is given to one organ, the concentration of power becomes arbitrary and ends all liberty. Therefore, he stated that the three powers should not be combined and given to a single organ of government or to two organs of government. He wrote that these three separate organs should be used by three separate organs of the government for safeguarding the liberty of the people.[35]

The theory of separation of powers by Montesquieu has guided the structure of government today including the one provided for under the Constitution of Lesotho 1993.[36]

2.2.1.5 Lon Fuller (1964)

Lon Fuller believed that government in accordance with the forms and procedure of law had a distinctive value that could help close the gap of separation between positive law on one hand and morality and justice on the other.[37] Legal positivists believed that laws could be impeccably drafted and even-handedly administered and still be unjust. However, Fuller believed as matter of political psychology, that there would be reluctance to use the forms of law to embody and inscribe injustice. He believed that coherence and goodness had more affinity than coherence and evil", he thought bad things happened in the dark as opposed to the sunlight of legality, and he maintained that "even in the most perverted regimes there is certain hesitancy about writing cruelties, intolerances and inhumanities into law".[38]

Fuller acknowledged that this link between legality and injustice was not certain and that it was controversial. But whether this connection held or not he wrote that the complete absence of

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[35] Montesquieu, *The Spirit of Laws* (translated by Thomas Nugent), London: G. Bell & Sons, 1914 at pages 151-162. Also at pages 150-151 the author refers to the three distinct powers: (a) that of enacting laws, (b) that of executing the public resolutions and (c) that of trying the cases of individuals.

[36] The powers of the three arms of government have been divided. The powers of parliament appear under chapter vi, the powers of the executive appear under chapter viii and the powers of the judiciary appear under chapter xi.

[37] Viner S. *Fuller's Concept of Law and its Cosmopolitan Aims,* Law and Philosophy Vol.26, No.1 (2007) at p3, available at <https://link.springer.com/10.007/s10982-oo6-0006-8> (accessed on November 21, 2019)

[38] Fuller, *Positivism and Fidelity to Law,* (1958) The American Journal of Philosophy vol.53 at 636-637

respect for formal criteria of legality might deprive a system of power of its status as law. He state that:

> When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality-when all these things have become true to dictatorship, it is not hard for me, at least to deny to it the name of law.[39]

In his 1964 book *The Morality of Law*[40], Fuller formulated principles of what he called the "inner morality of law". These principles required laws should be general, publicly promulgated, prospective, clear, internally consistent, not impossible to be complied with, temporarily enduring and congruent with official action.[41] He argued that these principles were indispensable to law-making. In his review of Fuller's book, Hart asked in what sense these principles could be called a "morality".[42] According to Hart, they seemed to be more like instrumental principles for effective legislation and in his view they were only as moral as the undertaking they made possible[43]. Fuller responded by denying that the significance of his eight principles was purely instrumental. He said they also constituted a morality of respect for freedom and dignity.[44]

I agree with Fuller on his theory about law and morality not being separate. His stance is very important because the rule of law specifies a set of requirements which lawmakers must respect if they are to govern legally and justly. As such, rule of law restricts illegal use of power. The morality within the law ideally determines the particular contours political relationships will

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[39] Ibid at 660

[40] Lon Fuller, *The Morality of Law,* 1969 [1964] 2nd ed. New Haven CT: Yale University Press

[41] Ibid at p46, he asserted that these principles should be used to decide the propriety of legal doctrines, popular will to the contrary notwithstanding.

[42] Hart, H.L.A., *Review of The Morality of Law,* The Harvard Law Review, 1965 vol. 78 at 1281-1296

[43] Hart (n 42) at p1284

[44] Lon Fuller, *The Morality of Law: Reply to critics,* (2nd ed.), New Haven, Connecticut Yale: Yale University Press, 1969.

It should be emphasised that the debate between Hart and Fuller had been going on for many years which demonstrated the division between positive law and natural law. Hart argued for positivist view by arguing that morality and law were separate while Fuller argued for morality as the source of law's binding power. The debate began when Hart published his Holmes Lecture titled *Positivism and the Separation of Law and Morals* which was delivered at Harvard Law School in April 1957 and published in Harvard Law Review in 1958. Fuller then replied in his article titled *Positivism and Fidelity to Law-A reply to Prof. Hart,* which was also published in Harvard Law Review in 1958. Hart's rejoinder was in his book titled *The Concept of Law,* to which Fuller replied in the first edition of his 1964 book *The Morality of Law*. Hart then gave his reply in 1965 in Harvard Law Review. Fuller also replied in the second edition of his book *The Morality of Law* which was published in 1969.

take. It is the morality of law which determines what kind of laws are regarded as being just or unjust laws. My argument is that the rule of law is instrumentally valuable because in practice, the inner morality of law limits the kind of injustice which governments pursue. His eight principles have arguably contributed to what is known as "a just law" today.

2.2.3 Challenges facing the rule of law in Lesotho

Regarding the rule of law in Lesotho, Mohamed P. took a very liberal approach to the rule of law in the case of *Attorney General v Swissbourgh Diamond Mine*[45] when he stated that the rule of law as applicable in Lesotho means that the law must be certain in its meaning and bind all people-poor and rich, powerful and powerless equally; that those who transgress must be accountable before an independent judiciary; that fundamental human rights of individuals should be inalienable; that government must be accountable and subordinate to law.[46] In this case, the government of Lesotho through the Military Council arbitrarily revoked the mining leases that were contractually agreed to between the government and the respondent company. The revocation was done not contractually but through the Revocation Order.[47] The respondent company challenged the validity of the said Revocation Order. The Court held that the Revocation Order was invalid because it specifically offended the principles of the Human Rights Act.[48] He further stated that it was against the fundamental principles of the rule of law.

With regard to the subordination of government to law, Mohamed P. provided that:

> No government, however powerful be its military arsenal, however awesome its police force and, indeed even however popular be its actual or perceived support among the populace at any given time in its history, dare be permitted to invade such fundamental rights, however humble, however impotent, be the victim of such transgressions; that the courts will fiercely protect such a citizen against the invasion of his rights.[49]

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[45] LAC 1995-99 at 224 B-F

[46] Supra at 224B-F

[47] Order No.7 of 1992

[48] Act No.24 of 1983

[49] Supra at 224E-G. Mohamed P also made a similar formulation sitting in the Supreme Court of Appeal of South Africa in the case of *Speaker of the National Assembly v De Lille* 1999(4) SA 863. The learned judge said: "The constitution is the ultimate source of all lawful authority in the country. No parliament, however bona fide or eminent its membership, no President however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the constitution. Any

This was indeed very wise and courageous for the learned judge to make such a formulation about the rule of law and protection of fundamental human rights.[50]

Despite all this, the rule of law has faced many challenges. There has been disregard of the rule of law which has resulted in human rights violations on all sides. Factions within the military have since the beginning employed unlawful means in order to attain power, evident by assassinations, coups and attempted coups[51]. The military in the country is the cause of most of its instability. The military appears to be central to conflicts in the country which is neither healthy nor conducive in creating an environment in which democracy and good governance can function. In 2014, Lieutenant General Tlali Kamoli was fired as commander of the Lesotho Defense Force (LDF) by Prime Minister Thomas Thabane for an alleged misbehaviour. The military factions were dissatisfied with the decision and hence they surrounded the state house, attacked the police headquarters, disarmed the police and killed one officer. This attempted coup was not to make positive changes to the country's fundamental social and political ideology but was an attempt to not only seek but replace the key government personnel. Raz did write that crime prevention agencies should not be allowed to pervert the law which in this case, the military did pervert it.

Although the military sits central to instability in Lesotho, this has been perpetrated by political elites who have operated outside the legal framework to gain power. This is evident where former Prime Minister Pakalitha Mosisili publicly thanked the military for helping him return to power in 2015 when he became Prime Minister due to the attempted coup by the military in 2014 which would have been an unconstitutional change of government. It was the period when parliament was paralysed from 2014 to 2015 when yet other premature elections were held.[52] In a pass out parade of the recruits into the Lesotho Defense Force (LDF) shortly after taking over

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citizen adversely affected by any decree, order, or action of any official body, which is not properly authorised by the constitution is entitled to the protection of the courts".

[50] Mohamed P's formulation resonates with some of Lon Fuller's principles that laws must be prospective and clear. His formulation also resonates with the principles by Joseph Raz in his article *The Rule of Law and its virtue,* Law Quarterly Review, 1977 (93) at 195. Raz identifies that laws should be stable, independence of the judiciary must be guaranteed, the principles of natural justice must be observed; crime prevention agencies should not pervert the law.

[51] Jens Bartelson defines a coup d'état in his article *Making Exceptions: Some Remarks on the Concept of coup d'état and its History,* Political theory, Vol.25, No.3, 1997 pp. 323-346 as "a stroke of state ; a seizure of power by a group using the permanent employees of the state… to capture and paralyse the nerve ends of continuing government".

[52] Mafa Sejanamane, *Understanding Political Instability in Lesotho,* Lesotho Times (Maseru, 12 May 2017) para17, available at <http://lestimes.com/understanding-political-instability-in-lesotho> (accessed on November 28, 2019)

as prime minister, he declared that : "*Hoja e ne e se ka lona, nka be ke se mona"*.[53] This is fairly translated to mean that he would not have been in office were it not for the help of the military.

Again the return to office by Mosisili as Prime Minister and the reinstatement of Kamoli as commander of the LDF in 2015 led to more political upheaval in both the military and political scene where several soldiers who were accused of mutiny were unlawfully detained, tortured and some exiled. This led to the assassination of Lieutenant General Mahao who had replaced Kamoli during the time when he was fired. However, more importantly this also led to the appointment of an international commission of inquiry which laid bare the lawlessness in Lesotho by the government and its agents. It recommended that suspects be suspended while their cases were investigated and that constitutional, public sector and security reforms should be undertaken.[54]

This indeed was a huge setback of the rule of law in the country and a setback of efforts to ensure promotion of human rights and the rights of citizens who elected the political elites into office. The government failed to maintain a civil society by trampling on the rule of law and on the rights of citizens, events that have now taken root in the country. The rule of law in Lesotho has to be strengthened. Strengthening the rule of law in Lesotho will require an independent judiciary as the most effective machinery in restraining organs of government within the bounds of their powers. This is an issue to be addressed later.

2.3 Constitutionalism

In a classical sense, constitutionalism presupposes some form of limitation on government power[55]. It is defined in descriptive as well as prescriptive terms. In its earlier descriptive sense, the term had been confined to a description of the rules governing the establishment and functioning of government institutions.[56] On the other hand, the modern prescriptive sense of constitutionalism lays down minimum standards to be met for constitutionalism to be obtained in

[53] Ibid
[54] Ibid at para18
[55] De Smith, S.A., *The New Commonwealth and its Constitutions,* London: Stevens & Sons 1964 at p108
[56] See Currie and De Waal (n24) at p12

a country.[57] It determines constitutionally determined structural, procedural and substantive limitations on government.[58]

It should be noted that constitutionalism is distinguishable from constitutionality which merely means governing according to the precepts of the constitution.[59] It is possible to have constitutionality without constitutionalism. For example, in Africa many countries experienced this following abrogation of independence constitutions and their replacement with constitutions that were designed to quicken development and be more in touch with unique African ways. In practice, these constitutions proved to be useless in preventing African rulers from abusing power.[60] For example, Apartheid South Africa ensured the legalisation of a universally loathed system of apartheid through the constitution that oppressed and excluded people of colour from participating in the country's mainstream political life. To ensure a just and favourable constitutionalism, there must be structural, procedural and substantive limitations.

2.3.1 Structural limitation of government

Structural limitation requires that only certain institutions must exercise certain forms of power. It requires separation of powers of the legislature, judiciary and executive. In Lesotho, the Constitution of Lesotho divides the government into legislative[61], executive[62] and judicial[63] branches. Structural limitation is found in the prescription by John Locke that government powers must be divided between different organs of government with each power entrusted to and discharged to a different body.[64] Locke argued that unless this was done, freedom and justice

[57] For a discussion on the evolution of constitutionalism over the years, see Charles Howard McIIwain, *Constitutionalism, Ancient and Modern*, Cornell: Cornell University Press (1947)
[58] Mcllwain (n57)
[59] Mohau K.K., *Constitutionalism and Constitutional Amendment in Lesotho: A case for substantive Limitations,* Lesotho Law Journal, 2014, vol.21 at p3
[60] See HWO Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox,* New York: American Council of Learned Societies, [1988] available at< https://books.lawin.co.za/constitutions-withouth-constitutionalism-on-an-african-political-paradox/ > (accessed March 6, 2020)
[61] See Chapter VI of the Constitution of Lesotho 1993
[62] See Chapter VIII of the Constitution of Lesotho 1993
[63] See Chapter XI of the Constitution of Lesotho 1993
[64] He wrote this in his *Second Treatise of Civil Government* (1689)

would be imperiled as the single repository of the extensive powers of law making and execution would find it hard to resist the temptation of abusing powers to his advantage.[65]

Baron de Montesquieu modified Locke's stance by adding the judicial power of government to the executive and legislative powers initially mentioned by Locke.[66] Montesquieu argued that the concentration of all powers of government in the hands of one person or body of persons was adversarial to the respect of the individual rights to liberty, life, freedom and justice.[67]

To avoid abuse of power, it is not enough to simply divide the government into different branches discharging different functions; it is equally important that each arm uses the power assigned to it so as to curb the abuse of powers assigned to the other arms through the idea of checks and balances. This means that each branch of government exercises certain powers that can be checked by powers given to the other branches.

The doctrine of checks and balances was reflected in the case of *Law Society of Lesotho v Ramolibeli NO and others*[68] per Maqutu J.A where he observed as follows:

> After all the doctrine of separation of powers is not quite a British constitutional doctrine. It is really a constitutional analysis of the British constitution as Baron de Montesquieu saw it in *The Spirit of the Laws.* His objective was to influence French constitutional thinking which tolerated despotism. He wanted power not to be concentrated in the hands of the same person, so that there could be checks and balances.

2.3.2 Procedural limitation of government

Procedural limitation of government requires that government institutions exercise powers conferred on them only if certain procedures are followed. For example in the case of *Harris and*

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[65] John Locke, *Second Treatise of Civil Government* (1689), (ed. Peter Laslett), Cambridge: Cambridge University Press, 1988. In sec. 143 he writes:

> It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage.

[66] Baron de Montesquieu, *The Spirit of Laws,* (Translated by Cohler, Miller & Stone), Cambridge: Cambridge University Press, 1989 at p157, available at< https://trove.nla.gov.au/version/46624423 > (accessed on November 30, 2019)

[67] Ibid.

[68] [2003] LSHC 89 at para8-9

Others v Minister of Interior[69], a legislation called the Separate Representation of Voters Act of 1951[70] disqualified people of mixed race referred to as "coloured" from the common voters roll of the Cape of Good Hope province of the Republic of South Africa. This Act was invalidated on the ground of non-compliance with the procedural requirements set under section 35 and section 152 of the Union of South Africa Act of 1909. Section 35 provided that no law could disqualify any person from voting by reason of their race who, at the establishment of the Union of South Africa, was or could be registered to vote in the Colony of the Cape of Good Hope, unless a bill altering that position was passed by two thirds majority of both Houses of Parliament sitting unicameral not bicameral. Section 152 also provided that in order to repeal or alter section 35, a bill had to be passed by two thirds majority of Houses of Parliament sitting together. The Separate Representation of Voters Act of 1951 was passed by Parliament sitting bicameral and hence it was invalidated on the grounds that proper procedure was not followed because Parliament was not sitting unicameral at the time it was passed.

Also in Lesotho, laws emanate only in the National Assembly and are sent for royal assent after they have been passed by the National Assembly and the Senate and only become law after publication in the gazette.[71] The courts are also required to observe fair procedures in the determination of civil and criminal cases[72] and the executive has to follow certain stringent procedures in the exercise of its powers like the declaration of state emergency.[73]

2.3.3 Substantive Limitations of government

Substantive limitations are imposed through a bill of rights that ensures that government action respects human rights. In Lesotho, substantive limitations of government are imposed by the bill of rights in Chapter II of The Constitution of Lesotho 1993. The constitution protects the rights of every individual and confers on any person whose rights are affected by, or threatened with

[69] 1952(2) SA 428 (A)
[70] Act No.46 of 1951
[71] This is provided for under section 78 of The Constitution of Lesotho 1993
[72]It is provided for under section 12 of The Constitution of Lesotho 1993, the right to fair trial
[73] Procedure for declaration of state of emergency is provided for under section 23 of The Constitution of Lesotho 1993. Section 23(1) reads: "In time of war or other public emergency which threatens the life of the nation, the Prime Minister may, acting in accordance with the advice of the Council of State, by proclamation which shall be published in the Gazette, declare that a state of emergency exists…"

infringement, entitlement to sue in protection or vindication of such rights.[74] The courts have in some appropriate cases protected these rights. For example in the case of *DPP V Lebona*[75] the Court of Appeal upheld a permanent stay of criminal proceedings which it found to have been inordinately delayed in violation of the applicant's right to be tried within a reasonable time as provided for under section 12(1) of the Constitution.

2.3.4 Challenges facing constitutionalism in Lesotho

The main purpose of constitutionalism is to limit government power. However, the events that occurred from 2014 to 2015 in Lesotho as earlier mentioned showed that there was serious constitutionalism crisis in the country.

2.3.4.1 Separation of powers

In Lesotho, the purpose of this doctrine was captured by Maqutu J. in the case of *Lesotho Human Rights Alert Group and Others v Minister of Justice & human Rights and Others*[76] were he stated that: "this doctrine to which all modern states aspire to, is really perceived as an anti-dote to despotism, oppression and arbitrariness that creeps into the state and its organs when all these powers are concentrated in the same hands".

Despite this wise formulation by the learned judge, there seems to be a huge gap when it comes to dividing power among the three organs of the state in Lesotho. There are views that have held that there is no strict separation of powers in Lesotho. For example, Peete J. in the case of *Judicial Officers' Association of Lesotho and Another v The Right Honourable The Prime Minister Pakalitha Mosisili and Others NO*[77] observed that:

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[74] Section 22 of the Constitution of Lesotho 1993. The court in the case of *Development for Peace Security v Speaker of the National Assembly* (CC No.5/2016) [2017] LSHC 5 interpreted this section and stated that in order to bring legal proceedings in terms of section 22 of the constitution, one must have locus standi to do so. He or she must show that his or her direct and substantial interest or right has been violated.

[75] LAC (1995-99) 474. Other cases such as *Hlaoli v Hlaoli* 1997-98 LLR-LB 314 (HC), the court was not reluctant to strike down legislation it found to be discriminatory and therefore in conflict with section 18(1) of the constitution that entrenches freedom from discrimination, *Attorney General v 'Mopa* LAC (2000-04) 427 the court also declared legislation inconsistent with the right to fair trial under section 12(8) of the constitution as unconstitutional, and *Ts'euoa v Minister of Labour and Employment and Others* LAC (2007-08) 289 the court also was not reluctant to strike down legislation violating the constitutional provision of equal protection of the law under section 19.

[76] C of A (CIV) No.27/94

[77] (Constitutional Case No.3/2005) (NULL) [2006] LSHC 150 (04 July 2006)

> In its purest form the doctrine of separation of powers is not very practical in today's modern democratic governance. Firstly, under the Constitution of Lesotho 1993, the Executive (the King and Prime Minister) have a clear role in the appointment of the Chief Justice who in turn is the Chairman of the Judicial Service Commission, has a role in the appointment of judges. Secondly, the Parliament provides all resources for the judiciary.

This is the truth in its entirety. This has compromised the independence of the judiciary and it is not uncommon that it would be reluctant to rule against the government and its agencies. The judiciary should have performed its functions by scrutinising the acts of the executive during the period 2014 to 2015 to prevent further turmoil by members of the army and some political elites that allied with the military to commit the transgressions mentioned above.[78] The judiciary should have made rulings to provide an effective tool for restoring order particularly by specifying the actions the executive should implement and a timeline for doing so. This way it would not be usurping the doctrine of separation of powers itself but would be exercising its judicial functions in delivering justice.

2.3.4.2 Individual rights and freedoms

Fundamental human rights and freedoms are the substantive limitations of government entrenched in national legislation and the Constitution of Lesotho 1993.[79] The assassination of Mahao in 2015 greatly infringed his inherent right to life as provided for under section 5(1) of the constitution.[80] The prominence placed on human life is accordingly also recognised internationally.[81] The protection of this right serves as proof of the value attributed to the sanctity of life by the law around the world and as such the government of Lesotho failed to protect this

[78] Just a reminder the transgressions committed were an attempted coup by members of the military in August 2014 and later in June 2015 the murder of Mahao and some soldiers being detained, tortured and some exiled.

[79]Chapter II of the Constitution of Lesotho 1993. It is prudent to point out that all human rights are indivisible, interdependent and interrelated. For example, see the Vienna Declaration and Programme of Action which was adopted by the World Conference on Human Rights in Vienna on 25 June 1993 at para5. Paragraph 5 states: "All human Rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms". Available on <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx > (accessed on February 20, 2020)

[80] Section 5(1) of The Constitution of Lesotho 1993 connotes: "Every human being has an inherent right to life. No one shall be arbitrarily deprived of his life".

[81] For example, article 3 of the Universal Declaration of Human Rights guarantees the right to life, and article 6 of the International Covenant on Civil and Political Rights protects the right to life. Lesotho has ratified both these instruments.

right when Mahao was assassinated. Also the detainment and torture of some members of the military was an infringement to their freedom from inhuman treatment as provided for under section 8(1) of the constitution.[82]

The occurrence of these events was proof that government and its agencies did not respect the limitation on their power imposed by the law. Government in Lesotho should be legally limited in its powers and its authority or legitimacy should depend on it observing these limitations. It is not enough to entrench limitation of government power in the constitution but an independent judiciary is required to be able to legally and justifiably enforce such limitation.

2.4 Democracy

There is no consensus among scholars on the exact definition of democracy. The Athenians of ancient Greece defined democracy as the government of the people by the people for the people.[83] Euripides, a Greek philosopher shared the above view when he defined a democratic state as one governed by people's representatives and for many, who have neither property nor birth.[84] For Rousseau, democracy is the government of the people for the general will of the people.[85] Despite the seemingly divergent views, there are some basic principles that are common to them. These include personal liberty, equality of all citizens before the law and general will of the people among others.

For the purpose of this paper, democracy may be defined as a political system which supplies regular constitutional opportunities for changing governing officials.[86] It is a societal mechanism for the resolution of the problem of societal decision-making among conflicting groups which permits the largest possible part of the population to influence these decisions through their ability to elect among alternative contenders for political office.[87]

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[82] Section 8(1) of The Constitution of Lesotho 1993 connotes: "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment. This right is also protected internationally by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987

[83] A.H.M Jones, *The Athenian Democracy and its critics,* The Cambridge Historical Journal, Vol.11 No.1, 1953, p1-26

[84] Hollad Sabine & Thomas L. Thorson, *A History of Political Theory,* 1973, 4th ed., Dryden Press at p66

[85] Ibid at 538

[86] Joseph Schumer, *Capitalism, Socialism and Democracy,* New York: Harper and Bros, 1947 at p232

[87] Ibid

Modern democracy is ordinarily representative democracy. In a representative democracy, majority rule means a majority of representatives as organised by means of a political party or coalition of parties. Modern representative democracies, in contrast to direct democracies, have citizens who vote for representatives who create and enact laws on their behalf. Lesotho, South Africa, the United States, and many other countries are examples of modern day representative democracies.

2.4.1 Challenges facing democracy in Lesotho

Democracy in Lesotho has faced a spiral of difficulties since the beginning and for over 20 years since 1993 when the country returned to constitutional democracy, representative democracy has remained fraught with danger, facing many pitfalls. Discontinuities between the formal institutional trappings of democracy on one hand, and the destabilising undercurrents of fractured political parties and power-hungry elites on the other is emblematic of the state of democracy in Lesotho.[88] At a 2007 lecture in Lesotho, Maseru on Friday 13th July at 'Manthabiseng Convention Centre, Professor Makoa captured these discordant trends:

> Lesotho's democracy has remained frozen at this formal institutional-structural level. It has not evolved into an interactive process enabling effective mutual engagement by the various political parties. Political parties are still largely sealed antagonistic entities not interacting freely even where there are serious national issues that they ought to address jointly. This has impeded the growth of 'consensual politics' that is crucial to the functioning of democracy. Another upshot of this is mutual suspicion and mistrust among the various power contenders, both of which are engines and fans of the much dramatised instability that is to dog the country.[89]

2.4.1.1 Democracy crisis from 1993-1998

In the early 1990s, Lesotho embarked on a new constitution-making process but its weak institutions were so fragile that they were unable to defend democracy.[90] This generated increased political instability during 1993-1994, caused primarily by army mutinies and mutinies

[88] Makoa, *The present state of Lesotho's democracy: threats and prospects* lecture at 'Manthabiseng Convention Centre, Friday 13th July 2007, Maseru , Lesotho

[89] Ibid

[90] Chris Landsberg, *Lesotho: challenges of a developing democracy*, University of the Witwatersrand, Dept. of International Relations, 2002 at p1, available at< https://www.eisa.org.za/wep/les2002ud22a.htm > (accessed on January 26, 2020)

in the police services[91]. For example, in August 1994, the King in collaboration with some members of the military, staged a coup, suspended parliament and appointed a ruling council.[92] Between 1995 and 1996 again there were isolated incidents of violence and instability. In 1997, the fragility of weak constitutional monarchy was exposed by a split in the Basotho Congress Party (BCP) leadership. Ntsu Mokhehle established a new party called Lesotho Congress for Democracy (LCD), which gained two-thirds of parliament. BCP was then relegated to opposition status.[93]

In May 1998, multi-party elections were held with victory for LCD. Pakalitha Mosisili became the new Prime Minister. There were then some allegations that there were some irregularities that occurred in the elections. The allegation of rigging in the elections was so serious that when the courts failed to dispense electoral justice, the aggrieved parties led by Basotho National Party (BNP) organised widespread protests.[94] This resulted in foreign intervention by Southern Africa Development Community (SADC) which appointed the Langa Commission to investigate the electoral process.[95] However, because of uncertainties, including those caused by delay in the outcome and findings of the Commission, protests intensified. Democracy proved too frail to defend itself against intervention.

2.4.1.2 Democracy crisis from 2014-2015

The attempted coup in 2014 by the military and the breakdown of democracy which resulted in premature elections in 2015 proved yet again that democracy in Lesotho was too frail to defend itself against intervention. Representative democracy in Lesotho has not been effective because representatives in the country are perpetrators of instability in the country by not respecting the rule of law and constitutionalism. A democratic government means that its main objective is to protect the rights of citizens by upholding the rule of law and constitutionalism. In Lesotho however, that has been a great deficit.

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[91] Landsberg (n90)
[92] Ibid
[93] Ibid at p2
[94] Hoolo 'Nyane, *A Critique of Proceduralism in the Adjudication of Electoral Disputes in Lesotho,* 2018, vol.17, JAE, at p3
[95] Ibid

2.5 Conclusion

In a very general sense, it can be said that the rule of law reinforces that of constitutionalism and provides certain norms, policies, institutions and processes that constitute core values which every individual in modern democracy needs to live peacefully. In advocating for fair and reliable democracy, rule of law and constitutionalism remain ideals. Instability caused by many factors in Lesotho is probably the worst cancer, not only destroying the economy of the country but also undermining faith in constitutionalism, electoral democracy and respect for the rule of law. In principle, democracy, rule of law and constitutionalism are elaborately provided in Lesotho but in practice, good governance still eludes the country. The next chapter will examine the concept of good governance and indicate how it can be promoted in Lesotho through judicial review as an effective mechanism with some important lessons from South Africa.

CHAPTER 3: JUDICIAL REVIEW AS A CORNERSTONE FOR GOOD GOVERNANCE IN LESOTHO: LESSONS FROM SOUTH AFRICA

3.1 Introduction

In postmodern era, dedication to the ideals of democracy, rule of law and constitutionalism defined in terms of good governance has become a core value in measuring the performance of governments and regimes. In today's legal parlance, constitutionalism implies governance according to the rule of law, an important universal norm that negates arbitrary rule hence promoting good governance. A cornerstone for good governance is through judicial review. Judicial review in administrative law plays an important role in ensuring a balanced account in inter-relationship of courts and the political process in delivering an accountable government.

The purpose of this chapter is to examine the concept of good governance and state that a cornerstone for good governance is through judicial review of legislative, executive and administrative decisions. It will examine the concept of judicial review as developed in the Republic of South Africa and state that there are some important lessons for Lesotho.

3.2 Good Governance

Good governance in modern democracy is an approach to government that is committed to creating a system founded on justice and peace that protects individuals' human rights and civil liberties.[96] It means dedication to the ideals of the rule of law and constitutionalism. Dedication to these principles will ensure that corruption is minimised, the views of the minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making.[97]It is also responsive to the future needs of society. The tension in a democracy is because not all of the people's personal preferences are measurable, and there will be differing motivations for making political decisions.[98] However the existence of constitutionalism dictates

[96] Ninad Shankar Nag, *Government, Governance and Good Governance*, 2018, Indian Journal of Public Administration, at p123, available at < http://journals.sagepub.com/home/ipa > (accessed on January 24, 2020)
[97] Ibid
[98] Ibid

different ways of regulating, founding and formulating government that is committed to the rule of law.[99]

Good governance shares or aims at the ethos of a cohesive and responsible government. It provides moral legitimacy, constitutional validity and credibility as well as instrumentalities of government.[100] This is done through an independent judiciary to ensure that no government action is exempt from judicial review under the constitution.

3.3 Judicial Review

3.3.1 Definition of judicial review

The social importance of judicial review in recent years is self-evident. Growth in executive interference in the lives of individuals, inevitable in modern states, has exposed society to the risk that the executive and legislative power may be exercised in an unbridled or abusive manner.[101] Judicial Review is the power of the courts to examine the actions of the legislative, executive and administrative arms of the government and to determine whether such actions are consistent with the constitution.[102] A seminal case on judicial review is *Marbury v Madison.*[103] In

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[99] Ibid

[100] Sam Agere, *Promoting Good Governance: Principles, Practices and Perspectives,* Vol.11, Commonwealth Secretariat, 2000 at p5 available at < https://books.google.co.ls > (accessed on February 11, 2020)
Also the following characteristics of good governance were required to be essential:

(a) Participation-Participation means the political dimension of good governance. The active participation of all the stakeholders in the process of development in a society is an indispensable condition of good governance. It means all men and women, inclusive of physically challenged ones, should have a voice in decision-making, either directly or through legitimate institutions that respect their interests.
(b) Rule of law-The rule of law is described as a cornerstone of a democratic society where everybody in a society is equal before the law and that laws are implemented in an impartial manner.
(c) Equity and inclusiveness-Equity means that all people are equal and have equal opportunities regardless of their gender, colour, race, and religion.
(d) Transparency-It means that processes, institutions and information are accessible to all people in a society.
(e) Responsiveness-The responsiveness of goods and service providers, both in the public and private sectors means that requests and requirements of people in a society are addressed in a punctual and time-frame manner.
(f) Consensus and legitimacy-To secure peace and security in a community, there must be consensus among different stakeholders, thereby the governance structure and functioning obtains legitimacy from the whole community.
(g) Effectiveness and efficiency-It means that the processes and programmes implemented by the institutions to produce favourable results must meet the needs of their stakeholders.
(h) Accountability-It means that decision-makers in government are answerable to the public for their inaction or deliberate lapses.

[101] John R. Schmidhauser, *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis*, London, Dublin and Edinburg: Butterworths, 1997 at p59.

[102] Michael Fordham, *Judicial Review Handbook*, New York: John Wiley & Sons Ltd. 1995 at p1

this case, it was the first time the U.S Supreme Court declared an act of Congress to be unconstitutional. On February 13, 1801, outgoing Federalist President John Adams signed the Judiciary Act of 1801, restructuring the U.S federal court system. As one of his last acts before leaving office, Adams appointed 16 judges who were mostly Federalist-leaning to preside over new federal district courts created by the Judiciary Act. However, a difficult issue arose when new Anti-Federalist President Thomas Jefferson's Secretary of State, James Madison refused to deliver official commissions to the judges Adams had appointed. One of those judges William Marbury appealed Madison's action to the Supreme Court. Marbury asked the Supreme Court to issue a writ of mandamus ordering the commission be delivered based on the Judiciary Act of 1789. However, Chief Justice of the Supreme Court John Marshall ruled that the portion of the Judiciary Act of 1789 allowing for writs of mandamus was unconstitutional and therefore void.

The ruling in this case established the precedent of judicial branches of government to declare a law unconstitutional. It was very important in helping to place the judicial branch on a more even footing with legislative and the executive branches and helped to further expand the doctrine of judicial review.[104]

3.3.2 The nature of judicial review

Judicial review is characterised by continuous tension between two opposing ideals: the ideal of governmental freedom of action, and the ideal of judicial control.[105] In its nature one can say that this mechanism is designed to check whether administrative, legislative and executive branches do not trespass the limit defined by law.[106] With this regard, courts can check whether there is

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[103] 5 U.S 137 (1803)

[104] The Marbury case had a profiling impact on the American system to strike down federal or state statutes as unconstitutional. There is a list of comprehensive cases and for that I will only highlight a few. In *Brown v Board of Education*, 374 U.S 483 (1954), the Supreme Court struck down state laws that established separate public schools for black and white students on the grounds that they violated the equal protection clause of the Fourteenth Amendment of the Constitution; in *Loving v Virginia* 388 U.S 1 (1967), the Supreme Court struck down a Virginia statute that prohibited interracial marriage, also on the equal protection grounds; in *Roe v Wade*, 410 U.S 133 (1973), the Supreme court struck down abortion laws on the grounds that they violated the rights to privacy under the constitution and more recently in *Citizens United v Federal Election Commission*, 558 U.S 310 (2010), the Supreme Court struck down a federal election law that restricted spending on election advertising by corporations and other associations.

[105] Cora Hoexter and Rosemary Lyster, *The New Constitutional & Administrative Law*, vol.2, Lansdowne: Juta Law, 2002 p67

[106] Ibid p87

arbitrariness, unreasonableness or procedural impropriety in the decision as part of their judicial review function.[107]

3.3.3 Judicial review in different jurisdictions

3.3.3.1 Judicial review in the Republic of South Africa

Judicial review in South Africa continues to be the most prominent mechanism for curbing and controlling maladministration and other abuses of public power. As far as control of public power is concerned, there are four sources of judicial review jurisdiction:[108]

- Promotion of Administrative Justice Act No.3 of 2000 (PAJA)
- Section 33 of the Constitution of South Africa 1996
- The constitutional principle of legality
- Special statutory review

3.3.3.1.1 Judicial review of administrative action

Section 33 of the Constitution of South Africa 1996 guarantees everyone the right to administrative action that is lawful, reasonable and procedurally fair.[109]

As a consequence of section 33(3) of the constitution which provides that national legislation must be enacted to give effect to the rights contained under section 33, the Promotion of Administrative Justice Act[110] was promulgated (PAJA). Chaskalson CJ confirmed this in the case of *Minister of Health v New Clicks South Africa (Pty) Ltd*[111] in which he stressed that the PAJA was intended to codify the rights contained in section 33 of the Constitution of South

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[107] Ibid at p68

[108] Hoexter and Lyster, (n105) at p87

[109] The right to administrative action under section 33 of The Constitution of South Africa 1996, it provides that:

1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
3) National legislation must be enacted to give effect to these rights, and must-
    a) Provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal
    b) Impose a duty on the state to give effect to the rights in subsections (1) and (2)
    c) Promote an efficient administration

[110] Act No.3 of 2000

[111] 2006 (2) SA 311 (CC)

Africa 1996. He further stated that it was required to cover the field and purports to do so[112], certainly at least in relation to the grounds of review.

The PAJA has become a routine pathway to review. Its long title indicates that the purpose of the Act is:

> To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa 1996 and to provide for matters incidental thereto.

Administrative action has been defined in section 1 of the PAJA as any decision taken, or any failure to take a decision by an organ of state when exercising a power in terms of the Constitution or performing a public function in terms of any legislation which adversely affects the rights of any person and which has a direct, external legal effect.[113]

However it is prudent to point out that the PAJA does not repeal or amend section 33 of the constitution because it is impossible for ordinary legislation to repeal or amend a constitutional right. Regarding judicial review of administrative action in South Africa, two things have to be noted. Firstly, the right to administrative action has been provided for under the constitution and secondly, it has been codified and operationalised through statute.

3.3.3.1.2 Judicial review of legislative action

Prior to the enactment of the Constitution of South Africa 1996, South African Constitutional law was overshadowed by parliamentary sovereignty.[114] In other words this meant that even where the courts attempted to adjudicate the lawfulness of a particular decision, the legislature could pass laws which prescribed what was lawful.[115] An example is the case of *Collins v*

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[112] At para 95

[113] This is a very long section and for that reason I have only paraphrased it. It is prudent to point out that excluded in the PAJA are:

a) Policy decisions of the executive
b) The making of legislation by Parliament, a provincial legislature or a municipal council
c) The exercise of judicial functions by officers of courts and some bodies

[114] Hoolo, 'Nyane, *Judicial Review of the Legislative Process in Lesotho: Lessons from South Africa*, PELJ, 2019 at p15, see also the case of *Poovalingan v Rajbans* 1992 (1) SA 283 (A) where the court admitted that there is a close bond between South African law and English law on the subject of parliamentary sovereignty.

[115] Prenisha Sewpersadh & John C. Mubangizi, *Judicial review of administrative and executive decision: overreach, activism or pragmatism?* Vol.12, Law Democracy and Development, 2017 at p219

Minister of Interior[116] where the court declined to intervene in a case where a law was passed bicameral when it was supposed to be passed unicameral in terms of the South African Act[117]. The court ruled that if the legislature has plenary power to legislate on a particular matter, no question can arise as to the validity of any legislation on the matter and such legislation is valid whatever the real purpose of that legislation is.

However, today South Africa enjoys a democratic constitution which makes it the supreme law of the land and which subjects every exercise of public power to the rule of law.[118] While the constitution has retained the common law notion of parliamentary sovereignty[119], it has made two important changes to the concept. Firstly, it has removed the ouster clause that precluded legislative process to judicial scrutiny.[120] Secondly, the common law on parliamentary sovereignty has been constitutionalised, hence any aspect of the concept which has not been codified in the constitution is not allowed.[121]

This approach was adopted in the case of *The Speaker of the National Assembly v Patricia De Lille.*[122]The case involved the suspension of a member of parliament on the grounds that her speech which she delivered in parliament was inappropriate and un-parliamentary. She was suspended for fifteen parliamentary working days. She challenged the suspension. The Speaker of the National Assembly wanted to claim the protection of parliamentary sovereignty. The court held that there was nothing which provided any constitutional authority for the Assembly to punish any member of the Assembly for making any speech, through an order suspending such member from the proceedings of the Assembly.[123]

It is safe to say that the new approach in South Africa enables the courts to intervene in the legislative process once the constitution or some other law has been violated.

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[116] [1957] 1 SA 552 (AD)
[117] South Africa Act 1909
[118] Ibid
[119] Section 57(1) of the Constitution of South Africa 1996 provides that: "The National Assembly may (a) determine and control its internal arrangements and proceedings; (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement".
[120] See Nick Freidman, *The South African Common Law and the Constitution: Revisiting Horizontality,* South African Journal on Human Rights, vol.30, 2014 at p68-83
[121] Ibid
[122] 1998 (3) SA 430 (C)
[123] Per Mohamed CJ at para29

3.3.3.1.3 Judicial review of executive action

The constitution of South Africa 1996 proclaims the rule of law as one of its values upon which South Africa is founded.[124] This means that all law and conduct inconsistent with the constitution is invalid. Executive decisions are subjected to review in terms of the rule of law theory and its principle of legality. In terms of this theory, the courts' function is that of a politically impartial watchdog over the government, especially the executive branch.[125] The courts are there to keep the state within the bounds of its powers and to protect citizens from abuses of power.[126] This was demonstrated in the case of *Pharmaceutical Manufacturers Association of South Africa: In re the Ex Parte Application of the Application of the Republic of South Africa*[127] where the court reviewed the president's authority as head of state in promulgating an act not in compliance with the principle of legality. The court found that the president had failed to comply with the rule of law.

Through this case, the court demonstrated its resolution to ensure that no unlawful executive action is exempt from judicial review under the constitution[128].

In order to achieve the goals of establishing a state with enough power to govern efficiently and a system of checks and balances to avoid abuse of power, the doctrine of separation of powers is implicit in the constitution.[129] The executive in South Africa has frequently relied on this doctrine to criticise the judiciary for judicial overreach.[130] The executive has relied on judicial overreach in instances where executive decisions come under judicial review.[131] The central stance of the executive has been that the courts may not subject executive decisions to the standard of review contained in the PAJA, which is generally thought to be a more exacting

[124] Section 1 (c) connotes that: "The Republic of South Africa is one, sovereign, democratic state founded on the values of supremacy of the constitution and the rule of law.
[125] Cora Hoexter and Rosemary Lyster, *The New Constitutional & Administrative Law*, vol.2, Lansdowne: Juta Law, 2002 at p69
[126] Ibid
[127] 2000 92) SA 674
[128]The principle of legality has become well established in South African law as a pathway to judicial review. See the case of *National Director of Public Prosecutions & others v Freedom Under Law* 2014 (4) SA 298 (SCA)
[129] Prenisha Sewpersadh & John C. Mubangizi, *Judicial review of administrative and executive decision: overreach, activism or pragmatism?* Vol.21, Law Democracy and Development, 2017 at p220
[130] Judicial overreach is when the judiciary has unjustifiably intruded on the domain of other branches of government by exercising political functions. See Patrick Lenta, *Judicial Restraint and Overreach,* South African Journal on Human Rights, vol.20, 2004 at p544-576
[131] Sepaersadh & Mubangizi (n129)

standard.[132] Also the executive's perception is that the courts are meddling in the political space through judgments that are aimed at weakening the government's authority and power. For example, in September 2015 Chief Justice Mogoeng Mogoeng, his deputy, Judge Dikgang Moseneke, as well as senior judges of the Supreme Court of Appeal met with former President of South Africa Jacob Zuma, his then Deputy President Cyril Ramaphosa and four cabinet ministers to discuss the serious tension between the judiciary and the executive. It was specifically because of the Al-Bashir judgment. Government failed to adhere to Judge President Dunstan Mlambo's order that it should detain Sudanese President Omar Al-Bashir who was wanted by the International Criminal Court (ICC) for mass killings and rape against civilians in Darfur. This caused tensions and the executive said the judiciary is problematic and wants to cause chaos for governance in South Africa.[133]

This shows that the judiciary in South Africa has used the rule of law and the principle of legality as a pathway for review where it regards the actions of the executive as being unlawful.

3.3.3.2 Judicial review in Lesotho: Lessons from South Africa

3.3.3.2.1 Judicial review of administrative action

Administrative law in Lesotho like Constitutional law is based on the English Common Law.[134] Judicial review of administrative action is provided for under section 119(1) and section 135 of the Constitution of Lesotho 1993.[135] Section 135 provides for the Ombudsman as an institution of administrative justice in Lesotho. The constitution creates the Ombudsman as an independent office which in the exercise of its functions, shall not be subject to the directions or control of any other person or authority. The Ombudsman investigates any department of government and

[132] The executive has relied on the PAJA because its policy decisions are not subjected to review under this Act.

[133] This is available at < https://issafrica.org/iss-today/the-judiciary-and-the-executive-at-at-peace-for-now > (accessed on February 27, 2020). The tension between the executive and judiciary in South Africa is an interesting topic worth writing on but the purpose of this study is to only show the willingness of the courts in South Africa to review executive decisions where they deem them as unlawful and unconstitutional without fear or favour.

[134] Hoolo 'Nyane, *Administrative Justice in Lesotho*, (Pursuing Good Governance in Africa: Administrative Justice in Common law Africa), Cape Town: Siber link, 2019 Chapter 1 at p1

[135] Section 119 (1) provides that: "There shall be a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings of any subordinate or inferior court, court-martial, tribunal, board or officer exercising judicial, quasi-judicial or public administrative functions under any law and such jurisdiction and powers as may be conferred on it by this Constitution or by any other law". Section 135 provides for the functions of the Ombudsman. Section 135 (1) (a) provides that: "The Ombudsman may investigate action taken by any officer or authority… in the exercise of the administrative functions of that officer or authority in cases where it is alleged that a person has suffered injustice in consequence of that action".

may make recommendations as to what remedial action should be taken regarding any grievances.[136] The problem with recommendations is that they are not binding and therefore do not have a legally binding effect.

On the matter of grounds of judicial review, the superior courts in Lesotho follow the trilogy of the grounds as laid out in the case of *Council of Civil Service Unions (CCSU) v Minister of the Civil Service.*[137] In this case, Lord Diplock laid out the three grounds of judicial review to be: illegality, irrationality and procedural impropriety. However, application of these principles has not been easy. For example the Court of Appeal in the case of *Mareka v Commander of Lesotho Defense Force*[138] had an opportunity to apply the ground of irrationality[139] but failed to. In this case the appellants sought the review of the decision of the Minister of Defense to establish the court martial to try them for an alleged mutiny. Their contention was that the decision was irrational because, *inter alia*, it was made prematurely as it was the intention of the government of Lesotho to firstly establish a commission to enquire into the veracity of the charges laid against them. The court declined to grant review on the basis of this ground. The basis of the court's finding was that the alleged 'irrationality' must be so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

The courts seem to still be very much reluctant to apply these grounds of judicial review. The reason South Africa is better than Lesotho regarding judicial review and administration of justice is because it has advanced in two fundamental respects. Firstly, it has provided for the right to administrative justice in its constitution and secondly, it has codified and operationalised it through statute. It is therefore submitted that Lesotho can learn from South Africa in this respect in order to have strong judicial review and effective administrative justice.

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[136] Section 135(3) (b) of The Constitution of Lesotho 1993

[137] [1985] AC 374

[138] C of A (CIV) No. 52/2016

[139] This means the exercise of public power must be rational not irrational. It means that exercise of public power must be within the authority vested in the functionary exercising such power. In the case of *Pharmaceutical Manufacturers: In re the Ex Parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 the court declared that rationality is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries and action that fails to pass this threshold is inconsistent with the Constitution and therefore unlawful.

3.3.3.2.2 Judicial review of legislative action

Regarding legislative process, section 81(1) of the Constitution of Lesotho 1993 provides that each House of Parliament may regulate its own proceedings and may in particular make rules for the orderly conduct of its own proceedings. The Parliament of Lesotho is bicameral according to section 54 of the constitution meaning there are two Houses of Parliament, the Senate and National Assembly.[140] However, a bill originates only from the National Assembly.[141] Due to Lesotho's parliamentary practice of parliamentary sovereignty that comes from the British parliamentary practice, legislative procedure is shielded from judicial review through an ouster clause.[142] This is in terms of section 80(5) where it provides that a certificate given by the Speaker of the National Assembly shall be conclusive for all purposes and shall not be questioned by any court.[143] The judiciary in Lesotho is divided about the legal effect of this clause[144]. Some cases have refused to go through this clause while others have taken the initiative to peruse it. For example in the case of *Development for Peace Education v Speaker of the National Assembly*[145] the High Court sitting as the Constitutional Court, refused to penetrate this clause and reasoned that Parliament of Lesotho has power under the constitution to make laws and regulate its own procedures which is provided for by separation of powers.

However the court in the case of *Mokhothu v Speaker of the National Assembly*[146] the court showed the willingness to peruse this ouster clause if a law has been violated. In this case the applicant was deprived of his status as the official leader of opposition after his party lost one member of Parliament to the government. The speaker did this despite the fact that the other opposition parties had written to assure the speaker that they supported the first applicant as the official leader of opposition. The Speaker's defense was that the ruling was an internal proceeding and that it was protected by privilege as codified by the ouster clause in section 80 (5) of the constitution. The court rejected the argument and held that the power of Parliament to

[140] Section 54 provides that: "There shall be a Parliament which shall consist of the King, a Senate and a National Assembly.
[141] Section 78 (2) connotes that: "A bill may originate only in the National Assembly"
[142] Hoolo, 'Nyane, *Judicial Review of the Legislative Process in Lesotho: Lessons from South Africa*, PELJ, 2019 at p13
[143] Section 80 (5) of the Constitution of Lesotho 1993 provides that: "A certificate given by the Speaker of the National Assembly under this section shall be conclusive for all purposes and shall not be questioned by any court".
[144] 'Nyane (n142)
[145] (CCNo.5/2016) [2017] LSHC 5
[146] (CC No.20/2017)[2017] LSHC 20

make rules and regulate its procedure is subjected to the provisions of the constitution because it is the creature of the constitution and that the court has the power to declare the Speaker's rulings invalid and unconstitutional.

The exercise of judicial review regarding this section is still uncertain in Lesotho evident by the two abovementioned cases. It is submitted that Lesotho should adopt a similar approach adopted by South Africa. Firstly, it should abolish all traces of parliamentary sovereignty and secondly it should remove the constitutional ouster clause in section 80(5) of the Constitution of Lesotho 1993 and consequently, the common law notion of parliamentary privilege should be changed within the modern idea of constitutionalism.

3.3.3.3.3 Judicial review of executive action

The weakness of judicial independence in Lesotho has made it very difficult for courts to review executive decisions without fear or favour like in South Africa. This is because administrative functions of the judiciary are very much linked to the executive branch of government which has undermined judicial autonomy.[147] Therefore is submitted that the courts should be courageous enough like the courts in South Africa and apply the principle of legality where they deem the acts of the executive as being unlawful.

3.4 Conclusion

It is well established that to run a peaceful state where good governance reigns there should be balance and harmony among the rule of law, constitutionalism and democracy. However, it is not enough to only think about good governance but a special reference should also be made regarding judicial review of not only executive decisions but administrative and legislative decisions as well as an effective mechanism.

[147] For example under section 120 (1) of the Constitution of Lesotho 1993, the King acting in accordance with the advice of the Prime Minister who are members of the executive appoint who shall be the chief justice. Also budgetary and administrative functions of the judiciary are linked to the Ministry of Justice which has undermined judicial autonomy.

CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

4.1 Concluding remarks

On an overview of this entire paper, supremacy of the law is the aim. Realistically speaking, the prospects of having stability in the country are very poor for the following reasons:

Rule of law

The rule of law in Lesotho has not achieved the intended results in that its deeply entrenched values that government and its agencies are accountable under the law have not taken root. The rule of law has not been central to government decisions hence as a result heavily armed forces such as the military have been used as political tools by some political elites to commit certain transgressions. It is evident by military coups and attempted coups in the past which have neither been healthy nor conducive in a society where the rule of law is supposed to reign.

Constitutionalism

The deeply entrenched values of constitutionalism are to limit government power. In Lesotho there has been great difficulty in limiting government power because of human rights violations such as the right to life under section 5(1) and freedom from inhuman treatment under section 8(1) of the Constitution of Lesotho 1993. It is evident by assassinations and unlawful detainment and torture of some members of the military which occurred in 2015. Also, in every democratic system of governance, the judiciary is entrusted with the mandate to protect individual rights and freedoms however the weakness of the judiciary in Lesotho due to being beholden to the executive branch of government has often failed to protect such rights when violated.

Democracy

A sustainable democracy is only possible when elected representatives maintain the confidence of the people, when government respects the wishes of the electorate and when there is an improvement in the lives of all citizens. In Lesotho however this has been a great deficit because Lesotho has not matured as a constitutional democracy. Mature democracies amongst other things depend on effective political parties, an effective parliament and an independent judiciary.

The coups and attempted coups in Lesotho have proven that Lesotho's form of democracy through elected representatives has been very frail to intervention.

Judicial Review

Judicial review has been very slow due to a weak judicial branch of government. Superior Courts in Lesotho are still very much reluctant to review unlawful administrative, executive and legislative decisions of government. As a result, this has produced a weak judiciary that is often beholden to the executive and legislative branches and therefore good governance has not taken root.

All these have indeed demonstrated the selfishness and egotism of man and the truth of the dictum that power corrupts and absolute power corrupts absolutely.

4.2 Recommendations

- There is a need to improve oversight bodies such as the office of the Ombudsman to improve public accountability. The role of the Ombudsman when overseeing state action is to only make recommendations and recommendations do not have a legally binding effect. The recommendations should have judicial recognition in order to have a legally binding effect.
- There should be an establishment of a fully fledged National Human Rights Commission in Lesotho. The Commission should be set up with a mandate to oversee issues of human rights violations and undertake its watchdog function with independence and autonomy to enforce realisation of those rights.
- The Human Rights Commission should make sure that a person claiming relief for any human rights violation committed by the state has *locus standi* to do so.
- Strengthen judicial independence where judges will be women and men of integrity, impartiality and legal wisdom. This can be done by administrative and budgetary separation from the Ministry of Justice. This will improve judicial review by the courts without fear or favour where other branches of the government (especially the executive) have violated the law. The judiciary can make rulings and set out specific actions and a timeline for compliance.

- It is undeniable that the military is a powerful force due to being armed with powerful weapons that can easily cause chaos in a country. This is evident by past coups by the military in Lesotho and more recently the attempted 2014 coup. The members of the military who are involved in staging a coup should be charged and convicted with offences such as high treason that is punishable by death. The Constitution of Lesotho 1993 protects the right to life under section 5 (1) but this right is not absolute and there are exceptions under section 5 (2) and one of the exceptions is if a person dies as a result of a death sentence imposed by a court of competent jurisdiction in respect of a criminal offence. Imposing a death sentence would not be arbitrarily depriving any of the members of the military who are involved in staging a coup of their right to life since treason is a serious criminal offence.

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