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## The Advent of Coalition Politics and the Crisis of Constitutionalism in Lesotho

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## Abstract

*The advent of coalition politics in the aftermath of the inconclusive 2012 election brought with it fresh challenges to constitutionalism in Lesotho. The challenges started with the process of the formation of government, sustenance of a coalition, and much more importantly, the executive powers of the office of Prime Minister. The country transitioned into the era of coalition politics with the same constitutional and legal framework which undergirded government in a single-party majoritarian setup. It did not take long until the country was plunged into a constitutional crisis which manifested itself through a stand-off between the Prime Minister and the Deputy Prime Minister. The crisis led to the collapse of the coalition government, barely two years into its normal electoral cycle. The purpose of this chapter is to analyse the nature of this constitutional crisis by studying the various constitutional episodes which characterised this crisis in 2014. The chapter contends that while some of these episodes may qualify to be called 'constitutional crises', not all incidences of political disagreement amounted to that.*

## Introduction

The development of constitutional democracy in Lesotho took a fresh turn in the aftermath of the 2012 election. The outcome of the 2012 election in Lesotho was a watershed in two fundamental respects. Firstly, it was the first time since independence that the electorate peacefully changed the

government through the ballot. Secondly, it was the first time that election results were inconclusive as there was no single party with the requisite majority in the National Assembly to form government alone. Therefore, the election ushered-in the era of coalition politics (Makoa, 2012). The three parties that managed to put together a hairbreadth majority to form government were All Basotho Convention (ABC), Lesotho Congress for Democracy (LCD) and Basotho National Party (BNP). Since then, major challenges for Lesotho have been on the areas of formation and running of coalition government.

The challenges were in three areas: the process of the formation of government, sustenance of a coalition, and, much more importantly, the executive powers of the office of Prime Minister. The country transitioned into the era of coalition politics with the same constitutional and legal framework which undergirded government in a single-party majoritarian setup. It did not take long until the country was plunged into a constitutional crisis which manifested itself through a stand-off between the Prime Minister and the Deputy Prime Minister. The crisis led to the collapse of the coalition government, barely two years into the normal electoral cycle.

The purpose of this chapter is to analyse the nature of this constitutional crisis. It contends that, while certain constitutional changes are desirable in order to enhance constitutional democracy in Lesotho, the *Constitution* was not necessarily the cause for the collapse of the country's first coalition government.

The chapter starts-off by conceptualising the trendy notions of constitutionalism and constitutional crisis, then proceeds to analyse the key constitutional episodes which have come to define this new era in the development of constitutional democracy in Lesotho.

## Conceptualising Constitutionalism and a Constitutional Crisis

In its classical conception, constitutionalism means the limitation of political power (Vile, 1998). In contemporary liberal politics, it occupies two awkward and somewhat contradictory positions–both as the adversary and as the necessary requirement of democracy (Murphey, 2007). On the one hand, constitutionalism becomes an adversary of democracy when it places fetters on the ability of elected representatives to do as they please (Luckham et al., 2003). That is why sometimes the perpetual strife between democracy and constitutionalism is called a counter-majoritarian dilemma (Friedman, 2001). Elected representatives normally feel offended when the constitution gives appointed officials the power to correct and review decisions of people who have been elected by the population through a democratic process.

On the other hand, constitutionalism is a necessary prerequisite of democracy because by its inherent ability to limit the power of political players, it helps create rules and frameworks within which power must be exercised. Thus, democracy devoid of these frameworks can be simply self-destructive. In fact, when a constitution is either dead or weak on the limitation of powers of state institutions, constitutional scholarship refers to it as a 'facade', or 'constitution without constitutionalism' (Sartori, 1962; Zhang, 2010). In such situations, democracy has a huge deficit.

Ever since the return to electoral politics in Lesotho, in 1993, constitutional democracy has been based on single-party majority. When a country is in a single-party dominated political system, constitutional studies have confirmed that a constitution becomes dormant and a breeding-ground for what Hadenius and Teorell (2007) call 'non-democratic regimes'. In that setup, the ruling political majority unanimously agrees on the interpretations of the constitution, there is no genuine disagreement. Disagreement is normally kept at minimum.

Lesotho has not been an exception to this phenomenon. The single party dominance which characterised the development of democracy in Lesotho, since 1993, had created a constitutional

order which was never really tested by disagreement in the political sphere. The real test to the constitutional order came only in the aftermath of the 2012 election when it became apparent that single party dominance had fizzled as the cornerstone of electoral politics in Lesotho. The country then entered an entirely new era of shared political power in the form of coalition governments.

In a similar manner, constitutionalism braced itself for a fresh test in Lesotho because disagreement was going to be genuine, as opposed to previously when it was conveniently kept at its bare minimum. As Nelson (2016) pointedly contends, commitment to democracy requires a pledge to the sustained negotiation and cultivation of disagreement. Disagreement, according to Nelson, 'is not democracy's problem, it is its strength'. It enhances limitation and balances that are necessary for constitutionalism to thrive.

From its inception, the idea of constitutionalism was intended to guard against the possibility of the tyranny of government. In essence, constitutionalism is predicated on the presupposition of pluralist view of a political society (de Smith, 1969). It is based on the idea that, the different branches of government, as well as other political interests, are in perpetual conflict, and would continually seek to balance each other. This, therefore, suggests that, conflict and opposition are inherent to modern conceptions of constitutionalism. As Levinson and Balkin (2009) pointedly posit, in contemporary constitutional discourse, conflict between political actors is the norm rather than exception. Hence, not every political disagreement, however heated it may be, should be allowed the status of a 'constitutional crisis'.

In Lesotho, in 2014, hardly two years after the epic 2012 political change, it became apparent that the tripartite alliance was going through a rough patch. The heated disagreement between the Prime Minister and his deputy led to incessant political conflicts, some of which qualified as 'constitutional crises', while others did not.

While political crises invariably lead to constitutional crises, care should always be taken not to confuse every 'political crisis' with a 'constitutional crisis'. Levinson and Balkin (2009: 714) capture the disjunction rather adroitly when saying that,

> The secret... is to think about crisis not in terms of constitutional disagreement but in terms of constitutional design. Disagreement and conflict are natural features of politics. The goal of constitutions is to manage them within acceptable boundaries. When constitutional design functions properly, even if people strongly disagree with, and threaten, each other, there is no crisis.

The authors prefer a narrow approach to constitutional crisis. They limit it only to situations of constitutional breakdown which may arise either because the political players have abandoned the constitution completely or because following the constitution leads to a disaster. If the central purpose of constitutions is to make politics possible, a constitutional crisis marks moments when constitutions threaten to fail at this task (Whittington, 2002; Levinson, 2006).

While a constitutional breakdown is the most overt form of constitutional crisis, Griffin (1996) suggests that the designation of a constitutional crisis may be appropriate also in situations when the apparently normal operation of the constitutional system produces a continual sense of political uncertainty and unease.

This extension of the notion of constitutional crisis is controversial since it has the potential to open up the definition for all sorts of constitutional and political uncertainty. Whittington (2002) contrarily contends that it does not seem to be the essential function of constitutions to eliminate political worry; therefore it cannot be regarded as the failure of the constitution if political unease exists within a constitutional order. In his view, a constitution is thrown into crisis when its prescriptive structure cannot be realised in practice, or is inadequate to achieve its goals. This is the situation where "the

imagined constitutional order may no longer be consistent with and is unable to contain the politics on the ground" (Whittington, 2002: 2199-2200 ).

The use of the phrase 'constitutional crisis' should be reserved for those situations when a constitution can no longer attain its fundamental objective of 'making politics easy'. Political crisis and constitutional crisis should be distinct for, as Withington (2002) suggests, political crisis need not implicate the constitution, and constitutional crisis need not have dramatic consequences for the political system.

The succeeding discussion of the many political episodes in Lesotho in the short period of the first coalition government sheds some light on the nature of crises which confronted the country's constitutional order in that period.

## Vote of No Confidence

The beginning of 2014 was studded with many political incidences which presented challenges to the coalition government formed two years earlier. However, the real constitutional issues started in May, 2014, when two members of parliament from All-Basotho Convention (ABC), Mophato Monyake and Thabiso Litšiba defected from government, thereby inflicting a blow to a coalition government which already had a thin majority of one in a 120-member National Assembly. Defection of members from government benches meant that government had lost majority in the National Assembly, and no longer met the terms of section 87(2) of the *Constitution of Lesotho*.

It is apposite to note that, in terms of the constitutional schematisation in Lesotho, although confidence of the National Assembly is the touchstone of government, when government loses the support of the majority of the members of the National Assembly, it does not automatically lose power. Section 87 (5), read with section 87 (6) of the Constitution, provides for the substantive and procedural requirements for vacation of the

office of the Prime Minister, which is the cornerstone of government in terms of the *Constitution in Lesotho* (Attorney General vs His Majesty the King, 2015).

The procedural requirements imposed by section 87(5) are that, even when it is abundantly clear that government has lost majority in parliament, there is still a need for a successful motion of no confidence by the National Assembly. When the motion has been passed by the National Assembly, the Prime Minister still has two options: either to resign or advise dissolution of government which would trigger the processes of the election of a new parliament within three months.

Thus, technically, it is possible that a Prime Minister can remain in office despite having lost support of the majority of members of the National Assembly; in other parliamentary democracies this is called minority government (Knopff and Snow, 2013); in Lesotho, the situation obtains as long as the procedural requirements for vacation of office by the Prime Minster remain unsatisfied.

Aware of those procedural requirements created by the Lesotho Constitution, the opposition sponsored a motion of no confidence in the government. Since government had lost majority in the House, prospects for the success of the motion were high. The *Constitution of Lesotho* envisages a constructive motion of no confidence (sec. 83(5)). This allows parliament to pass a motion of confidence only when there is an alternative successor with a requisite majority (Bergman, 1993). Hence, the motion of no confidence which was tabled proposed that, former Prime Minister, Pakalitha Mosisili, should form government.

When relations between ABC and LCD continued to plummet, LCD supported the motion of no confidence without necessarily defecting from government. The constitutional issue, at the time, was whether a party which is in government could support a vote of no confidence against a government to which it is part. Neither does the *Constitution* expressly provide for this scenario nor is there any precedent which can be followed in Lesotho. The matter was not decided in the courts, as the case

which was instituted by ABC and BNP members to raise these issues was not litigated to finality due to other fast-paced political developments at the time.

While there is no precedent in Lesotho, either legal or from parliamentary practice, where a party which is still in government initiates, or supports, a vote of no confidence against the government, it would seem that constitutional practice in Lesotho does not necessarily prohibit it. In terms of the *Constitution*, a motion of no confidence is raised individually by a member of parliament (MP).

This, therefore, means even individual MPs from government side can initiate, or support, a motion of no confidence against government. That this is possible can be seen in the decision of the High Court of Lesotho in the case of *Ntsu Mokhehle v Molapo Qhobela and Others* (1997). In this case, Mokhehle, who was the Prime Minister of Lesotho and leader of Basutoland Congress Party (BCP), had fallen out of favour with his own executive committee. Because of that, the party's executive had organised a party conference to remove Mokhehle from the position of party leader.

At the time, it was not clear whether Mokhehle's removal from party leadership had a bearing on his position as Prime Minister. His own view was that, being party leader was not a condition necessary for the office of the Prime Minister. The court made a fine distinction between the two. It held that the Prime Minster is the creature of the National Assembly. Members of the National Assembly are empowered to vote for the Prime Minister and to remove him. The court held that:

> It is clear from the above that in all the happenings in parliament, the BCP as a political unit does not feature prominently. Its members are recognised by the Constitution as individuals despite the use of the term political party in the Constitution ... *The party does not feature by law in the making or unmaking of the Prime Minister* (italics added).

Based on this decision, the then Prime Minister defected to form a new party, Lesotho Congress for Democracy (LCD) in 1997, with majority of the members of the National Assembly; his position, as the Prime Minister, did not change.

It would, therefore, seem that, MPs from the government side can raise, or support, a motion of no confidence against the government as individuals.

Although the motion of no confidence against ABC-LCD-BNP coalition government could not be pursued to finality, it would seem that, the process did not raise any threat of a constitutional crisis. The processes squarely fitted within the four corners of the *Constitution*. It raised some constitutional issues which had no precedent in the constitutional practice in Lesotho but it was not anywhere closer to a situation of a constitutional crisis.

## Prorogation of Parliament

Against the background of loss of the majority and threats of motion of no confidence, in June, 2014, Prime Minister Thomas Thabane prorogued parliament, in terms of section 83 of the *Constitution of Lesotho*. The section empowers the King, at any time, to prorogue parliament upon the advice of the Prime Minister. Together with dissolution and summoning of parliament (Hicks, 2012), prorogation of parliament is one of the antique prerogatives of feudal kings which, with the ascendancy of electoral democracy and adoption of political dispensations—such as the Westminster constitutional design—kings exercised upon advice of their prime ministers.

These conventions were implanted in independence constitutions of Britain's former colonies, such as Lesotho. Under British conventions, the prerogative existed as a form of adjourning a session of parliament. It is classically the preserve of the King, whereat he delivers the prorogation speech and reviews the work of the session that was.

Prorogation in Lesotho is still cast in the classical mould. In

classic British parliamentary practice, parliament was literally a chamber of the sovereign so much that it could only meet at his pleasure. It was entirely up to him to summon, prorogue, or, even, dissolve it depending, on his own conveniences (Markesinis, 1972). A monarch could even abuse the prerogative so much that parliament would only be summoned to transact the executive business, such as approving the budget and other policies, after which it could be sent on prorogation. Once prorogued, parliament could only come back on summons by the sovereign. Thus, in its nature prorogation has always been susceptible to abuse.

Circumstances in which a parliament can be prorogued have remained unclear. In constitutional monarchies such as Lesotho, it is a prerogative used to remind parliamentarians of the humble origins of parliaments. In fact, under modern Westminster designs, a lot of the powers which are *de jure* wielded by the monarchs have *de facto* shifted either to the cabinet or to the Prime Minister (Jennings, 1969).

Amongst the modern parliamentary designs, Lesotho's model is similar to the Canadian design. While in Lesotho the *de jure* powers are reposed in the King, in Canada they are enjoyed by the Governor General upon the advice of the Prime Minister. The most recent lesson from Canada on prorogation, which arguably inspired prorogation in Lesotho in 2014, was in 2008. Like all developed economies, in 2008 the Canadian economy experienced difficulties that came with financial crises of that year. Against enormous opposition and criticism, the Prime Minister, Stephen Harper—who led a minority government—was able to convince the Queen's representative (and, therefore, equivalent to the King in Lesotho), the Governor-General, to prorogue Parliament in order to allow him time to deal with the economic crisis. Among others, and as in Lesotho, the Prime Minister was accused of proroguing parliament in order to avoid a motion of no confidence.

Hogg (2009), one of the leading constitutional authorities in Canada, contends that while the Governor General would

ordinarily accept the advice from the executive, he may, under exceptional circumstances, reject the advice. He contends further that the imminent vote of no confidence is one of the exceptional circumstances which empower the Governor General in Canada to exercise discretion and reject the Prime Minister's advice. When commenting about the 2008 prorogation in Canada, the author contends that,

> While the Byng-King dissolution of 1926 is not a close analogy to the Harper-Jean prorogation of 2008, it is a precedent for the proposition that the governor general has a personal discretion when a Prime Minister tenders advice the effect of which is to preclude the House of Commons from passing the judgement on his government(Hogg, 2009-2010:198).

There are other scholars who argue that the Governor General can hardly refuse the advice of the political executive (Russel, 2011). According to Nicholas and James (2011),

> In Canada, the entrenchment of responsible government in 1848 transferred the bulk of Crown's powers from the Governor to the political executive, which now exercises them in the name of the Crown. Responsible government means that...the monarch or his or her representative is bound by constitutional convention to follow and carry the advice of Prime Minister…

A closer look at Lesotho constitutional schema favours the latter approach. Confidence is still the footstool of government in Lesotho, just as it is in the United Kingdom and Canada to the extent that a government without confidence of parliament in Lesotho would be an affront to the true spirit of the Constitution. Ordinarily, a government which suspends parliament to perpetuate its rule without confidence of parliament is an enigma under the broader constitutional schematisation in Lesotho.

However, the way prorogation is cast under the *Constitution*

*of Lesotho* is slightly unique, and merits circumspection. Firstly, section 83(4) seems to empower the Prime Minster to advise the King without exception. While the section empowers the King with discretion to refuse dissolution of parliament on the advice of the Council of State, the same discretion does not seem to obtain in relation to prorogation. The powers to prorogue and to dissolve parliament seem to be couched differently in Lesotho. Both of them are exercisable by the King acting in accordance with advice of the Prime Minister but the discretion of the King is retained with regard to dissolution but not with regard to prorogation. It would therefore seem that the prerogative of prorogation has effectively shifted almost wholly to the Prime Minister in Lesotho.

Secondly, the *Constitution of Lesotho* appears to constrain the King in situations where the Prime Minister advises prorogation, even when the intention is to avoid an imminent vote of no confidence, because of the procedural requirements of the vote of no confidence in terms of section 87(5) of the *Constitution*. Unless a successful motion of no confidence is passed by parliament, it is hard to conclude that government has lost confidence in the House. Any other suggestion would be presumptuous. There seems not to be any process under the *Constitution* by which it can 'appear' to the King that his government has lost confidence of the House except through a successful and constructive motion of no confidence.

Thirdly, due to its peculiar history (Proctor, 1969), the *Constitution of Lesotho* is structured, in such a way that the King cannot refuse the advice of the Prime Minister. Section 91(3) provides that if the King refuses the advice of the Prime Minister, the latter may do that act and then report to parliament. It should seem therefore that in terms of the current constitutional schema in Lesotho, prorogation is the effective preserve of the Prime Minister; the *Constitution* does not seem to put any limitations on the exercise of that power. This, of course, lends it to the potential of abuse by the Prime Minister.

This schema is crying out for reform. The *Constitution* may

be improved by introducing the notion of regular prorogations where parliament is prorogued annually to provide for regular sessions of parliament. The exceptional circumstances under which the regularity rule may be deviated should also be expressly provided for.

## Coalition Government and Executive Powers of the Prime Minister

One thing which brought the *Constitution* to the state of crisis throughout the tenure of the first coalition was the nature of the executive power of the Prime Minister in a coalition government. The vexed issue was whether the Prime Minister is the creature of the *Constitution* or the coalition agreement. The issue accompanied the coalition government from its inception, in 2012, but it became much more overt when the government faced its trying moments in 2014. The LCD, the second biggest partner in the coalition arrangement, and the one that provided the Deputy Prime Minister, was of the view that, a coalition government Prime Minister was different from a single party Prime Minster, in that the coalition Prime Minister is enjoined to consult.

The ABC and BNP were of a view that the Prime Minister was a creature of the *Constitution* and there was no difference in executive powers when he was a coalition Prime Minister and when he was a single party Prime Minister. Indeed, these diametrically opposed positions were taken largely because of the political circumstances of the time wherein LCD sought recourse from the coalition agreement and ABC from the *Constitution*.

The main issue for constitutional scholarship is whether the *Constitution* of Lesotho envisages two types of Prime Ministers, namely the coalition government Prime Minister, on the one hand and a single party Prime Minister, on the other. The investigation of this question requires proper understanding of the provisions of the *Constitution of Lesotho*, the British

conventions that inform those provisions and the coalition agreement for this particular tripartite pact which launched the first coalition in the aftermath of the inconclusive 2012 election.

The key provisions of the *Constitution* are those that deal with the formation of government and operation of cabinet in relation to Prime Minister. Government in Lesotho is formed in terms of section 87(2) of the *Constitution*. The section provides that,

> The King shall appoint as Prime Minister the member of the National Assembly who appears to Council of the State to be the leader of the political party or coalition of political parties that will command the support of a majority of the members of the National Assembly.

It is important to note that the government in Lesotho turns on the office of Prime Minister. However, neither is the choice of the Prime Minister done directly by the electorate nor indirectly by parliament.

Unlike in countries that have the investiture vote for Prime Minister, or President, (Martin and Stevenson, 2001), the *Constitution of Lesotho* does not provide for indirect election of the Prime Minister by parliament. The position of Prime Minister is an appointive position. The King 'appoints' the person who 'appears' to enjoy the confidence of the House.

Historically, the British monarch appointed the person who enjoyed the support of the House to form government because that person had the likelihood of forming a stable government (Bogdanor, 2008). Therefore, that appointment is inherently the prerogative of the King, hence the use of the word 'appears'. Under the current *Constitution* the Council of State has been designated as the interlocutor in the appointment process.

The parliament still has the right later during the course of government, on the strength of the principle of democracy, to confirm, or disprove, the confidence it has in government. These classic principles for the choice of the Prime Minister have

developed tremendously in tandem with the contemporary tenets of parliamentary democracy.

The position of the Prime Minister in modern times is almost invariably decided by the nature of voting during parliamentary election. It would be noted that, in the case of Lesotho, Section 87 (2) refers to appointing 'a leader of a party or coalition of parties'. Clearly, the section envisages that there may be situations when a single party may not be able to garner sufficient majority to form a government.

As it has been noted in the aforementioned decision of the High Court of Lesotho in the case of *Ntsu Mokhehle v Molapo Qhobela and Others* (1997), the role of political groupings in parliament is immensely minimised when it comes to demonstration of confidence in government. Theoretically, it would seem that it is immaterial whether members of parliament come from a coalition, or a single party.

What seems to be material is the confidence of the House, as shown by individual members of parliament. This purely legalistic approach is subject to criticism from political studies because it denigrates the role of political parties in a constitutional democracy. Perhaps that is one area for reform because the reality of the matter is that governments are formed by political parties conjointly, or individually. To insist on a purely legalistic approach that government depends on the confidence of individual members of parliament is to be oblivious to the realities of politics which provide the very reason for the existence of the *Constitution*.

Furthermore, by contemplating a confidence based on 'coalition', the section, by implication, refers to 'agreement' of parties to form a coalition. Thus, it could be argued that a 'coalition' is an 'agreement' by another name. Recourse from British constitutional conventions also provides that coalition agreements in situations of hung Parliament are integral to the process of the formation of government (Maer, 2010:1). As one influential British constitutional expert instructively argues:

> …the fundamental convention of parliamentary government that a government must retain the confidence of the House of Commons remains in a hung Parliament situation. Admittedly, after an inconclusive election, it may not be immediately clear who is best placed to secure that confidence. In such a situation, there would have to be negotiations between the political leaders. The political colour of the new government would be determined by political decisions – decisions made by the political leaders (Bogdanor, 2008).

However, care must be taken when seeking recourse from British constitutional conventions that the *Constitution of Lesotho* is written and its express provisions cannot be contradicted by an 'agreement'; not even by an Act of Parliament.

Thus, it can be argued that the coalition 'agreement' is legal (not a private arrangement) to the extent that it does not offend the express or implied provisions of the *Constitution*. The fact it is possible under section 87(2) of the *Constitution* to form of a *coalition* government clearly implies that more than one political party would *agree* on the terms of the coalition. Thus, it may not be entirely correct that coalition agreements are private arrangements which have no bearing on the *Constitution*. It would seem that the *Constitution* itself, fortified by convention, sanctions coalition agreements for purposes of forming a government, particularly in hung parliament situations.

Another area of controversy which haunted the first coalition government was the power of the Prime Minister in the relation to the cabinet. During the course of the coalition government, there were three key decisions taken by the Prime Minister which were blatantly rejected by the Deputy Prime Minister, citing non-consultation by the former. The charge of non-consultation came in two counts. The first one was non-consultation of coalition partners in government while the second one was non-consultation of the coalition partners as political parties including LCD. This issue goes to the core of constitutional practice in Lesotho.

The leading occasions in which the Deputy Prime Minister flatly rejected the decision of the Prime Minister were the dismissal of the army commander in August, 2014, the dismissal of the Minister of Communications and the appointment of the President of the Court of Appeal. The latter is slightly different because the Deputy Prime Minister was also citing the caretaker nature of government as the President of the Court of Appeal was appointed after the dissolution of parliament. In the bigger picture, it occurred within the context where the Deputy Prime Minister was having broad-based problems with executive decisions of the Prime Minister in general, particularly on appointments and dismissals.

Unlike in a presidential system where executive authority is found in a single centre of authority, the *Constitution of Lesotho* seems to distinguish between *de jure* executive authority and *de facto* executive authority, and vests them differently. Section 86 posits, in general terms, that, executive authority in Lesotho shall vest in the King and exercisable through the advice of government officers. The section on its own does not expressly provide for the centre of executive authority in Lesotho. Instead, it lends itself to interpretation. As a British-based constitutional system, it would seem that the monarch in Lesotho is the *de jure* repository of executive authority.

However, due to the ascendancy of parliamentary democracy, the authority has largely shifted to the elected government of the day (Langford, 2006). This has effectively meant that the Prime Minister, and no longer the King, is 'the pivot of the political system, the focus of a political party as well as the legislative and executive branches of the government' (Casstevens, 1990:338). This means that, executive authority to implement the law, develop national policy, coordinate factions of government, appoint key personnel in government and initiate legislation (Rauntenbach and Malherbe, 1999) vests in the cabinet and the Prime Minister.

The *Constitution* does not vest specific functions in the office of the Prime Minister, save where he makes certain

appointments and dismissals. The *Constitution* does not vest general executive power in the Prime Minister, either. Instead, Section 88 provides that the Prime Minister is part of the cabinet whose function is to 'advice the King in the government of Lesotho'. The Section also embodies the salutary principle of collective responsibility.

However, Section 88(2) provides for instances where the principle of collective responsibility may not apply. Those are instances of the appointment and removal of ministers and the dissolution or prorogation of parliament. It seems that the *Constitution ex facie* obliges the Prime Minister to work within the principle of collective responsibility, save for those specific exceptions where he is not bound to work with the cabinet. However, there are other executive powers which the *Constitution* vests unto the Prime Minister. These are powers such as appointment and removal of the army commander, appointment and removal of both the Chief Justice and the President of the Court of Appeal and other key officers in government.

In order to demonstrate this constitutional scheme, it is apposite to refer to, at least, three cases which brought the *Constitution* to the situation of a crisis during the life of the first coalition government; namely, the dismissal of the Commander of the Lesotho Defence Force (LDF), the removal of the Minister of Communications and the appointment of the President of the Court of Appeal.

The removal of the commander of the LDF, Tlali Kamoli and on 29 August, 2014, and appointment of the new one, Maaparankoe Mahao, by the King on the advice of the Prime Minister arguably marked the beginning of what could properly be called a constitutional crisis; the situation where a constitution can no longer regulate politics.

On the following day, the 30 August, 2014, the army mounted a mid-night operation at two police stations in Maseru, which saw a standoff between the army and the police. In the shootout, one police officer was reported dead. During that operation all

the radio stations in the country were taken off-air and the Prime Minister, Thomas Thabane, skipped the country to seek refuge in South Africa.

The operation has been a matter of considerable controversy. While the army has vehemently refuted the widespread allegations of an attempted coup, the international community was almost unanimous that the operation bore all the hallmarks of attempted coup (AU, 2014; UN, 2014; Commonwealth, 2014; Freedom House 2014). It is beyond the scope of this chapter to investigate the veracity of allegations relating to that episode, one way or the other. What is the mainstay of this chapter, though, are the constitutional implications of both the appointment of commander of LDF and the constitutionality of the operation of the 30th August, 2014.

The 1993 *Constitution of Lesotho* introduced a very unusual model where the *Constitution* was silent or woolly about two key aspects of civil-military relations in contemporary constitutional democracies. These aspects include the office of the commander-in-chief of the LDF and appointment of the commander of the LDF. It has been argued elsewhere that the *Constitution* established this unusually weak model of civil military relations because it was adopted under the hand of the military junta during the transitional period in 1993 ('Nyane, 2015). Instead, the *Constitution* created the Defence Commission which was an oversight on the army with power to appoint the Commander of LDF (Section 145). The *Constitution* also reposed the command of the LDF in the commander 'subject to any direction of the Defence Commission' (Section 146 (1)).

Clearly, the *Constitution* established this weak civil-military relations model due to, among others, the history of the army in Lesotho, which depicts the type of army which has always been a strong factor in politics (Matlosa and Pule, 2001). The Defence Commission was intended to cushion the defence force from the political meddling which may be occasioned by the political executives such as the Prime Minister. Following the 1994 military disturbances, the Commission of Inquiry was

established. Its key recommendations were that LDF should be brought under clear civilian control and that the commander of the LDF, who was then appointed by the Defence Commission, should be appointed by the King on the advice of the Prime Minister.

The recommendations also inspired the constitutional and statutory reforms which resulted in the very First Amendment to the *Constitution of Lesotho* and the repeal of the *Lesotho Defence Order of 1993*. The new regime of civil military relations enhanced the civilian control of the army and forthrightly designated the Prime Minister as the commander-in-chief of the army. The newly amended Section 145 of the *Constitution* provides that the Prime Minister 'shall have power to determine the operational use of the Defence Force'. The Section also abolished the former Defence Commission and consequently reposed the power to appoint the commander of the army on the King upon the advice of the Prime Minister.

The executive powers of the Prime Minster over the army were considerably enhanced. Furthermore, the newly adopted *Defence Force Act of 1996* rendered the commander of the army answerable to the minister on all matters under his charge in the day-to-day discharge of his duties (Section 12).

Thus, on the 29th August, 2014, when the Prime Minister changed the commander of the army, he was substantively empowered by the new legal regime of civil-military relations (Phumaphi, 2015).

What remained a matter of controversy was, firstly, whether in dismissing the sitting commander, the Prime Minister followed a fair procedure (*Commander of LDF v Mokoena, 2002*). Secondly, the fact that the army launched the operation of that magnitude without the sanction of the Prime Minister was clearly indicative of the crisis in constitutional relations of state institutions.

What brought the *Constitution* to the state of crisis was not necessarily the fact that state institutions overstepped their constitutional mark but, instead, the fact that the deposed

commander could not seek recourse from the judiciary but resorted to forceful retention of office. At political level, the Deputy Prime Minister sided with the deposed commander citing non-consultation on the decision to remove the commander. The standoff was later mediated through the SADC process, which effectively uprooted the 'two commanders' and sent them on 'leave of absence' pending the remedial election which was also the outcome of the SADC facilitate process (Ramaphosa, 2014).

Another episode of the constitutional crisis which mired the country in 2014 was the dismissal by the Prime Minister of the Minister of Communications, Science and Technology, Selibe Mochoboroane, on the 16th October 2014. Mochoboroane was a minster from LCD according to the coalition agreement which was signed in 2012 by the tripartite coalition. The Deputy Prime Minister and leader of LCD, Mothejoa Metsing rejected the dismissal and argued that,

> After receiving Mr. Mochoboroane's expulsion letter, I requested that the process be put on hold as it was not agreed upon by the three parties in government as per the coalition Agreement we signed when we formed government (*Lesotho Times*, October 2014).

In terms of the said coalition agreement, the three political parties put primacy on consultation both at inter-party level and in government. The agreement also territorialised government by allocating ministries to the three parties in government with the tacit understanding that each of the three leaders would be a quasi-Prime Minister in the ministries allocated to his party (ABC *et al*, 2012). The Deputy Prime Minister was therefore correct that the unilateral removal of the minister in the LCD turf was in violation of the principles of the coalition agreement. What was the issue was whether the limitations imposed by the coalition agreement on the coalition Prime Minister have the consequential impact on the powers of the Prime Minister as

espoused by the *Constitution*.

The proper starting point for the investigation of the powers of the Prime Minister under the *Constitution* of Lesotho is Section 88. Section 88(2) which has the general purport on the powers of the cabinet provides thus,

> The functions of the Cabinet shall be to advice the King in the Government of Lesotho and the Cabinet shall be collectively responsible to the two Houses of the Parliament for any advice given to the King by or under the general authority of the Cabinet and for all things done by or under the authority of any Minister in the execution of his office.

It would seem that, unlike Section 87(2), which makes mention of a coalition for purposes of formation of government, Section 88(2) does not contemplate a situation of a coalesced cabinet in its wording. In theory, the Section envisages one cabinet irrespective of how government was formed. As noted earlier, the section has inbuilt exceptions which are provided under Section 88(3). There are basically three exceptional occasions when the King may not be expected to be advised by cabinet but by the Prime Minister alone, thereby absolving the Prime Minister from the saddle of collective ministerial responsibility. These are the appointment of ministers and deputies; dismissal of ministers and deputies; dissolution and prorogation of parliament.

The fundamental question which is ignited by this scenario, despite the tabulated legalism of the Sections of the *Constitution* involved, is whether Lesotho is a cabinet government or a Prime Ministerial government. In terms of the classic British constitutional conventions, government in a British system is fundamentally cabinet-based (Jennings, 1969). The Prime Minister is just but a *primus inter pares* – one amongst the equals.

That is what distinguishes Lesotho as a parliamentary system from presidential systems. In presidential systems

executive authority is wielded by the President. In Lesotho the executive authority is *de jure* wielded by the King. The cabinet exercises the *de facto* executive powers. The popular notion that the Prime Minister is the head of government in Lesotho does not have a basis in the constitutional design of Lesotho.

However, this does not degrade the pivotal nature of the position of the Prime Minister as the one who forms the government. The best guides on the powers of the Prime Ministers in relation to the cabinet are the Sections of the *Constitution* themselves. In general terms, *de facto* executive authority in Lesotho is wielded by cabinet. However, where the sections of the *Constitution* empower the Prime Minister to do a certain act—like Section 124, which empowers him/her to advise on the appointment of the President of the Court of Appeal, or Section 145, which empowers him to advise on the appointment of the commander of LDF—such powers should not be subjected to the general ambit of Section 88(2).

Lesotho's Constitution is designed in such as to make it appear as if the position of Prime Minister has been politically presidentialised, because he has immense political powers. However, the reality of the matter is that, constitutionally, the Prime Minister in Lesotho is the *primus inter pares* in cabinet. Interpreting the *Constitution* to give broader powers to the Prime Minister will defeat the whole constitutional scheme. The Prime Minister is not directly elected under the constitutional design in Lesotho; he is appointed by the King.

Like other members of cabinet, his position is not elective but appointive. Interpreting the *Constitution* otherwise would lead to clear absurdity. It would mean that all the sections of the *Constitution* relating to the advice of the King, even those that are very express, would be subjected to the ambit of Section 88(2).

This interpretive approach was favoured by both the High Court and the Court of Appeal of Lesotho in the most recent decision in *Attorney General v His Majesty the King and Others (2015)*. In this case, the Attorney General challenged the

constitutionality of the appointment by Prime Minister of the President of the Court of Appeal without the involvement of the cabinet in terms of section 88(2) of the Constitution.

It is important to note that, the case arose out of the same pattern of political stand-off between the Prime Minister and his Deputy. The Deputy Prime Minister made the affidavit supporting the Attorney General that the cabinet was not consulted. The main issue was whether section 88(2) of the *Constitution* is applicable to the appointment of the President of the Court of Appeal under Section 124(1) of the Constitution.

The High Court (Constitutional Division) decreed that Section 124 and its lookalikes in the *Constitution* are specific clauses that empower the Prime Minister unilaterally to advise the King. Therefore they do not fall under the ambit of Section 88(2). The Court reasoned that,

> [a]lthough the Prime Minister is the first amongst equals in the sense that he is a Minister, he is however a very powerful Minister. He is in a sense, if not in reality, the King's chief advisor. He is the pivot point around which the political process revolves. *He is given express power, by the Constitution, to give the King advice on certain specific issues* (emphasis added).

The Court of Appeal agreed that 'it is not correct that the *Constitution* required the Prime Minister, before advising the King on the appointment of a new President of this Court, to refer the subject of that advice to cabinet'(*ad Para* 45).

## Conclusion

This chapter has discussed at some of the constitutional issues which mired the country in the year 2014. It demonstrated that not all political disagreements of the time qualify to be called

'constitutional crises' as it was popularly imagined in public discourse. When a constitution is called upon to guide proceedings in difficult constitutional questions, the situation cannot always be called a constitutional crisis. It becomes a crisis when a constitution is crippled to do what is its purpose; namely, regulation of politics.

The fact that the breakdown of relations between the LCD, on the one hand and ABC and BNP, on the other, brought what could be labelled a 'political crisis' does not necessarily mean the *Constitution* was brought to a situation of crisis. What brought the *Constitution* to the precipice of crisis, though, was the constitutionality of refusal by the minister and commander of LDF to vacate offices upon dismissal by the Prime Minister.

On the question of the removal of the minister, the *Constitution* is fairly clear. In terms of Section 87 of the *Constitution* the office of the minister becomes vacant amongst others 'if the King acting in accordance with the advice of the Prime Minister, so directs' (Section (87(7) (d)). It is important to note that in terms of section 88, while the Prime Minister is generally obliged to work as part of the cabinet collective on the removal of a minister he is exempted. It is his exclusive preserve, regardless of whether the cabinet is a coalition or not.

Another episode which has a bearing on the principles of the *Constitution of Lesotho* was the appointment of the president of the Court of Appeal. In a similar manner, LCD was opposed to the appointment still citing non-consultation by the Prime Minister. This one could not degenerate into the crisis because the matter was decided by the courts, and parties accepted the outcome of the courts.

Furthermore, the chapter contends that a lot of the principles of the *Constitution of Lesotho* have not been put to the real test since independence. The experience of 2014 was necessary for development and consolidation constitutional democracy in Lesotho. The *Constitution* of Lesotho draws from British constitutional conventions but care should always be taken that the *Constitution of Lesotho* is written and its written clauses

deserve a fair interpretation. There is also a unique history which has inspired the form and substance of certain specific clauses of the *Constitution of Lesotho*. Those peculiarities provide the semblance of uniqueness to the Constitution, despite it being generally the prototype of British-based constitutions.

It has been contended, throughout this chapter, that, the very fact that the *Constitution* is still cast on antique British constitutional conventions proffers the strong case for the review of the *Constitution*. Bringing this Constitution up to speed with contemporary trends in constitutional democracy is a pressing need for the country. In its current form the *Constitution of Lesotho* is very weak on limitation of the powers of state institutions, particularly the office of the Prime Minister.