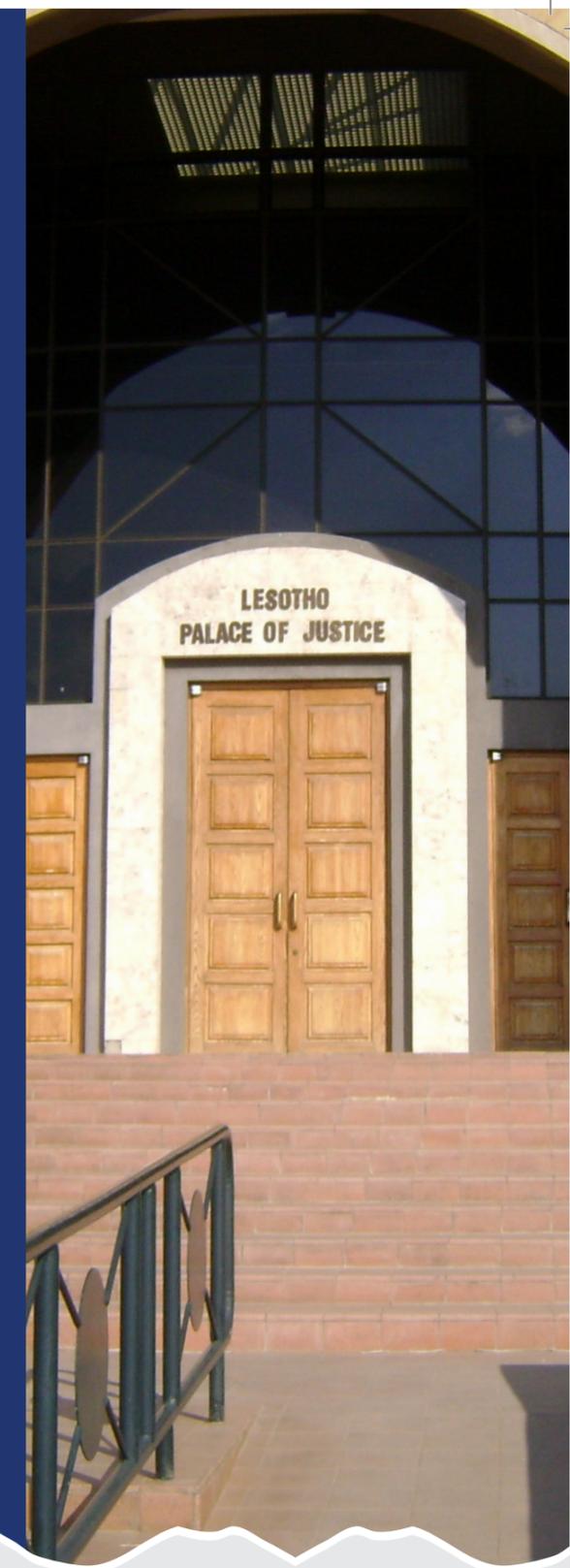


Politics of Judicial Independence in Lesotho



Freedom House Southern Africa  
Report prepared by Rachel Ellett, PhD



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The ideas behind the two frameworks owe a great number of intellectual debts. Of particular note, however, is Peter Von Doepp. Peter's excellent book *Judicial Politics in New Democracies: Cases from Southern Africa*, our co-authored work and conversations have informed the framing and categorization of the interference framework in this report.

As always, the standard disclaimers apply. I am the sole author of this report and as such hold full responsibility for any errors, misstatements, misinterpretations or omissions contained herein.

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## Executive Summary

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Lesotho is a small landlocked country entirely surrounded by South Africa. Since gaining independence from British rule in 1960 Lesotho has faced manifold challenges towards achieving political stability and sustained economic growth. The population of Lesotho remains overwhelmingly rural-agrarian and despite some economic growth, gains in GNI per capita have been small and life expectancy has dropped. In 2011 Lesotho placed below average for countries classified by the United Nations as 'low human development.'<sup>1</sup> Since transitioning from authoritarian rule in the early 1990s Lesotho has struggled to establish a stable multiparty democracy, particularly during election periods. These challenges are compounded by the failure to fully address fundamental governance issues such as the relationship between traditional institutions and the state.<sup>2</sup>

As is the case in all democratic states, the establishment of mechanisms of accountability is critical to political and economic development in Lesotho. To be truly effective these institutions must span the formal and informal sector and, they must transect horizontal and vertical dimensions of accountability.<sup>3</sup> Policymakers and academics have increasingly turned their attention to the foundational importance of strong, transparent and fully functional rule of law institutions to economic and political development. First and foremost the courts' role in resolving conflict is essential to maintenance of the rule of law. A stable and predictable investment climate is rooted in the ability of courts to apply the law in a predictable and consistent manner. Second, in transitioning democracies the courts can play an important role in acting as a restraint on overzealous executives, hegemonic political parties and human rights abusers. Given the importance of rule of law to both political and economic development, it is within this context that Freedom House Southern Africa has commissioned a report on judicial independence in Lesotho.

The Lesotho judiciary's history as paramount defender of the rule of law is uneven. Despite being infused with a fairly robust set of institutional protections and a history of strong personnel, the judiciary continues to face a number of challenges. These challenges relate to three major substantive areas: 1) long-term resources constraints, 2) public perceptions of corruption and weak independence and, 3) a hostile and unstable political environment. The goals of this report are two-fold: Part I assesses the current state of judicial independence in Lesotho; Part II reviews the scope



and type of interference experiences by the Lesotho judiciary. Finally, while the introduction to this report provides analysis and description of the historical backdrop to contemporary Lesotho the greater part of the analysis focuses on the last ten years (2002-2012).

Each section of the report is structured around a taxonomy of judicial independence/interference. Judicial independence is compartmentalized into five broad descriptive categories; each of which contains a number of sub-elements. These sub-elements are captured through a combination of checklist items and descriptive analysis. Category i *Scope of Judicial Power* and Category ii *Differentiation and Separation of Powers* focus on the formal legal and political distribution of power as it relates to the judiciary. Category iii *Internal Institutional Safeguards* examines the internal factors – both formal and informal – that shape and protect judicial independence. Category iv *Transparency* speaks to the need for access to information in order to monitor judicial independence. Finally, Category v *External Institutional support* articulates the significance of judicial allies’ in buttressing strong judicial institutions. Seeking to move beyond a rigid constitutional definition of judicial independence to a more holistic approach, this framework is interdisciplinary and captures both the informal and formal relationships between courts, government, groups and individuals. The taxonomy of interference is captured across five major categories: Manipulation of Personnel, Institutional Assaults, Personal Attacks on Judges, Budget Manipulation and, Attempted Cooption of Judges. This section of the report is a straightforward description of the interference experienced by judges in Lesotho over the last ten years.

The overall performance of the Lesotho judiciary exhibits no substantially serious issues related to professionalism and/or independence. After applying the framework (see Figure 2) to Lesotho three broad weaknesses were observed:

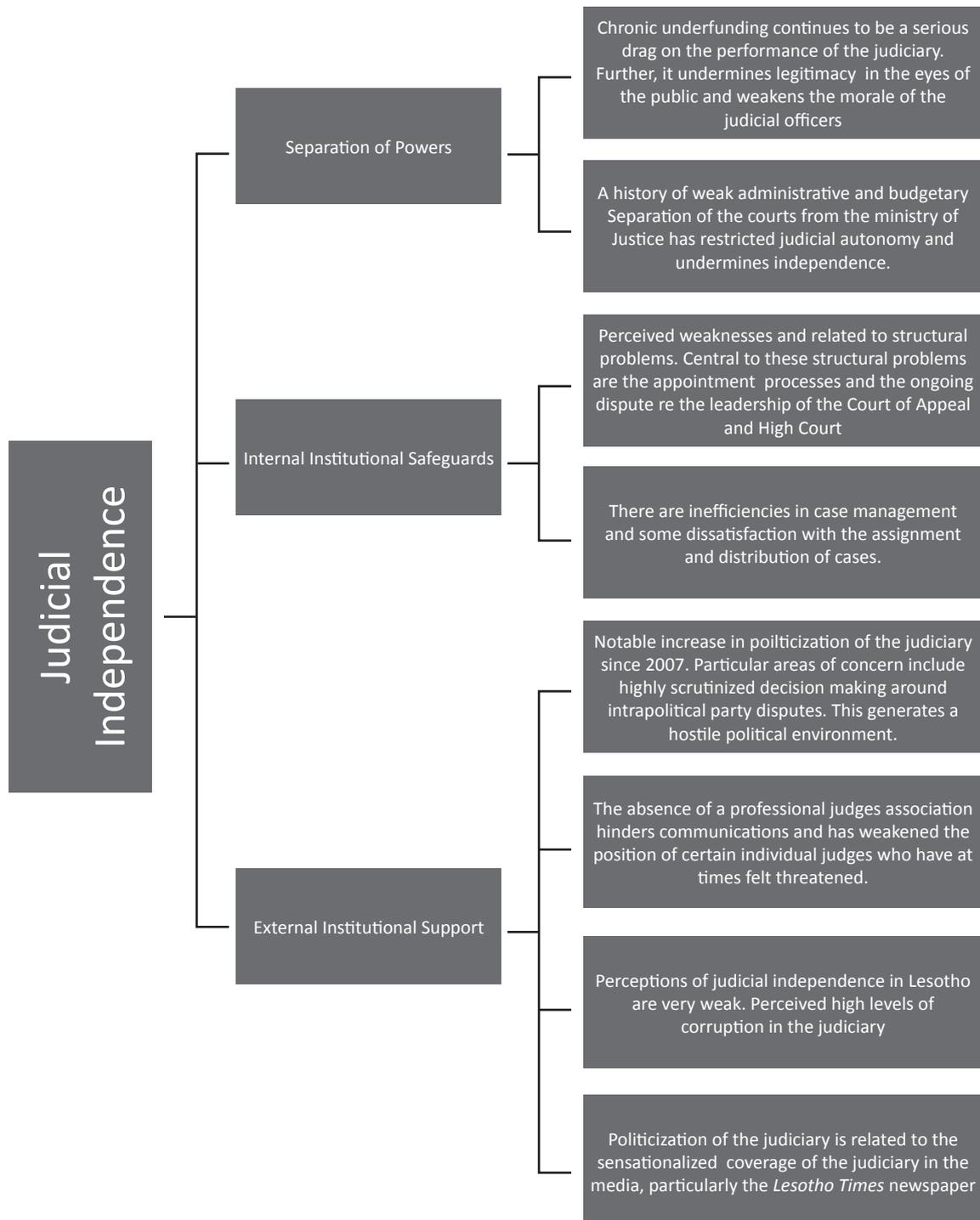
1. *Separation of Powers* Chronic underfunding and inadequate autonomy from the Ministry of Justice continues to be a serious drag on the performance of the judiciary. Further, it undermines institutional legitimacy in the eyes of the public and weakens the morale of judicial officers.
2. *Internal Institutional Safeguards* Perceptions of judicial independence in Lesotho are very weak. Perceived weaknesses are primarily due to structural problems related to the appointments procedures and internal administrative structure.



3. *External Institutional Support* There has been an increase in the politicization of the judiciary and attacks on judicial independence since the 2007 election. This is due in part to the amplified political volatility and subsequent split within the ruling Lesotho Congress for Democracy (LCD) party which has necessitated keeping the judiciary under tight control.
4. These weaknesses are further detailed and diagrammed in Figure 1 below:



**Figure 1: Typology and Summary of Challenges to Judicial Independence in Lesotho**





Following analysis and assessment of the major challenges, each of the 2011 judicial independence indicators were bench marked as ‘adequate’ or ‘inadequate’. Adequate indicates current structures and practices align with international judicial independence standards<sup>4</sup> and best practices/environmental factors highlighted in the current rule of law literature (see Table 1 below). Because the independence indicators are compound categories, cases marked inadequate may reflect weak performance in all or perhaps just a few categories. This is further elucidated in the final ‘Goals’ column, where specific areas requiring attention are further detailed. The findings of this research are captured and summarized in Table 1 below.

**Table 1: Judicial Independence Indicators: 2011/12 Lesotho Benchmarks**

Independence Indicators	2011 Lesotho Benchmark	Goals
<i>Scope of Judicial Power</i>		
<i>Judicial review/institutional structures</i>	Adequate	-Regularly revisit the question of establishing a permanent Court of Appeal --Consider standardization/clarification of procedures for High Court judges to sit <i>ex officio</i> on the Court of Appeal
<i>Exclusive authority and established appellate procedures</i>	Adequate	N/A
<i>Differentiation and Separation of Powers</i>		
<i>Budgetary Autonomy and Adequate Resources/Salary</i>	Inadequate	-Complete the transition to independent budgeting under the Administration of Judiciary Act 2011 -Address division of authority; clarify powers of the registrar and address personnel issues -Strengthen salary at High Court level -Introduce laws and structures to protect individual judges’ salary from manipulation. One example is to establish an independent remuneration commission for judges and other public officers, such as the South African model -Publish an annual report with detailed budgeting(per Sec. 20 of Administration of Judiciary Act 2011) -Improve access to legislation, court procedures, and cases and enhance training opportunities.
<i>Judicial Security/Buildings</i>	Inadequate	-Provide 24 hour security for all judges -Increase budget and improve management of court building
<i>Strong separation of powers provision</i>	Inadequate	-Further administrative/budgetary separation from the Ministry of Justice -Review effects of the Administration of Judiciary Act 2011
<i>Internal Institutional Safeguards</i>		
<i>Adequate Tenure and Retirement Provisions</i>	Inadequate	-Review use of judges employed under temporary contracts
<i>Objective advancement</i>	Inadequate	-Continue adoption of an electronic case management



<i>procedures and assignment of cases</i>		<p>system and regularly review time-frames within which judgments are delivered</p> <ul style="list-style-type: none"> <li>-Produce and publicly disseminate annual reports.</li> <li>-Regularly review and assess case assignment data, reviewing for allocation biases.</li> </ul>
<i>Adequate recruitment, appointment and removal procedures</i>	Inadequate	<ul style="list-style-type: none"> <li>-Overhaul the Judicial Service Commission in consultation with the Chief Justice and the Law Society. Open up to legal practitioners and civil society.</li> <li>-Make the workings of the JSC transparent and accountable.</li> <li>-Consult external parties on the merits of potential judicial appointees.</li> <li>-Advertise positions and conduct interviews for potential candidates.</li> </ul>
<i>Comprehensive ethics code and fair removal process</i>	Inadequate	<ul style="list-style-type: none"> <li>-The current ethics code should be statutorily adopted</li> <li>-Extend application of the ethics code to DPP, AG, and other bodies with a judicial function</li> <li>-Consider adoption of asset disclosure program for Judges</li> <li>-Guarantee the right to a fair hearing, representation or appeal in judicial disciplinary disputes.</li> </ul>
<i>Strong institutional leadership</i>	Inadequate	<ul style="list-style-type: none"> <li>-Resolve protocol and seniority issues in the Judiciary's leadership structure</li> <li>-Address structural issues related to the Registrar and dissatisfaction of Court of Appeal regarding the new Administration of Justice Act.</li> </ul>
<i>Stable/local composition of bench</i>	Inadequate	<ul style="list-style-type: none"> <li>-Enhance efforts to speed up indigenization of the Court of Appeal</li> <li>-Review use of judges on temporary contracts</li> <li>-Consider prohibiting multiple leadership positions across multiple jurisdictions/institutions</li> </ul>
<i>Transparency</i>		
<i>Public access to proceedings, reporting of judgments, access to judgments/trial records</i>	Inadequate	<ul style="list-style-type: none"> <li>-Continue cooperation with Lesotho Legal Information Institute</li> <li>-Conduct training with Lesotho Media for more effective and accurate judicial reporting</li> </ul>
<i>External Institutional Support</i>		
<i>Vibrant civil society support</i>	Inadequate	<ul style="list-style-type: none"> <li>-Provide media with access to information to promote fair and responsible reporting of court proceedings.</li> <li>-Train journalists on legal reporting</li> <li>-Provide training for civil society organizations on monitoring cases/ and how to identify judicial corruption.</li> <li>-Review the possibility of instituting a confidential complaints procedure for the public?</li> </ul>
<i>Strong regional/international professional connections</i>	Inadequate	<ul style="list-style-type: none"> <li>-Resurrect domestic independent Lesotho Judges Professional body. Coordinate and potentially combine with Magistrates association.</li> <li>-In turn, this will aid in strengthening participation in regional and international judges associations</li> </ul>
<i>Non-threatening Political environment</i>	Inadequate	<ul style="list-style-type: none"> <li>-Political and judicial leadership should become more active in responding to individual anti-judge and institutional level anti-court rhetoric.</li> </ul>



## Methods

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Desk research on Lesotho politics and history and review of recent court judgments was conducted in the United States.

Twenty-six interviews were conducted in Johannesburg and Maseru between October 13<sup>th</sup> and 21<sup>st</sup> 2011. Some interviewees were contacted directly, others through referral from Freedom House. All interviews were conducted anonymously and included members of both the Court of Appeal and the High Court, lawyers, prominent businessmen, members of civil society (both legal and non-legal), non-practicing lawyers, members of international organizations and academics. The interviews are coded (using letters) to maintain anonymity.

The dates of interviews are not specified so as to further protect the identities of interviewees. Interviews conducted ranged in length from 40 minutes to 1 hour and 30 minutes. The interviews were semi-structured around a set of core questions generated from the judicial independence framework. The interviews were recorded and transcribed and for the most part took place in the offices of each interviewee.

## Introduction

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The state of judicial independence in Southern Africa is seen by many observers to be at best anemic, at worst a myth. The gap between political rhetoric and reality remains vast. At a recent International Commission of Judges (ICJ) Symposium in Lesotho<sup>5</sup> Professor Michelo Hasungule pronounced that “most Southern African countries merely pay lip-service to the notion of judicial independence.” Within the region there exists a perception that inadequate institutional safeguards generate weak separation of powers and this renders courts vulnerable to political interference. There are a number of ways in which overly powerful executives have impeded the realization of judicial independence in Southern Africa; indeed even the internationally respected South African judiciary is not immune to executive intimidation. In the wake of two major government losses in the Constitutional Court, President Jacob Zuma suggested that the court should not interfere with the executives’ “sole discretion” to decide public policy.<sup>6</sup> Also witness extra-judicial killings in Botswana<sup>7</sup>; blatant executive interference in the judiciary of Swaziland<sup>8</sup> and inadequate security



protection for judges in Lesotho.<sup>9</sup> Despite the adoption of multipartyism and the promulgation of expansive liberal democratic constitutions, recent events suggest a failure to fully institutionalize the rule of law. As guardians of the constitution, the judiciary is located on the frontlines of this struggle.

Today most Southern African countries have the formal institutional trappings of democracy, including courts with power of judicial review, de facto judicial independence, however, is frequently undermined. Judicial independence is institutionally and individually embedded in a complex web of political contingencies. The executive branch, political parties, the media and civil society and, regional political/legal dynamics all shape the evolution of judicial power and independence. Thus, if our goal is to fully grasp the factors through which judicial independence is both buttressed and undermined we need to simultaneously peer inside and outside the courts.

Past assumptions of many democratization scholars and policymakers has been that courts are capable of self-transformation into powerful institutions of democratic accountability following transition from authoritarian rule. While it is evident that in some settings multiparty elections and diffusion of political power go hand in hand with strong judicial institutions;<sup>10</sup> we increasingly see in Southern Africa that this is not the case. Corrupt hegemonic party systems tend to heighten political insecurity, which in turn create a hostile environment for judiciaries already institutionally weakened through budgetary neglect.<sup>11</sup> In unstable political settings incumbents lack faith in the ability of courts to deliver their short-term needs. It is thus self-evident that well insulated, independent courts do not necessarily make for strong political allies in volatile electoral settings. Compliant or malleable courts can, however, be powerful tools as part of a repertoire of control for political elites. Courts are one piece of a larger political puzzle, and even the most determined and independent-minded judge can be stymied by a powerful executive.<sup>12</sup>

Discontinuities between the formal institutional trappings of democracy on one hand, and the destabilizing undercurrents of fractured political parties and power-hungry elites on the other, is emblematic of the state of democracy in Lesotho today. At a 2007 lecture in Lesotho Professor Makoia 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 forces [...] 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 dramatized instability that is said to dog the country.<sup>13</sup>

If we go back in time to Lesotho's independence in 1966, it becomes clear that the widely held perception of Lesotho's future promise as a stable democratic state has not been fully realized.

Richard Wiesfelder captures the optimism at Lesotho's independence as follows:

A long tradition of free speech and participatory government was reinforced by considerable experience with competitive political parties and the Westminster parliamentary system. Broad political awareness, spurred by the highest literacy rate in Black Africa, enhanced Basotho determination to provide a model of stable, democratic institutions, in contrast to the repressive apartheid structure of the omnipresent Republic of South Africa.<sup>14</sup>

Fast-forwarding fifty years, against a backdrop of political instability the Lesotho judiciary has been marginalized, in turn creating a weak institutional legacy within which to build judicial power and independence. While there exists a legacy of individual excellence amongst the judges and lawyers of Lesotho's legal profession, there remain significant weaknesses in regards to judicial independence at the institutional level. The goal of this report is two-fold: Part I assesses the current level of independence in the Lesotho judiciary; Part II reviews the scope and type of interference with the judiciary in Lesotho.

Judicial independence, we agree, is a good thing. But judicial independence is not a normative end unto itself. Rather, an empowered and independent judiciary is seen as critical to economic development, protection of human rights regimes and democratization. Although judicial independence is a contested concept, there is broad consensus in the scholarly literature that it can be captured within or across these three broad macro-level categories:

- Decisional impartiality
- Capacity of judges to see their preferences realized as outcomes, and
- Institutional rules and features that support these other aspects of independence<sup>15</sup>

In order to support the impartiality and capacity of individual judges to realize their preferences, there needs to be a combination of stable institutions with a generous degree of political insularity. To secure judicial independence we must focus on the peculiarities and specificities of that political setting in combination with universal frameworks and norms. In short, this framework seeks to move beyond a rigid, formal constitutional definition of judicial independence to a more holistic approach grounded in the political and economic realities of Southern Africa.

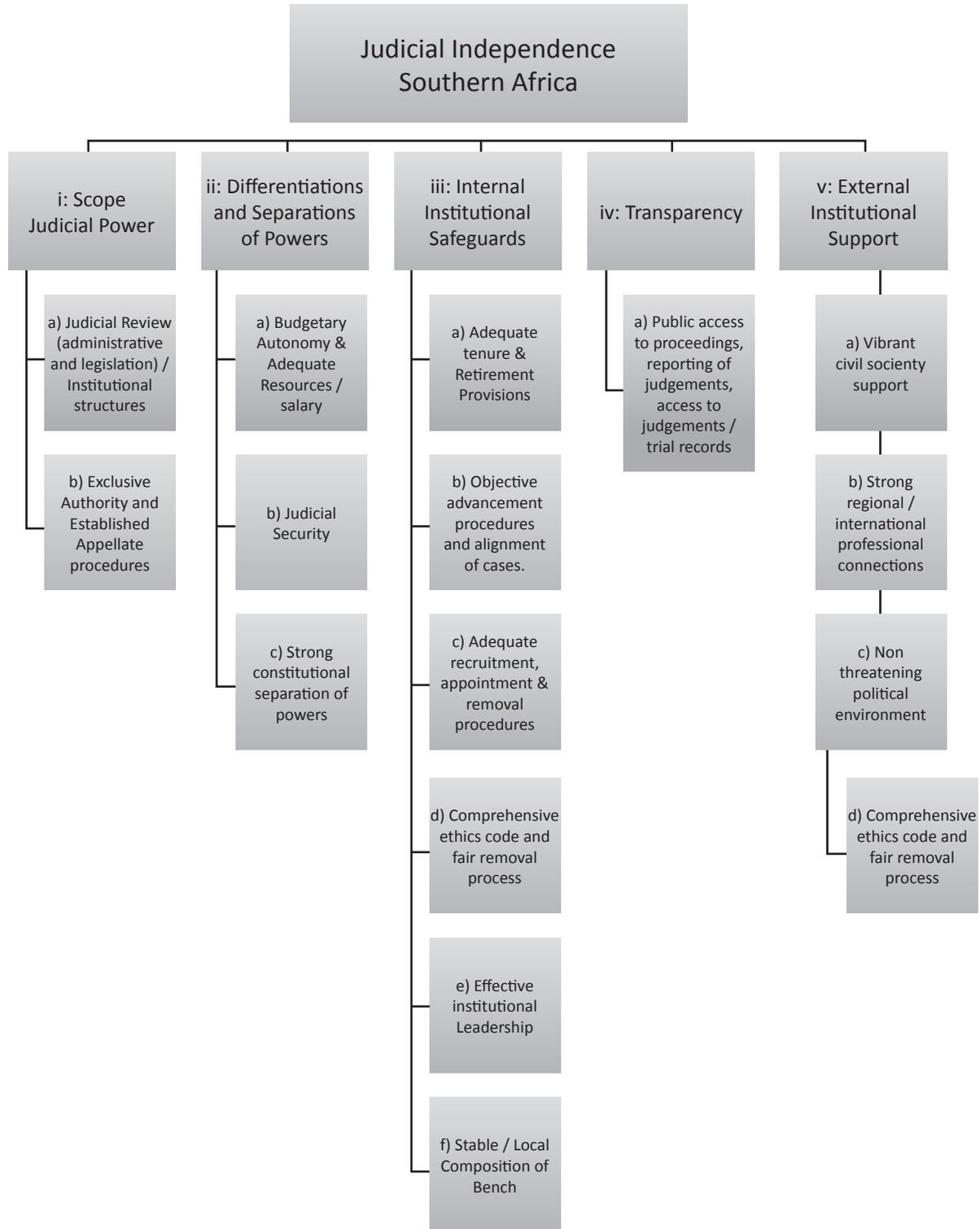


This framework attempts to not conflate a politicized judiciary with a lack of judicial independence through adopting the challenge issued by Frank Upham, “Instead of focusing on the depoliticization of the judiciary, international financial institutions and other international purveyors of the new rule of law orthodoxy should be concerned with the judiciary’s legitimacy and effectiveness, not its political purity.”<sup>16</sup> Courts are political institutions; but politics and corruption need to be carefully picked apart when analyzing judicial independence. The policy implications of this approach are that judicial reform cannot merely be a technical form of assistance. Indeed, a scenario is possible where the courts are so independent that they are rendered insulated from mechanisms of accountability and transparency.<sup>17</sup>

The framework organizes judicial independence into five broad descriptive categories (i-v in Figure 1 below). Within those broad descriptive categories are a number of sub-elements. These sub-elements are captured through a combination of checklist items and descriptive analysis. Category i *Scope of Judicial Power* and Category ii *Differentiation and Separation of Powers* focuses on the formal legal and political distribution of power as it relates to the judiciary. Category iii *Internal Institutional Safeguards* examines the internal factors – both formal and informal – that shape and protect judicial independence. Category iv *Transparency* speaks to the need for access to information in order to monitor judicial independence. Finally, Category v *External Institutional support* articulates the significance of judicial allies’ in buttressing strong judicial institutions.



**Figure 2: Judicial Independence Benchmark Framework**





## Political Background and Context

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Lesotho became a full British colony in 1884 and would not gain its independence until 82 years later in 1966. Adopting a constitutional monarchy with parliamentary sovereignty, Lesotho has failed to smoothly progress towards a stable democratic regime and instead has been wracked by instability, tension and a tendency towards authoritarianism. During this period the judiciary has remained at the periphery of political action. As Weisfelder writes, this is not unexpected given the historical regional context:

[T]he presumption of parliamentary sovereignty has such deep roots in Britain, South Africa, and the Commonwealth that it is difficult to conceive of judges schooled in that tradition overturning governmental acts, regardless of the letter and intent of the constitution. This sort of activist role was all the more unlikely when the judges were expatriates, whose tenure in office was uncertain, or South Africans, seconded to Lesotho by the Pretoria regime as a form of technical assistance!<sup>18</sup>

Because of the costs of litigation, uncertainty of outcomes, and fears that the judicial deck was stacked, opponents of both the colonial regime and Chief Jonathan's government sought fulfillment of their objectives through direct and activist strategies instead of through the courts. The power of judicial review in the human rights field was never discussed during the heated pre-independence deliberations. This omission suggests that partisan support for civil liberties had a pro forma quality. Clearly Basotho leaders expected the key political battles to occur elsewhere within the institutional framework.<sup>19</sup>

The Basotho National Party (BNP) took power in the first post-independence election and remained in power for five years. A disillusioned electorate then voted the BNP out, and the Basotho Congress Party (BCP) into power. Refusing to step aside, BNP Prime Minister Leabua Jonathan imprisoned the opposition leadership, and the King, and effectively ruled through executive fiat until 1986. Immediately following the coup the judiciary became inaccessible due to “the temporary withdrawal of the South African Chief Justice of the Lesotho High Court”, thus making “it impossible for Basotho to seek redress through the judicial safeguards of the 1966 Constitution.”<sup>20</sup> With the suspension of the Constitution the Chief Justice indefinitely postponed the opening of the Court, a move many perceived to be an unsubtle attempt to block certain political leaders bringing cases to the court.<sup>21</sup> After the courts were reopened BCP opposition leader Mokhehle appealed the electoral results in constituencies with significant irregularities and succeeded in winning two cases.<sup>22</sup> In an interview with a member of the BNP, Khaketla revealed the complete level of distrust in the judiciary as a loyal institution. When asked why they did not go to the courts instead of enacting a coup, the politician noted: “If we had handed over to Mokhehle, thereafter the Courts



would no longer have been ours. And how could we trust them to be impartial? Even before the election they showed they were biased.”<sup>23</sup> Post-coup, the judiciary effectively aligned the institution with Jonathan by holding that, “[p]opular acceptance of the coup derived from the loyalty of the revolutionary regime to the King, who, in turn, ‘was pleased to accept the new order and to exercise his function as Head of State’.”<sup>24</sup>

Courts under authoritarian regimes are rarely disbanded<sup>25</sup> and can serve as a useful pseudo-democratic window dressing. During the Jonathan authoritarian era, although the courts did little to condemn the coup (note Chief Justice H.R. Jacobs statement that opposition to the coup was an “evil conspiracy which could have had far reaching consequences”<sup>26</sup>) there were spots of resistance. In 1975 there were a series of public trials for BCP individuals accused of participating in the 1970 coup. Weisfelder conjectures that the decision to hold the trials “may have been an effort to undercut the barrage of criticism by the South African press and church newspapers in Lesotho.”<sup>27</sup> The new Mosotho Chief Justice, J.T. Mapetla issued very light sentences for the accused, who he argued, could not be called terrorists. Weisfelder concludes, that although “the light sentences may have embarrassed the regime, they did permit the Minister of Justice [...] to argue that the judicial processes reflected at open society.”<sup>28</sup> Naturally, as Wesifelder and others have documented, this did not reflect the reality for many individuals who languished in detention under colonial era security statutes.

In January 1986 the Jonathan regime was ousted through a military coup led by Major General Lekhanya. Once again the courts de facto sanctioned the coup ex post facto. In *Mokotso and Others v HM King Moshoeshoe II & Others*<sup>29</sup> the court reasoned that because the government was established without an opposition, it was effective and people were abiding by the rule of the new government.<sup>30</sup> The Military Council would remain in power between 1986 and 1993, and under military rule King Moshoeshoe II was granted executive power. After King Moshoeshoe II was sent into exile, his son, King Letsie III was installed. Military rule was grounded in a series of interminable states of emergency. An important case filed by the legal fraternity at this time sought to overturn a declaration of a state of emergency because it was not made in accordance with the procedure established in the Emergency Power Act of 1982 (*Law Society of Lesotho v Minister of Defence*).<sup>31</sup> Chief Justice Cullinan adopted a liberal view of the Court's authority on this issue, declaring the state of emergency illegal and that the Proclamation and Legal Notice No.81 and 82 were null and void.



Democratic rule was temporarily restored in 1993 with the election of the BCP; but this period continued to be a turbulent time for Lesotho. In 1994 King Letsie III staged a Palace coup and toppled the BCP government. After protracted negotiations, including regional intervention through the Southern African Development Community (SADC), the BCP government was reinstated. King Moshoeshoe II, after being reinstated in 1995, died in a car accident in 1996 and was replaced by his son, Letsie III. By the next election internal fractures led to the collapse of the BCP and a new party was formed: the Lesotho Congress for Democracy (LCD). The LCD won the 1998 election with a substantial majority and shortly thereafter Pakalitha Mosisili replaced Nstu Mokhehle as prime minister. Prime Minister Mosisili remains in power today.<sup>32</sup>

The aftermath of the 1998 election degenerated into political disorder and ultimately a complete erosion of the rule of law. The opposition had petitioned the King to nullify the election results and the country was at a political impasse. The Prime Minister was forced to bring in outside assistance and this came in the form of SADC/South African military forces. The 2002 elections proceeded without a concomitant breakdown in law and order. That said, it was perhaps unsurprising, in the words of Roger Southall, “that the results would be accepted automatically, even though the leading opposition politicians had all been involved in the negotiations around the adoption of the new electoral system and even though they had likewise been drawn into oversight of the administration of the election by the IEC.”<sup>33</sup>

In the post-2007 election era there appears to be a marked downturn in respect for the rule of law in Lesotho. In the 2007 elections the LCD party retained power, taking 61 out of 80 constituencies. The results were disputed by the opposition; most prominently the ABC party.<sup>34</sup> The subsequent protests and disputes surrounding the 2007 election further contributed to the destabilization of politics in Lesotho. As Southall notes, opposition members continue to be frustrated with “the futility of legal and political appeal, with the courts apparently searching for legal devices which will help them avoid confrontation with the government, and the latter itself stubbornly determined to give no ground about key issues which threaten the country’s political stability.”<sup>35</sup> Retired President Masire of Botswana was brought in to negotiate a settlement, but failed. The report he produced in response to the ongoing dispute was not well-received by the government, who believed that the issues had been dealt with by the courts and refused to entertain discussion that the proportional representation (PR) electoral system had been manipulated to benefit the party. Thereafter the government changed its position and indicated



that the alliance between the parties relating to the Proportional Representation seats will be reviewed in the next elections since any decision to undo the whole process would be costly to the country since they would have to “compensate” the affected MPs.<sup>36</sup>

Politicization is inevitable when the judiciary is drawn into high level political disputes. In 2011 the High Court reversed an injunction compelling the LCD to hold a conference to discuss the removal of its national executive. Another highly politicized set of cases related to the liquidation of the MKM pyramid scheme placed the High Court at the center of national debate and scandal. Many Basotho elites were directly connected with MKM, including several of the High court judges. Additionally there have been indirect negative consequences related to the deteriorating security situation. Violent attacks on members of the opposition have been recorded and in 2009 the Prime Minister survived an assassination attempt. There is increased concern that the military is responsible for the abduction, illegal detention, torture and general harassment of the civilian population. In their 2007 report, the SADC Lawyers Association concluded, “[t]here has been a breakdown of the Rule of Law in Lesotho. The Association therefore urges the Lesotho authorities to effectively address matters raised in this report in order to restore respect for the law and to improve the administration of justice [ . . . ]”<sup>37</sup>

The future of the Lesotho Congress for Democracy (LCD) and the future of Prime Minister Mosisili and his new DC party is far from certain. As in the past, it is expected that the results will be disputed. However, the substantial electoral reforms may well prevent collapse into unrest this time. While views on the Lesotho monarchy are diverse, there is no danger that the current King will attempt to enter politics. One informant, reflecting on the current King claimed, “[he is] not as dynamic as his late father who was a super intellectual, with views on how the country can be run. [The] current King attempted unsuccessfully to host people who were on his side, encouraging him to run the show. But they called him to order and he listened [ . . . ] when politicians are crazy he can come in to mediate, but his father had more gravitas.”<sup>38</sup> Another informant articulated a different vision, “[h]is father meddled in politics and would probably bring chaos to the country given his attitude to the politicians [ . . . ] He wanted Lesotho to be an absolute monarch like Swaziland, which is untenable in this day and age. I think the current King “inherited” his approach from his mother, who viewed diplomacy as the best form of approach in dealing with the tension between the monarchy and the politics of Lesotho.”<sup>39</sup>



Entirely surrounded by South Africa, Lesotho's distinct geopolitical setting has shaped its political and economic trajectory. As the noted anthropologist James Ferguson reflects, "Lesotho is a very unusual national setting [. . .] Lesotho offers one of the first and most completely monetized and proletarianized contexts in Africa [. . .] Lesotho's extraordinary labor-reserve economy is as little defined by national boundaries, and as little responsive to national planning, as any that could be imagine."<sup>40</sup> Lesotho's story is intimately tied to the story of South Africa. Ferguson's conceptualization of porosity can be extended to the Lesotho legal system. The close allegiance between the Jonathan government and South Africa in the early post-independence years resulted in a number of key justice sector positions being filled with white South African judges, from the magistracy up to the Attorney General and Chief Justice.<sup>41</sup> While the justice sector has increasingly filled positions with local Basotho over the last three decades, the current composition of the Court of Appeal is a reminder of this legacy. Furthermore, continued attacks against the rule of law under both authoritarian and multiparty rule, serve as a reminder of how the law has historically been used to restrict individual rights rather than protect them over time. As evidenced by the 2007 SADC Lawyers fact finding mission, draconian colonial era security laws and a powerful police force continue to restrict rights and suffocate attempts to protect those rights.<sup>42</sup>

The 1996-2010 World Bank Governance Indicators for Lesotho demonstrated improvement (albeit non-linear) in the areas of *Political Stability, Control of Corruption, and Voice and Accountability*; in contrast *Regulatory Quality and Rule of Law* indicators demonstrated a slight decline.<sup>43</sup> The 2011 Economist Intelligence Unit Democracy Index categorizes Lesotho as a "flawed democracy" and ranks it 64<sup>th</sup> out of 165 countries.<sup>44</sup> This aligns with the Freedom House 2012<sup>45</sup> rating of Lesotho as "partly free."<sup>46</sup> In 2012 43% of sub-Saharan African countries were classified "partly free."

It is clear that "the notorious fractiousness of Lesotho's politics has done immense damage to a country whose prospects for dragging itself out of poverty are already severely limited."<sup>47</sup> There is an inverse relationship between Lesotho's economic prospects and the potential for political instability, malfeasance and corruption. In Lesotho, as elsewhere in sub-Saharan Africa, concentration of power in the executive is often justified in the face of the dual challenges of economic development and political stability. One interviewee boldly went so far as to proclaim that in Lesotho the "Executive has absolute control, dissent is not practiced."<sup>48</sup> While expert assessments of democracy in Lesotho show marginal improvement over the last ten years, popular



attitudes to democracy remain weak. Surveying attitudes to democracy in Lesotho between 1999 and 2008, Afrobarometer surveys found that support for democracy has been consistently low, topping out at 50 percent. By 2008 patience with democracy had plummeted to 26%. In 2008 51% rated Lesotho as “not a democracy” or a “democracy with major problems.”<sup>49</sup> Lesotho has failed to bring about significant improvements in the material well-being of its citizens despite transitioning to multipartyism. Thus, dissatisfaction with democracy is often intimately tied to dissatisfaction with material living conditions. Lesotho is a contradictory amalgamation of statistics. The adult literacy rate (% of people ages 15 and above) is high by regional standards at 90%. But HIV prevalence rates remain extremely high at 24% and consequently life expectancy at birth is 47. GNI per capita<sup>50</sup> is \$1, 040, significantly lower than neighboring South Africa, Swaziland, Botswana and Namibia.<sup>51</sup>

The relationship between high political instability and judicial independence in Lesotho can be captured across two major dimensions:

- 1) Increased judicial politicization through significant political disputes coming to courts for resolution forms a threat to institutional legitimacy.
- 2) Political instability correlates with higher levels of corruption; subsequent spillover of corruption into the judiciary becomes inevitable.<sup>52</sup>

The relationship between weak economic development and judicial independence can be captured through two broad dimensions:

- 1) Chronic underfunding generates sub-optimal performance across the judiciary at both the institutional and individual level.
- 2) Chronic underfunding turns budgeting into a highly politicized, high-stakes activity and renders the judiciary impotent and lacking leverage.



# PART I: Assessing Judicial Independence in Lesotho

## I: Scope of Judicial Power

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Judicial power in colonial Lesotho was severely circumscribed. In the context of deeply concentrated power in the colonial executive, judicial review was virtually non-existent. On these precarious foundations, the Lesotho judiciary has since struggled to institutionalize judicial independence and separation of powers. Despite these challenges there is evidence that the judiciary has sporadically asserted itself vis-à-vis the executive and that judicial power has waxed and waned over time. A brief review of the major challenges to judicial independence and power in post-independence Lesotho is outlined below:

### i) Historical Background on Lesotho Judiciary

**Early Experiment with Democracy 1966-1970** Under the 1966 independence constitution the judiciary was empowered to review administrative acts and was released from the stranglehold of executive and legislative authority.<sup>53</sup> Although democratic institutions were still in their embryonic stage, the period is widely considered to be stable and respectful with regards to the rule of law.

**Authoritarian/Military Rule 1970-1993** After the Leabua Johnathan coup in 1970, judicial power was severely restricted. The constitution was suspended thus effectively muting the judiciary. Interference manifested in the appointment process, most notably through bypassing the Judicial Service Commission and appointment of judges solely upon the recommendation of the Prime Minister.<sup>54</sup> Despite the flawed appointment process, there were a few notable bright spots. In 1986 the Lesotho Law Society filed a case against the Minister of Defense (*Law Society of Lesotho v. Minister of Defense & Internal Security and Another*<sup>55</sup>) seeking to overturn the recently imposed state of emergency. Justice Cullinan adopted a liberal view of the Court's authority on this issue, positing that the power to declare a state of emergency should be exercised by two authorities, the King and the Assembly, and that the state of emergency order was accordingly unlawful. In addition, the statute giving police the power to exercise detention without trial was declared unconstitutional.



**Unstable Democracy 1993-2002** Unlike South Africa or Uganda for example, Lesotho did not engage in a full scale participatory review of the 1966 independence constitution in the early 1990s. Instead in 1991 the constitution was revised with invitation for only minimal solicitation of public views. One interviewee noted that the drafting of the 1993 constitution was carried out with “[o]nly the interim authority of persons and political parties. But there was no in-depth consultation [. . .] Actually I think it is the most emaciated constitution ever.”<sup>56</sup> Formal de jure power was restored to the judiciary, but decades of violence, conflict, instability and disrespect for the rule of law had hollowed out the core democratic institutions.

**Greater Democratic Stability 2002-Present** Despite maturation and stabilization of the courts, de facto judicial power remains fragile due to low levels of legitimacy and weak respect for judicial independence and the rule of law. There exist strong perceptions of an executive dominated appointments process and LCD party factionalism generates a politically hostile environment rife with uncertainty. Significant human rights infringements continue, particularly in regards to unlawful detention:

“[a]rbitrary arrests and detentions beyond the legally permitted number of hours pervade Lesotho. Challenging these in the courts of law is increasingly impossible, as this involves arduously lengthy and financially costly process often protracted by those managing the state as a deliberate stratagem to deter people from appealing to courts for protection.”<sup>57</sup>

That said, there are important instances where the judiciary has been applauded, perhaps most notably the successful international corruption cases surrounding the Lesotho Highlands Water Project.<sup>58</sup> The judiciary has a strong track record of striking down unconstitutional acts of government. Reviewing the period from 1993 to 2005, Mahao finds “[t]hat the preponderance of constitutional cases decided by the courts of Lesotho in the period under focus are against the state is a good indicator that they discharge their check function well.”<sup>59</sup>

Finally there is one noteworthy item related to the expansion of judicial power. The passage of the Seventh Amendment to the Constitutional Bill 2011<sup>60</sup> will now allow individual voters to sue the Independent Electoral Commission (IEC) and petition courts to order reallocation of parliamentary seats. Previously only the IEC was able to petition the court. Under this amendment electoral disputes may now be appealed to the Court of Appeal. As reported in the *Lesotho Times*, “the amendment is meant to avoid the long-drawn clashes that erupted between the IEC and opposition parties over the allocation of proportional representation (PR) seats after the 2007 general elections.”



## ii) Institutional Structure

The Lesotho legal system is based on South African Roman-Dutch law. The judicial structure is comprised of a Court of Appeal, a High Court and, subordinate courts and tribunals. Both the Court of Appeal and the High Court have authority to hear constitutional issues. The High Court can form as an ad hoc Constitutional Court in panels of 3 or 5 judges. Under the High Court Act of 1967, the Court has full powers of jurisdiction and authority to review the proceedings of all subordinate courts.<sup>61</sup>

### a) *Judicial Review (administrative and legislation)/Institutional Structure*

Under the 1993 Lesotho constitution the judiciary can review executive and administrative action:

Section 119. (1) There shall be a High court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings and the power to review the decisions or proceedings of any subordinate or inferior court, court-martial, tribunal, board or officer exercising judicial or quasi-judicial or public administrative functions under any law [ . . . ]

A Court Martial Appeals Court was established through Constitutional amendment in 1996. The Court Martial Appeals Court has superior jurisdiction and is appointed by the Prime Minister acting in consultation with the Chief Justice (Sec. 146 (2)). Appeals from the Court Martial can only go to the Court Martial Appeals Court. The Court of Appeal has held that military issues require different treatment from civil matters and that military personnel is not being discriminated against for the simple reason that they have their own separate court system.<sup>62</sup> Lesotho's constitution includes an expansive bill of rights and a standard derogation clause.

Institutional structure may impact judicial power and independence. For example, the establishment of a permanent and separate constitutional court may attract a greater number of cases if it is well-staffed, efficient and perceived to be independent. Moreover, specialization can encourage the development of expertise in the rapid handling of constitutional matters. Lesotho is imbued with a permanent High Court and an ad hoc Court of Appeal which is currently in session twice per annum. In interviews several member of the courts articulated that the current workload of the Court of Appeal was moving towards a point at which it could foreseeably become a permanent court in the near future.<sup>63</sup> If this is indeed correct, there could be a number of



advantages to establishing a permanent Court of Appeal, such as speeding up the development of a local jurisprudence for example. One observer noted, under the current institutional arrangement you can end up with a “McDonalds situation” where neither the lawyers nor the judges are in a position to carefully develop jurisprudence and the ad hoc court dispenses with its business in a brisk and efficient manner. In the most recent sitting of the Court (October 2011) 29 cases were enrolled for hearing, 3 were postponed, the remaining 26 were disposed of.<sup>64</sup>

The creation of a permanent Court of Appeal could also accelerate the indigenization of the Court of Appeal. There is one Mosotho currently serving on the Court of Appeal bench, Court President Ramodibedi. Shifting to a permanent Court of Appeal may no longer make the Court an attractive option for retired South African judges, for as one interviewee noted, “They will not come permanently here. They don’t want to sit there forever. There are only two sessions every year.”<sup>65</sup> This raises important questions about the ability of Lesotho to staff a permanent court solely through internal appointments.

A permanent Commercial Division of the High Court is currently being established. A full-time commercial judge from Australia (Justice Lyons) has been appointed on the recommendation of the Commonwealth Secretariat and a second, permanent Mosotho Judge (Justice Molete) now also sits on the commercial bench. Again, the creation of specialized branches of the High Court is important in terms of fast-tracking cases, the development of jurisprudence, and the development of competent, highly respected jurists. This can only be a positive contribution to judicial independence Lesotho.

#### ***b) Exclusive Authority and Established Appellate Procedures***

Section 118 of the Constitution of Lesotho reads:

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

- (a) a Court of Appeal
- (b) a High Court
- (c) Subordinate Courts and Courts-martial;
- (d) Such tribunals exercising a judicial function as may be established by Parliament



While the ability of Parliament to set up tribunals with a judicial function could be considered problematic, it at least seems clear that the tribunals are subordinate and their decisions are subject to review by the High Court and Court of Appeal. Dating back to colonial rule, it is not uncommon in commonwealth Africa to have parallel judicial institutions (sometimes referred to as “special courts” or “specialized courts” or “exceptional courts”). In some cases these courts are legitimate and enhance the dispensation of justice. In others, the tribunals may attempt to usurp the jurisdiction of civilian courts. Currently the latter scenario appears to not be the case in Lesotho.

## II: Differentiation and Separation of Powers

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### *a) Budgetary Autonomy & Adequate Resources/Salary*

Until 2011 the Lesotho judiciary was administered directly under the Ministry of Justice. The passage of the Administration of the Judiciary Act, 2011 has sought to generate a degree of financial/administrative autonomy for the judiciary. Beyond the question of budgeting autonomy, limited resources continue to be a struggle for the Lesotho judiciary and frequently compromise the independence and integrity of individual judges and of the institution as a whole. Under Sec. 118 (3) of the Lesotho constitution the government is legally mandated to provide adequate resources:

Sec. 118 (3) The Government shall accord such assistance as the courts may require to enable them to protect their independence, dignity and effectiveness, subject to this Constitution and any other law.

Every single interviewee at the Court commented on the severe constraints imposed through under-resourcing the judiciary. Further, many suggested that this was a deliberate tactic of executive interference. While this allegation is regularly heard across many Southern African countries, it is very difficult to substantiate and remains speculative.

The administrative structure in Lesotho has served to seriously weaken the independence of the judiciary. There is a lack of communication between the various institutions. A 2005 report on the Lesotho Justice sector noted the following:



There is a serious lack of communication, consultation and co-ordination between line ministries and the various institutions throughout the Justice Sector and indeed this problem is also apparent between the institutions themselves. Decisions taken by one institution that will have a direct impact on another institution are simply not discussed.<sup>66</sup>

In a 2005 case brought by the Judicial Officers' Association of Lesotho (JOALE), the courts forced the government to backtrack after declaring unconstitutional an executive decree seeking to place subordinate court judicial officers under the administrative control of the District Administrators (*The Judicial Officers' Association of Lesotho (JOALE) and Law Society of Lesotho vs. The Rt. Honourable the Prime Minister*<sup>67</sup>). Where the executive controls the courts' administrative processes and budget, the court simply becomes an extension of the Ministry of Justice. As such, appointments are made by the executive and "judges find themselves in the unedifying and compromising position of having to lobby politicians and executive officials for funds for improvements and simple repairs to court buildings, for essential material for libraries or for information technology."<sup>68</sup> As noted in a report on Judicial Independence in the Arab World, administrative autonomy is potentially a major threat to judicial independence. In Egypt,

"[the] Ministry of Justice, continues to exercise considerable authority over the judiciary, especially the civil, criminal and administrative courts [ . . . ] However democratic the system or professional the personnel, Ministries of Justice inevitably have strong ties to the judicial branch. The strength or weakness of these ties must be measured in light of the department's ability to infiltrate the judiciary. This ability may result in interference with, and at times domination of, the judicial function in countries where the executive has *de facto* control over the other branches of government."<sup>69</sup>

Functional and cordial relations between the courts and the Ministry of Justice are not always institutionally entrenched and are frequently vulnerable to the vicissitudes of specific personalities or individuals. This renders institutions arbitrary and opaque. One interviewee, reflecting on the relationship between the judiciary and the Ministry in the 1970s, remarked that, "the court system took itself very seriously at that time. [It was] not good for the Chief Justice and the Minister to be seen discussing. [They] wanted the public to perceive independence [ . . . ] There has been a big change [to this functional working relationship]."<sup>70</sup>

There are a number of different areas that need to be addressed to administration and budgeting. Below I organize my comments into three broad areas: i) The separation of the judiciary from the Ministry of Justice and the Administration of the Judiciary Act, 2011; ii) legal reform through the Millennium Challenge Corporation and iii) general budget support/constraints.



*i: Separation of the Judiciary from the Ministry of Justice and the Administration of the Judiciary Act, 2011*<sup>71</sup>

Below is a précis of the major provisions of the new Act:

- Provides for autonomous administration of the Judiciary, a Judicial Service and for a budget of the Judiciary
- Appoints the Registrar of the High Court as the Chief Accounting Officer
- Provides for the creation of the position of Deputy Registrar Legal who is entrusted to oversee all the legal and judicial processes including case management of the High Court and Court of Appeal
- Provides for creation of the position of Deputy Registrar of Administration who is responsible for the day to day administration and non-judicial processes of the High Court and Court of Appeal
- Creates position of Judge's Clerk
- Provides for the promulgation of Ethical Principles for the Judiciary.
- Sets up the Advisory Committee that will advise the Chief Justice on matters relating to the Judiciary
- Creates a Judicial inspectorate (members appointed from Parliament; Attorney-General's office; Law Society; Ministry of Finance and the Police) who shall inspect the courts, issue reports, investigate complaints, etc. The Ministry of Justice, Human Rights and Rehabilitation shall be the Secretariat for the Judicial Inspectorate.

The bill has been in gestation for over a decade now. It was the positioning of this bill as a conditionality attached to the proposed 4M€ European Union-funded project entitled 'Strengthening the Lesotho Justice Sector' that finally mobilized the passage of the legislation. The overall sentiment towards the Act within the judiciary appears positive and can be captured through the following: "[The Act] really bolsters the independence of the judiciary [. . .] The government gives you a certain vote of money, and you spend as you like. And it comes straight from the consolidated fund, you have to budget and can also hire and fire. The judiciary doesn't become the dumping ground for political favors."<sup>72</sup> One individual framed the Act as an attempt to consolidate power in the High Court and away from the Court of Appeal.<sup>73</sup> A number of individuals expressed concern about the consolidation of power in the office of the registrar. The complaints



surrounding the registrar relate to her alleged abuse of power and her apparent unaccountability to her superiors. The following quote captures the sentiments of these individuals:

“There was some correspondence by the Chief Magistrate and the Labour Court President, talking about the constitutionality of the Act and way the Registrar is handling it [ . . .]This letter asked the Chief Justice to intervene, and if he doesn’t give permission, to institute a constitutional case [ . . .][It]seems as though it is uncertain now moving forward. I’d rather survive with this old system, despite its faults. The relationship between the Ministry of Justice and Courts [is] not great, [but] I’ll take that given a choice. [We should] hold this process until it is done properly; until genuine concerns have been addressed.”<sup>74</sup>

In December of 2011 the Law Society formally requested that the Prime Minister establish a tribunal to investigate alleged corruption and mismanagement in the judiciary. This request came on the heels of a jointly written letter by the Judges of the High Court to the Chief Justice regarding a number of complaints surrounding the Registrar Sekoai.<sup>75</sup> The complaints of the High Court judges, as reported in the media and affirmed in my interviews, are that Sekoai was “corrupt, insubordinate, incompetent and arrogant.”<sup>76</sup> The failure of the Chief Justice to remove the Registrar has been a major source of dissatisfaction for the High Court Judges. The role of the Registrar is typically seen as less controversial than is currently the case in Lesotho. In sub-Saharan Africa there is tendency for individuals to be appointed to this position with no experience on the bench. This is sub-optimal and perhaps partially explains some of the ongoing problems surrounding the current Registrar Sekoai. It should be noted, however, it is common across Africa for the registrar to be promoted to the bench.

In February 2012, Sekoai was placed on leave for the second time after the entire bench of the High Court went on strike.<sup>77</sup> Sekoai was then transferred to the post of Chief Magistrate for the Southern Region. The Magistrates, protesting very loudly, claimed that this position should be advertised and that Sekoai was not qualified. The Magistracy then commenced a four week strike, joined by the lawyers for three days at the beginning of March. The complaints against Sekoai were reviewed by the Judicial Service Commission, ultimately the Minister of Justice stepped in and appointed Sekoai to the post of Deputy Principal Secretary in the Ministry of Justice<sup>78</sup>, thus avoiding total crisis and the collapse of the Lesotho justice system. It is unclear to this author why the judges pursued informal mechanisms through which to oust the Registrar rather than instituting an official investigation.<sup>79</sup> This case speaks to the institutional weakness of the judiciary itself and the concomitant problems related to administrative oversight by the Ministry of Justice.



The most salient aspect of the new Judicial Administration act is the internal redistribution of power as it relates to budgeting for the Court of Appeal. The consolidation of the administrative structure under the judiciary empowers the Registrar of the High Court in ways unprecedented. In addition to exercising control over the day-to-day functions of the judiciary, the Registrar become Chief Accounting Officer over the entire judiciary. The current President of the Court of Appeal is strongly advocating independent budgeting for the Court of Appeal.<sup>80</sup> This is part of his push for greater substantive and symbolic institutional separation of the Court of Appeal from the High Court. Last year in a speech at the opening of the Court of Appeal the President of the Court of Appeal excoriated the performance of the High Court and opined on the current budgeting arrangements for the Lesotho judiciary. This is reproduced in part below:

“We have in the past made a clarion call for a separate budget for the Court of appeal if it is to function properly and more effectively along the same lines as the two Houses of Parliament. Nothing has happened so far and we can only renew the call as we hereby do. The Court of Appeal is an entirely different institution from the High Court. Failure to provide a separate budget for the Court seriously hampers the proper functioning of the Court in several ways. Purely as an example, we had only two (2) criminal appeals in this session because records had not been transcribed in other cases where appeals have been noted. The trade-mark explanation is that there are no funds or these have been diverted elsewhere in the High Court. Similarly, law reports are not being kept up to date. In addition the Court is having to manage with outdated editions of leading text books.<sup>81</sup>”

The Judicial Administration Act establishes a new Judicial Inspectorate. The Judicial Inspectorate (Sec. 41 (1)) shall consider of members nominated by the Parliament, Attorney-General, Law Society, Ministry of Finance and Development Planning and Police. They shall be appointed by the Minister of Justice in consultation with the Chief Justice. The Inspectorate is effectively a judicial ombudsman. Ombudsmen typically have expansive review powers, but lack the teeth to enforce sanctions or remedies. In the case of the Judicial Inspectorate the functions include: regular inspection of the Courts, receive public complaints, make interim reports and recommendations. Of potential concern here is that the Inspectorate could be little more than judicial independence ‘window dressing’ because the Inspectorate shall come under the jurisdiction of the Ministry of Justice. Certainly oversight and accountability are the hallmarks of any system of protection for judicial independence; however there exists the possibility that this new body may in fact curtail independence.



*ii: Millennium Challenge Corporation: Civil/Commercial Legal Reform*

In July 2007, the Millennium Challenge Corporation signed a five-year, \$362.6 million compact with the Kingdom of Lesotho aimed at reducing poverty and increasing economic growth.<sup>82</sup> Civil law reform is a central plank to the strategies encouraging economic growth and private sector development. Civil law reform encompasses development of a functioning commercial court,<sup>83</sup> court-annexed mediation, small claims procedures and introduction of improved case management.<sup>84</sup> The desired outcomes are to increase the use of commercial dispute resolution and to improve access to justice for private business, financial institutions and individuals. The project is titled the MCC Civil Legal Reform Project (\$3 million). Data reported to date indicates that this process is occurring more slowly than hoped.<sup>85</sup> While this project is an important and timely step-forward in justice sector reform and economic development more broadly; it must be acknowledged that some of the most serious areas of concern remain with the criminal sector of the Lesotho justice system.

*iii: General budget support and constraints*

“We are in a silent war with the executive. The budget is not reflective of the needs of the Lesotho judiciary.”<sup>86</sup>

In Lesotho, as in much of Commonwealth Africa, judges receive an elaborate package of incentives alongside their standard salary package. This frequently becomes an easy way for the government to manipulate compensation packages. The assumption here is that the government benefits by not moving to higher fixed salary (as in South Africa) through lower pension payouts after the judge retires.

“The reason we haven’t done that is just economical. I would favor to move to a fixed salary and spend on whatever you want. It’s about pensions. Your pensions are only payable on your salary, not on what you add-on. That’s why they put all the add-ons. The responsibility allowance is not part of the pension. Under the constitution they can’t lower your salary or perks. But they annoy you by not giving you money to put new tires on your Mercedes Benz for example. The perks don’t continue after retirement.”<sup>87</sup>

It is most likely the case that the majority of judges would rather have a fixed salary and gain the extra pension. There is no indication, however, that this is going to happen soon. Without the benefit of exact salary data, it should be noted that more than one individual was of the opinion



that Court of Appeal allowances were are at an adequate level, but High Court salary structures are not.<sup>88</sup>

Where possible individual judges need to be protected from pressures asserted through personal or informal networks. In a country as small as Lesotho, the challenges are acute, and it is difficult to protect judges from society writ large. The focus of this paper is on institutional independence. But given the individual-level challenges faced by Judges in Lesotho it is worth noting particular issues. Individual judicial independence is formally protected through long-term tenure. Individual judicial accountability should be present at many levels and stages of the appointment process, beginning with the Judicial Service Commission. Judges also take a responsibility to ensure they protect themselves from interference. Section 4.2 of the Bangalore Principles of Judicial Conduct state:

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.<sup>89</sup>

In interviews Judges appeared more concerned with a diffuse level of societal pressure rather than being approached by specific individuals. This will be discussed in further detail under the judicial interference section of this paper. I raise one issue here in relation to the budget and that is the provision of transportation. For an extended period in 2010 Judges were not provided with adequate transportation. At that time, a picture of Justice Mahase exiting a 4+1 taxi was printed in the newspaper.<sup>90</sup> In another instance Justice Monapathi was revealed to have borrowed a vehicle from MKM while he was hearing an MKM related case.<sup>91</sup> Monapathi subsequently recused himself from the case. Later in 2010 that the government provided new Mercedes Benz vehicles for the 10 High Court judges. President of the Court of Appeal Ramodibedi also received an official car.<sup>92</sup> However, at the time of this research several of the judges appeared to be having transportation problems. Their vehicles had been taken in for servicing and were not being released until the bill was paid. While Judges may be entitled to expensive cars as part of their remuneration package, amongst the general population it creates perceptions of the executive “buying” the favor of the judiciary. One interviewee boldly conjectured, “You can never win an election petition against the ruling party. Perception is that the judiciary compromised itself when it received cars, it has to have affected their independence.”<sup>93</sup> There are two issues occurring here in tandem. First, that judges’ functional independence is compromised when they do not have access to adequate transportation. Second,



that the manipulation of transportation benefits and the provision of expensive cars promote the perception that independence has been compromised. Again, it would seem that a simple solution here would be to raise salaries and eliminate the add-on perks. Judges would then be responsible for providing their own transportation; this is the case in South Africa where only the Chief Justice and his Deputy at the Constitutional Court receive official cars and drivers. A recent opinion piece in the *Lesotho Times* newspaper reflected on the budgetary challenges currently facing the Lesotho courts:

“The courts are underfunded and at times even too broke to do basic things like paying allowances for witnesses in murder cases. Sometimes judges have to pound the High Court corridors endlessly to get paper, cartridges and pens [ . . . ] When the judges are not hunting for basic tools they are busy praying that their cars don’t break down because the High Court has made it clear that if their cars are taken for repair they will have to use the yellow bellied jalopies called four-plus-ones. Magistrates, judges’ clerks and assistant registrars are a bitter lot over their meager salaries. They are miserable.”<sup>94</sup>

In sum, there are three major attacks on judicial independence related to the budget. First, budget deficiencies are a burden in terms of efficiency. From a lack of printer cartridges to transportation of judges, in concert these problems impede the administration of justice. Second, the indirect effect of an under-resourced judiciary is the negative impact on morale amongst both staff and judges. Finally, and perhaps most serious, is public perception. When the public observes the poor treatment of the judiciary the institution is perceived to be an undervalued part of the democratic process. When judges are seen arriving at court in public transportation it generates a perception that their independence has been automatically compromised. On a practical level, limited resources frustrate the ability of the public to access the courts in a timely and efficient fashion.

#### **b) Judicial Security/Buildings**

Owing to a devastating fire in 1998 related to political riots, Lesotho has a moderately new purpose-built High Court and Court of Appeal centrally located in the capital city Maseru. Relative to other African countries, Uganda for example, Lesotho is well positioned with regards to the structure and location of its higher courts. The Lesotho Palace of Justice is a befittingly grand building that appears to (at least externally) be in good condition. If one enters the building it is clear that there are a number of significant problems with maintenance. A few examples will suffice:

- Elevators are not operational
- The library is inadequately stocked with current legal materials from the region and Lesotho



- Light fixtures are broken and basic provisions are not available
- Security apparatus at the front entrance is non-functioning

While individually none of these factors are devastating attacks on judicial independence, combined they serve to undermine the integrity of the institution. If the elevators are not functioning members of the public with disabilities are unable to access the court. If the library is inadequately stocked all members of the legal profession are unable to be guaranteed access to the basic tools of the trade.

There are a number of issues at stake in relation to court security and security at judges' homes. In the court building, the security gates were not working at the time of this researcher's visit and security was apparently minimal. Each judge had a full time security guard to escort them during the workday. However, there have been disturbing instances of Judges' security being jeopardized at home. Since the attack on Justice Mahase and more recently Justice Majara (a gun attack on her official vehicle<sup>95</sup>), there has been a call to provide 24 hour security for Judges. Justice Mahase, when interviewed by the SADC Lawyers Association, made the following statement:

[I] informed the Chief Justice about my anxieties with respect to my personal security after the police had searched my residence, I also requested the Chief Justice to give me assurances about my personal security. I have had no response from the Chief Justice. I am sure that I am being followed around by strange people, their faces peep over the barrier surrounding my residence. My family members are also being followed around by strange men. With respect to security, none of the judges except the Chief Justice have official security at their residences. I am not sure if the judicial conditions stipulate that we are supposed to have security, we have however discussed the need for security but nothing has been done.

Given the history of politically motivated assassinations and the increase in gun violence in Lesotho, 24 hour security for judges would seem to be a prudent measure. The potential threat of violence is of equal concern to actual violence. If a judge's security is not guaranteed then she cannot be called upon to administer justice without 'fear or favor.'

### c) ***Strong Constitutional Separation of Powers***

Exclusive judicial authority is now vested in the judiciary under the 1993 constitution; this is a shift from the 1966 constitution which remained silent on this question. There is no strong or explicit



separation of powers clause in the Lesotho constitution, other than Sec.118 (2) on protecting judicial independence.

Sec. 118 (2) The courts shall, in the performance of their functions under this Constitution or any other law, be independent and free from interference and subject only to this Constitution and any other law.

Section 118 (1) could be strengthened through insertion of the term “exclusive.” Section 118 (2) is the closest the Lesotho constitution comes to defining the separation of powers and appears rather weak in comparison to the South African constitution for example. Section 118 (3) of the constitution highlights the importance of financial and other support that is needed to preserve judicial independence and operational efficacy. It is apparent that the government is currently failing to meet its constitutional obligations towards the Lesotho judiciary as it pertains to Section 118 (3). There are several weaknesses with regards to de facto separation of powers in Lesotho; these are outlined below.

### III: Internal Institutional Safeguards

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Formal institutional safeguards form the basic scaffolding of judicial independence. Many of these institutional safeguards are enshrined in the multitude of international standards on judicial independence.<sup>96</sup> The primary focus of this assessment is the structural and political impediments rather than the personal conduct of individual judges. Certainly institutional independence is a necessary, though not sufficient condition for securing the independence of the judiciary. Individuals must serve with integrity and possess a strong measure of incorruptibility; this concept is often referred to as the ‘personal independence’ of judges. Personal independence is secured by a series of internal institutional safeguards ranging from adequate tenure provision, to satisfactory remuneration to transparent appointment processes. Outlined below is an assessment of these key safeguards in reference to Lesotho.

a) ***Adequate Tenure & Retirement Provisions***

The current retirement age for judges in Lesotho is 75 years or by another age prescribed by parliament.<sup>97</sup>



The Chief Justice and any other judge of the High Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehavior and shall not be so removed except in accordance with the provisions of this section.

If a complaint is filed against a judge it must be investigated through a tribunal appointed by the King.<sup>98</sup> The constitutional language surrounding tenure appears to be standard and adequate. The author is not aware of any recent attempts to impeach a High Court or Court of Appeal judge.

The major concern regarding retirement of judges in Lesotho is the high number of judges who have now passed retirement age and are still on the bench. At that point their contract is subject to the whim of the executive through ad hoc negotiation. The ambiguous extension of judges' contracts weakens the insularity of the Lesotho judiciary. This practice is common across commonwealth Africa. In Tanzania for example, a number of judges beyond retirement age are sitting on the Court of Appeal without security of tenure.<sup>99</sup>

**b) *Objective advancement procedures and assignment of cases***

A number of interviewees expressed concerns around case assignment protocol. The notion of 'judge-shopping' or even 'forum-shopping' in large countries with multiple jurisdictions is an unacceptable abrogation of judicial independence. This has been readily documented in Tanzania for example.<sup>100</sup> In Lesotho, in matters where there is strong political interest, cases have allegedly been assigned to some of the younger, more inexperienced judges. For example, some of the more junior judges have recently handled cases related to key political figures, or involving internal political party disputes. One judge remarked, "I personally do have concerns. I'm not sure about equity in distribution and allocation of highly sensitive cases. Some of us, we tend to get more of those than others. I wonder why me?"<sup>101</sup>

The alternative is to assign these types of cases to more senior judges. As one interviewee commented, "The Chief Justice and senior justices should be doing those tough cases." However, there is also a perception that some of the more senior judges in the high court have political ties that are just too tight. Further the Chief Justice is not hearing these high profile cases because he effectively no longer sits on the bench and hears only non-contestable matters. There are two speculative potential reasons here i) he is consumed by administrative duties, particularly given the substantial number of international justice sector reform projects currently underway. ii) The Chief



Justice has been told that if any of his judgments are appealed they will be overturned.<sup>102</sup> The latter explanation is related to the on-going conflict between the Chief Justice and the President of the Court of Appeal. It is unusual for a Chief Justice to hear no cases and is a situation that warrants some attention. A case could be made that the most important constitutional cases should warrant the expertise and seniority of the Chief Justice on the bench, both in terms of his symbolic and substantive expertise.

Other interviewees remain unconcerned by the case assignment process: “Effectively the Chief Justice assigns cases; I’ve seen absolutely nothing wrong. It is a fair process as far as that is concerned. I have never known the Chief Justice to interfere with a judgment.”<sup>103</sup> A transparent and fair internal judicial culture is critical to consolidating judicial independence. In the case of Lesotho there is no written evidence of serious wrongdoing, but procedures are not being routinized in a way that is transparent. This in turn generates internal institutional conflict and divisions.

In regards to tracking cases, the Millennium Challenge Corporation work will go a long way towards improving case management and case tracking systems. Under the new system there will be a transparent computerized record of case allocations. This will allow users to see the number of cases assigned to a particular judge, why the cases are still pending, and what type of cases are being dealt with. It is not simply a matter of number of cases, but the complexity of those cases that need to be taken into account when reviewing workload and equity issues for individual judges.<sup>104</sup>

A central concern with regards to advancement procedures in the Lesotho judiciary relates to the failure - with the exception of the current Court President Michael Ramodibedi- to promote Basotho High Court judges to the Court of Appeal. In a paper delivered at the recent International Commission of Jurists (ICJ) conference in Lesotho, Justice Peete opined the following, “Four decades since independence, Lesotho has a paramount duty to train its own *cadre* of judicial officers (*expatriate* judges should only be engaged on brief contracts and mainly to train local people – and not to replace each expatriate with another *ad infinitum*).”<sup>105</sup>

Under the tenure of Court of Appeal President Ramodibedi the practice of utilizing certain High Court judges in their *ex officio* capacity as members of the Court of Appeal has continued; a practice begun under former Court of Appeal President Steyn. The arguments in favor of this practice are that it is a useful training mechanism for High Court judges to gain exposure to the Court of



Appeal. A more cynical interpretation is that the Basotho judges simply sit there to “diversify” or “indigenize” the bench. One interviewee summed up this position in the following way:

“I think the President of the Court of Appeal handpicks female judges [ . . . ] for cosmetic purposes to show that there are some Basotho people appearing in the court of appeal. It’s cosmetic and window-dressing. One, because they are not even allowed to write simple judgments. They are not even allowed to dissent to any of the judges. They sit there just to decorate [and show] that today there is a Lesotho judge appearing with white men from South Africa.”<sup>106</sup>

The practice of training High Court judges at the Appellate Court level appears to be a sound one. It has also been practiced in Botswana under the leadership of Chief Justice Tebutt.<sup>107</sup> However, the opaque and arbitrary selection of a small number of judges to serve on the Court of Appeal bench is more problematic. Appellate judges do receive an increase in their salary for this work and this has raised issues of fairness within the High Court. More than one interviewee suggested this could be remedied through a straightforward rotation of High Court judges on and off the Court of Appeal bench. Successful reform will likely necessitate close collaboration between the Chief Justice and the President of the Court of Appeal.

There has never been a dissenting judgment in the Lesotho Court of Appeal, the verdicts are unanimous.<sup>108</sup> There is wide variation in sub-Saharan Africa with regards to the institutional culture of apex courts. An interesting comparison here can be made between Tanzania and Uganda. The Ugandan Supreme Court regularly offers dissenting and individual opinions, most notably in the recent high-stakes presidential election petitions; whereas in Tanzania, judgments at the Court of Appeal are regularly unanimous. Because the reputation of the Tanzania Court of Appeal is so conservative fewer cases are appealed because the petitioners know they will be automatically shut down.<sup>109</sup> Globally there is tremendous variation in percentage of unanimous judgments in appellate/constitutional courts. In Commonwealth countries such as Australia, South Africa and Canada it is high, whereas in the US it is low. Unanimity can be positively interpreted in fledgling institutions, in that it generates greater institutional legitimacy. The theory here is that consensus and clear majority opinion aid in the facilitation of external compliance. Interestingly in the case of the United States, Supreme Court unanimity was high between the 1800’s and the 1930’s at which point there was a massive spike in split decisions.<sup>110</sup> In the case of Lesotho, the high level of consensus in the Court of Appeal could certainly be argued to be a reflection of the strong leadership of Court President Ramodibedi.



c) ***Adequate recruitment, appointment and Removal procedures***

General Comments on Judicial Appointments and the work of the Judicial Service Committee

There is universal dissatisfaction with the current judicial appointment process in Lesotho. According to a 2006 African Peer Review Mechanism report,

“the major problem that has often hindered checks and balances among Lesotho’s three main organs of the state is the Executive’s political interference in both the Judiciary and Legislature, which development tends to undermine democratic governance to a considerable degree. In respect to the Executive interference in the Judiciary, issues have often been raised about the extent to which appointment of judges is premised upon meritocracy or political considerations.”<sup>111</sup>

While interviewees were unanimous in their criticism of the appointment process, critiques tended towards the general and opaque. A typical comment would be, for example, “[T]he unique position in Lesotho is that in the appointment process, there is nepotism, political patronage, and the whole thing in the appointment process is not transparent. And I am very sorry to say that people who got appointed [...] is not good. It’s bad for the legitimacy of the institution.”<sup>112</sup> The structural causes of the weak appointments process are related to composition of the Judicial Service Commission. Sec. 132. (1) of the Lesotho Constitution reads:

- (1) There shall be a Judicial Service Commission which shall consist of –
  - (a) the Chief Justice, as Chairman;
  - (b) the Attorney-General;
  - (c) the Chairman of the Public Service Commission or some other member of that Commission designated by the Chairman thereof; and
  - (d) a member appointed from amongst persons who hold or have held high judicial office who shall be appointed by the King acting in accordance with the advice of the Chief Justice [ . . . ]

Membership of the Lesotho Judicial Service Commission is heavily skewed in favor of the executive. It is comparable to the 1977 Tanzania Constitution made-up by the Chief Justice; the Attorney-General; a Justice of the Court of Appeal; the Principal Judge of the High Court; and two members who shall be appointed by the President.<sup>113</sup> This is in stark contrast to the South African Constitution where membership is allowed for up to 25 members, including opposition politicians, a member of the law society; a university law lecturer, and other non-executive members.<sup>114</sup> It is worth noting



that despite the broad-based membership of the South Africa Judicial Service Commission there is extensive criticism of the appointment process, as it relates to the domination and influence of ANC politicians. Both the Tanzanian and Lesotho Judicial Service Commissions reflect the legacy of colonial era appointments where individuals were placed through executive fiat.

“[The] constitution makes it very weak to stand in the way of the Prime Minister as far as appointments are concerned. If you are talking about the Attorney General, if you are talking about the Public Service Commissioner, the Chief Justice [ . . . ] at the end of the day it is the Prime Minister. At the end of the day we don’t really have a judiciary that is ready to embarrass the Prime Minister or executive. The independence of the judiciary is tested quite accurately by political cases. I don’t recall in recent times the judiciary in its composite actually embarrassing the government.”<sup>115</sup>

In a 2003 speech Chief Justice Lehohla outlined his position on reform of the JSC,

“A biting by the bug of democracy has caused strong debate in some quarters that the Commission’s size be increased in numbers to be more representative of various components of society. While there may be merit in this argument wisdom cautions that this move should not be rashly embarked upon. It would be tragic to increase the composition of the Judicial Service Commission merely for the sake of increasing it. Saying this I take comfort in the words of The Hon J.H. Steyn expressed in a memorial lecture [ . . . ] “The Judicial Service Commission is a professional body, and unlike its South African counterpart, not large unwieldy and politically suspect because of its composition.” I entirely agree and would only go as far as saying if there need be change it should be minimal and consist of nothing else but personnel drawn strictly from professional bodies.”<sup>116</sup>

Discussion around reform of the JSC appears to be focused almost exclusively on inclusion of the Law Society, but other important actors – academics, civil society members could, or perhaps should, be included. Currently the government has two representatives on the JSC in the form of the Attorney General and the Chairman of the Public Service Commission. One individual argued, “[w]e recommended that the chairman of the Public Service Commission must be excluded, and the Attorney General should remain, representing the interest of the state. And we want the law society to be included [ . . . ] the faculty of law, and the civil society should be included.”<sup>117</sup> Membership of the JSC could be expanded, however in and of itself expansion will not automatically bring about independence. There comes a point at which the unwieldy nature of a large body offers diminishing returns in relation to providing for a democratic and transparent process. Indeed, it could potentially generate greater politicization of the process.

In the past Registrars in Lesotho have been appointed to the High Court bench. This practice is common in the region and has occurred in Malawi, Uganda, Tanzania and elsewhere. Given the



challenges of seeking appointees from private practice this is perhaps unavoidable. There are currently three former registrars sitting as judges and several interviewees declared this to be an unsatisfactory situation. As one individual noted, “you need people who have been through the hurly-burly of practice, people with a quiet respect for commerce.”<sup>118</sup> Alternatively, more active recruitment from the magistracy would ameliorate this situation. In the long term there are plans to create a judicial training institute. Students who wish to follow a judicial career will go straight to the institute from their university course. The hope is to generate a pool of qualified judges from which to draw, thus avoiding the perception that the government is “nepotistically appointing registrars and magistrates.”<sup>119</sup> Finally it is important to note that there has been a significant improvement in the appointment of women to the High Court bench in Lesotho. They now make up half the total number of judges and this is above average by comparative regional standards.

The history of Court of Appeal appointments is considerably more opaque since individuals are recruited from outside Lesotho. There is a sense of dissatisfaction behind the process through which these judges are recruited and a belief that they are less independent because of the contractual nature of their appointments. This is articulated well by the following quote:

“Despite the fact that they are part-time, the reasoning behind their judgments – maybe they are more professional or more trained than our local judges – ... is superb. At the end of the day they are not brave enough to bite the hand of the executive. They have not said the government is wrong on a serious constitutional issue. It is the manner by which these judges get appointed [ . . . ] we are just told that one more judge is appointed. There is no process of justifying the system of appointment [ . . . ] Expatriate judge appointment is very arbitrary. It is just a friend advising a friend about a friend. Now the Court of Appeal is sitting we just see new faces and we don’t know when they came or how they came.”<sup>120</sup>

With the exception of the current President of the Court of Appeal (Michael Ramodibedi) all sitting judges are retired white South African men. Another individual described these judges as “hired guns [ . . . ] a cabal of judges who are appointed through a murky process; working through an old-boys club.”<sup>121</sup> Further discussion of the expatriate make-up of the Court of Appeal can be found under Section (f) Local/Stable Makeup of Bench.

**d) *Comprehensive Ethics Code and Fair Removal Process***

The Ethical Principles for the Judiciary of Lesotho are based on the *Bangalore Principles of Judicial Conduct*. In 2004 Chief Justice Lehohla distributed a copy of the newly constituted Ethical Principles for the Judiciary of Lesotho with the following forward:



[The principles] are meant to serve as a guide for the ethical conduct of Judges and Magistrates and to preserve the honour, integrity and independence of the Judiciary.

Given that the quality of justice depends to a large extent on the standards observed by Judges and Magistrates who dispense it, I trust that Judges and Magistrates will at all times live up to the precepts set in these Principles, unanimously approved by us, in such a manner as to preserve and maintain the dignity of our office as well as to ensure that confidence in the integrity, independence and impartiality of the Judiciary is upheld and enhanced.

I am pleased to commend these Principles to Judges and Magistrates for our guidance, use and observance.

The principles are robust and closely align with the internationally recognized Bangalore Principles; but the principles have yet to be formally codified into a statute. Under the 2011 Administration of the Judiciary Act S.22. (1) 'The Judicial Service Commission shall make or adopt such Ethical Principles for the judiciary as may be appropriate to uphold the independence and other interests of the judiciary . . .' It is further held that these principles may be applied when the commission exercises disciplinary control over judicial officers, including removal of a Judge for inability or misbehavior. This is a positive development towards implementation of the ethics principles. It also adds a further layer of protection for the judges in regards to disciplinary or removal practices.

**e) *Effective Institutional Leadership***

Institutional leadership is a critical factor in establishing judicial independence. There are two facets of judicial independence at stake here: external and internal. Internally the Chief Justice holds manifold important roles in the day to day running of the court, oversight of case allocation, disciplining and oversight of individual judges, etc. Given the position of the Courts vis-à-vis the Ministry of Justice the leadership structure extends beyond just the Chief Justice. In 2005 the secretariat of the Lesotho justice Sector Development Programme released an in-depth review and assessment of the Lesotho justice sector. While this report is now clearly dated, its damning indictment of the administrative management of the entire justice sector deserves revisiting:

[T]here is a serious lack of effective management, both in terms of resources and finance. There is a startling lack of management information in many of the institutions such that it is difficult to appreciate how management decisions can be made. Leadership is not



effective and needs to be improved; there is little evidence of people working as teams within the institutions either at senior management and professional levels or lower down in the organisations. There is also a lack of involvement of junior staff in decision making; they are neither consulted nor involved in day-to-day decisions which affect them. The management of human resources and in particular the training and development of resources is poor and in some instances there is no evidence of any training plan whatsoever<sup>122</sup>

A second facet of leadership relates to the creation and establishment of a positive institutional culture; particularly a sense of collegiality within the court. This is critical for the establishment of a strong institution. As former Swaziland judge Justice Masuku recently noted, “At the horizontal level, it is imperative that we refrain from uttering disparaging personal sarcastic remarks, criticisms or demeaning statements about our colleagues on the Bench [ . . . ] We are not called to like and glorify our colleagues on the Bench but we owe them respect, courtesy and civility in all our dealings with them, publicly or even privately.”<sup>123</sup>The leadership of the court serves dual-functions of legal administrative leadership and social cohesive leadership.

In regards to the external function of the Chief Justice there are a number of important functions to be fulfilled. Some of these functions are very public – serving as the de facto spokesperson of the judiciary<sup>124</sup> for example - other roles relate to behind the scenes negotiation of budgets or perhaps even resistance of political interference.

i) *Protocol/Seniority Dispute Between Chief Justice and President of Court of Appeal*

In and of itself, the issue of protocol is not significant as it relates to either the administration of the judiciary or the protection of independence. However, because the ramifications of this dispute have had an impact on the administration and independence of the judiciary in Lesotho, this report will detail the nature of the dispute and its consequences.

The current dispute over seniority and protocol has emerged from the appointment, for the first time, of a Mosotho to the office of the President of the Court of Appeal. Previously this was a part-time appointment held by foreigners and thus the question of state protocol was moot. The position of this report is that the question of protocol seniority in the Lesotho judiciary is ambiguous. I will begin by examining both positions through analysis of the constitution and then I will then overview the dispute and the political ramifications of the dispute.



The constitution is silent on the question of who is the head of the judiciary. The following arguments are based on an evaluation of the position of the courts in relation to the institutional hierarchy.

**Position 1:**

- The Court of Appeal is the final arbiter and is located at the top of the judicial hierarchy.
- If the Chief Justice is unavailable, an appeals court judge (or a high court judge) can serve in the position (120(4)). If the President of the Court of Appeal is unavailable, only another appeals court judge can step in. This reinforces the hierarchy of the appeals court over the High Court.
- Sec. 123(2, C) allows for High court judges to serve *ex officio* in the Court of Appeal thus solidifying the superiority of the Court of Appeal.

**Position 2:**

- In the Lesotho constitution, both Courts are referred to as "a superior court of record" (Sec.123(4) and Sec.119(3))
- Sec.119 (1) indicates that the High Court can review the decisions or proceedings of any subordinate or inferior court, and the description of the Court of Appeal doesn't say that.
- Sec. 123(2, C) allows for High Court judges to serve *ex officio* in the Court of Appeal, thus affirming that both are superior Courts of record.

This position, as it relates to the equality of the two courts, is summarized below:

“[T]he justices of the high court are *ex officio* judges of the court of appeal. *Ex officio* means that you're a judge of appeal by virtue of your position in the High Court. So we're all the justices that include the President of the Court of Appeal. He's just one of the justices of the Court of Appeal [ . . . ] All of the constitution says they're all equal and they get the same status [ . . . ] One will be in charge of the Court of Appeal, but he's just another justice. There shall be a Chief Justice of all of those justices, and that's the Chief Justice. He's the leader; he's the first man of the equals. He's the head of the judiciary.”<sup>125</sup>

In sum, while the Lesotho constitution offers hints as to the answer to this question, those clues can be formulated into arguments for either side. The on-going dispute between the Chief Justice and President of the Court of Appeal has emerged over the last ten years. The timeline is as follows:



**2002:** Justice Lehohla was appointed Chief Justice in 2002

**2002:** Justice Ramodibedi was appointed first ever Mosotho Court of Appeal Judge in 2002

**2008:** Justice Ramodibedi was appointed as President to the Court of Appeal in 2008

**March 29, 2009:** Cabinet issues a directive stating that in state protocol the Court of Appeal President is senior to the Chief Justice

**May 26, 2010:** the Chief Justice wrote to the Southern African Chief Justice's Forum (SACJF) complaining about the cabinet directive and asking them to intervene

**2011:** SACJF wrote to Prime Minister Mosisili requesting a reversal of the 2009 Cabinet directive

**June 28 2011:** Prime Minister replied asking the SACJF to not interfere with executive (sovereign) matters

**September 10, 2011:** Chief Justice raised a complaint at the SACJF Annual General Meeting in Uganda.

The dispute is highly disruptive to the judiciary and undermines judicial independence through a process of incremental institutional politicization – both internal and external. One member of the court noted, “People predicted it and here we are we can see. It is playing out in the meetings. We are hanging our heads in shame. We don’t want to be begged to take sides. Here we are. I don’t see one of them giving up.”<sup>126</sup> A significant number of interviewees believe that Ramodibedi desires and indeed expects to be Chief Justice in both Swaziland and Lesotho.

The dispute inhibits the ability of both leaders to fully meet the demands of their important positions because it foregrounds internal politics in the day to day functioning of the institution. Newspaper headings such as “Top Judges Fight . . . feud turns nasty at Uganda meeting”,<sup>127</sup> “Chief Justice Petty”<sup>128</sup> simultaneously perpetuate and fuel the conflict while reflecting a public frustration with the seemingly intractable nature of this dispute. The second article appeared to be skewed in favor of Ramodibedi leading more than one interviewee to conclude that Ramodibedi was utilizing the media in order to shape the debate in his favor.<sup>129</sup> Perceptions are key here: “[The dispute] erodes public confidence in the judiciary. If the two most senior judges in this country cannot see



eye to eye over mere protocol niceties, which are a prerogative of the executive, then how will they deal with real issues under their jurisdictions?"<sup>130</sup>

The question of how the dispute will be resolved is contested. One solution would be to adopt a system similar to South Africa. As one informant elaborated, "there should be established the Supreme Court of Lesotho, and the apex of which should be the appeal court headed by the chief justice, then the high court should be headed by a judge called the judge president [. . .] But the apex of the court should be the Court of Appeal, headed by the Chief Justice. So the President of the Court of Appeal and the Chief Justice should be one person [. . .]."<sup>131</sup> It should be further noted that there are proposed amendments pending in South Africa where the Constitutional Court will be affirmed as the highest court and the Chief Justice will be recognized as the head of the entire judicial system.<sup>132</sup> This approach is not universally embraced, and some informants have noted that there are potential practical problems in merging the administration of the two courts.

In 2003 the Lesotho Law Society filed a case claiming that Justice Ramodibedi's continued performance of functions of a High Court puisne judge, after his appointment as a substantive Court of Appeal Judge, was unconstitutional.<sup>133</sup> The Law Society also argued that Judge Ramodibedi sitting in both Courts "creates the perception in the mind of ordinary people that even the Court of Appeal would be loath to overturn Judge Ramodibedi's judgments and this may impact negatively on public confidence in the administration of justice." Sitting as a Constitutional panel, the Court established that the Court of Appeal and the High Court were both portions of the Supreme Court. Therefore it was constitutionally sound for Justice Ramodibedi to sit in both Courts. Further, the High Court concluded that there was no law supporting the complete separation of the two courts, although in practice there were very few instances where a judge was appointed to both courts. The court upheld the constitutionality of the appointment of Justice Ramodibedi as an acting judge in the High Court, but when he was sitting in the High Court, he should be addressed as Ramodibedi J. (judge) instead of Ramodibedi J.A.

There is no clear consensus on whether the constitution needs to be amended to explicitly delineate out who is the head of the Lesotho Judiciary. The position taken by Prime Minister Mosisili is that Section 123 (2) (a) of the Constitution confirms that the President has seniority because he is listed before the Chief Justice. The majority of Commonwealth jurisdictions do not have specific provisions or language identifying the Chief Justice as the head of the judiciary; yet the Chief Justice



is assumed de facto head. Exceptions with specific language regarding the position of the Chief Justice are Sierra Leone Sec. 120 (1); Swaziland Chapter IX; Uganda Sec. 133(1); Maldives Sec.141 (b); Ghana Sec.125 (4); Gambia Sec.121(1) and Bahamas Sec.98 (b). Of these states only Gambia and the Bahamas have a Chief Justice who does not sit at the head of the apex court.

At the October 21, 2011 session of the Court of Appeal the President of the Court made the following public statement with regards to the dispute:

It is a matter of regret that I am constrained to refer to a disturbing headline in the October 13 -19 Lesotho Times Publication entitled “Top judges fight”. I just want to say that when the moment is appropriate I will be able to deal with all the issues referred to in the article. Of paramount importance is the institutional integrity of the entire judiciary and the Law Society. Judges and legal practitioners must all work together to maintain that.<sup>134</sup>

Justice Ramodibedi consistently attempts to position the Court of Appeal as functionally and intellectually superior to the High Court.

Criticism of Chief Justice Lehohla has centered on his failures to effectively administer the High Court and his perceived close ties to the government by virtue of the fact that his brother is Deputy Prime Minister. In a country with a small elite class these close social and family ties are inevitable and cannot lead to automatic assumptions about a lack of independence. What is unfortunate for the judiciary is the highly factionalized ongoing political disputes within the LCD ruling party. Spillover of this conflict into the courts, both real and perceived, is deleterious to judicial independence in Lesotho. Given that both leaders are many years away from retirement, a solution will need to be found and that it will likely require further political intervention. Meanwhile the issue continues to be a stumbling block towards achieving judicial independence in Lesotho. From a functional or administrative perspective this is taking time and attention away from the day to day running of the courts. From an internal leadership perspective this undermines the authority of both individuals and weakens internal respect for their authority. Moreover, the tense atmosphere and divisive nature of the dispute tears at the fabric of the culture of the institution, undermining collegiality. As one informant argued, “Those who wish to distract the judiciary with all efforts to divide judges to factions, making judges bite each other, and we have a problem of leadership. This affects the morale. Once the leadership is acrimoniously in battle, morale does go away. How can you have effectiveness and unity?”<sup>135</sup> Finally, from an external perspective the leaders of the courts are important symbols of the institution as a whole.



*f) Stable/Local Composition of Bench*

**i) Expatriate Contract Judges on Lesotho Bench**

Lesotho has a long legacy of appointing expatriate judges. Despite gaining political independence from Britain in 1966 appeals to the Judicial Committee of the Privy Council continued for many years thereafter. There is a long history of strong intra-regional ties within Southern Africa. In 1954 the Basutoland, Bechuanaland Protectorate and Swaziland Court of Appeal was established.<sup>136</sup> This shared appellate court was an economical and efficient way to dispense justice in light of the small number of appeals emanating from each jurisdiction. Although each country had its own High Court, the Judges (including the Chief Justice) were obliged to serve across all three territories. The Attorney General was resident in South Africa and was also shared across all jurisdictions. The Attorney General was responsible for bringing all criminal prosecutions to the High Court;<sup>137</sup> this subsequently created an intolerable backlog of cases. At independence Lesotho established its own Court of Appeal; however personnel continued to be shared with the Courts of Appeal of Botswana and Swaziland.<sup>138</sup>

There has been, and continues to be, a shortage of qualified judges across the region. Historically the minute class of legal professionals was a function of the size of the populations, but also a function of the history of legal education in Lesotho, Botswana and Swaziland. Legal education for the region began in Lesotho with the establishment of the Department of Law in the then University of Botswana, Lesotho and Swaziland (UBLS) in 1964. The joint degree was a five year program in which students would study in Lesotho and complete one year abroad at the University of Edinburgh. With some adjustments along the way, it wasn't until 1988 that legal education was fully localized. The impact of more than a quarter century of lawyers being educated outside the country is not simply felt in terms of numbers. The small number of lawyers graduating during this period served to preserve the realm of law for the elite.<sup>139</sup> Today while private practice lawyers thrive and the number of law graduates continues to grow, one of the significant challenges in attracting top-level candidates out of private practice and onto the bench is the massive pay cut they would experience upon acceptance.

The use of expatriate judges at the highest levels of the judiciary in Lesotho, Botswana and Swaziland continues today. As in the past many serve concurrently across multiple jurisdictions. Below are a few, although not exhaustive, recent examples:



**Table 2: Examples of Judges Serving Concurrent Appointments across Multiple Jurisdictions**

	<i>Lesotho</i>	<i>Botswana</i>	<i>Swaziland</i>	<i>Other</i>
S.A. Moore		X	X	Caribbean
C.T. Howie	X	X		
M.M. Ramodibedi	X	X	X	[Former] Seychelles
J.G. Foxcroft		X	X	
I.G. Farlam	X		X	
S.B. Domah				Seychelles and Mauritius
A.M. Ebrahim			X	[Former] Zimbabwe
S. Twum			X	Ghana

The use of expatriate contract judges is accompanied by a number of benefits in settings such as Lesotho or Botswana. The appointments are typically permanent contracts, meaning the judge will stay on until reaching retirement age. These senior judges bring a wealth of expertise and outstanding legal credentials to the region's apex courts. However, in the long-term there are several problems with this practice. First, expatriate judges are not necessarily best equipped to understand and operate in a society/culture different from their own. As one interviewee strongly expressed, "I hate the percentage of white men in the Court of Appeal [. . .] most of them are old people who don't know the values and aspirations of Lesotho."<sup>140</sup> Second, the perception that the executive is packing the apex court with compliant expatriate judges is a significant obstacle to legitimizing the judiciary. Regardless of their 'actual independence', the critically important aspect here is 'perceived independence'. The use of expatriate judges symbolically perpetuates the perceived notion that the judiciary is an imported, colonial institution remote from the concerns and needs of the local population. In instances where expatriate judges are brought in to administer specific cases the authority/perceived independence of local judges may be undermined.<sup>141</sup>



## ii) Use of Acting Judges

The Chief Justice has made use of short-term contract acting judges to aid in reduction of the case backlog. While this is an administratively expedient practice, there are concerns around judges fluidly moving back and forth between the bench and the bar; again this creates a negative public perception. “[Currently] [f]our acting judges are well-off lawyers with strong private practices. Acting since 2009, but [this is] not seen as a pathway to the bench [for them].”<sup>142</sup> More specifically, an individual case is discussed by an informant below:

“[Dr Mosito] was first an acting judge of the High Court. Now he is acting judge of the Labour Appeal court. In the Labour Appeal Court he is virtually the only judge. But he refuses to leave private practice. He is still driving both of them. His law firm is one of the senior reputable law firms in the country. I’ve not monitored how his own cases have made it through to the Labour Court. He is also reputable on labour cases. Now that he is the ultimate judge on labour issues in Lesotho it is even worse. He is the teacher of labour law at the university. It is always baffling. There are others who do the same in the High Court [. . .]. The implications are far reaching, this is the person who sits with colleagues on the bench, tomorrow he is on the bar trying to convince colleagues. Tomorrow again he is on the bench. When it goes to the lower courts this person is just bulldozing because he is the judge of the higher courts. When he appears in the magistrate’s court, you can imagine the poor magistrate presiding over the judge of the higher court.”<sup>143</sup>

Section 4.12 of the Bangalore Principles states that, “A judge shall not practise law whilst the holder of judicial office.” Section 4.3 states that, “A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge’s court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.” The situation described above represents both opportunities and potential constraints. Clearly this individual is an expert in his field; however, the potential for conflict of interest appears to be significant. Once more we have to consider the human resource limitations of a country as small as Lesotho and weigh up the costs and benefits associated with appointing an individual who continues to maintain a thriving private practice.

In 2004 the Lesotho Law Society filed a case against Justice Cullinan’s appointment as acting judge.<sup>144</sup> Cullinan was the former Chief Justice of Lesotho and was appointed acting Judge of the High Court in 2000. The Law Society of Lesotho sought a declaration that the appointment was unconstitutional and that Justice Cullinan lacked independence and impartiality when he was handling certain cases in favor of governmental interests, reflected in the higher level of remuneration relative to other acting judges, and finally that he had exceeded the mandated



retirement age. The Law Society also sought an order declaring that the South African Uniform Rules of Professional Ethics did not form part of the Applicant's Code of Ethics. The Court questioned the bona fide of the Law Society, and defended Justice Cullinan's remuneration, stating, "nothing has changed except perhaps the volatile sensitivities of the Law Society and the fact that he now receives even less of a remuneration that he received than when in the Court of Appeal." The court concluded that there was "no merit therefore in the contention that Judge Cullinan's remuneration induced a perception that his independence was compromised in any way." The application was dismissed *in toto*.

### ***iii) Judges with Multiple Concurrent Leadership Appointments***

A distinct, although related problem, is judges<sup>145</sup> serving multiple concurrent leadership appointments. The relevant case here is Judge President of the Lesotho Court of Appeal Michael Ramodibedi. Ramodibedi currently serves as Chief Justice of Swaziland, President of Court of Appeal of Lesotho and Justice of Botswana Court of Appeal. Further, between September 2004 and March 2006 Ramodibedi served as the President of the Court of Appeal of the Seychelles. After resigning from the Seychelles he joined the Botswana bench. According to documents obtained by the Swaziland Times,

"Earlier this year (February 2006), government asked Ramodibedi to consider relinquishing his position as Appeal Judge outside, given that the Seychelles Court of Appeal required the full-time attention of its President," states the document. It further stated: "Having considered all the issues, Ramodibedi submitted his resignation as President of the Seychelles Court of Appeal."<sup>146</sup>

The problems of holding multiple judgeships are exponentially greater when considered in light of the heavy administrative responsibilities of the post of Chief Justice and President of the Court of Appeal. The Law Society of Swaziland has been particularly vocal in protesting the three concurrent appointments of Chief Justice Ramodibedi. Receiving significant salaries from three different governments is potentially troubling in relation to judicial independence. According to the Swaziland Times the Chief Justice is paid a higher salary than Ministers in the Swazi government.<sup>147</sup> There are strong perceptions that Ramodibedi is pro-government in both Lesotho<sup>148</sup> and Swaziland. As one anonymous commenter wrote on the Swaziland Times website, "The CJ's custom-built mansion in the face of a huge national deficit stands as a prominent reminder of the cordial and unbreakable bonds that exist between the CJ and his employer."<sup>149</sup> In Lesotho, one interviewee



claimed the following: “[R]ecently you find the President of the Court of Appeal made this statement which is clearly pro-government, where he said the Court of Appeal will not allow the ruling political party to fall apart.”<sup>150</sup>

The case referenced above relates to the ruling Lesotho Congress for Democracy (LCD) party. In early 2011 three members of the LCD party filed a case in High Court requesting a special conference to discuss the lack of confidence in the national executive committee of the party. The application was dismissed and the plaintiffs appealed. Judge President Ramodibedi scheduled an extraordinary session of the Court of Appeal for December, assigning the case to himself. Members of the LCD petitioned for Justice Ramodibedi to recuse himself and he refused. In short, the appeal was upheld and the LCD was ordered to hold a special conference at the end of January 2012 to discuss “the lack of confidence in the executive committee by 17 of the party’s constituencies and fill the post of treasurer.”<sup>151</sup> After issuing his ruling in December Ramodibedi was quoted as saying, “[Ultimately] the remedy lies in the special general conference of the party itself. It certainly does not lie with the courts.”<sup>152</sup> Navigating intraparty disputes is a challenge for any judge. In this case the perception created by arbitrarily assigning himself the case and setting an extraordinary session, in addition to publicly declaring that the courts must not let the ruling party fall apart, enhances negative perceptions of a politicized Lesotho judiciary.

Beyond issues of time management across multiple appointments, perceptions of pro-government attitudes and collection of multiple salaries, Chief Justice Ramodibedi has been embroiled in a series of serious infringements of the rule of law in Swaziland. The Swaziland Law Society has fought vigorously and vociferously against Ramodibedi’s conduct as have regional bodies such as the SADC Lawyers Association.<sup>153</sup> They have been joined by the Botswana Law Society who issued this statement: “The world has shrunk into a very small global village of which the BOLESWA countries are only a tiny ward. Our fear is that Honourable Ramodibedi’s way of doing things and the way he understands democracy (in the eyes of the beholder) is inimical to the development of a progressive judicial system that we would love to see for this country.” In contrast the Lesotho Law Society has supported Ramodibedi. Despite pressure from the SADC Lawyers Association; the Lesotho Law Society issued a statement claiming that,

“Justice Ramodibedi has contributed immensely to the human rights jurisprudence in Lesotho. He is a rigorous keeper of standard and professional ethics, which unfortunately has at times brought him into collision with his peers [ . . . ] Justice Ramodibedi has earned



the respect of the Law Society and legal fraternity in general by his open door and inclusive policy in managing the affairs of the Court of Appeal.<sup>154</sup>

Controversy surrounding any judge of the Court of Appeal is problematic, but when that judge is the leader of that court it serves to politicize and delegitimize the entire judiciary. As noted earlier, the leadership of the judiciary has a number of functional roles, but is also the symbolic figurehead of the judiciary. Justice Ramodibedi has powerful supporters at his side, most notably the former President of the Lesotho Law Society Mr. Mda.<sup>155</sup>

While in office, the President of the Law Society has consistently sought to uphold the reputation of Justice Ramodibedi while simultaneously seeking the removal of Chief Justice Lehohla.

## IV: Transparency

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Opaque court processes prevent civil society, the media and, indeed the general public from monitoring the courts. If accountability mechanisms are unable to function then judicial independence is severely weakened.

a) ***Public access to proceedings, reporting of judgments, access to judgments/trial records***

Until very recently, public access to court judgments was severely limited and official reporting of judgments had stalled. At the launch of the new Lesotho Legal Information Institute (LesothoLII) website<sup>156</sup>, which aims to create universal free access to the law in Lesotho, the Chief Justice addressed the recent impetus to reinstate the law reporting committee in Lesotho, “This enactment will make it easier for law reporting to operate as an effective tool to support the administration of justice. This law reporting committee will naturally play a critical role in supporting LesothoLII and its development into an efficient disseminator of legal information.”<sup>157</sup> The Chief Justice also highlighted the significant opportunities the new LesothoLII website offers to the judiciary of Lesotho, but warns that it will require a collective effort to maintain and constantly update the website. “The necessity of this initiative in this Kingdom is beyond debate. Our country has suffered from a dearth of law reports. Our law reports are not up to date [ . . . ] this is clearly unhealthy for any legal system. It makes it difficult for precedent to take root. It means that lower courts will



struggle to know what new law has been developed by courts of record.”<sup>158</sup> Access to Lesotho case law and statutes through the website will certainly improve the quality of the work of lawyers and judges. Although, it should be noted that internet access at the court was not consistent and several judges had unworkable equipment due to computer viruses.

The library at the palace of justice is currently suffering from a number of deficits including significant lacuna in Lesotho statutes and case law.<sup>159</sup> The LesothoLII website, if maintained and updated, will be a significant improvement on existing law reporting in Lesotho. Further improvements to access of information will be implemented through the EU Justice Sector Reform project and the MCC project. The case tracking system in particular will improve transparency and access to information.

While judgments are uploaded to the LesothoLII website with regularity, there are a secondary set of considerations with regards to transparency and that is the accessibility of the writing. Although Lesotho has a very high literacy rate, the use of complex language, sentence structure and legalese frequently renders court judgments inaccessible to much of the population. Judicial training around judgment writing could be a helpful intervention as part of broader institutional efforts to improve transparency.

## V: External Institutional Support

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Legitimacy is the bedrock of judicial independence and possessing strong external institutional support is crucial to judicial legitimacy. It is challenging to accurately capture attitudes in a single, static snapshot. Lesotho is part of the Afrobarometer surveys<sup>160</sup> and this data reflects interesting shifts in attitudes towards the rule of law generally and the courts more specifically over time. Between 2000 and 2003 trust in the Courts grew from 40% to 58%. Indeed trust grew in all government institutions, but decreased in the media.<sup>161</sup> In 2005 67% believed that the Prime Minister must always respect the laws and the courts, even if he thinks they are wrong. This rose to 70% in 2008. Despite these positive figures there remained an alarming 24% (2008) who believe that since the Prime Minister is elected to lead the country, he should not be bound by laws or court decisions that he thinks are wrong.<sup>162</sup> Trends regarding support for rule of law are often regional. Several informants indicated a concern that the aggressive attitude of the current ANC



administration towards the courts in South Africa<sup>163</sup> and the total disregard for the rule of law in Swaziland are generating regional trends which could potentially spill over into Lesotho.

In transitioning states weakly institutionalized judiciaries tend to be more reliant on support from key allies than their counterparts in established liberal democracies. Legitimate public criticism is a way of ensuring judicial accountability and protecting judicial independence. Below I outline key areas of institutional support for judicial independence in Lesotho:

a) ***Vibrant civil society support***

i) **Law Society**

It is common for lawyers and judges to be in a position of mutual distrust entangled with a reciprocal dependency. Across sub-Saharan Africa the relationship between the bar and the bench is constantly strained by a number of competing tensions; the case of Lesotho is no exception. Functional relationships can and do exist, but they hinge on strong and positive relationships between the leadership of the judiciary and the bar. While accounts differed as to the victim and the perpetrator in this instance, all are unanimous in their assessment of the acrimonious relationship between Mr Mda, the eleven year President of the Law Society and Chief Justice Lehohla.<sup>164</sup> Alongside the judiciary the Lesotho Law Society (LLS) is the public face of the legal profession in Lesotho. The current Law Society executive committee claims that the Chief Justice is a stumbling block towards successful engagement with judiciary and since relations between the Law Society and the court leadership as so dysfunctional, the LLS has frequently chosen to push complaints through litigation instead.<sup>165</sup>

The LLS is a statutory body established in 1983.<sup>166</sup> In addition to regulating their profession, one of the primary objectives of the LLS is:

4. (a) to consider, originate and promote reforms and improvements in law; to consider proposed alteration and oppose or support the same; to assist in the administration of justice; and to effect improvements in administration or practice of law;

Although a statutory body, the LLS receives no funding from the government and is instead reliant on member dues. Current member dues are set at 500 Maloti per annum. This appears to be inadequate, particularly as it relates to running the offices of the society. The offices are currently located in the basement of the High Court. Further, the tensions between LLS and the court have



exerted a negative pressure on the judiciary and have diverted attention away from the internal business of the law society. One interviewee, with a long history in private practice, characterized this as a “misdirected energy” which has transformed relations between the judiciary and the law society into an “antagonistic and adversarial relationship.”<sup>167</sup>The focus of informant’s comments on Mr Mda, whose polemical rhetoric consistently antagonizes the entire bench.<sup>168</sup>One informant characterized the situation in the following way,

“[H]e damages the whole image of the higher judiciary [. . .] I don’t think that is very honest or helpful at the end of the day. It is a question of personalities. We shouldn’t be seen as enemies. They used to have a standing meeting with the Chief Justice and Law Society. He tried to have meetings with the Chief Justice, invited some judges. Doors of CJ are open. But for some reason they didn’t want to go there. They preferred the adversarial approach [. . .] I’ve heard that the younger lawyers want to change the face of the law society. Do things a little differently. We have to work together towards an independent and effective judiciary. Criticism should be with sole intention of strengthening the whole justice system.”<sup>169</sup>

This adversarial relationship has reached the point at which the two bodies are not communicating directly with one another. Mda appears to be fearless in giving highly critical public speeches about the judiciary, frequently in front of the Judges themselves. One illustrative example is Mda’s speech at the 2010 opening of the first session of the Court of Appeal. In this speech he advocated a kind of ‘witch-hunt’ in the judiciary where incompetent High Court judges should be “named and shamed:”

“My lords, the Law Society is of the view that judges who are guilty of undermining delivery of justice to the people through failure to deliver judgments must be named and shamed [. . .] The judicial shame of non-delivery of judgments by some High Court judges continues as a norm [. . .] In this regard I need not reiterate that the statement of the president (of the Court of Appeal Justice Michael Ramodibedi) at the close of the last session of this honourable court in October 2009 expressing this court’s frustration, is also shared by the Law Society [. . .] The solution to the problem lies in heeding the clarion call of the president of this honourable court (Court of Appeal) that all judges without exception must start hearing cases — and delivering reasoned judgments timeously.”<sup>170</sup>

This approach cannot be considered productive in regards to strengthening bench-bar relations. A more productive approach would be to institute regular meetings between the judiciary and the leadership of the law society. To that end, progress is potentially near, as a new bench-bar committee has been formed and this will hopefully ameliorate the situation.<sup>171</sup> Structural change, combined with new LLS leadership, brings promise of a more productive partnership in the future. One of the other broader issues related to uncooperative relations between the LLS and the government is the continued use of South African lawyers by government. “The Ministry of Justice often employs *pro-deo* and *pro-bono* lawyers who are mainly white South Africans to supplement



the State attorneys. These lawyers are then paid exorbitantly and yet the same services could be offered by Basotho lawyers if they are paid that well.”<sup>172</sup>

The LLS is statutorily obliged to police its members and to maintain standards in the profession. Interviews with individuals both inside and outside its membership are unanimous in condemning the Society for a failure to meet its obligations in this regard. Several interviewees indicated that Law Society meetings are not regularly held and that the President and the Executive Committee of the Society are given a free hand in instituting proceedings. At the annual elections only paid-up members are allowed to vote and consequently only a few people have a voice. At the December 2011 annual general meeting of the Law Society proceedings were halted when only 42 of the society’s 234 members attended. This is a recurrent problem for the LLS. Some individuals have expressed concern that urgent matters are being postponed due to a regular failure to achieve quorum.<sup>173</sup>

A particularly striking element of the Law Society’s history is its long record of pursuing litigation in furtherance of association goals. Since the 1980s the LLS has been active filing cases related to important political and legal issues. This can be a useful and valid approach for a law society, particularly as it relates to important public interest or human rights test cases. Although the LLS has not focused their efforts on filing these types of test cases, some cases have resulted in important interventions related to the protection of judicial independence in Lesotho. For example, there have been a number of cases filed around the use of acting judges. An early and important case in this regard was the *Law Society of Lesotho v. Honourable the Prime Minister of Lesotho and Another*(1985).<sup>174</sup> The LLS claimed that the appointment of then Acting Judge Peete was made in contravention of the government’s duty to guarantee the independence of the Courts under the Human Rights Act. Peete could not become an acting (temporary) judge because as a civil servant and prosecutor, his appointment would interfere with the independence of the court due to his relationship with the Executive. The Court held that even though an acting judge was not prohibited from holding another office of profit, the office may not be one in the government. Since the government is one of the most frequent litigants, and after the one-time appointment Peete was going back to his original position, he must recuse himself in such a situation when the government was a litigant. Thus a compromise position was found in this case. But it highlighted some of the challenges of making appointments to the judiciary in a small jurisdiction such as Lesotho. Okpaluba and Molapo (2005) find that the use of temporary appointment in a country as small as



Lesotho is inevitable, but ultimately concluded that “In spite of the smallness of the jurisdiction, the courts in Lesotho have demonstrated [ . . . ] that judicial independence and impartiality are the bulwark of the Kingdom’s judicial and constitutional system.”<sup>175</sup>

More recent Law Society cases have been highly politicized. A 2010 case in point is in relation to the appointment of the Director of Public Prosecutions, Thetsane, as King’s Counsel (*Law Society of Lesotho v. Thetsane and Others (2010)*).<sup>176</sup> The LLS argued that the DPP did not meet the requirement of the King’s Counsel. The court ruled that the respondent has been an advocate of at least 15 years standing, and has “rendered distinguished services in the law practice in the courts of Lesotho.” As is typical in these politicized cases the arguments simultaneously played out in the court of public opinion through significant coverage in the Lesotho media. The LLS claimed that Thetsane rarely appeared in court and in more complicated criminal cases he would hire outside attorneys from South Africa. One could see why this would raise the ire of the LLS.<sup>177</sup>

## ii) Media

The use of the media by judges can be an effective strategy whereby the advance leaking of decisions can be a strategy to preempt government interference. Or judges may leak decisions to gauge government reaction in advance. The mass media appears to be more interested in publishing accounts of scandalous judicial behavior, public and private, rather than providing judges with an open platform through which they can defend themselves.<sup>178</sup> The Lesotho media, in particular the Lesotho Times, has paid significant attention to the judiciary since it came into print. For example, in the electronic version of the Lesotho Times accessed on December 12, 2011, five out of eleven of the front page articles concerned matters pertaining to the judiciary in general, or in relation to specific judges.<sup>179</sup> One observer reflected that court stories are a big money maker for the newspaper.<sup>180</sup> Coverage tends to be sensationalized and there is a lack of serious reflective analysis on the courts as a whole. Overall the Lesotho Times is widely perceived to be independent and is owned by a foreign company.

In light of the ongoing dispute between the Chief Justice and the President of the Court of Appeal coverage has intensified and become more deeply political. The Lesotho Times article of October 20, 2011 entitled, “Top Judges Feud” was perceived to be heavily biased by several observers. One individual conjectured that, “The President of the Court of Appeal has got some communication with the Lesotho Times to promote his image.”<sup>181</sup> Another individual suggested that in this case,



“Ramodibedi had tipped the media and that he had a strong rapport with journalists.”<sup>182</sup> There are clearly tensions here with regard to the accountability function of the media. Most recently in regards to the issues surrounding the incompetency in the office of the registrar, the judges have chosen to take this internal dispute to the media. According to the newspaper the Judges claim the only way to stir the Chief Justice in action was to go public.<sup>183</sup> This strategy of publicly airing internal judicial administrative disputes is surely not constructive for the institution as a whole. However, if the dispute is intractable and ongoing there may instances where judges feel as though they have no choice.

On balance, the media has played an important role in shining a flashlight into the inner-workings of the Lesotho judiciary. Important cases are followed closely and there is strong coverage of issues such as the underfunding of the judiciary. All this is important to the strengthening of judicial independence in Lesotho. That said, the media, in particular the Lesotho Times has also played a significant role in politicizing the judiciary. Personnel disputes are sensationalized and play out like soap opera stories on a regular basis. This undermines the legitimacy, the perceived independence and the authority of the Lesotho judiciary as an institution.

### *iii) NGOs*

There are two important roles for NGO's to play in regards to supporting judicial independence. The first, more indirect support is education. Organizations such as the Transformation Resource Centre (TRC) play an important role in educating the public on the principles of democracy, good governance and human rights and to inform and empower marginalized Basotho with regard to justice and development.

The second, more direct support mechanism includes the filing of important public interest litigation test cases. In the area of water and environmental justice the TRC is pursuing class action litigation against the Lesotho Highlands Water Authority to seek compensation for affected and displaced groups. Other organizations such as Women and Law in Southern Africa and the Federation of Women Lawyers (FIDA) also play these dualistic roles in Lesotho. They can play an important accountability mechanism due to their expertise and knowledge related to rule of law and justice. In regards to speeding up the filing of important public interest litigation, there could be scope here for coordination and partnership with the Lesotho Law Society. Coordination across organizations and sectors continues to hinder the work of NGO's in Lesotho.<sup>184</sup> The Lesotho Law



Society is an important member of civil society and as such should be a leader in regards to supporting the rule of law and constantly monitoring Lesotho's democratic development. While I have dealt with the LLS in a separate section of this report, it is worth noting here that the LLS would be a far more effective body if it focused its efforts on building horizontal networks and connections across civil society rather than maintaining the hostile status quo with the judiciary and the Chief Justice. Lawyers hold a considerable actual and symbolic power in society.<sup>185</sup> If used for purposeful, liberal means they can truly be a force for positive democratic development.

Finally, it should be noted that there exists a degree of hostility and distrust between civil society groups and the judiciary. At a conference of the Southern Africa Chief Justices Forum it was resolved that "The NGOs, the Civil Society and the citizens of member Countries should be sensitized on the need to accept the independence of the Judiciary."<sup>186</sup> Facilitating dialogue between NGO's and the courts could be a way to improve understanding and dialogue. Due to the current political environment in Lesotho many informants in the civil society sector expressed an across the board distrust of the government writ large, including the judiciary. There was a universal belief that the judiciary is enmeshed in networks of corruption and that the lack of transparency, particularly as related to the appointments process, was serving to hide malfeasance and corruption. When pushed to give specific examples, there were few, but perceptions are highly negative.<sup>187</sup>

**b) *Strong regional/international professional connections***

Beyond professional development, here are a number of important reasons why active membership in regional and international judges associations is important for judicial independence. These organizations can act as an important source of external support in the face of interference. At the Ceremonial Opening of the High Court in 2003 the present Chief Justice reiterated his endorsement of active membership in international judges associations:

"I cannot over-emphasise the importance of the need for the upper echelons of the Judiciary in Lesotho to join as an association the Commonwealth Magistrates and Judges Association – CMJA. That our Magistrates have been members for some years now is truly commendable. A good portion of jurisdictions in the SADC region are full members I don't see any good reason why we should keep ourselves locked outside this useful movement"<sup>188</sup>

Amongst the Judges of the High Court there is dissatisfaction with the way in which judge's selection and travel to international conferences is allocated. "We are not really active in



international associations. The Chief Justice will appoint one justice to attend a conference, but only at the Chief Justice's invitation [ . . . ] can't all go because of finances."<sup>89</sup>

The significance of regional judge's bodies has played out in the recent dispute between the Chief Justice and the President of the Court of Appeal. As discussed in Section iii.e., the Southern African Chief Justices Forum has entered into the dispute on the side of the Chief Justice. There are arguments on both sides as to whether it is counterproductive or indeed supportive to have an outside body intervene in internal disputes. On one hand they can bring a voice of impartiality and clarity to a messy and complex situation. On the other, external interference can easily be framed as a form of 'meddling' in the affairs of a sovereign state.

It is very important that Lesotho Judges resurrect or create their own domestic independent judges association. This association should be central to the judges' interactions with the state and provide protection and guidance and advice to individuals should the need arise. One of the reasons why the judiciary has become so politicized is because the High Court bench is not speaking with one voice. Information is leaked out in bits and pieces, sometimes pitting individuals or groups against one another. An independent judges association and the creation of a spokesperson position for the judiciary would aid in ameliorating this situation.

c) ***Nonthreatening Political Environment***

There is a commonly held belief amongst the judges of the Lesotho High Court that they are operating in a politically hostile environment. They perceive the public as being overly critical and quick to align judges with the interests of the executive. They claim the government exhibits open hostility to the institution through chronic underfunding and an inconsistent execution of judgments. Below is a selection of reflections from individual judges:

"We sometimes make decisions that are not very popular. Sometimes the decisions we make are in favor of government. But then you get a backlash from the general public. It is really sad, people don't know, or really understand the reasons for the judgment. They just have this general belief that we are not as independent as we are supposed to be."<sup>90</sup>

"We have a problem of public confidence. Politicians fear and actually hate us. They say "how can judges have the power of sending someone for death? How can they declare an act of the parliament unconstitutional? They're not elected by the people. Who the hell do they think they are?" You say the culture in Africa has originated from England, parliamentary supremacy. The concept of separation of power and judicial independence is something from the US. So by tradition the politicians think the will of the people is justice. And judges



must go according to the wishes of the elected. Judges are leveled as reactionary and anti-government lies in the news media [. . .] you find judges of the high court are demonized.”<sup>91</sup>

One significant problem faced by the judiciary is the tendency of political parties to rush to the courts to solve their internal disputes. In 2011, there were two highly publicized political party disputes heard in the High Court. Both were overturned on appeal. The first was in relation to the opposition Basotho National Party (BNP).<sup>92</sup> While there is reason for celebration that political actors are resolving their disputes through the courts of law rather than the barrel of a gun, the effects on the institutional legitimacy of the Lesotho judiciary are injurious over time.

The immediate and direct effects of political hostility are documented and discussed in Part II below.

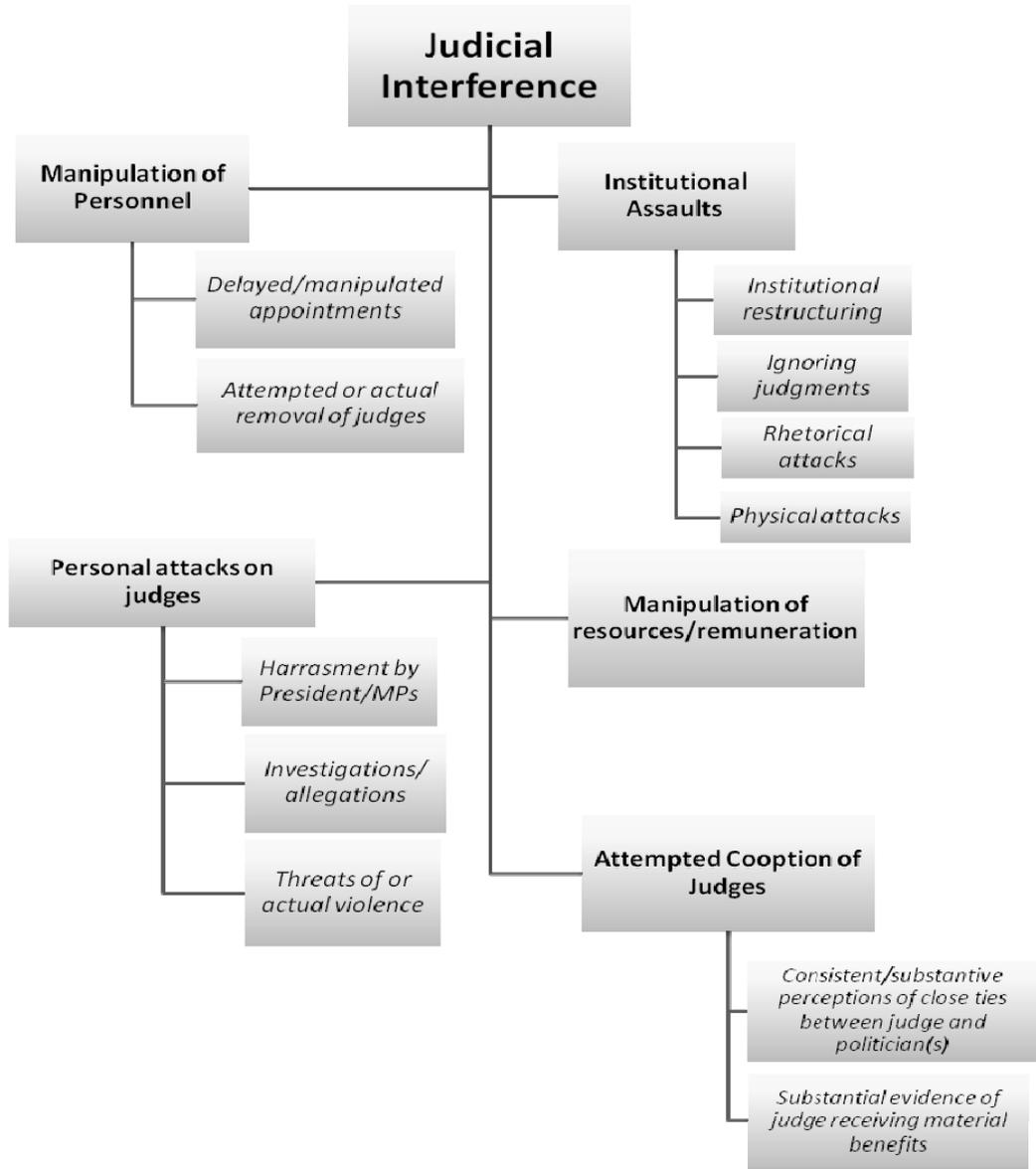
## PART II: Analysis of Judicial Interference

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Figure 3 below captures the variety of ways in which governments can engage in interference towards both individual judges and the institution as a whole. As will become evident when reading through the list and description of forms of interference in Lesotho, they map quite clearly onto the major areas of concerns with regard to judicial independence. Significant points of weakness include the appointment process, the chronic underfunding of the institution, the perception of close ties between judges and politicians – particularly in relation to the perceived political ties of the judicial leadership - and, an apparent unwillingness on the part of the government to protect judges and the judiciary as a whole from rhetorical attack.



**Figure 3: Typology of Judicial Interference**





## A: Manipulation of Personnel

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Manipulation of personnel was the most commonly cited form of interference in judicial independence. However, there was no direct or written evidence offered in support of this assertion. Most comments were similar to the following and were purely speculative:

“Appointments have been refused because people were not supporters of the ruling party. This is unwritten, but known. But I know of at least one case which was confirmed to me that particular person could not be appointed because it was pointed out in the meeting that in the Independent Political Authority investigation she as was not a supporter of the ruling party.”<sup>193</sup>

It would require a longitudinal review of judgments for each individual judge, a mandate beyond the scope of this report, to ascertain any pattern of ‘bias’. Manipulating judicial appointments is the most efficient form of interference available to a government. It is indirect and can potentially yield long-term benefits to those in power. Concerns around manipulation of appointments have arisen in relation to a couple of extremely high profile political cases and are worthy of mention here.

The numerous cases filed in relation to the prosecution of high-level corruption related to the Lesotho Highlands Water project in Lesotho marked a watershed moment for the Lesotho judiciary. The trials were separated and tried sequentially. First, Masupha Sole was tried, presided over by Judge Cullinan.<sup>194</sup> Following the Sole trial the Canadian construction company, Acres International limited, were tried and convicted. This trial was presided over by Judge Lehohla (present day Chief Justice).<sup>195</sup> Finally the German engineering company, Lahmeyer International was convicted.<sup>196</sup> All three cases resulted in successful prosecutions and failed on appeal. Judge Cullinan was specially appointed for this case. As Fiona Darroch narrates,

An experienced, retired former chief justice, Judge Cullinan, was appointed to ensure that no question of judicial partiality or incompetence would arise. His reputation, experience and faultlessly argued judgments on the preliminary issues (none of which were appealed) ensured that a high judicial standard marked the start of the process and set its tone thereafter. Judge Lehohla’s ruling in the conviction of Acres reflected the emerging revulsion of the Lesotho judiciary for the offence of corporate bribery and, in particular, for the contemptuous attitude that characterised Acres’ approach to the litigation process. In interview he noted that the message from the Lesotho courts was uncompromising: corruption will not be tolerated, and will be investigated and tried at the highest level. Top South African advocates were instructed throughout by the defendants in these trials. There have been no allegations of judicial corruption thus far. It is certain that no defendant would have shirked from making that allegation if there were any justification for doing so.<sup>197</sup>



Thus, in this instance it would appear that the handpicking of a judge from outside of Lesotho to avoid bias resulted in a positive end result. However, this can also be interpreted as the subtle undermining of judicial authority and independence because it silently speaks to the lack of independence of local judges.

#### *MKM Ponzi scheme Cases*

The liquidation of the MKM pyramid scheme has played out through the courts in a protracted manner. There have been continued efforts by the MKM owners to overturn a 2011 High Court ruling that the group should be liquidated. In a subsequent blow to the liquidators, the High Court blocked an application for rentals on properties owned by the MKM group to be paid to the court's registrar for safe keeping.<sup>198</sup> This scheme touched virtually all members of Lesotho's elite and this has placed tremendous pressure on the judges involved. As one noted, "Lesotho is one big family. No judge wants to be accused of causing people to lose their hard-earned money as would happen in liquidation."<sup>199</sup> It is within this context that a string of recusals occurred.

Justice Peete was the first judge to withdraw, followed by Justice Majara, followed by Justice Chaka-Makhoane who recused herself after a nocturnal visit by an emissary sent by the boss of MKM. Justice Monapathi recused himself because he had used a Mercedes Benz car borrowed from MKM. Then the case was handed over to Justice John Lyons, who shortly thereafter withdrew. Eventually Justice Musi from South Africa took over the case. In total the case came before six judges before Justice Musi was brought in by the Chief Justice to preside over this issue. The Chief Justice has ordered that all MKM related matters be heard by Justice Musi. In late 2011 a group of MKM creditors sought to have Justice Musi removed from these cases.<sup>200</sup> This chain of events speaks volumes on the challenges of working as a judge in a small country. That said, as one individual anonymously quipped, "We can't always be importing judges when we have problem. This turns Lesotho into a sub- state."<sup>201</sup>

Beyond the judiciary, the finance minister Timothy Thahane received a death threat because people believed that he was blocking the MKM bail-out even when this issue was pending in the High Court. Thahane repeatedly said that this was an issue for the court, and he should not be blamed for any decisions.<sup>202</sup> The company was liquidated and in May of 2011 and the case is currently awaiting appeal.



Both the Lesotho Highlands Water cases and the MKM cases do not demonstrate ‘manipulation of personnel’ per se; but instead highlight the challenges of generating a bench that is not just independent, but is perceived to be independent. In a country as small as Lesotho, in cases as complex in size and political magnitude as the two aforementioned, the challenges become evident.

Despite the universal dissatisfaction with the Judicial Services Commission no direct evidence of manipulation of appointments to the bench was uncovered.

## **B: Institutional Assaults**

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### ***Institutional Restructuring***

The Judicial Administration Act of 2011 is not a direct attempt by the government to undermine judicial independence in Lesotho. There are a number of positive elements to the Act as discussed earlier in the report. However, the high level of suspicion around the legislation and the negative response in regards to the role of the legislature prompted several individuals to frame the Act as a form of manipulation or interference. One informant captured this position as follows:

There is quite lot of politics around it. The Act is good in that it enforces the independence of the judiciary. But what appears to be now that it has been drafted in such a way that certain individuals particularly in the registrar, who may be subject to some political pressures; it appears that they have tried to amass powers, which would end up neutralizing the whole independence of the judiciary. If it is going to be implemented in this fashion, then it is actually worse. It seems to give the registrar of the high court power far beyond what she could get in the constitution. She has the budgeting power over everybody [. . .] It gets the potential of actually destroying the independence if it is not amended appropriately to remove the excessive powers from the registrar.<sup>203</sup>

At the time of writing it is unclear whether litigation will be filed to amend the Act. The Registrar was removed from the High Court in early 2012 and reappointed as a Deputy Principal Secretary in the Ministry of Justice.

### ***Ignoring Judgments***

In 2007 it was alleged that the government was ignoring court orders related to civilians who were abducted and held in custody by the defence force. Justice Mahase is directly quoted in the SADC Lawyers Report:



One of the court orders which were ignored by the authorities was mine. This was a habeas corpus application in respect of one man. He was sent to court on arrest for treason. The Chief Magistrate declined to place this man on remand, but did not release him, instead he sent the man back to police custody. An application was made for the release of this man together with others he had been arrested with. I ordered their release, even the Counsel for the Crown conceded that it was wrong for the magistrate to have sent the accused back into police custody. But this order was ignored by the security officials.<sup>204</sup>

Other interviewees expressed complaints in regards to non-payment of damages by the government. Specific evidence was, however, not uncovered.

### ***Rhetorical Attacks***

A consistent complaint made by judges in Lesotho is in relation to the hostile rhetorical environment. This is primarily, although not exclusively, lobbied against political elites. According to one interviewee there are deep-seated prejudices in which judges are flippantly labeled as “executive-minded” or “reactionary” or “anti-government.”<sup>205</sup> This is perhaps a reflection of Lesotho’s spirited public debate and of the insipient one-partyism that increasingly pervades multiple aspects of Lesotho’s political life.

Judges complained that politicians would regularly chastise individuals on the bench during public speeches or campaign rallies.<sup>206</sup> Again, no documentation was found to confirm these allegations. One area of hostility that has been easy to document is the use of the Comments sections below newspaper articles in the online version of the Lesotho Times. A recent example is a judgment issued by Justice Majara in relation to a rape conviction case. Comments below the article were a stream of personal invectives and hate speech. One example of the type of comment is, “I can’t believe Majara. Sometimes she acts as if she isn’t a lawyer but a gender activist. What sort of judgment is this?”<sup>207</sup> These comments align with the complaints of Judges in regards to the level of poorly-informed hostility that work within in Lesotho.

## **C: Personal Attacks on Judges**

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During interviews it became apparent that judges who have handled some of the internal political party disputes – from both the ruling party and the opposition – have experienced greater levels of harassment and interference. The follow account from one Judge illustrates this:



They brought a case here and I was allocated that case. I dealt with it, I gave my judgment. It didn't sit well with one faction [ . . . ] There was talk, threats of violence against me. There were so many things. Threats – people would come and tell me that this is your career, you're not going anywhere. They are going to fix you. It doesn't sit well, but it comes with the territory. But when it's new it upsets you. After a while I did what I thought was best. I always say they should be thankful that there should be an independent judiciary. Once they are on the other side they can't be bought.<sup>208</sup>

In 2011 Justice Nthomeng Majara was shot at while driving with her sister in her official car. The shooter was an ex-boyfriend of her sister and it does not appear to be related to the performance of Justice Majara on the bench.<sup>209</sup> However, it does raise important questions with regards to the security of judges outside the courthouse. In 2007 the Southern Africa Development Community (SADC) Lawyers Association mobilized a fact-finding mission to Lesotho.<sup>210</sup> At that time they interviewed Justice Mahase who had experienced serious harassment in relation to habeas corpus applications that year. The events are serious enough that they warrant recounting in detail. The incidents surrounding the home search and two other subsequent incidents are discussed.

#### 1: Search of Residence

At the time of Mahase's house search, on the 15<sup>th</sup> June 2007, there was a curfew in force in Lesotho. The Chief Justice informed Justice Mahase that the Commissioner of Police had requested permission to search her house. Seven police vehicles and seventeen officers later arrived at her house and searched the premises. They claimed they were searching for her husband and illegal guns.<sup>211</sup> Justice Mahase's husband, who is active in politics, had been living elsewhere for some time.

That same week Justice Mahase had been the judge on call dealing with a number of habeas corpus applications. "Unfortunately for me I was the judge on duty when political upheavals, abductions of persons, torture etc occurred."<sup>212</sup> She released the detainees – many of whom had been brutally tortured. It is suspected that these cases triggered resentment in the police force and led to the search of her home. Justice Mahase reports that she was not protected by the Chief Justice during this incident and that she continues to feel unsafe.<sup>213</sup> The conclusions of the SADC lawyers report are condemnatory towards the government,

Although judge Mahase's case is the only one of its nature, the linkages which this case has with the general situation in Lesotho gives rise to the worry that the independence of the judiciary has been compromised. The absence of any official reaction to the treatment of the judge, and also to her complaint is further cause for worry. In the opinion of the Mission based on its findings, considering the circumstances surrounding the search of the judge's



residence, it is difficult to avoid the impression of intimidation and harassment of the judge for making judicial decisions that did not suit the Executive and/or the ruling party.

## 2: Condemnation in Steyn Commission Report

On 22<sup>nd</sup> April 2009 attacks were launched on Makoanyane Military Base, the State House and residents of Maseru by a group of 15 mercenaries. One year later in April 2010 an investigatory commission<sup>214</sup> chaired by retired Judge President of the Court of Appeal Justice Steyn released a report outlining the findings of the inquiry. The report did not offer significant insight into the motivations behind the attack, but did offer detailed analysis of the security failings of the Lesotho state.<sup>215</sup> According to the Lesotho Times, the report contained a series of observations related to Justice Mahase's handling of the suspects in 2007. In a letter of complaint to the Attorney General, the Law Society claims that Steyn Report claimed the following: "There was clear and credible evidence before us by the members of the security triumvirate that the ready release on bail of persons charged with the offences set out above frustrates their efforts to bring such accused persons to justice."<sup>216</sup> The Law Society vigorously protested the inclusion of these comments in the Steyn Report and suggested that the Commission had overstepped its mandate; asserting that, "The Steyn Commission selectively subjected the ruling of Mahase J to non-curial review."<sup>217</sup> In non-legal jargon this meant that Mahase was implicated as a person of relevance to the Commission proceedings, yet she was not subpoenaed to testify. This author is not qualified to comment on the merits of the claims surrounding Mahase's conduct as a Judge. However, criticizing and singling out this Judge raises a number of issues and according to Mda, it questions the right of the judiciary to handle bail applications in security related cases.<sup>218</sup>

## 3: Public Harassment on Harvest FM Radio Station

Finally, Justice Mahase has been the subject of further harassment in regards to a recent case between a prominent local businessman and local village authorities, involving a disputed piece of land.<sup>219</sup> The proceedings were protracted and antagonistic and at one point both the applicant and the defendant were placed in jail on contempt of court charges.<sup>220</sup> The village Chief's family members went on a local radio station, Harvest FM, to personally attack Judge Mahase and discuss the case, even though it remained *sub judice*.<sup>221</sup> Justice Mahase has since filed a lawsuit against the radio station seeking retraction of these statements.<sup>222</sup> In a letter to the radio station, Justice Mahase's lawyer posits that the public allegations "[w]ere to the effect that my client was paid a



bribery hence she committed Jobo Mofoka to prison, that she is corrupt and is not fit to be a judge.”<sup>223</sup>

While many Judges complained about this type of public incident; currently it appears that only Justice Mahase has been willing to publicly push back. This can be a risky strategy for judges because it violates the embedded professional norms against speaking or acting outside of the courtroom or off the bench. In this case although the attack did not come from the government, it remains damaging to the professional reputation and integrity of Justice Mahase as an individual judge and subsequently undermines the legitimacy of the Lesotho judiciary as an institution. Strong leadership from within the judiciary to engage and educate the media on appropriate coverage of court matters could be a useful remedial strategy in this instance. Neither public tussles nor litigation are good for the reputation of the individual judge, nor the legitimacy of the institution as a whole.

## **D: Budget Manipulation Resources / Remuneration**

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It is particularly challenging to document budget manipulation; particularly as it relates to intentional withholding of funds. Although there is physical evidence of poor availability of resources and buildings in disrepair, this is certainly not unique to the court. Moving from visual evidence to general claims about the deliberate manipulation of the judicial budget is a substantial leap. Many interviewees both within and outside the institution claimed that the Lesotho judiciary does not receive an adequate budget. One Judge framed the problem in the following way:

“Judges don’t make a lot of noise about this and in the process a lot of things are compromised. The government does not seem to really take it [budget] seriously; although it is a very serious aspect of judicial independence. Besides the budgetary aspect, there is an inability to provide what is already there in the regulations and statutes. But besides that some in our government, like in most African governments interfere directly.”<sup>224</sup>

In his speech at the opening of the new court session in 2011 the Chief Justice highlighted the important of a well-resourced judiciary. An editorial response in the Lesotho Times condemned the Chief Justice for not adopting a more forceful critique of government under-resourcing of the courts.



“This is the same judiciary which almost ground to a halt last year because the courts had run out of funds. The judiciary sector was so broke that it ran out of basics such as pens, printing paper and cartridges. Files, stamps and recording tapes, flash disks and CDs were also in short supply. The judiciary was in a virtual state of paralysis. It is also clear that government is starving the courts of basic resources. These problems must be resolved if the people’s confidence in the judiciary is not to be undermined.”<sup>225</sup>

Again, as far as salary manipulation is concerned, there is no written or definitive evidence to suggest that this is deliberate. One interviewee asserted that, “Judges [h]ave not received fringe benefits since 2006.”<sup>226</sup> Another claimed that the judges know it is intentional withholding because ‘people’ tell them that this is the case:

“The government, they are the ones who pay our salaries, the ones who give us our benefits, and for quite some time now they have been sidelining us [ . . . ] You find them discriminating against us. Because Lesotho is so small you do hear them saying “we are going to fix them” because we refuse to do their bidding.

An example: The Executive wanted to get seat on Judicial Service Commission. We sat down as Judges and the CJ, we discussed it. We told them we didn’t want you represented. Attorney General is de facto member of JSC. They wanted a minister there. Also want Minister of Justice. For us we thought it was not wise. We knew that the minute we allow someone from the executive, we knew that the independence of the judiciary was at stake. So we decided no we are not going to accept this. The Principal Secretary told us that the Prime Minister needs to know who is being appointed to the bench, he doesn’t want to wake up and find out that so and so has been appointed as a judge when he has paid for that person with his money [ . . . ] We said that we would sue them if they tried, so they backed off. They said, let them have that way, but we will show them.”<sup>227</sup>

There is one year when they increased their salaries by close to 80% (ministers and MP’s) Judges got only 1.8%. They really discriminate against us.”<sup>228</sup>

In sum, while it would be reasonable to conclude that the government is under funding the judiciary and underpaying High Court Judges, there is no direct evidence to suggest this is a deliberate or intentional strategy.

## **E: Attempted Cooption of Judges**

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### *Consistent/substantive perceptions of close ties between judges and politicians*

There exists a strong perception of close ties between judges and politicians by individuals within and outside of the judiciary. To return to a theme that has threaded throughout this report, it is perhaps an inevitable consequence of the size of Lesotho and the particularly small size of the Lesotho elite, that people perceive the judges as being closely networked to political elites. That



judges interact with the public on a day-to-day basis is unavoidable; they can however control where they go and how they act. As one informant reflects, “In Lesotho Judges are everywhere. People observe this, judges are not always professional. They don’t help themselves.”<sup>229</sup> Institutions are created because they substitute the personal bonds of trust that exist in small communities. They create and enforce a set of rules by which the rulers and the ruled should abide. In Lesotho the formal institutions of power are competing with informal or normative networks of power. Who you are, who you are related to, who you went to school with, who your children are friendly with, which church you go to, all matter. These relationships become alternative networks of power and influence in any society but in a country as small as Lesotho the impact of these networks is magnified. One informant captured this dynamic in the following way,

“Being a small and close community, well it’s not that small, its 2 million people, but the elites who show up in the court is small, and they all know one another. They went to school together. I think it’s a problem with some of the judges. I think the pressure is sometimes brought there, and it leads to a mistaken understanding in the community that if you get to know the judge or his associates, he will do the right thing by you.”<sup>230</sup>

Mapped on to competing informal networks of power and influence are political loyalties. Given the highly acrimonious, highly divisive nature of Lesotho politics, it is these perceived and/or real political ties that are most damaging to the judiciary. One judge stated, “I am not a member of the political party but found it disturbing, because once you are a member of a political party, they will approach you and say “hi, our cases are coming.”<sup>231</sup> The presumption that political or personal ties will generate a favorable judgment was perceived by some to be modeled at the top of the political system and filtered down. One informant captured this phenomenon in the following way:

“The Prime Minister unfortunately lacks that ability to be objective and be neutral so much that for some of our ministers in government and so on to actually approach a judge or to feel that they are entitled to have a judge who can be told what to say and what to do seems like a small or natural thing. They would actually prefer to have that kind of [judge]. They don’t appreciate the seriousness of a lack of independence in the judges [ . . . ]

I know most of the judges they would not be moved by direct interference. What the government does is different in the sense that they prefer somebody who can be appointed to the position and who will toe the line. They appoint the judges who know what to do. In a lot of cases it is quite an embarrassment because the movement we have is a big line about the prime minister and the chief justice and the judges of appeal. It is really ugly but you can see that the prime minister is leaning one side which you feel they will do whatever he says; it is to the one side that can look after his interests. So there is a lot of mistrust and it has resulted in leaking of confidential information. You can see it’s totally unacceptable and not in the interests of judicial independence.”<sup>232</sup>



Perceptions of close ties between the judiciary and the politicians are both a cause and symptom of a fluid political climate and a politicized judiciary. It is evident that the indirect effects of Lesotho's political climate negative impact the judiciary. Some informants went so far as to posit that the negative effects on the judiciary were part of a deliberate strategy by political elites:

“Lesotho is a typical case of the political parties, or the political party in government, through a remote control, destabilizing the judiciary [ . . . ] [W]e find that destabilization comes from within the judiciary, from the court of appeal, and from the cabinet. Right now the cabinet of Lesotho is divided into two, the factions. These factions in the cabinet are overflowing into the judiciary [ . . . ] It's overflowing into the judiciary, into the public service, into the parliament, and other organs of the state. Lesotho's politicization is so extreme that people are now classified according to whether they are for or against the government. The morale in the public service is the lowest. The public service is rattled with corruption, even right from the Prime Minister's office. So judicial independence is not something that is limited within the parameters of the judiciary.”<sup>233</sup>

In sum, this aspect of judicial interference is the simultaneously the most damaging to perceptions of judicial independence and the most difficult to counter. The judiciary is not located on an island, but is instead embedded in a complex web of political, social and economic ties. The systemic problems far outweigh the minor indiscretions of individual judges.

### ***Substantial evidence of judges receiving material benefits***

In September 2011, the *Lesotho Times* reported that two High Court Judges (in addition to seven other senior government officials) had received parcels of residential land. “Two High Court judges, Justice 'Maseshophe Hlajoane and Nthomeng Majara, have been granted sites numbers 12284-631 and 12284-635 at Maseru Central, respectively.” The Minister of Local Government told the *Lesotho Times* that she was “within the confines of the law” in issuing the parcels of land, she further noted that “the stands were allocated to the beneficiaries as a token of appreciation for the service they had rendered.”<sup>234</sup> Assuming the allocation was indeed legal, the comments of the Local Government Minister leaves the reader with the impression that the two Judges are receiving ‘perks’ above and beyond the statutory salary and benefit provisions of their positions.

A second instance worthy of mention is the buy-out option for official government vehicles. Under this scheme Judges and other senior government officials had the option to purchase their official government-issued vehicles at book value.<sup>235</sup>

Executive interferes in matters of remuneration and benefits. There was a serious scandal two or three years ago, around the vehicles that were used by people in statutory positions.



All of a sudden the government decided that after a particular duration they will give those particular vehicles at very minimum cost, around R4000. The public was very unhappy with that decision. People assumed that the judges were guilty.<sup>236</sup>

Again, perceptions of corrupt practices can be equally damaging as actual corrupt practices in terms of damaging the institutional legitimacy of the judiciary. Even if the buy-out scheme was legitimate and not a significant financial loss to the government; the perception of currying favors through extraordinary perks persists. A plaintiff in an election petition case sought to have the entire bench recused based on evidence related to this alleged 'scandal.'<sup>237</sup>

## Conclusion

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In sum, analysis of judicial interference in Lesotho suggests that while there are no single major, violent or devastating attacks on the Lesotho judiciary, there are a multitude of smaller issues which in concert represent a pervasive, omnipresent threat to judicial independence.

The goals outlined in the executive summary of this report address areas in which the judiciary can be institutionally strengthened. For it is through the creation of a robust, transparent, efficient and independent set of judicial institutions that the rule of law can be secured in Lesotho.



<sup>1</sup>United Nations Development Program, 'Lesotho: Explaining HDI value and rank changes', in *Human Development Report 2011*, at p.3. <http://hdrstats.undp.org/images/explanations/LSO.pdf>.

<sup>2</sup> See 'Implementing the APRM: Views from Civil Society. Lesotho Report. September 2011. [http://www.saiia.org.za/images/stories/research/aprm/aprm\\_lesotho\\_amp\\_report\\_sept\\_2011.pdf](http://www.saiia.org.za/images/stories/research/aprm/aprm_lesotho_amp_report_sept_2011.pdf).

<sup>3</sup> Horizontal accountability refers to the relationship between the various arms of government; vertical accountability refers to the relationship between the state and the people/civil society.

<sup>4</sup> The following are a selection of major international principals: UN Draft Principles on Independence of the Judiciary (1981); International Bar Associations Minimum Standards of Judicial Independence (1982); Montreal Universal Declaration on the Independence of Justice (1983); Beijing Statement of Principles of the Independence of the Judiciary (1995); Universal Charter of the Judge by the International Association of Judges (1999); European Association of Judges Charter (1999); Commonwealth Latimer House Guidelines on Judicial Independence (1999); Bangalore Principles of Judicial Conduct (2002).

<sup>5</sup> ICJ Conference "Lesotho: Judges' Symposium on Judicial Independence, Accountability and Reform in Lesotho", 28 – 30 July 2010, Lesotho Sun Hotel, Maseru, Lesotho. [http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal\\_Documentation&id=23047](http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23047).

<sup>6</sup> Wyndham Hartley, "Executive Superior to Courts Says Zuma", *Business Day*, November 2, 2011 <http://www.businessday.co.za/articles/Content.aspx?id=157561>.

<sup>7</sup> Lekopanye Mooketsi "Ditshwanelo decries Kalafatis' killing" *Mmegi*, 22<sup>nd</sup> May, 2009 <http://www.mmegi.bw/index.php?sid=1&aid=2&dir=2009/May/Friday22>.

<sup>8</sup> "Outcry over secretive hearing on Swazi Judge" *Mail and Guardian*, August 22, 2011. <http://mg.co.za/article/2011-08-22-outcry-over-secretive-hearing-on-swazi-judge>.

<sup>9</sup> "Judges Sister Shot" *Lesotho Times*, May 19<sup>th</sup>, 2011 <http://www.lestimes.com/?p=6114>.

<sup>10</sup> See for example, Rebecca Bill Chavez. *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Palo Alto, CA: Stanford University Press, 2004); Pillar Domingo "Judicialization of Politics or Politicization of the Judiciary: Recent Trends in Latin America," *Democratization*, 11 (2004), 104-26; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003); Gretchen Helmke, *Courts Under Constraints: Judges, Generals and Presidents in Argentina* (New York: Cambridge University Press, 2005); Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (New York: Cambridge University Press, 2007); Pedro Magalhaes, "The Politics of Judicial Reform in Eastern Europe," *Comparative Politics* 23 (1999), 43-62; Shannon Smithey and John Ishiyama, "Judicial Activism in Post-Communist Countries," *Law & Society Review*, 36 (2002), 719-41.

<sup>11</sup> Trochev, Alexei. 2010 "Meddling with Justice: Competitive Politics, Impunity, and Distrusted Courts in Post-Orange Ukraine." *Demokratizatsiya*, 18, no. 2: 122-147; VonDoepp, Peter, and Rachel Ellett. 2011. "Reworking Strategic Models of Executive-Judicial Relations: Insights from New African Democracies." *Comparative Politics*, 43, no. 2: 147-165.

<sup>12</sup> Ellett, Rachel and Alexei Trochev (2010) "Victims, Villains, Heroes or Insurance Providers? Judicial Behavior in Uganda and Ukraine" International Political Science Association RC 09 Annual Meeting (Comparative Judicial Studies), June 21-23<sup>rd</sup>, 2010. Bologna, Italy.

<sup>13</sup> Makoia The *present state of Lesotho's democracy: threats and prospects* lecture at Transformation Resource Centre 'The State Democracy Seminar' Friday 13th July 2007, Manthabiseng Convention Centre, Maseru, p.2.

<sup>14</sup> Richard F. Weisfelder (1976) "The Decline of Human Rights in Lesotho: An Evaluation of Domestic and External Determinants" *Issue: A Journal of Opinion*, Vol. 6, No. 4 (Winter, 1976), pp. 22-33.



<sup>15</sup> See Clark, Tom and Jeffrey Staton (2011) Challenges and Opportunities of Judicial Independence Research, *Law and Courts*, Vol. 2, No.2 (2011), pp.11-12.

<sup>16</sup> Upham, Frank. 2006. "Mythmaking in the Rule-of-Law Orthodoxy" in Promoting the Rule of Law Abroad: In Search of Knowledge, Ed. Thomas Carothers. Washington D.C.: Carnegie Endowment for International Peace, p.89.

<sup>17</sup> See for example, Ellett, Rachel and Alexei Trochev (2010) "Victims, Villains, Heroes or Insurance Providers? Judicial Behavior in Uganda and Ukraine" International Political Science Association RC 09 Annual Meeting (Comparative Judicial Studies), June 21-23<sup>rd</sup>, 2010. Bologna, Italy.

<sup>18</sup> Richard F. Weisfelder (1976) "The Decline of Human Rights in Lesotho: An Evaluation of Domestic and External Determinants" *Issue: A Journal of Opinion*, Vol. 6, No. 4 (Winter, 1976), pp. 25.

<sup>19</sup> Ibid at p.26.

<sup>20</sup> Ibid at p.28.

<sup>21</sup> Khaketla, B.M. 1972. *Lesotho 1970: An African Coup under the Microscope*. Berkeley and Los Angeles: University of California Press, p.210.

<sup>22</sup> Ibid, at p.215.

<sup>23</sup> Ibid, citing Dr. Maphathe, at pp.215-16.

<sup>24</sup> Hatchard, John, Muna Ndulo, Peter Slinn. 2004 *Comparative constitutionalism and good governance in the Commonwealth: an Eastern and Southern African perspective*. Cambridge: Cambridge University Press, p.94.

<sup>25</sup> See Tate, Neil "Courts and Crisis Regimes: A Theory Sketch with Asian Cases" *Political Research Quarterly* June 1993 Vol. 46 no. 2 311-338.

<sup>26</sup> Jacobs cited in Weisfelder, p.29.

<sup>27</sup> Ibid, at p.29.

<sup>28</sup> Ibid, at p.29.

<sup>29</sup> [1989] LRC (Const) 24.

<sup>30</sup> Hatchard, John, Muna Ndulo, Peter Slinn. 2004 *Comparative constitutionalism and good governance in the Commonwealth: an Eastern and Southern African perspective*. Cambridge: Cambridge University Press, p.248-249.

<sup>31</sup> [1988] LSCA 66.

<sup>32</sup> On February 28<sup>th</sup> 2012 Mosisili resigned from the LCD to form a new party the Democratic Congress (DC). The DC became the new government after 45 MPs crossed the floor to his new party. See "Who's who in the Democratic Congress . . ." *Lesotho Times* 29 February, 2012.

<sup>33</sup> Southall, Roger "An Unlikely Success: South Africa and Lesotho's Election of 2002" *The Journal of Modern African Studies* Vol. 41, No. 2 (Jun., 2003), pp. 269-296, at p.290.

<sup>34</sup> ABC party was formed in 2006, when Tom Thabane and a group of 15 other members of the LCD broke away.

<sup>35</sup> Southall, Roger. 2009. *Africa Yearbook: Lesotho 2009*.



<sup>36</sup> Author correspondence with Lesotho academic, April 2012.

<sup>37</sup> *Report of the SADC Lawyers Association fact finding mission to Lesotho*, July 2007, p.29. Downloaded from <http://www.sarpn.org/documents/d0002994/index.php>.

<sup>38</sup> Author interview, Respondent R Johannesburg, SA, October 14<sup>th</sup>, 2011.

<sup>39</sup> Author correspondence with Lesotho academic, April 2012.

<sup>40</sup> Ferguson, James (1994) *The Anti-Politics Machine: "Development," Depoliticization, and Bureaucratic Power in Lesotho*. Minneapolis, London: University of Minnesota Press, p.257.

<sup>41</sup> *Ibid*, at p.106.

<sup>42</sup> *Report of the SADC Lawyers Association fact finding mission to Lesotho*, July 2007, p.29. Downloaded from <http://www.sarpn.org/documents/d0002994/index.php>.

<sup>43</sup> [http://info.worldbank.org/governance/wgi/sc\\_chart.asp#](http://info.worldbank.org/governance/wgi/sc_chart.asp#).

<sup>44</sup> EIU Democracy Index Report 2011 downloaded from [http://www.eiu.com/public/topical\\_report.aspx?campaignid=DemocracyIndex2011](http://www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex2011).

<sup>45</sup> Freedom House 2012 Freedom in the World Report downloaded from [http://freedomhouse.org/sites/default/files/inline\\_images/FIW%202012%20Booklet--Final.pdf](http://freedomhouse.org/sites/default/files/inline_images/FIW%202012%20Booklet--Final.pdf).

<sup>46</sup> A Partly Free country is one in which there is limited respect for political rights and civil liberties. Partly Free states frequently suffer from an environment of corruption, weak rule of law, ethnic and religious strife, and a political landscape in which a single party enjoys dominance despite a certain degree of pluralism.

<sup>47</sup> Southall, Roger "An Unlikely Success: South Africa and Lesotho's Election of 2002" *The Journal of Modern African Studies* Vol. 41, No. 2 (Jun., 2003), pp. 269-296.

<sup>48</sup> Author interview, Respondent A, Johannesburg, South Africa.

<sup>49</sup> *Afrobarometer Lesotho Popular Attitudes toward Democracy in Lesotho: A Summary of Afrobarometer Indicators, 1999-2008* [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.afrobarometer.org%2Findex.php%3Foption%3Dcom\\_docman%26task%3Ddoc\\_download%26gid%3D209&ei=jHsHT\\_PzFYvFsQLd\\_yKSRcG&usg=AFQjCNH1YZNvmZPN2XZmeCnk5vsUram8g](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.afrobarometer.org%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D209&ei=jHsHT_PzFYvFsQLd_yKSRcG&usg=AFQjCNH1YZNvmZPN2XZmeCnk5vsUram8g).

<sup>50</sup> Atlas method (current US\$) 2010.

<sup>51</sup> World Bank Data downloaded from <http://data.worldbank.org/country/lesotho>.

<sup>52</sup> In the 2011 Transparency International Corruption Perceptions Index Lesotho ranked 77 out of 182 countries <http://cpi.transparency.org/cpi2011/>. Interestingly Lesotho is ranked considerably lower in the World Banks Doing Business in the World 2011 Report, 143 out of 183 countries <http://www.doingbusiness.org/rankings>.

<sup>53</sup> Nqosa Leuta Mahao (2005) "Judicial independence and the enforcement of the constitution in Lesotho" *Journal of Commonwealth Law and Legal Education* Vol. 3, Iss. 2, 2005.

<sup>54</sup> *Ibid*, p.54.

<sup>55</sup> [1988] LSCA 66.



<sup>56</sup> Respondent A, October 2011, Maseru, Lesotho.

<sup>57</sup> Ibid, at p.3.

<sup>58</sup> See e.g., *E. Sole v The Crown*, Lesotho Court of Appeal, (CRI) 5 of 2002, judgment delivered 14 April 2003.

<sup>59</sup> Mahao, Nqosa Leuta. (2005) "Judicial independence and the enforcement of the constitution in Lesotho" *Journal of Commonwealth Law and Legal Education* Vol. 3, Iss. 2, 2005.

<sup>60</sup> "New Electoral Law Passed" *Lesotho Times*, June 9<sup>th</sup>, 2011 <http://www.lestimes.com/?p=6265>.

<sup>61</sup> High Court Act (No.4 of 1967), Section 7.

<sup>62</sup> Author correspondence with Lesotho academic, April 2012.

<sup>63</sup> Author interviews, Maseru, Lesotho, October 2011.

<sup>64</sup> Statement by the President of the Court of Appeal, His Lordship Mr. Justice M.M. Ramodibedi, at the Close of the October 2011 session of the court on 21 October 2011. Downloaded from <http://www.lesotholii.org/content/statement-president-court-appeal-his-lordship-mr-justice-mm-ramodibedi-close-october-2011-se>.

<sup>65</sup> Author interview, Respondent S, Maseru, Lesotho, October 2011.

<sup>66</sup> Lesotho Justice Sector Development Programme: the Lesotho Justice Sector, a situation report / by the Secretariat of the Lesotho Justice Sector Development Programme (2005) Maseru, Lesotho.

<sup>67</sup> [2006] LSHC 32.

<sup>68</sup> Cachalia, Azhar (2010) "Administrative Independence as a Guarantee of Judicial Independence: Experiences from South Africa." Address to the International Commission of Jurists Judge's Symposium on Independence, Accountability and Reform in Lesotho, 28 July 2010.

<sup>69</sup> Adel Omar Sherif and Nathan J. Brown, "Judicial Independence in the Arab World," study prepared for the UNDP, Program on Governance in the Arab Region, September 2002, p.13.

<sup>70</sup> Author interview, Respondent M, Maseru, Lesotho, October 2011.

<sup>71</sup> Act No.16 of 2011 Supplement No.1 to Gazette No. 57 of 29<sup>th</sup> July, 2011.

<sup>72</sup> Author interview, Respondent C, Maseru, Lesotho, October, 2011.

<sup>73</sup> Author interview, Respondent N, Maseru, Lesotho, October 2011.

<sup>74</sup> Author interview, Respondent D, October, 2011.

<sup>75</sup> See "Law Society Urges MPs to Probe Graft in Judiciary" *Lesotho Times*, Nat Molomo, December 8, 2011 <http://www.lestimes.com/?p=7863>.

<sup>76</sup> "Judges Boycott Court Cases" *Lesotho Times*, February 9<sup>th</sup>, 2012 <http://www.lestimes.com/?p=8331>.

<sup>77</sup> Ibid.

<sup>78</sup> "Sekoai Lands Deputy PS' Post" *Lesotho Times*, March 8<sup>th</sup>, 2012 <http://www.lestimes.com/?p=8578>.

<sup>79</sup> See, for example, Public Service Act 2005 (Act No. 1 of 2005).



<sup>80</sup> See Statement by the President of the Court of Appeal, His Lordship Mr. Justice M.M. Ramodibedi, at the Close of the October 2011 session of the court on 21 October 2011. Downloaded from <http://www.lesotholii.org/content/statement-president-court-appeal-his-lordship-mr-justice-mm-ramodibedi-close-october-2011-se>.

<sup>81</sup> Ibid.

<sup>82</sup> See <http://www.mcc.gov/pages/countries/overview/lesotho> Lesotho currently ranks 138 (out of 183) in the 2010 World Bank Ease of Doing Business index (see <http://www.doingbusiness.org/~media/FPDKM/Doing%20Business/Documents/Annual-Reports/English/DB11-FullReport.pdf> accessed November 27, 2011).

<sup>83</sup> The Commercial Court is expected to procure its own separate building. Author interview Respondent S, Maseru, Lesotho October 2011.

<sup>84</sup> US Millennium Challenge Corporation Lesotho Compact <http://www.mcc.gov/pages/countries/program/lesotho-compact>.

<sup>85</sup> See Lesotho Table of Key Performance Indicators (Quarter 10 Results: January to March 011) <http://www.mcc.gov/documents/reports/table-commonplus-lesotho.pdf>.

<sup>86</sup> Author interview, Respondent G, Maseru, Lesotho, October, 2011.

<sup>87</sup> Author interview, Respondent C, Maseru, Lesotho, October, 2011.

<sup>88</sup> Author interview, Respondent O, telephone interview, October 2011, Johannesburg, South Africa.

<sup>89</sup> Bangalore Principles of Judicial Conduct 2002, [http://www.ajs.org/ethics/pdfs/Bangalore\\_principles.pdf](http://www.ajs.org/ethics/pdfs/Bangalore_principles.pdf).

<sup>90</sup> Mantoetse Maama "New Mercs for High Court Judges", *Sunday Express*, November 9<sup>th</sup>, 2010 <http://sundayexpress.co.ls/?p=3312> '4+1 Taxi' refers to cars where four people heading in the same direction share the vehicle.

<sup>91</sup> Ibid.

<sup>92</sup> This is the first time a President Justice of the Court of Appeal has received an official car. Past Justices were not full time residents of Lesotho and therefore were not eligible for benefits.

<sup>93</sup> Author interview, Respondent H, Maseru, Lesotho, October, 2011.

<sup>94</sup> "Crap, Tosh and Other Things" *Lesotho Times*, November 3<sup>rd</sup>, 2011 [www.lestimes.com/?p=7551](http://www.lestimes.com/?p=7551).

<sup>95</sup> "Judge's sister shot" *Lesotho Times*, 19 May 2011.

<sup>96</sup> The following are a selection of the major principals: UN Draft Principles on Independence of the Judiciary (1981); International Bar Associations Minimum Standards of Judicial Independence (1982); Montreal Universal Declaration on the Independence of Justice (1983); Beijing Statement of Principles of the Independence of the Judiciary (1995); Universal Charter of the Judge by the International Association of Judges (1999); European Association of Judges Charter (1999); Commonwealth Latimer.

<sup>97</sup> Sec. 121 (8) of the Lesotho constitution. Removal of judges is governed under Sec. 121 (3).

<sup>98</sup> Sec.121 5(a).

<sup>99</sup> See Ellett, Rachel. 2008. Emerging Judicial Power in Transitional Democracies. PhD Dissertation, The Department of Political Science, Northeastern University Boston, Massachusetts, May 2008, pp.202-204.

<sup>100</sup> Ibid, p.397.



- <sup>101</sup> Author interview, Respondent D, Maseru, Lesotho, October, 2011.
- <sup>102</sup> Numerous author interviews, Maseru, Lesotho, October 2011.
- <sup>103</sup> Author interview, Respondent B, Maseru, Lesotho, October 2011.
- <sup>104</sup> Author interview, Respondent C, Maseru, Lesotho, October 19<sup>th</sup>, 2011.
- <sup>105</sup> ICJ Conference “Lesotho: Judges’ Symposium on Judicial Independence, Accountability and Reform in Lesotho”, 28 – 30 July 2010, Lesotho Sun Hotel, Maseru, Lesotho.  
[http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal\\_Documentation&id=23047](http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23047).
- <sup>106</sup> Author interview, Respondent A, Maseru, Lesotho, October, 2011.
- <sup>107</sup> See “Kirby takes over Court of Appeal” Mmegi, August 3, 2010.  
<http://www.mmegi.bw/index.php?sid=1&aid=3911&dir=2010/August/Tuesday3>.
- <sup>108</sup> Author interview, Respondent A, Maseru, Lesotho, October 2011.
- <sup>109</sup> See Ellett, Rachel. 2008. *Emerging Judicial Power in Transitional Democracies*. PhD Dissertation, The Department of Political Science, Northeastern University Boston, Massachusetts, May 2008.
- <sup>110</sup> Lee Epstein and Jack Knight, *The Choices Justices Make*. Washington: C.Q Press (1998): 24.
- <sup>111</sup> Matlosa, Khabele. 2006. *Democracy and Political Governance in Lesotho: Key Issues and Challenges* Background Paper prepared on behalf of the APRM Secretariat, Midrand, Johannesburg, 7th August 2006.
- <sup>112</sup> Author interview, Respondent A, Maseru, Lesotho, October 2011.
- <sup>113</sup> 1977 Tanzania Constitution Sec. 112.
- <sup>114</sup> See Sec. 178 of South Africa Constitution.
- <sup>115</sup> Author interview, Respondent L, Maseru, Lesotho, October 2011.
- <sup>116</sup> Author interview, Respondent F, Maseru, Lesotho, October, 2011.
- <sup>117</sup> Author interview, Respondent A, Maseru, Lesotho, October, 2011.
- <sup>118</sup> Author interview, Respondent O, October 2011, telephone interview, Johannesburg, South Africa.
- <sup>119</sup> Author interview, Respondent A, October, 2011, Maseru, Lesotho.
- <sup>120</sup> Author interview, Respondent L, Maseru, Lesotho, October, 2011.
- <sup>121</sup> Author interview, Respondent J, Johannesburg, October 13, 2011.
- <sup>122</sup> Lesotho Justice Sector Development Programme: the Lesotho Justice Sector, a situation report by the Secretariat of the Lesotho Justice Sector Development Programme (2005) Maseru, Lesotho.
- <sup>123</sup> “PROFESSIONAL CONDUCT AND JUDICIAL ACCOUNTABILITY: ISSUES AND POSSIBLE ENFORCEMENT MECHANISMS” MASERU, LESOTHO, 28 and 29 JULY, 2010 ICJ Conference.
- <sup>124</sup> For example, in Uganda a full-time spokesperson has been hired.



- <sup>125</sup> Author interview, Respondent C Maseru, Lesotho, October, 2011.
- <sup>126</sup> Author interview, Respondent D, Maseru, Lesotho, October, 2011.
- <sup>127</sup> "Top Judges Fight . . ." *Lesotho Times*, October 13, 2011.
- <sup>128</sup> "Chief Justice Petty . . ." *Lesotho Times*, October 20<sup>th</sup>, 2011.
- <sup>129</sup> Author interviews, Maseru, Lesotho, October 2011.
- <sup>130</sup> "Crap, Tosh and Other Things" *Lesotho Times*, November 3<sup>rd</sup>, 2011.
- <sup>131</sup> Author interview, Respondent A, Maseru, Lesotho, October, 2011.
- <sup>132</sup> "Bills Affecting Judiciary Set for Finalisation" Cape Times, summarized in Legal Brief Africa, Issue No. 462 <http://www.legalbrief.co.za/article.php?story=20120113085009727>.
- <sup>133</sup> *Law Society of Lesotho v. Ramodibedi N.O. and Others* (Constitutional Case No. 1/03 [2003] LSHC 89.
- <sup>134</sup> Statement by the President of the Court of Appeal, His Lordship Mr. Justice M.M. Ramodibedi, at the Close of the October 2011 session of the court on 21 October 2011 <http://www.lesotholii.org/content/statement-president-court-appeal-his-lordship-mr-justice-mm-ramodibedi-close-october-2011-se>.
- <sup>135</sup> Author interview, Respondent A, Maseru, Lesotho, October, 2011.
- <sup>136</sup> Basutoland, Bechuanaland Protectorate, and Swaziland Court of Appeal Order in Council S. I.1954 No. 1369.
- <sup>137</sup> See Report of Basutoland Commission 1963.
- <sup>138</sup> Palmer, Vernon and Sebastian Poulter (1972) *The Legal System of Lesotho* Charlottesville, Virginia: The Michie Company Law Publishers, p.470.
- <sup>139</sup> Ellett, Rachel L., *The African Lawyer as Political Insider/Outsider* (2010). American Political Science Association 2010 Annual Meeting Paper. Available at SSRN: <http://ssrn.com/abstract=1643413>.
- <sup>140</sup> Author interview, Respondent A, Maseru, Lesotho, October 2011.
- <sup>141</sup> Note *Law Society of Lesotho v. Cullinan and Another* (CIV/APN/438/04) [2005] LSHC 183.
- <sup>142</sup> Author Interview, High Court Judge, October 18<sup>th</sup>, 2011.
- <sup>143</sup> Author interview, Respondent L, Maseru, Lesotho, October 2011.
- <sup>144</sup> *Law Society of Lesotho v. Cullinan and Another* (CIV/APN/438/04) [2005] LSHC 183.
- <sup>145</sup> "How Makhulu baas resigned in Seychelles" *Swaziland Times*, July 18<sup>th</sup>, 2011. <http://www.times.co.sz/News/30678.html>.
- <sup>146</sup> Ibid.
- <sup>147</sup> "CJ Paid More than Ministers" *Swaziland Times*, July 18<sup>th</sup>, 2011. <http://www.times.co.sz/News/30678.html>.
- <sup>148</sup> Author interviews, Maseru, Lesotho, October, 2011.
- <sup>149</sup> Comments Section, <http://www.times.co.sz/News/30678.html>.



- <sup>150</sup> Author interview, Respondent A, Maseru, Lesotho, October, 2011.
- <sup>151</sup> "LCD to hold special conference at Month's End" *Lesotho Times*, January 5<sup>th</sup>, 2012 <http://www.lestimes.com/?p=8034>.
- <sup>152</sup> "LCD ordered to hold special conference" *Lesotho Times*, December 15, 2011 <http://www.lestimes.com/?p=7897>.
- <sup>153</sup> SADC Lawyers Association Resolutions of the 2011 SADC Lawyers Association Annual General Meeting and Conference <http://www.oamoz.org/Docs/decisoes.pdf>.
- <sup>154</sup> Excerpted from article, Nat Molomo "Lawyers Back Ramodibedi" *Lesotho Times*, August 18<sup>th</sup>, 2011 <http://www.lestimes.com/?p=6796>.
- <sup>155</sup> "Mda Steps Down as Law Society President" *Public Eye Daily* March 16<sup>th</sup>, 2012 <http://www.publiceye.co.ls/2012/03/16/mda-steps-down-as-law-society-president/>.
- <sup>156</sup> <http://www.lesotholii.org/>.
- <sup>157</sup> <http://www.lesotholii.org/content/leslii-launch-speech-his-lordship-hon-mr-justice-lehohla-chief-justice-kingdom-lesotho>.
- <sup>158</sup> Ibid.
- <sup>159</sup> Author interview with Court librarian, October, Maseru, Lesotho, 2011.
- <sup>160</sup> See [www.Afrobarometer.org](http://www.Afrobarometer.org).
- <sup>161</sup> John Gay and Robert Mattes *THE STATE OF DEMOCRACY IN LESOTHO: A REPORT ON THE 2003 AFROBAROMETER SURVEY* Afrobarometer Working Paper No. 32.
- <sup>162</sup> Afrobarometer Lesotho Popular Attitudes toward Democracy in Lesotho: A Summary of Afrobarometer Indicators, 1999-2008 [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.afrobarometer.org%2Findex.php%3Foption%3Dcom\\_docman%26task%3Ddoc\\_download%26gid%3D209&ei=jHsHT\\_PzFYvFsQLdYKSRcg&usg=AFQjCNH1YZNvmZPN2XZmeCnk5vsUram8\\_g](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.afrobarometer.org%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D209&ei=jHsHT_PzFYvFsQLdYKSRcg&usg=AFQjCNH1YZNvmZPN2XZmeCnk5vsUram8_g).
- <sup>163</sup> "Ramphela: Cabinet's talk undermines our intelligence" *Mail and Guardian*, November 25<sup>th</sup>, 2011 <http://mg.co.za/article/2011-11-25-ramphela-cabinets-talk-undermines-our-intelligence/> and more recently, see "ANC Sets its Sights on the Judiciary" *Mail and Guardian*, February 17<sup>th</sup>, 2012 <http://mg.co.za/article/2012-02-17-anc-sets-its-sights-on-the-judiciary/>.
- <sup>164</sup> It is perhaps noteworthy to mention that Mr.Mda is the personal lawyer to Justice President Ramodibedi. Author interview, Respondent J, Johannesburg, South Africa, October, 2011. Mda stepped down as President of the Lesotho Law Society in March 2012.
- <sup>165</sup> Author interview, Respondent G, October 2011, Maseru, Lesotho.
- <sup>166</sup> The Law Society Act 1983 Act No.13 of 1983.
- <sup>167</sup> Author interview, Respondent G, October, 2011, Maseru, Lesotho.
- <sup>168</sup> Author interview, Respondent E, October, 2011, Maseru, Lesotho.
- <sup>169</sup> Author interview, High Court Judge, October 20<sup>th</sup>, 2011.
- <sup>170</sup> Excerpted from "Mda Blasts Incompetent Judges" *Lesotho Times*, 7 April, 2010 <http://www.lestimes.com/?p=3393>.



<sup>171</sup> Author interview, Respondent A, October, 2011, Maseru, Lesotho.

<sup>172</sup> Report of the Africa Commission on Human and People's Rights Promotion Mission to the Kingdom of Lesotho 3-7 April, 2006, p.26.

<sup>173</sup> "Law society AGM fails to take off" *Sunday Express*, December 12, 2011 <http://sundayexpress.co.ls/?p=5731>.

<sup>174</sup> (C of A (CIV) No.5 of 1985) [1985] LSCA 144.

<sup>175</sup> C. Okpaluba & T. Molapo (2005) "Judicial Independence and Impartiality: Foundational Values in Contemporary Basotho Constitutional Jurisprudence" *Lesotho LJ*. Vol.18. No.1.

<sup>176</sup> *Law Society of Lesotho v. Thetsane and Others* (C of A (CIV) 13 of 2010) [2010] LSCA 35.

<sup>177</sup> See, for example, "Society accepts ruling on DPP", *Lesotho Times*, 3 November, 2010; "Law Society under fire", 27 Oct, 2010; "Law Society takes on Thetsane", *Lesotho Times*, 6 October, 2010.

<sup>178</sup> See for example, Nyamnjoh, Francis. (2005) *Africa's Media, Democracy and the Politics of Belonging*. London: Zed Books.

<sup>179</sup> <http://www.lestimes.com/> Accessed December 12, 2011, all articles were marked December 8<sup>th</sup>. Titles were: "Chief Justice to Probe Complaints against Registrar"; "Law Society Urges PM to Investigate Graft in the Judiciary"; "Troubled MKM wants Judge Out"; "High Court Dismisses Call for LCD Leadership Conference"; "Judge Orders Lehohla to Decide on Protest Request."

<sup>180</sup> Author interview, Respondent P, Maseru, Lesotho, October 2011.

<sup>181</sup> Author interview, Respondent A, Maseru, Lesotho, October 2011.

<sup>182</sup> Author interview, Respondent P, Maseru, Lesotho, October 2011.

<sup>183</sup> "Chief Justice to Probe Complaints Against the Registrar", Caswell Tlali, *Lesotho Times*, December 8, 2011. <http://www.lestimes.com/?p=7867>.

<sup>184</sup> Author interviews, Maseru, Lesotho, October 2011.

<sup>185</sup> See for example, Terence Halliday, Lucien Karpik and Malcolm Freeley, eds., *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*. Oxford, UK: Hart Publishing.

<sup>186</sup> Conference Resolutions and Statement of the Southern African Chief Justices Forum Conference held in Johannesburg, South Africa, 13-14<sup>th</sup> August, 2010.

<sup>187</sup> Author interviews with civil society informants, Maseru, Lesotho, October 2011.

<sup>188</sup> Ceremonial Opening of the High Court Official Inauguration of the High Court Building, February 3<sup>rd</sup>, 2003. Address by the Honourable Chief Justice Mr. Lehohla.

<sup>189</sup> Author interview, Respondent E, Maseru, Lesotho October, 2011.

<sup>190</sup> Author interview, Respondent D, Maseru Lesotho, October, 2011.

<sup>191</sup> Author interview, Respondent A, Maseru Lesotho, October, 2011.

<sup>192</sup> *National Executive Committee, Basotho National Party and Others v Molapo* C of A (CIV) 34/2011.

<sup>193</sup> Author interview, Respondent K, Maseru, Lesotho, October, 2011.



<sup>194</sup> *E. Sole v The Crown*, Lesotho court of appeal, (CRI) 5 of 2002, judgment delivered 14 April 2003 by Smalberger JA, Melunsky JA (former judges of the South African Supreme Court of Appeal) and Gauntlett JA (senior counsel in South Africa and former chairman of the South African Bar Council).

<sup>195</sup> *Acres International Limited v The Crown*, Lesotho Court of Appeal, (CRI) 8 of 2002 delivered on 15 August 2003 by Steyn, president of the court, Ramodibedi JA and Plewman JA (a former judge of the South African Supreme Court of Appeal).

<sup>196</sup> *Lahmeyer International GmbH v The Crown*, Lesotho Court of Appeal, (CRI) 6 of 2002, delivered on 7 April 2004 by Steyn, president of the court, Grosskopf JA and Smalberger JA (both former judges of the South African Supreme Court of Appeal).

<sup>197</sup> Darroch, Fiona. 2007. "Lesotho Highlands Water Project: corporate pressure on the prosecution and judiciary" In *Global Corruption Report 2007: Corruption in Judicial Systems*, Transparency International. Downloaded from [www.transparency.org](http://www.transparency.org).

<sup>198</sup> *Economist Intelligence Unit* Political Summary, October 2011 downloaded from <http://www.eiu.com/Default.aspx>.

<sup>199</sup> Judge cited anonymously in "Bail out MKM: Judge" *Lesotho Times*, 15<sup>th</sup> July, 2010. <http://www.lestimes.com/?p=4057>.

<sup>200</sup> "Troubled MKM Creditors want Judge Out" *Lesotho Times*, 8 December, 2011 <http://www.lestimes.com/?p=7857>.

<sup>201</sup> "SA judge to handle MKM" *Sunday Express*, November 8, 2010 <http://sundayexpress.co.ls/?p=3319>.

<sup>202</sup> "Bail out MKM: Judge" *Lesotho Times*, 15<sup>th</sup> July, 2010. <http://www.lestimes.com/?p=4057>.

<sup>203</sup> Author interview, Respondent S, Maseru, Lesotho, October 2011.

<sup>204</sup> *Report of the SADC Lawyers Association fact finding mission to Lesotho*, July 2007, p.29. Downloaded from <http://www.sarpn.org/documents/d0002994/index.php>.

<sup>205</sup> Author interview, Respondent A, Maseru, Lesotho, October, 2011.

<sup>206</sup> Author interviews, Maseru, Lesotho, October 2011.

<sup>207</sup> "High Court Overturns Sex Assault Verdict" *Lesotho Times*, February 15, 2012 <http://www.lestimes.com/?p=8379>.

<sup>208</sup> Author interview, Respondent D, Maseru, Lesotho, October, 2011.

<sup>209</sup> "Judge's Sister Shot" *Lesotho Times*, 19 May, 2011.

<sup>210</sup> *Report of the SADC Lawyers Association fact finding mission to Lesotho*, July 2007. Downloaded from [http://www.sarpn.org/documents/d0002994/SADC\\_Lawyers\\_Association\\_Lesotho\\_mission.pdf](http://www.sarpn.org/documents/d0002994/SADC_Lawyers_Association_Lesotho_mission.pdf).

<sup>211</sup> See *Ibid*, pp.4-5.

<sup>212</sup> *Ibid*, p.5.

<sup>213</sup> SADC Lawyers Report.

<sup>214</sup> The Commission was comprised of Justice Jan Steyn from South Africa (a former President of the Lesotho Court of Appeal); Major-General Abel Shilubane from South Africa; Brigadier Baptista Posholi (a retired army officer from Lesotho); and Lieutenant-Colonel Modiri Kooagile from Botswana. See Southall, Roger Africa Yearbook 2010 Lesotho for background on the workings of the commission.

<sup>215</sup> *Ibid* at p.2.



<sup>216</sup> “Lawyers Query Insurgency Report”, Caswell Tlali, *Lesotho Times*, 20 October, 2010 <http://www.lestimes.com/?p=4661>.

<sup>217</sup> “Lawyers Query Insurgency Report”, Caswell Tlali, *Lesotho Times*, 20 October, 2010 <http://www.lestimes.com/?p=4661>.

<sup>218</sup> Ibid.

<sup>219</sup> *Tlelai v Registrar of Deeds, Ministry of Local Government and Others* CIV/APN/159/2008 [2011] LSHC 93.

<sup>220</sup> “Top Businessman Faces Jail for Ignoring Order”, *Lesotho Times*, 19 June, 2010.

<sup>221</sup> Author interview Respondent E, Maseru, Lesotho, October 2011.

<sup>222</sup> See “Judge Sues Harvest FM Radio Station for M8 Million” *Sunday Express*, August 21, 2011 <http://sundayexpress.co.ls/?p=4968>.

<sup>223</sup> Ibid.

<sup>224</sup> Author interview, Respondent S, Maseru, Lesotho, October, 2011.

<sup>225</sup> Editorial: “Chief Justice’s Speech Skirted Burning Issues”, *Lesotho Times*, February 3<sup>rd</sup>, 2011 <http://www.lestimes.com/?p=5329>.

<sup>226</sup> Author interview, Respondent E, Maseru, Lesotho, October 2011.

<sup>227</sup> Author interview, Respondent M, Maseru, Lesotho, October, 2011.

<sup>228</sup> Author interview, Respondent D, Maseru, Lesotho, October 2011.

<sup>229</sup> Author interview, Respondent P, Maseru, Lesotho, October, 2011.

<sup>230</sup> Author interview, Respondent C, Maseru, Lesotho, October, 2011.

<sup>231</sup> Author interview, Respondent A, Maseru, Lesotho, October, 2011.

<sup>232</sup> Author interview, Respondent S, Maseru, Lesotho, October, 2011.

<sup>233</sup> Author interview, Respondent A, Maseru, Lesotho, October, 2011.

<sup>234</sup> “Judges, Ministers Get Land” Caswell Tlali, *Lesotho Times*, September 1<sup>st</sup>, 11. <http://www.lestimes.com/?p=7000>.

<sup>235</sup> “MP Attacks Prosecution Boss” Nat Molomo, *Lesotho Times*, April 28, 2010 <http://www.lestimes.com/?p=3581>.

<sup>236</sup> Author interview, Respondent L, Maseru, Lesotho, October 2011.

<sup>237</sup> See *Molapo v. Ntsekhe and Others* (CIV/P/2/2007) [2007] LSHC 85.



# Assessing Judicial Independence in Southern Africa: A Benchmark Framework

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## I: Introduction

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*“The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”*

Judicial independence, we agree, is a good thing. But judicial independence is not a normative end unto itself. Rather, an empowered and independent judiciary is seen as critical to economic development, protection of human rights regimes and democratization. Although judicial independence is a contested concept, there is broad consensus in the scholarly literature that it can be captured within or across these three broad macro-level categories:

- Decisional impartiality
- Capacity of judges to see their preferences realized as outcomes, and
- Institutional rules and features that support these other aspects of independence<sup>2</sup>

In order to support the impartiality and capacity of individual judges to realize their preferences, there needs to be a combination of stable institutions with a generous degree of political insularity. Total political insularity is neither possible nor desirable, thus this framework is grounded in the assumption that the judiciary is embedded in local political settings. In order to secure judicial independence we must focus on the peculiarities and specificities of that political setting in combination with universal frameworks and norms. The focus of this framework is on the third category – the institutional rules and the features that support impartial decision making. While formal constitutional protection of separation of powers and judiciary autonomy are necessary, they are not sufficient to secure judicial independence. As the UN Basic Principles on the Independence of the Judiciary indicate, judicial independence is institutional and behavioral. Judicial independence is equally reliant upon the government and other institutions as it is upon the judiciary itself. The approach taken in this framework is interdisciplinary and captures both the informal and formal institutional relationships between courts, government, groups and individuals. In short, this framework moves beyond a rigid, formal constitutional definition of judicial independence to a more holistic approach grounded in the political and economic realities of southern Africa.

## II: Securing Judicial Independence in Southern Africa

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Commencing with the onset of the third wave of democratization<sup>3</sup>, the assumption of many democratization scholars and policymakers alike has been that the courts should and indeed can self-transform into powerful institutions of democratic accountability in the wake of multiparty elections. Moreover subsequent work by scholars of comparative judicial politics<sup>4</sup> has posited that in certain settings a competitive democracy is a necessary requisite for strong judicial institutions. Contrarily, in the cases of highly insecure clientelist or neopatrimonial<sup>5</sup> regimes the transition to multipartyism can create a hostile environment for institutionally



weak judiciaries.<sup>6</sup> For incumbent leaders the risk of losing elections comes with the possibility of criminal prosecution once outside of office<sup>7</sup> and, there is a lack of trust in courts when it comes to delivering the short-term needs of insecure neopatrimonial elites. Well insulated, independent courts do not necessarily make for strong political allies in volatile African electoral settings. Compliant or malleable courts can, however, be powerful tools in a repertoire of control. Courts are one piece of a larger political puzzle, and even the most determined judge will be stymied by a powerful executive.

Across the region the overall perception is that there are inadequate institutional safeguards for the protection of separation of powers. There are a number of ways in which overly powerful executives have interfered with judicial independence in the region. Indeed, even the respected South African judiciary is not immune to executive intimidation. In the wake of two major government losses in the Constitutional Court, President Jacob Zuma suggested that the court should not interfere with the executives “sole discretion” to decide public policy.<sup>8</sup> Also, note recent incidents of extra-judicial killings in Botswana<sup>9</sup>; blatant executive interference in the judiciary of Swaziland<sup>10</sup> and, inadequate security protection for judges in Lesotho.<sup>11</sup> Despite the widespread adoption of multipartyism and the promulgation of expansive liberal democratic constitutions, recent events suggest a failure to fully institutionalize the rule of law. As guardians of the constitution the judiciary is located at the battle lines of this struggle.

In 1996 at its 19<sup>th</sup> Ordinary Session, the African Commission on Human and People’s Rights<sup>12</sup> issued a resolution on the “Respect and the Strengthening on the Independence of the Judiciary.” The text of the resolution reads as follows:

*Noting that justice is an integral part of human rights and a necessary condition for democracy,*

*Considering the importance and the role of the judiciary, not only in the quest for the maintenance of social equilibrium, but also in the economic development of African countries,*

*Recognising the need for African countries to have a strong and independent judiciary enjoying the confidence of the people for sustainable democracy and development,*

*Considering the need to train lawyers in human rights in order to enable them apply judiciously international human rights instruments:*

*1. CALLS UPON African countries to:*

- repeal all their legislation which are inconsistent with the principles of respect of the independence of the judiciary, especially with regard to the appointment and posting of judges;*
- provide, with the assistance of the international community, the judiciary with sufficient resources in order to enable the legal system fulfill its function;*



- *provide judges with decent living and working conditions to enable them maintain their independence and realise their full potential;*
- *incorporate in their legal systems, universal principles establishing the independence of the judiciary, especially with regard to security of tenure;*
- *refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrate*

2. *URGES African judges to organise nationally and regionally, periodic meetings in order to exchange experience and evaluate efforts undertaken in various countries to bring about an efficient and independent judiciary*

The major emphasis of this resolution is on the empowerment and buttressing of institutional independence. From sufficient resources, to adequate pay conditions, to formal independence provisions, to empowerment of judges through regional cooperation and collective evaluation. The only reference made to external interference is the final bullet in section 1. – “refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates.” This is foundational to the creation of an empowered and independent judiciary. Without political restraint, the other institutional aspects are rendered irrelevant. Point 2 offers an interesting insight in that it shifts some agency onto the judges themselves. They must, in other words, be active participants in protecting their independence and, the most effective way to achieve this is through cross-national, inter-regional collaboration and organization.

Below the benchmark framework is outlined in graphic form and then described in more detail.

### **III: Judicial Independence Benchmark Framework**

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There are significant challenges in capturing judicial independence as a numerical/dichotomous variable. Judicial independence is a composite concept that is best located on a continuum, i.e. more or less independence. The methodology used to apply this framework will be in-depth qualitative analysis. Some elements of judicial independence identified will simply need to be noted as present or absent (i.e. constitutional provisions/statutes). Other aspects, such as analysis of key judgments and pervasiveness of corrupt practices, will require in-depth analytic narratives. Most important will be the location of judicial independence elements in social, economic, political and legal change. We cannot theorize judicial independence in the abstract; analysis has to be situated in specific locales and judicial reform may vary in sequence across different settings. Formal institutions do not necessarily behave in the same way across states.

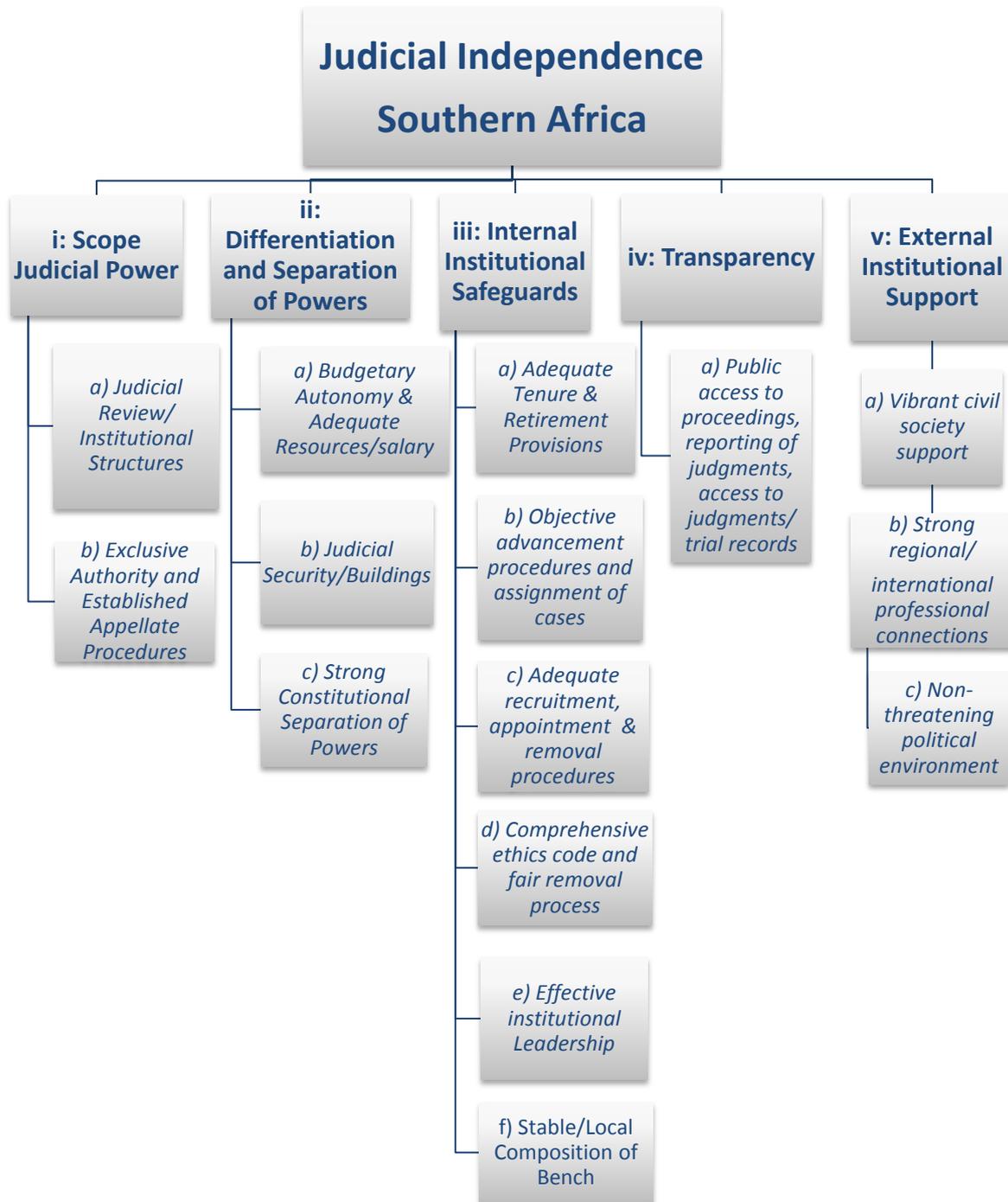


This framework does not conflate a politicized judiciary with a lack of judicial independence. Instead I take up the challenge issued by Frank Upham to, “Instead of focusing on the depoliticization of the judiciary, international financial institutions and other international purveyors of the new rule of law orthodoxy should be concerned with the judiciary’s legitimacy and effectiveness, not its political purity.”<sup>13</sup> Courts are political institutions; but politics and corruption need to be carefully picked apart when analyzing judicial independence. The policy implications of this approach are that judicial reform cannot merely be a technical form of assistance. Indeed, it is possible to consider a scenario where the courts are so independent that they are rendered insulated from mechanisms of accountability and transparency. Or in clientelist regimes too much judicial independence may insulate judges from support systems, but render them vulnerable to interference from autocratic leaders.<sup>14</sup>

The framework organizes judicial independence into five broad descriptive categories (i-v in Figure 1 below). Within those broad descriptive categories are a number of sub-elements. These sub-elements combine checklist items with the need for descriptive analysis. Category i *Scope of Judicial Power* and Category ii *Differentiation and Separation of Powers* focuses on the formal legal and political distribution of power as it relates to the judiciary. Category iii *Internal Institutional Safeguards* examines the internal factors – both formal and informal – that shape and protect judicial independence. Category iv *Transparency* speaks to the need for access to information in order to monitor judicial independence. Finally, Category v *External Institutional Support* articulates the significance of ‘judicial allies’ in buttressing strong judicial institutions.



**Figure 1: Sub-Components of Judicial Independence<sup>15</sup>**





## **i: Scope of Judicial Power**

First and foremost it is important to establish the degree of judicial power. Discussions around independence are rendered meaningless if the court has severely limited jurisdiction and weak powers of judicial review.

### *a) Judicial Review (administrative and legislation)/Institutional Structure*

Ascertaining whether a court has full, concrete judicial review over administrative action and legislation is a key starting point. In addition, there can be significant structural differences across judicial institutions which can impact access to the courts. Narrowly written *locus standi* laws can prevent cases coming to the courts in the first place. Additionally, expansive ouster clauses can further restrict access. These clauses are prevalent across sub-Saharan Africa and date back to the colonial period.

Differences in institutional structure may impact judicial power and independence. For example, the establishment of a constitutional court may attract a greater number of cases if it is well-staffed, efficient and independent. It is able to develop a level of expertise in rapidly handling constitutional matters.

Finally, a question distinct to the region of southern Africa is the continued existence of ad hoc appellate courts. These courts convene two or three times a year and efficiently dispose of pending appeals. Some of the concerns central to the institutional structure are, 1) the impact in terms of building institutional legitimacy and strength; 2) whether there is a significant enough body of case law to warrant a permanent appellate court and 3) the ability of each country to staff a permanent appellate court with citizen judges.

### *b) Exclusive Authority and Established Appellate Procedures*

Dating back to colonial rule, it is not uncommon in commonwealth Africa to have parallel judicial institutions (sometimes referred to as “special courts” or “specialized courts” or “exceptional courts”). In some cases these courts are legitimate and enhance the dispensation of justice. In others cases, such as Uganda, military tribunals may attempt to unconstitutionally expand their jurisdiction to usurp the power of the conventional courts.<sup>16</sup> If the constitution is supreme the judiciary must be vested with the sole authority to interpret the full constitutionality of legislation and administrative action. Witness, for example, the non-judicial review of constitutional matters in Ethiopia.<sup>17</sup> Finally lower courts decisions must only be overturned by established appellate procedures.



## ii: Differentiation and Separation of Powers

According to McGuire (2004), differentiation of the judiciary from the political environment is the principal indicator of an institutionalized political organization.<sup>18</sup> Publics have to be able to perceive the judiciary as being substantively and figuratively separate from other political institutions. A fully institutionalized judiciary generates a stronger sense of legitimacy and is better able to resist political interference.

### a) *Budgetary Autonomy & Adequate Resources/Salary*

Assuming control of the budget is particularly crucial in developing countries. Judiciaries are frequently at the mercy of powerful executives and legislatures. In many African settings budget needs are articulated through the Ministry of Justice, resulting in the potential watering down or distortion of real needs. Lack of participation of the judiciary in the budget formulation process can seriously undermine judicial independence. Further, judges should be able to oversee the distribution of resources. The lack of an independent budget source can be used as a form of constraint. Constraints can range from institutional underfunding to suppressed judicial salaries. If judicial salaries are too low the institution will be unable to attract qualified appointees. Existing judges unable to support their salaries will be far more vulnerable to bribery and corruption.

There are significant concerns about the jurisprudential resources of African courts. It is not unusual for a judge not to have access to a complete set of national laws, access to foreign law, law journals, etc. Many studies have cited interviews with judges who cannot even gain access to their colleagues written judgments. The failure to peer-review judgments is surely a significant barrier to the fulfillment of an effective court system.

### b) *Judicial Security/Buildings*

The physical condition of many African courts is sub-standard. This can lower the speed at which justice is dispensed, lower the morale of judges, and can even impact the safety of judges and other court personnel.

Personal security is an ever present danger for judges in both the developed and developing world. The threat of violence (sometimes deadly), kidnappings and intimidation is a real and present problem. This may include direct attacks on specific judges or their families. In African jurisdictions it is common for judicial leadership to have twenty-four hour security protection, but not necessarily the *puisne* judges.



c) *Separation of Powers Provision*

Because of the continued abuse of executive power in sub-Saharan Africa it is imperative that the cornerstone of judicial independence be a strong articulation of the separation of powers in the constitution. The judiciary, as guardian of the constitution, must insure that the exercise of public power is done so legally. Moreover, in their role as guardian of the constitution the court must be protected from undue interference from either the legislature or the executive branch. Separation of powers provisions range from weak to robust. Here Chapter 41 of the Constitution of South Africa can be considered a robust separation of powers provision:

**41 Principles of co-operative government and intergovernmental relations**

(1) All spheres of government and all organs of state within each sphere must-

(a) preserve the peace, national unity and the indivisibility of the Republic;

(b) secure the well-being of the people of the Republic;

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

(d) be loyal to the Constitution, the Republic and its people;

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and [ . . . ]

**iii: Internal Institutional Safeguards**

Internal institutional safeguards form the basic scaffolding of judicial independence. Many of these safeguards are enshrined in the multitude of international standards on judicial independence.<sup>19</sup>



The following reflect some of the general categories addressed in these international instruments:

a) *Tenure & Retirement Provisions*

Security of tenure is one of the foundational planks of judicial independence. Weak tenure provisions and/or flawed disciplinary procedures render judges vulnerable to political removal. In sub-Saharan Africa executive domination of appointments renders tenure security as essential. The makeup of Judicial Service Commissions substantially varies from country to country; from expansive (such as South Africa) to the narrow (Lesotho). Appointment procedures to the Judicial Service Commission in Africa frequently render the committees vulnerable to Executive interference.

The UN Basic Principles on Judicial Independence stipulate that “Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”<sup>20</sup> In some African countries this system is compromised by a (actual or perceived) shortage of judges. Judges’ contracts are regularly negotiated and extended beyond retirement age. In each case this occurs through direct negotiation with the executive branch. Elsewhere, tenure is rendered obsolete through the use of provisional or acting judges. In certain cases, tenured high court judges are concurrently appointed as acting judges to the Supreme Court. In Southern Africa specifically there continues to be a significant number of expatriate judges in the highest level courts. There are concerns around their appointment and contractual provisions that need to be assessed.

b) *Objective advancement procedures and assignment of cases*

Clear, objective and transparent advancement procedures are essential. According to the *Beijing Principals*, “Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience.”<sup>21</sup>

Courts are hierarchical institutions. This is true within, and between judicial institutions. Lower courts are supposed to follow the higher courts precedence. Further, there is a hierarchy of individual judges within each of the courts. Often this hierarchy can restrict judicial independence when questions of career advancement are shrouded in mystery and secrecy. Assignment of cases should purely be an internal matter and should not involve forum shopping to specific perceived pro-government or pro-business judges. In sub-Saharan Africa there sometimes appears to be politicization of case assignment in high stake cases –



this is particularly true in countries where there is open jurisdiction, i.e. cases can be filed in any court regardless of where the original complaint originates (see Tanzania for example). Sub-Saharan African jurisdictions have been slow to modernize judicial operations through information technology, and implementation of case tracking and management systems. Thus, in many jurisdictions Chief Justices or Principal Judges accrue significant amounts of discretionary power in the allocation of cases.

c) *Adequate recruitment & appointment procedures*

Recruitment of judicial appointees should be completed in a transparent, timely and independent manner. Commonly, the recruitment process across sub-Saharan Africa is opaque at best and highly politicized at worst. There are clearly concerns with regards to recruiting high quality judges who represent a broad swath of society (gender, ethnicity, etc.) but there are also challenges in finding enough qualified individuals. This is why we still see the frequent recruitment of expatriate judges in Southern Africa.

Judicial selection procedures are often the most scrutinized and most controversial aspects of judicial independence. In sub-Saharan Africa the ultimate power of appointment typically lies in the hands of the President/Prime Minister, with only an advisory role being taken by the Judicial Appointments/Service Commission. Furthermore, representatives on the Judicial Appointments/Service Commission rarely represent a broad segment of society (South Africa is exceptional here) and are often appointed by the President.

d) *Comprehensive Ethics Code and Fair Removal Process*

Many countries have adopted a code of ethics for judges. The international standard on this is embodied by the *Bangalore Principles of Judicial Conduct*. These codes are simultaneously forms of transparency and accountability. Additionally, a code of conduct creates a framework of protection for judges, particularly with regards to their illegal removal or attempted impeachment procedures. An explicit Code of Conduct would have been helpful to the judges targeted for impeachment in Malawi in 2003. Codes of conduct cover a range of different domains and may also explicitly address restrictions on the political activity of judges. The *UN Basic Principles* outline a number of protections for judges from unlawful removal. Judges should be given the right to a fair hearing, and the ruling of that hearing should be subject to independent review. *“Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties”*.<sup>22</sup> Finally, the initial basic mechanisms for sanctioning judges should be contained within the judiciary itself: it should self-regulate. Frequently there the use of vague language creates a situation where legal processes can be hijacked for political means.



e) *Effective Institutional Leadership*

Given the myriad challenges facing courts in southern Africa, there is significant pressure placed on judicial leadership to advocate on behalf of the institution, maintain harmony and morale within the institution and to protect the institution from external influence. The role of the Chief Justice thus spans a wide range of important roles of duties. The public face of these duties is formal and certainly important. However, in challenging or threatening political climates with weak economic support behind the scenes judicial leadership becomes crucial. For example, in the face of an untenable budget crisis Tanzania's Chief Justice Nyalali reached out directly to international aid donors, who offered both financial support and professional development assistance, as a part of his efforts to make the judiciary matter.<sup>23</sup> In the case of controversial or politically challenging judgments, the Chief Justice may attempt to "smooth the way" in advance of publicly reading the judgment.<sup>24</sup> These types of informal interactions between judicial leadership and the political regime are a type of interference. But in challenging or hostile political settings, they may be manipulated into form of protection for the judiciary and, provide a mechanism through which at least a façade of judicial integrity is provided to the public. If we accept that strong personal networks and patrimonial ties are a permanent fixture of African politics, then securing a politically astute leader at the headship of the judiciary can be an important component of judicial independence.

f) *Stable/Local Composition of Bench*

There are three types of judicial appointment: a) Permanent, b) fixed-contract and c) a short-term acting appointment. The appointment of expatriate judges on contract can be a helpful short term solution in settings where recruitment and appointment of local judges is difficult. African lawyers are frequently not attracted to a career on the bench because the pay is significantly lower than the amount they would receive in private practice. Bringing in outside expertise is a useful way to relieve the burden on an already burdened institution. Hatchard, et al. discusses this practice:

Difficulties in recruiting adequate numbers of suitably qualified local candidates to the Bench has led to the appointment of expatriate judges on fixed-term contracts in several Eastern Southern African states (Kenya, Lesotho, Zambia, Zimbabwe, and Uganda have all at one time of another appointed expatriates as full-time contract judges. Given that such a position may also appeal to prospective appointees who may wish to commit themselves to a new jurisdiction until retirement age, the contract system has some mutual benefits. For jurisdictions



with smaller workloads, part-time appointments to the apex court have also proved useful. This is the case in both Botswana and Namibia where some highly distinguished expatriate judges have contributed significantly to the development of constitutional rights.<sup>25</sup>

However, in the long-term there are several problems with this practice. First, expatriate judges are not necessarily best equipped to understand and operate in a society/culture different from their own. Second, short-term acting judges are hypothetically more vulnerable to corruption and interference because they are on fixed terms or temporary contracts. In other words a future decision regarding contract renewal may potentially affect their judgment in certain cases. As Hatchard, et al. illustrate with this case from Kenya:

The pressures that can be brought to bear on such judges are well illustrated by the case of Justice Derek Schofield in Kenya. In 1987 the expatriate contract judge was told by the then Chief Justice (also an expatriate contract judge) that if he persisted in dealing with a sensitive case involving the police in a particular way, the Chief Justice was going to have difficulty in recommending a renewal of contract. As Schofield himself has noted, ‘. . . If that was the price I had to pay for a renewal of contract I was not prepared to pay it’ and he subsequently left the country at the expiration of his contract.<sup>26</sup>

A perception that the executive is packing the apex court with compliant expatriate judges is clearly a significant obstacle to legitimizing the judiciary. Regardless of their ‘actual independence’, the critically important aspect of failures to indigenize the bench is ‘perception of independence’. The use of expatriate judges symbolically perpetuates the perceived notion that the judiciary is an imported, colonial institution remote from the concerns and needs of the local population. Further, in instances where expatriate judges are brought in to specific cases it may undermine the authority/perceived independence of local judges.

The use of short-term local contract judges can also be problematic. Chief Justices may bring in these judges from private practice to sit in a regional court, for a specified period of time to assist in the clearing of case backlog. Presumably however, that judge will then go back to being a private practice lawyer and could appear before one of her “colleagues.” In this instance it is more desirable to expand the permanent bench to a point at which the case backlog is kept under control. This is a band aid fix to a long-term structural/budgetary problem and could potentially undermine judicial independence.

Finally, there are numerous documented instances of judges serving in multiple jurisdictions concurrently. The current President of the Court of Appeal in



Lesotho, Justice Michael Ramodibedi also serves as Chief Justice in Swaziland, as a Judge in the Botswana Court of Appeal and at one point also served as a Justice of Appeal in Swaziland. This leads to a hypothetical scenario where political pressure brought to bear in one jurisdiction may impact the behavior of that same judge in another jurisdiction. While this practice originates from the shared legal institutions of British colonialism there is little justification for this practice today. It appears to be unnecessary at best and a threat to judicial independence at worse.

#### **iv: Transparency**

Opaque court processes prevent civil society and the media from monitoring the courts.

- a) *Public access to proceedings, reporting of judgments, access to judgments/trial records*

According to Latimer House Guidelines, “Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public. Superior Court decisions should be published and accessible to the public and be given in a timely manner.”<sup>27</sup> Similarly, the Madrid Principles<sup>28</sup> highlight the importance of both fair reporting by the media and access by the courts themselves.

Thanks to the remarkable work of the Southern Africa Legal Information Institute (SAFLII)<sup>29</sup> remarkable gains have been made in providing access to judgments. Across African jurisdictions official law reports have been sporadic at best, but in many cases dormant for many years now. The advent of SAFLII and the slow spread of computer technology mark the beginning of a legal information revolution.

Technology is also key to improved tracking of cases through electronic case management systems. These case tracking systems provide important data on the performance of judges through individualized docket systems. Transparency in this regard can be a powerful protectant against political interference.

There is increased attention given to the role of the media in upholding the rule of law in recent years. The Konrad-Adenauer-Stiftung organization recently published a media handbook designed to enhance the capacity of the media as regards to their role reporting on the rule of law.<sup>30</sup>

There are numerous challenges to achieving a strong relationship between the media and the judiciary in sub-Saharan Africa. Journalists will complain about a lack of access to judges, tardy publication of judgments and an often baffling and technical legal language. Judges will frequently complain about shoddy and



inaccurate writing on the part of unprofessional journalists and their weak understanding of the law. However, judges frequently use the media as a tool to fight back against interference or perhaps to fight internal battles within the judiciary by leaking important documents or information to journalists. This is a high-risk strategy because it may help achieve short-term goals, but ultimately can serve to delegitimize the institution.

#### **v: External Institutional Support**

In transitioning states weakly institutionalized judiciaries may rely on support from key lies more frequently than in established liberal democracies. Legitimate public criticism is a way of ensuring judicial accountability and protecting judicial independence. There is a vast body of research investigating published reaction to judicial decisions, judicial appointments and general attitudes toward the legitimacy of the institution.<sup>31</sup> This is best captured through large scale surveys. However, it may also be tracked through newspaper articles and interviews with key individuals. Below I outline key sources of support and important factors related to the generation of perceived institutional legitimacy:

##### *a) Vibrant civil society support*

Generating the support of major stakeholders and groups in society is essential to the ability of judges to stand up to political interference. Support can serve as a latent force that shapes judicial behavior – both a restrictive and enabling latent force. Nonetheless, this variable is to a certain degree endogenous; meaning public support hinges upon existing perceptions of the judiciary as independent and legitimate.

There are a multitude of law-related NGO's in southern Africa. They can simultaneously serve as critics and supporters of judicial independence and the Rule of law. Both roles are essential to ensuring transparency, maintaining dialogue and judicial accountability. Over time these organizations may also serve as alternative potential recruiting grounds for judges. Pulling judges from a wide and diverse set of backgrounds is important to building robust courts.

##### *b) Strong regional/international professional connections*

There are a number of different roles regional and international law associations can play. Certainly there are important professional development reasons for active involvement of individual judges in professional associations. However, I highlight regional/international professional associations in the context of sub-Saharan Africa because they are important allies in politically unstable or crisis situations. Judges are constrained by professional norms that restrict off-bench speech and behavior. Regional/international organizations can both highlight problems and advocate on behalf of beleaguered courts or individual judges.



Witness here the advocacy on behalf of the beleaguered Swazi Judge Thomas Masuku by domestic and regional law societies, the International Commission of Jurists, etc.

To return to the African Commission on People and Human Rights resolution on judicial independence, they “2. *URGE African judges to organise nationally and regionally, periodic meetings in order to exchange experience and evaluate efforts undertaken in various countries to bring about an efficient and independent judiciary.*”<sup>32</sup> Regional exposure to best practices, to comparative judicial salary and benefits data, to the sharing of judgments is more than just professional development; it can be a powerful way to leverage pressure on recalcitrant executives.

c) *Non-Threatening Political Environment*

While all the factors described heretofore are essential to maintaining judicial independence they are not sufficient. If a judiciary is operating in a threatening political environment then formal constitutional protections, strong leadership or even strong civil society allies will not be enough to protect them from incursion.

Political elites can be directly and/or indirectly threatening. Below is a taxonomy of judicial interference in southern Africa. It is equally important to understand strategies of interference which seek to undermine judicial independence as it is to identify factors that support and protect judicial independence.

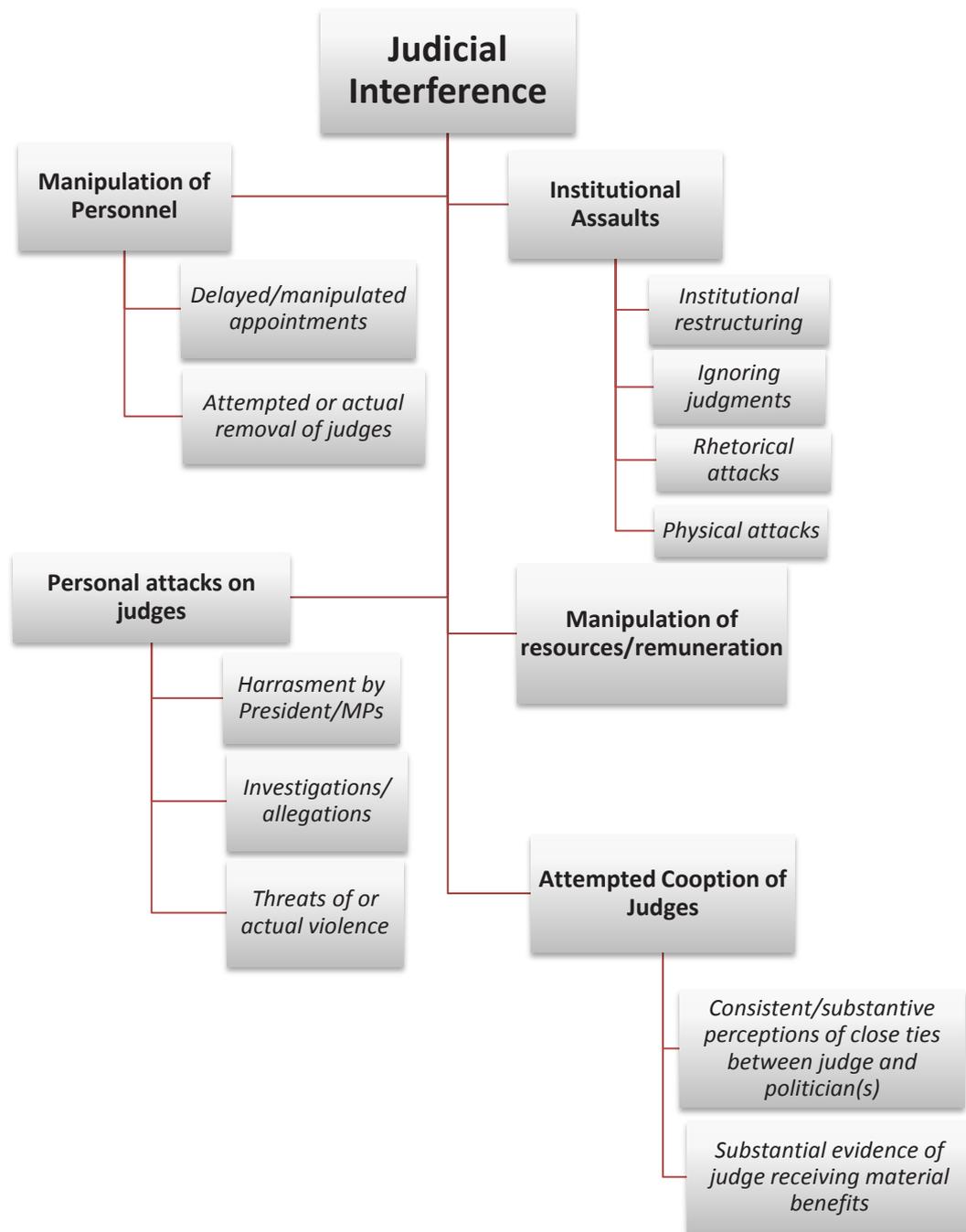
### **III: Rubric for Cataloguing Judicial Interference<sup>33</sup>**

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While it is clearly important to outline the ways in which judicial independence is preserved and buttressed, it is also important to generate a taxonomy of what judicial *dependence* can look like. There are a myriad of ways in which governments can interfere with the judiciary. Below, Figure 2 is taxonomy of specific types of attacks that can be catalogued over time. Incidents will be tracked year to year by totaling the number of incidents (where identified) within and across categories.



**Figure 2: Taxonomy of Judicial Interference in Southern Africa**





## Appendix A:

**Table 1: Judicial Independence in Southern Africa**

Outcome Indicators	Definition	2011 Benchmark	Outcome/Policy Goal
<b>I: Scope of Judicial Power</b>			
Concrete Judicial review/institutional structures			
Exclusive authority and est. appellate procedures			
<b>II: Differentiation and Separation of Powers</b>			
Budgetary Autonomy and Adequate Resources/Salary			
Judicial Security/Buildings			
Strong separation of powers provision			
<b>III: Internal Institutional Safeguards</b>			
Adequate Tenure and Retirement Provisions			
Objective advancement procedures and assignment of cases			
Adequate recruitment, appointment and removal procedures			
Comprehensive ethics code and fair removal process			
Strong institutional leadership			
Stable/local composition of bench			
<b>IV: Transparency</b>			
Public access to proceedings, reporting of judgments, access to judgments/trial records			
<b>V: External Institutional Support</b>			
Vibrant civil society support			
Strong regional/international professional connections			
Non-threatening Political environment			



<sup>1</sup> United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Hereinafter, UN Basic Principle.

<sup>2</sup> See Clark, Tom and Jeffrey Staton (2011) Challenges and Opportunities of Judicial Independence Research, *Law and Courts*, Vol. 2, No.2 (2011), pp.11-12.

<sup>3</sup> Huntington, Samuel. 1991. *The Third Wave: Democratization in the Late Twentieth Century*. Norman, OK: University of Oklahoma Press.

<sup>4</sup> See for example, Rebecca Bill Chavez. *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Palo Alto, CA: Stanford University Press, 2004); Pillar Domingo "Judicialization of Politics or Politicization of the Judiciary: Recent Trends in Latin America," *Democratization*, 11 (2004), 104-26; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003); Gretchen Helmke, *Courts Under Constraints: Judges, Generals and Presidents in Argentina* (New York: Cambridge University Press, 2005); Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (New York: Cambridge University Press, 2007); Pedro Magalhaes, "The Politics of Judicial Reform in Eastern Europe," *Comparative Politics* 23 (1999), 43-62; Shannon Smithy and John Ishiyama, "Judicial Activism in Post-Communist Countries," *Law & Society Review*, 36 (2002), 719-41.

<sup>5</sup> For review and critique of the use of this concept see Pitcher, Anne, Mary H. Moran and Michael Johnston "Rethinking Patrimonialism and Neopatrimonialism in Africa." *African Studies Review* 52.1 (2009): 125-156.

<sup>6</sup> Trochev, Alexei. 2010 "Meddling with Justice: Competitive Politics, Impunity, and Distrusted Courts in Post-Orange Ukraine." *Demokratizatsiya*, 18, no. 2: 122-147; VonDoepp, Peter, and Rachel Ellett. 2011. "Reworking Strategic Models of Executive-Judicial Relations: Insights from New African Democracies." *Comparative Politics*, 43, no. 2: 147-165.

<sup>7</sup> Note the successful prosecution of former President Chiluba of Zambia, attempted prosecution of former President Muluzi of Malawi (both ousted by opposition), and threatened prosecution of former Prime Minister Lowassa of Tanzania. Ugandan opposition leader Kizza Besigye was recently injured by police and forced to flee the country in the wake of the 2011 post-election protests. Chairman of the Tanzanian opposition CHADEMA party was recently arrested and charged in court for holding illegal protests.

<sup>8</sup> Wyndham Hartley, "Executive Superior to Courts Says Zuma", *Business Day*, November 2, 2011 <http://www.businessday.co.za/articles/Content.aspx?id=157561>.

<sup>9</sup> Lekopanye Mooketsi "Ditshwanelo decries Kalafatis' killing" *Mmegi*, 22<sup>nd</sup> May, 2009 <http://www.mmegi.bw/index.php?sid=1&aid=2&dir=2009/May/Friday22>.

<sup>10</sup> "Outcry over secretive hearing on Swazi Judge" *Mail and Guardian*, August 22, 2011 <http://mg.co.za/article/2011-08-22-outcry-over-secretive-hearing-on-swazi-judge>.

<sup>11</sup> 'Mantoetse Maama "Judges Sister Shot" *Lesotho Times*, May 19<sup>th</sup>, 2011. <http://www.lestimes.com/?p=6114>.

<sup>12</sup> The African Commission at its 19th Ordinary Session held from 26th March to 4th April at Ouagadougou, Burkina Faso, ACHPR /Res.21 (XIX) 96: Resolution on the Respect and the Strengthening on the Independence of the Judiciary (1996). Downloaded from [http://www.achpr.org/english/resolutions/resolution26\\_en.html](http://www.achpr.org/english/resolutions/resolution26_en.html).

<sup>13</sup> Upham, Frank. 2006. "Mythmaking in the Rule-of-Law Orthodoxy" in *Promoting the Rule of Law Abroad: In Search of Knowledge*, Ed. Thomas Carothers. Washington D.C.: Carnegie Endowment for International Peace, p.89.



<sup>14</sup> See for example, Ellett, Rachel and Alexei Trochev (2010) "Victims, Villains, Heroes or Insurance Providers? Judicial Behavior in Uganda and Ukraine" International Political Science Association RC 09 Annual Meeting (Comparative Judicial Studies), June 21-23<sup>rd</sup>, 2010. Bologna, Italy.

<sup>15</sup> Portions of this framework are broadly adapted from the American Bar Association *Judicial Reform Index (JRI)*.

<sup>16</sup> See Ellett, Rachel. 2008. *Emerging Judicial Power in Transitional Democracies: Malawi, Tanzania and Uganda*. Unpublished doctoral dissertation, Northeastern University.

<sup>17</sup> Mgbako, Chi, Sarah Braasch, et al. 2008. "Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights" *Fordham International Law Journal*, Vol. 32, Issue 1, Article 15.

<sup>18</sup> McGuire, K. T. 2004. "The Institutionalization of the U.S. Supreme Court." *Political Analysis* 12(2): 128–42, at p.130.

<sup>19</sup> The following are a selection of the major principals: UN Draft Principles on Independence of the Judiciary (1981); International Bar Associations Minimum Standards of Judicial Independence (1982); Montreal Universal Declaration on the Independence of Justice (1983); Beijing Statement of Principles of the Independence of the Judiciary (1995); Universal Charter of the Judge by the International Association of Judges (1999); European Association of Judges Charter (1999); Commonwealth Latimer House Guidelines on Judicial Independence (1999); Bangalore Principles of Judicial Conduct (2002).

<sup>20</sup> UN Basic Principles on the Independence of the Judiciary, Principle 12.

<sup>21</sup> *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, doc. cit.*, operative paragraph 17.

<sup>22</sup> UN Basic Principals, Principal 18.

<sup>23</sup> Widner Jennifer. 2001. *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa*. W.W.W. Norton & Co.

<sup>24</sup> See Ellett, Rachel. 2008. *Emerging Judicial Power in Transitional Democracies: Malawi, Tanzania and Uganda*. Unpublished doctoral dissertation, Northeastern University.

<sup>25</sup> Hatchard, John, Muna Ndulo, Peter Slinn. 2004 *Comparative constitutionalism and good governance in the Commonwealth: an Eastern and Southern African perspective*. Cambridge: Cambridge.

<sup>26</sup> *Ibid*, at p.159 University Press, p.159.

<sup>27</sup> Latimer House Guidelines, Section IV (d).

<sup>28</sup> A group, convened by the International Commission of Jurists (ICJ) met for three days in Madrid from 18 to 20 January 1994. In short, they concluded that Freedom of the media, which is an integral part of freedom of expression is essential in a democratic society governed by the Rule of Law. It is the responsibility of judges to recognise and give effect to freedom of the media by applying a basic presumption in their favour and by permitting only such restrictions on freedom of the media as are authorised by the International Covenant on Civil and Political Rights ("International Covenant") and are specified in precise laws. Available at



<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/ba4aa28729b3df7180256775004ec1c4?Opendocument>.

<sup>29</sup> <http://www.saflii.org/>

<sup>30</sup> <http://www.kas.de/rspssa/en/events/45834/>.

<sup>31</sup> See for example J. Gibson, G. Caldeira, and V. Baird (1998) "On the Legitimacy of National High Courts." *APSR* 92: 343-358.

<sup>32</sup> The African Commission at its 19th Ordinary Session held from 26th March to 4th April at Ouagadougou, Burkina Faso, ACHPR /Res.21 (XIX) 96: Resolution on the Respect and the Strengthening on the Independence of the Judiciary (1996). Downloaded from [http://www.achpr.org/english/resolutions/resolution26\\_en.html](http://www.achpr.org/english/resolutions/resolution26_en.html).

<sup>33</sup> This is broadly adapted from VonDoepp, Peter and Rachel Ellett (2011) "Reworking Strategic Models of Executive-Judicial relations: Insights from New African Democracies" *Comparative Politics*, Vol.43, No.2, January 2011, pp.147-165.