

# REPORT OF THE 2018 FACT-FINDING MISSION ON EFFECTING JUDICIAL REFORMS TO

*SECURE THE STABILITY, INDEPENDENCE  
AND ACCOUNTABILITY OF THE JUDICIARY*

**FOR THE ENHANCEMENT  
OF THE RULE OF  
LAW IN LESOTHO**



**By the African Judges and Jurists Forum  
(Report prepared by Itumeleng Shale (PhD))**



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## EXECUTIVE SUMMARY

The Judiciary of Lesotho has been resilient under difficult circumstances. Its challenges have been characterised by backlog of cases as well as lack of stability at its helm. The stability is often adversely affected by turbulence in the body politic of the country. Change of government has invariably resulted in changes in key judicial leadership positions, which vitiates the existence of security of tenure. For the past decade, appointment and removal of heads of the judiciary - the Chief Justice as well as the President of the Court of Appeal - seem to have ignited interest from the executive. This interest is insulated by the constitutional provisions in terms of which the appointment as well as impeachment of the Chief Justice and the President of Court of Appeal are made by the King on the singular advice of the Prime Minister. These arrangements have given incentive to the executive to appoint and fire the heads of the judiciary as and when it politically suits them. The mission is of the opinion that the constitutional provisions are not consistent with regional and international human rights law and standards. In the circumstances of Lesotho the current state of the law and practice give rise to the perception that the appointment of judicial officials and any impeachment action against them will be politically motivated. Failure of the appointment and impeachment procedures to adhere to the international standards has also led to friction or strong perception of friction between the Executive and the Judiciary in a deeply polarized society.

Because of the loopholes in the Lesotho's legal framework, the appointment process of the President of the Court of Appeal has been subject to prolonged political dispute and litigation that has resulted in a leadership vacuum at the apex court that has made it dysfunctional. The result is that all litigants who expect justice from the Court of Appeal have years of waiting before they can get their matters resolved. While the case challenging the appointment of an acting President of the Court of Appeal is presently set down for hearing at the High Court, it is not clear that this adjudication will conclude the legal process and pave way for the appointment of the acting President of the Court of Appeal.

The appointment of ordinary judges of the High Court is made by the King on the advice of the Judicial Services Commission (JSC), which is chaired by the Chief



Justice chairing a panel of only four people comprising the Chief Justice herself, the Chairperson of the Public Service Commission, the Attorney General and one Judge. All these officials are effectively appointed by the Prime Minister or closely work with the Chief Justice resulting in strong perceptions that the appointment process of judges of the High Court is also opaque, not transparent and open to chonyism.

The above challenges had been identified by the fact-finding mission which was commissioned by the Africa Judges and Jurists Forum and the International Commission of Jurists (respectively, AJJF and ICJ) in 2013. When a follow-up was made in 2018, it emerged that the legal framework remains the same, which situation has resulted in further problems within the Lesotho's judiciary including dysfunction in the Court of Appeal and impeding impeachment proceedings against the Chief Justice. It is under these circumstances that the AJJG and ICJ have commissioned the High-Level Mission to conduct a fact-finding Mission in Lesotho to inquire into the process of appointment and removal of judges in Lesotho.

The mission emphasised the need for the Lesotho authorities to ensure that the constitutional and legal frameworks on the selection, appointment and tenure of judges and the actual practices conform to Lesotho's international obligations contained in the international human rights treaties to which it is party, as well as other applicable international standards and best practices. The mission met with a range of stakeholders, including Ms Nthomeng Majara the Chief Justice of Lesotho, Hon. Sephiri Motanyane the Speaker, Hon Teboho Lehloenya the Deputy Speaker, Adv Fine Maema KC the Clerk of the National Assembly, Hon Mokhele Moletsane the Minister of Justice, Adv. Hae Phoofolo KC the Attorney General, Leader of Opposition in the House and Opposition leaders, judges of the High Court, Justice Maseshophe Hlajoane President Court of Appeal designate, Justice Kananelo Mosito, academics, independent lawyers, civil society, diplomats and the SADC Preventive Mission in the Kingdom of Lesotho (SAPMIL) and Adv Tekane Maqakachane, President law society.



## 1 Introduction

For a long time the judiciary of Lesotho has had problems characterized by backlog of cases as well as independence and accountability of the judiciary. These problems have been attributed to several factors including ambiguous constitutional provisions and political instability in the country. Lesotho's political landscape has been rather turbulent and led to seeking of SADC security intervention, two snap elections, resulting in three coalition governments, all in a five year period. The change of governments also came with changes in the appointments and impeachment of leaders of the judiciary. For instance, the first coalition government led by Prime Minister Thomas Thabane took power in 2012 and was followed by resignation of the Chief Justice Mahapela Lehohla and Justice Michael Ramodibedi who was President of the Court of Appeal at the time. Although they both resigned due to a power scrimmage as to who, between the two of them was the head of the judiciary, Justice Ramodibedi resigned in the midst of criminal proceedings against him and impending impeachment proceedings. It may therefore be argued that their resignation was not wholly free from political motivation. The two senior judges were replaced by Justice Nthomeng Majara and Justice Kananelo Mosito who were appointed in September 2014 and January 2015 as Chief justice and President of the Court of Appeal respectively. However, due to structural flaws in the legal framework relating to appointment, discipline and removal of judges in the Lesotho's legal framework, the two appointees have also not enjoyed security of tenure in their offices as illustrated more fully in the next sections of this report.

In line with their objectives and mandate to ensure access to justice and independence of the judiciary globally and in Africa specifically, the African Judges and Jurists Forum (AJJF) and the International Commission of Jurists (ICJ) have conducted fact-finding missions aimed at making recommendations for betterment of the judicial system of Lesotho, so as to achieve protection of human rights through a stable, independent and accountable judiciary. The first mission was in 2013, while the second from which this report flows was convened from 7 to 11 May 2018.



## 1.1 The 2013 fact-finding mission and its recommendations

The 2018 Fact-Finding Mission was a follow-up of the recommendations which were made in 2013 following a similar Mission of that year, whose purpose was to gather facts concerning a crisis in the judicial leadership in Lesotho. The crisis had been attributed to a number of factors including lack of clarity in the Constitution, as to who, between the Chief Justice and the President of the Court of Appeal, is the head of the judiciary, lack of transparency in the appointment, discipline and removal of judges in general, non-representation of other stakeholders such as the Law Society, legal academics, civil society organisations and politicians in the Judicial Service Commission (JSC). The Mission of 2013 comprised the following members:

1. Retired Chief Justice Sandile Ngobco of South Africa
2. Retired Chief Justice Augustine Ramathan of Tanzania
3. Retired Chief Justice Justin Nganunu of Botswana (deceased)
4. Mr. Martin Okumu Masiga, Africa Deputy Director of the International Commission of Jurists
5. Mr. Brian Penduka, Africa Programme Legal Consultant, International Commission of Jurists

The 2013 Fact - Finding Mission made the following key recommendations:

1. That the Constitution of Lesotho should be amended to address, expressly, the question of the head of the judicial branch of government; that the said amendment must specify that the head of the judiciary is the Chief Justice, who, in terms of such amendment, must preside at the apex court, while the head of the High Court should have the title of either the President of the High Court, Judge President, Principal Judge or other suitable title;
2. That consideration should be given to restructuring the Judicial Service Commission so as to ensure that the major stakeholders in the justice system are represented in it. These should at least include, *inter alia*, the Chief



Justice, the Judge President, representatives from the Executive and the Legislature, the Law Society, Legal Academics and Civil Society;

3. That consideration should be given to whether or not the conduct of one or both of the two judges merits investigation under sections 121 and 125 of the Constitution, and in a manner consistent with international standards by an independent and impartial tribunal, whose ruling is subject to independent review; and
4. That urgent comprehensive review of the administration of justice in Lesotho be carried out in order to identify the root causes of the problems afflicting the justice system and to set out a plan for strengthening the harmonious administration of justice, advancing judicial independence, enhancing access to justice and strengthening public confidence in the administration of justice

## **1.2 The 2018 Fact-Finding Mission**

### **1.2.1 Mission composition**

The 2018 Fact – Finding Mission to the Kingdom of Lesotho consisted of the following members:

1. Retired Chief Justice Mohammed Othman Chande of Tanzania; member of the Judicial Elders' Council of the Africa Judges and Jurists' Forum (AJJF)
2. Retired Chief Justice Ernest Sakala of Zambia; member of the Judicial Elders' Council of the Africa Judges and Jurists' Forum (AJJF)
3. Mr. Arnold Tsunga, Africa Director of the International Commission of Jurists
4. Mr. Martin Okumu Masiga, Secretary General of the Africa Judges and Jurists' Forum (AJJF)
5. Ms. Mary Pais Da Saliva, Legal Advisor, International Commission of Jurists

### **1.2.2 Objectives of the 2018 Fact-Finding Mission**





The main objective of the Fact-Finding Mission of 2018 was to follow up the extent to which Lesotho had implemented recommendations made five years back and to evaluate its compliance with regional and international commitments relating to the process of appointment, discipline and removal of judges.

### **1.2.3 Main Findings**

From the interviews with the relevant stakeholders and observations during its five days in Lesotho, the Mission made the following main findings:

- a) That the recommendation on investigation of the conduct of the then Chief Justice and President of the Court of Appeal had been implemented and consequently the two office bearers resigned from their positions and were replaced by Chief Justice Nthomeng Majara, who was appointed in 2012 and Justice Kananelo Mosito who was appointed in 2014, but removed and or resigned in December 2016, and re-appointed in June 2017, which reappointment was subjected to a constitutional challenge and is currently awaiting appeal;
- b) That the 2013 recommendations for amendment of the Constitution and restructuring of the JSC had not been implemented. Therefore procedures for appointment of Chief Justice Nthomeng Majara and President of the Court of Appeal, justice Kananelo Mosito were also made by His Majesty the King, acting on the singular advice of the Prime Minister, a practice which the 2013 Mission had identified as unsatisfactory and opening the judicial appointment process to real or perceived political influence;
- c) That the recommendation to conduct a comprehensive review of the administration of justice in Lesotho, in order to identify the root causes of the problems afflicting the justice system, was partially implemented. In line with this recommendation and the SADC recommendations on broader national reforms in Lesotho, there has been established a Judicial Reforms Committee. It is composed of judges, who have developed a number of proposals for reform captured in their document: *Proposals on*



*Judicial Reforms.* The proposals will form part of the overall constitutional reform initiative which is currently in process ; and

- d) That the structural issues in the appointment of judges have precipitated a conflictual relationship between the judiciary and the executive and has led to polarisation amongst judges, between the judges and the legal practitioners and also amongst legal practitioners.
- e) The call to enact constitutional changes for the judiciary to be led by a Chief Justice who sits and presides over the highest Court in the land was not implemented. This had been seen as important to avoid unnecessary rivalry and conflict between the Chief Justice and President of the Court of Appeal. In the past, noxious relations between these two most prominent judicial offices undermined the dignity and effectiveness of the judicial system.
- f) That the relationship between the judiciary and the Law Society of Lesotho were tense. There was limited communication and collaboration between the two institutions, which bred an atmosphere of suspicion. The current Law Council had not had a meeting with the Chief Justice or the Judiciary. This environment could potentially spiral into hostility between the two institutions. This would inhibit their ability to stand together against incursions into judicial independence, access to justice, human rights and the rule of law, which is their core mandate.

### **1.3 Structure of the report**

This report consists of five main sections. Section one is a brief introduction which outlines the objectives, findings and recommendations of a previous mission which the ICJ and AJJF had conducted in 2013. It also gives a brief account of the 2018 Fact-Finding Mission, its composition, objectives, methodology and main findings. Section two discusses international standards on appointment of the judiciary and benchmarks the situation in Lesotho against the same. Section three focuses on disciplinary proceedings for judges at the international level and how such are



conducted in Lesotho. Section four deals with impeachment of judges in Lesotho and the fifth and concluding section provides detailed conclusions and recommendations.

## **2 Appointment of judges**

According to international standards, a transparent and fair process of appointment of judges is a pre-requisite to ensure independence and impartiality of the judiciary as well as all citizen's equal access to justice. The Mission found that the appointment process Lesotho is neither fair nor transparent and this negatively impacts independence of the judiciary and the peoples' access to justice.

Sections 120 (1) and 124 (1) of the Constitution of Lesotho 1993, confer powers of appointment of the Chief Justice and the President of Court of Appeal upon the King, acting on the singular advice of the Prime Minister. Chief Justice Majara and Justice Mosito who replaced CJ Lehohla and Ramolibeli respectively were appointed by the King on the recommendation of the Prime Minister. The Thabane-led coalition government was short-lived and in 2015 it lost the snap elections to another coalition government led by Prime Minister Mosisili Pakalitha. While Justice Majara's appointment was never challenged, Justice Mosito's appointment faced several challenges immediately when the Mosisili-led government took over.

First the Attorney General filed action in which he challenged Justice Mosito's appointment. He contended that by virtue of the provisions of section 88 of the Constitution it was impermissible for the Prime Minister to advise the King to make the appointment, because the cabinet had not been informed of the possible appointment and its views on it were neither sought nor obtained.<sup>1</sup> Both the Constitutional Court and the Court of Appeal dismissed this challenge on the grounds that sections 91(1) and 124 (1) empower the Prime Minister to advise the King on appointment of the President of the Court of Appeal but do not require that such advice be given upon prior reference to the cabinet.

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<sup>1</sup> *Attorney General v His Majesty the King & Others, the Prime Minister & Others* (2015) LHC 3; *Attorney General v His Majesty the King & Others, The Prime Minister & Others* (2015) LSCA 1 para 2.



The Director of Public Prosecutions then pressed criminal charges against Justice Mosito for tax evasion. An impeachment tribunal was set up and it recommended his removal from judicial office. However, prior to the King's confirmation of the Tribunal's recommendation, Justice Mosito wrote a resignation letter to the King. Justice Robert Nugent was appointed to replace Justice Mosito as Court of Appeal President.

In June 2017 Lesotho had yet another snap election in which the Mosisili-led coalition government lost to Thabane's four-party coalition government. Three months after his appointment by the Mosisili-led coalition government, Justice Nugent received a letter from Prime Minister Tom Thabane informing him to vacate office and on 1 August 2017 Justice Mosito was reappointed as President of the Court of Appeal. According to the government gazette, this appointment was in accordance with section 124 (1) of the Constitution which empowers the Prime Minister to recommend appointment of the President of the Court of Appeal to the King. However, he was stopped from taking the oath of office by litigation challenging his appointment in *Qhalehang Letsika & Ors Vs Dr. Kananelo Mosito & 6 Ors* (Unreported) LHC, 16/2017. In the meantime, Chief Justice Nthomeng Majara withstood enormous political pressure including protest marches and threats of impeachment orchestrated by functionaries of the government.<sup>2</sup> On 8 February 2018, a 3 judge bench in *Qhalehang Letsika & Ors* reached a verdict that the removal of Justice Robert Nugent by Prime Minister Tom Thabane was unlawful and unconstitutional since it disregarded the process prescribed by the constitution and was a subversion of the rule of law and a threat to the independence of the judiciary; that the appointment of Justice Mosito was illegal and unconstitutional having disregarded the decision of the tribunal, which had not been set aside by a court of law; and further that having been based on the unconstitutional removal of Justice Robert Nugent, the appointment of Justice Mosito could not result into lawful effects.<sup>3</sup>

The - appointment procedures outlined in sections 120 and 124 of the Constitution are in large part responsible for the current chaotic situation in the judiciary of

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<sup>2</sup> Tefo Tefo 'Law Society shoots down lawyers demands' *Lesotho Times* 2 February 2018. Available at <http://www.lestimes.com/law-society-shoots-down-lawyers-demands/> [Accessed 9 June 2018].

<sup>3</sup> *Qhalehang Letsika & 3 Ors v Dr. Kananelo Mosito & 6 Ors* (CC 16/2017) LSHC 1 (9 February 2018).



Lesotho. Conferment of excessive powers in the Prime Minister does not adhere to international standards contained in Article 14 of the *International Covenant on Civil and Political Rights (ICCPR)* and Articles 7 and 26 of the *African Charter on Human and Peoples Rights*, all of which protect the right to a fair hearing and guarantee independence of the courts. These Articles require that appointment of judges be done through a transparent and non-discriminatory process and on the basis of prescribed criteria based on merit and integrity.<sup>4</sup>

The limitation of appointment powers to the Prime Minister also fails to adhere to the *UN Basic Principles on the Independence of the Judiciary and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, both of which provide that the methods of judicial selection must safeguard against judicial appointments for improper motives.<sup>5</sup> The exercise of this power by the Prime Minister alone leaves a strong perception that his recommendation of a certain individual for appointment, as either Chief Justice or President of the Court of Appeal, may be politically motivated. From the mission's interview with the Minister of Justice, the Attorney General, leaders of opposition parties as well Mr Qhalehang Letsika, this perception also emerged as a basis of the number of cases lodged by the four lawyers who first challenged the appointment of Professor Mosito as President of the Court of Appeal and later the appointment of Justice Hlajoane to act in that position.<sup>6</sup> Because of these challenges which until the time of writing of this report, have not been resolved, the Court of Appeal of Lesotho has been rendered dysfunctional.

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<sup>4</sup> See Human Rights Committee, General Comment No.32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc.CCPR/C/GC/32 (2007), para. 19; UN Basic Principles on the Independence of the Judiciary, principle 10; See also, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and People's Rights, Article A.4(h)-(j); See also Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 32 and Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Preliminary Report to the Human Rights Commission on a mission to Ecuador, UN Doc. E/CN.4/2005/60/Add.4 (2005), para. 5(d)

<sup>5</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10; See also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(h)

<sup>6</sup> Interview with Mr Qhalehang Letsika on 10 May 2018.



In order to avoid a possibility of political manipulation of the appointment process, the Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers, have repeatedly recommended the use of bodies that are independent from the Executive,<sup>7</sup> inclusive and composed mainly (if not solely) of judges and members of the legal profession.<sup>8</sup> However, in Lesotho, the Judicial Service Commission (JSC) is not involved in the appointment of the Chief Justice and the President of the Court of Appeal. Its powers are limited to appointment of the puisne judges and judicial officers in the subordinate courts.

While participation of the JSC in the appointment of the Chief Justice and the President of the Court of Appeal would be ideal, another problem identified by both the 2013 and 2018 fact-finding Missions is lack of plurality in the composition of the JSC itself. In 2013 a recommendation was made that to ensure pluralistic representation within the JSC, membership should be opened up to include as members, other critical stakeholders, including the Law Society of Lesotho, the faculty of law, civil society representatives, magistrates and others, as may be necessary to secure the independence and accountability of the judiciary. It was further recommended that in order to advance the independence of the Judicial Service Commission, these members should be elected by the bodies to which they belong and not by the Prime Minister or the Chief Justice. For example the representative of the Law Society should be elected by or nominated by members of Law Society and the same should be done for the Magistrates, Judges and Civil Society representatives. However, as at 2018 this recommendation had not been implemented and the perception amongst stakeholders that appointment of leaders

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<sup>7</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(h) encourages “the establishment of an independent body”. Also e.g., Concluding Observations on the Congo, CCPR/C/79/Add.118, para. 14; Concluding Observations on Liechtenstein, CCPR/CO/81/LIE, para. 12; Concluding Observations on Tajikistan, CCPR/CO/84/TJK, para. 17; Concluding Observations on Honduras, CCPR/C/HND/CO/1, para. 16; Concluding Observations on Azerbaijan, UN Doc. CCPR/C/AZE/CO/3 (2009), para. 12; Human Rights Committee, Concluding Observations on Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1 (2006), para. 20; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 11; Universal Charter of the Judge, Article 9

<sup>8</sup> Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 28-29. See International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – Practitioners’ Guide, No. 1 (2007), pp. 45-48



of the judiciary was politically motivated remained. This perception fuelled litigation against such appointments and consequently affected functionality of the judiciary. The need to expedite pluralism within the JSC was a fact conceded by almost all stakeholders whom the mission interacted with including the judges, the Law Society, representatives of the Civil Society Organisations (CSOs), academics and independent lawyers.

The representation in the JSC because it is composed of four members being the Chief Justice who is its chair, the Chairperson of the Public Service Commission, the Attorney General and one Judge. All these officials are effectively appointed by the Prime Minister or work closely with the Chief Justice, resulting in strong perceptions that the appointment process of judges of the High Court is also opaque, not transparent and open to cronyism.

The procedures for the appointment of judges in general, and the Chief Justice and the President of the Court of Appeal in particular, has led to devastating consequences for the administration of justice in Lesotho. For instance, due to a number of court cases which challenged the appointment of both the substantive and Acting Presidents of the Court of Appeal this position has become vacant rendering that court dysfunctional for the last 2 years. The result is that all litigants who expect justice from the Court of Appeal have to wait for the leadership impasse to be resolved before they can get their matters heard by that apex court.<sup>9</sup>

The Mission notes further that the opaque appointment procedure has also led to friction or strong perception of friction between the Executive and the Judiciary. But more seriously, it undermines the legitimacy of judges and erodes public confidence in the judiciary. It therefore recommends that consistent with ever-growing citizen demands and best practices on transparency, accountability and popular participation in public affairs, authorities in Lesotho should consider, seriously,

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<sup>9</sup> The Court of Appeal has two sessions a year, and the last two sessions of October 2017 and April 2018 have not been convened. According to the Assistant Registrar in the Court of Appeal, as at May 2018, 54 cases with records and 48 whose records had not yet been filed, remained pending in the Court of Appeal. It is important to note that many other litigants could have given up on pursuing their appeals since the Court of Appeal ceased functioning.



making the nomination and appointment of judges an open process. Some of the best practices in the region depict a mix of the following elements:

- (a) Nomination of candidates for judicial office may be sought from the legal fraternity such as the Law Society, voluntary associations of legal professionals, faculties of law, individual lawyers, the Attorney General's Office, the Director of Public Prosecution or equivalent office;
- (b) Advertisements are made in the mass media calling for applications from duly qualified and interested lawyers;
- (c) Shortlisted candidates are interviewed by the JSC in a session that may be open or closed to the media.
- (d) A narrow list of successful candidates is drawn by the JSC for submission to the Head of Government/State who then nominates from the list, and submits the same to parliament for Parliamentary Confirmation Process. This takes the form of pre-appointment scrutiny hearings open to the public. Lawyers and any members of the public who know a reason why the nominee should not be confirmed can appear before the Commission and make submissions with evidence to support their contention.
- (e) The final names are then submitted to the appointing authority. It follows that in the case of Lesotho, after the parliamentary confirmation the Prime Minister would submit the final names to the King for appointment.

### **3 Disciplinary Procedures**

Independence of the judiciary does not imply that judges must not be accountable in carrying out their functions. International standards dictate that judges must be accountable and must respond to any ethical, disciplinary and even criminal offences which they are alleged to have committed. However, there should also be safeguards against malicious charges against judges brought with the purpose to discredit them. International principles on fair trial also require that complaints about judicial misconduct must be processed expeditiously and fairly under appropriate procedures.<sup>10</sup> Moreover, the judge against whom allegations of misconduct are

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<sup>10</sup>Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article





made must be notified of the allegations against him or her, be given adequate time and facilities to prepare and present a defence and must be afforded fair hearing during the proceedings.<sup>11</sup> A decision which follows from such proceedings must be based on established standards of judicial conduct, and sanctions must be proportionate.<sup>12</sup>

While the Bangalore Principles and UN Basic Principles require that there must be enshrined in the law, a judicial code of conduct, drafted primarily by judges and members of the legal profession and consistent with international standards,<sup>13</sup> there is no law which prescribes judicial conduct and discipline in Lesotho. The Constitution of Lesotho does not provide for discipline of judges but for their removal. Section 121 (3) of the Constitution provides that:

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 *misbehaviour*.  
(emphasis added)

The mission is of the opinion that silence in the legal framework as to type of acts which constitute judicial misbehaviour fails to conform to the international requirement that in order to preserve independence of the judiciary while at the same time ensuring judicial accountability, there should be enshrined in the law, a judicial code of conduct, which serves as the basis for the determination of cases of alleged judicial misconduct.<sup>14</sup>

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A.4(r); UN Basic Principles on the Independence of the Judiciary, Principle 17; Draft Universal

Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 28.

<sup>11</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(q).

<sup>12</sup> UN Basic Principles on the Independence of the Judiciary, Principle 19; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 27.

<sup>13</sup> Bangalore Principles of Judicial Conduct; International Bar Association Minimum Standards of Judicial Independence, para. 35-42.

<sup>14</sup> UN Basic Principles on the Independence of the Judiciary, Principle 19



Principle 19 of the UN Basic Principles on independence of the judiciary requires further that where disciplinary proceedings have been conducted, a sanction imposed must be appropriate. This principle envisages that there are circumstances in which a judicial officer may be found guilty of a disciplinary offence but nonetheless remain fit to continue exercising his or her judicial functions. The Principles of Fair Trial buttress this by stating that decisions to suspend or remove a judge must be limited to cases in which the incapacity or behaviour of a judge renders the individual unfit to discharge his or her judicial duties.<sup>15</sup>

Absence of a Code of Conduct which prescribes disciplinary offences, procedures to be followed as well as appropriate sanctions in the legal framework of Lesotho leaves no option for any other sanction other than impeachment. As a result, judges may be removed for any offences which may not, for all intents and purposes, be linked or related to the judges' integrity and ability to discharge their judicial function. This is one of the issues which arose from the mission's interview with the respondents that the Mission interacted with. The mission therefore recommends drafting of a Code of Conduct which prescribes acts which constitute judicial misconduct as well as sanctions which may be imposed for such acts, with impeachment being the last resort for grievous misconduct which tarnishes the judge's integrity.

#### **4 Impeachment Procedures**

Impeachment proceedings against a judge must be resorted to in extreme cases in which the breach of discipline affects the integrity of a judge and also renders him or her unfit to discharge his or her judicial duties.<sup>16</sup> As indicated above, in Lesotho the Constitution provides for removal of a judge for inability to perform judicial

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<sup>15</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A.4(p)-(q); UN Basic Principles on the Independence of the Judiciary, Principle 17-20; Draft

Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 26-31; Universal Charter of the Judge, Articles 8 and 11.

<sup>16</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article

A.4(p)-(q); UN Basic Principles on the Independence of the Judiciary, Principle 17-20; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 26-31; Universal Charter of the Judge, Articles 8 and 11.



function or misbehaviour. However, contrary to the international standards, the legal framework of Lesotho does not define what type of misbehaviour warrants a judge's removal from office.

International standards dictate further that the body responsible for the discipline of judges should be independent of the Executive,<sup>17</sup> plural and composed mainly (if not solely) of judges and members of the legal profession.<sup>18</sup> In Lesotho, impeachment of the Chief Justice and the President of the Court of Appeal is initiated by the Prime Minister in terms of sections 121 and 125 of the Constitution. These sections empower the Prime Minister to establish the impeachment tribunal at his own initiative. These constitutional provisions strip the Judicial Service Commission of one of its most central mandates, according to best practice within the region as well as internationally.

This process thus, fails to comply with international standards on fair trial as the Prime Minister chooses people to preside in a case in which he is the complainant. The procedure leaves huge room for political manipulation in that the PM may initiate impeachment proceedings against a Chief Justice or Judge President on grounds not anticipated by the Constitution. It is the exercise of this power by successive Prime Ministers that has made the judiciary unstable with the change of government and has compromised the ability to ability of the judiciary to consistently uphold human rights and defend the rule of law.

## **5 Conclusion and Recommendations**

In the light of the above findings and with the view to strengthen independence and accountability of the judiciary in Lesotho, the Mission makes the following recommendations:

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<sup>17</sup> Human Rights Committee, Concluding Observations on Azerbaijan, UN Doc. CCPR/C/AZE/CO/3 (2009), para. 12; Human Rights Committee, Concluding Observations on

Honduras, UN Doc. CCPR/C/HND/CO/1 (2006), para. 16; Human Rights Committee, Concluding Observations on Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1 (2006), para. 20

<sup>18</sup> Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 28-29.



1. That the Constitution be amended for purposes of:
  - (a) Establishing open, transparent, participatory and competitive judicial appointment procedures.
  - (b) Expanding the mandate of the Judicial Service Commission to empower it to make recommendations to the Prime Minister for the establishment of an independent tribunal to inquire into the dismissal of any judge including the Chief Justice and the President of the Court of Appeal.
  - (c) Expanding the composition of the Judicial Service Commission to include other key stakeholders such as the law society, civil society, magistrates, the high court, the court of appeal and the legal academia. The representatives of these sections of the legal fraternity or society must be chosen by the relevant sections of the legal fraternity or society themselves and not imposed upon them by any authority.
2. That a judicial code of conduct be established to prescribe acts, which constitute judicial misbehaviour, disciplinary procedures and appropriate sanctions be spelt out.
3. That Impeachment of judges should be done in accordance with international standards on due process and fair hearing and should be resorted to, for specified gross offences which impact on the integrity of the judge and his or her ability to carry out judicial functions. The impeachment proceedings must be adjudicated upon by an impartial, independent and competent tribunal which is not subject to influence by the executive.
4. Lesotho should consider restructuring of the court system. In conformity with conventional and best practice, the ultimate head of the judiciary should be the Chief Justice. This must be spelt out in the constitution of the country, with clarity. The Chief Justice must be a judge of the highest court in the land and preside over that court. The High Court should be headed by a Principal



Judge or Judge President who should be the administrative head of that tier of the court hierarchy.

5. That a practice of regular bar-bench dialogue be established to improve the relationship between the legal practitioners and judicial officers to diminish toxic relations that are being exploited to undermine the independence of the judiciary in Lesotho.

## **The Africa Judges & Jurists Forum (AJJF)**



**158 Jan Smuts Avenue, Rosebank  
Johannesburg, South Africa  
E-mail: [info@africajurists.org](mailto:info@africajurists.org)**