

**TOWARDS CONSTITUTIONALISATION OF LESOTHO'S PRIVATE  
LAW THROUGH HORIZONTAL APPLICATION OF THE BILL OF  
RIGHTS AND JUDICIAL SUBSIDIARITY**

**BY**

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## DEDICATION

To my wife and son, **'Marorisang** and **Realeboha Maqakachane**;

For the great support and inspiration during this difficult time.

## **DECLARATION**

I, the undersigned, **TEKANE SOPHONIAH MAQAKACHANE**, do hereby declare that the Master's Degree research dissertation that I herewith submit for the Master's Degree qualification at the University of the Free State is my independent work, and that I have not previously submitted it for qualification at another institution of higher education.

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**TEKANE SOPHONIAH MAQAKACHANE**

## ACKNOWLEDGMENTS

From that day when listening to the President of one of the Local Courts in Lesotho and heard her overrule one of the litigants to the customary law dispute: “If you refer me to the Constitution, then you are in the wrong court, this is a customary law court”, I developed a keen interest in the subject on which the President of the Local Court concluded by a single sentence, but with so much conviction and authority – the constitutionalisation of Lesotho’s private law through the horizontal application of the Bill of Rights and the decentralised constitutional review.

I wish to extend my gratitude to my Supervisor, **Professor JL PRETORIUS**. He has been immensely supportive. Listening carefully and patiently, you will be sure not a single word escapes his remarkable attention. His inspiring guidance has been a ceaseless encouragement for the accomplishment of this daunting task.

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Finally, to the **GIVER OF LIFE** for keeping the breath in my nostrils, thank You, Lord.

## SUMMARY

The Constitution of Lesotho is a product of the two-year deliberative discussions between 1990 and 1992. With this relatively transformative constitutional document, Lesotho sought to break away from the harsh consequences of a century-long British colonial imperialism and domination, as well as more than two decades of authoritarian and military rule. The latter period was characterised by political intolerance, suspension of constitutions, insurgencies, sporadic violence and brutality, the introduction of draconian legislation and denial and violations of basic human rights.

The Constitution therefore provided for the twin transformative tools of the horizontal application of the Bill of Rights and the decentralised constitutional review as the cradle for the constitutionalisation project that was to be carried out in the new constitutional era. The horizontal application of the Bill of Rights means that every private actor is entitled to rely on the Bill of Rights in his or her private law disputes with another private actor. The doctrine further lays down constitutional duties for the courts not only to protect the fundamental rights and freedoms of private actors, but also not to infringe upon those rights and freedoms. On the other hand, the decentralised constitutional review is looked at through the principle of subsidiarity. This is a structural principle that not only fragments and organises power and authority between the superordinate and the subordinate authorities that function in the same hierarchical order; the principle further imposes duties on the superordinate authority to support and assist the subordinate authority where the latter cannot discharge its function effectively and efficiently.

Looking at the structure of the Constitution, the constitutional powers as well as the functional relationship between the High Court and the subordinate courts in Lesotho (Magistrate Courts, Central and Local Courts, Judicial Commissioner's Court and specific Tribunals with judicial power), the constitutional review framework of Lesotho is decentralised. It is structured in the manner of the American model of constitutional review and not the European prototype, which concentrates the constitutional review powers in the specialised court, the Constitutional Court, thus excluding the ordinary courts from the exercise of constitutional jurisdiction. Consequently, all subordinate courts in Lesotho have constitutional jurisdiction to control the constitutionality of private law and conduct as well as to develop common law and customary law to be in conformity with the Constitution. The effect – the horizontal effect – would be the constitutionalisation of all private law in Lesotho

and the attainment of constitutional justice.

Notwithstanding this, the constitutional review practice of the courts in Lesotho is inconsistent with the above constitutional review framework. Not only have the subordinate courts remained dormant in the exercise of constitutional jurisdiction; through the trilogy of cases: *Morinyane*, *Chief Justice* and *Mota*, constitutional jurisdiction of the High Court and the subordinate courts has been excised and withered. Consequently, both the High Court and the subordinate courts have been excluded from exercising constitutional jurisdiction, with the High Court being able to do so only in direct, and not indirect, constitutional review proceedings. In the final analysis, the constitutional review has taken up the Continental model and the Bill of Rights is now verticalised.

While a number of factors account for these trajectories, the constitutional review practice has not only affected the general administration of justice but also banished the overwhelming majority of the people of Lesotho to the margins of constitutional justice as a result that private law is shielded from the influence of the Bill of Rights. This study seeks to calibrate the constitutional review practice with the constitutional review framework.

#### **KEY WORDS**

Bill of Rights, Constitution of Lesotho, constitutionalisation, constitutional justice, constitutional review practice, decentralised constitutional review, horizontality, horizontal effect, public-private distinction, subsidiarity.

## OPSOMMING

Die Grondwet van Lesotho is 'n produk van die tweejaarlang beraadslagende gesprekke tussen 1990 en 1992. Lesotho het daarna gestreef om met hierdie relatief transformerende konstitusionele dokument weg te breek van die fel gevolge van die eeuelange Britse koloniale imperialisme en oorheersing, asook meer as twee dekades van outoritêre en militêre oorheersing. Laasgenoemde periode is gekenmerk deur politieke onverdraagsaamheid, die opskorting van grondwette, insurgensies, sporadiese geweld en brutaliteit, die instel van drakoniese wetgewing en die ontkenning en skending van basiese menseregte.

Die Grondwet het daarom voorsiening gemaak vir die tweeledige transformerende hulpmiddels van die horisontale toepassing van die Handves van Regte en die gedesentraliseerde konstitusionele oorsig as die basis vir die konstitusionaliseringsprojek wat in die nuwe konstitusionele era uitgevoer moes word. Die horisontale toepassing van die Handves van Regte beteken dat elke private rolspeler daarop geregtig is om op die Handves van Regte in sy of haar privaatregtelike dispuut met 'n ander private rolspeler staat te maak. Die leerstelling bepaal verder konstitusionele pligte vir die howe, nie net om die fundamentele regte en vryhede van private rolspelers te beskerm nie, maar ook om nie inbreuk te maak op daardie regte en vryhede nie. Aan die ander kant word daar by wyse van die beginsel van subsidiariteit gekyk na die gedesentraliseerde konstitusionele hersiening. Dit is 'n strukturele beginsel wat nie alleen mag en gesag tussen die meerdere en die ondergeskikte gesag in dieselfde hiërargiese orde fragmenteer en organiseer nie. Die beginsel ken verder pligte aan die meerdere gesag toe om die ondergeskikte gesag te ondersteun en behulpsaam te wees, waar laasgenoemde nie sy funksie effektief kan verrig nie.

Wanneer daar gekyk word na die struktuur van die Grondwet, is dit duidelik dat die konstitusionele hersieningsraamwerk van Lesotho gedesentraliseer is wat betref die konstitusionele magte en die funksionele verhouding tussen die Hoë Hof en die ondergeskikte howe in Lesotho (landdroshowe, sentrale en plaaslike howe, die Geregtelike Kommissarishof en spesifieke tribunale met regterlike mag). Dit is gestruktureer volgens die Amerikaanse model van konstitusionele hersiening en nie die Europese prototipe nie, wat die konstitusionele hersieningsmagte in die gespesialiseerde hof – die Grondwetlike Hof –

konsentreer, en daardeur gevolglik die gewone howe uitsluit uit die beoefening van konstitusionele jurisdiksie. Gevolglik het alle ondergeskikte howe in Lesotho konstitusionele jurisdiksie om die grondwetlikheid van die privaatreë te beheer, asook om die gemenerereg en gewoonterereg te ontwikkel in ooreenstemming met die Grondwet. Die effek – die horisontale effek – sal die konstitusionalisering van alle privaatreë in Lesotho en die bereiking van konstitusionele geregtigheid wees.

In weerwil hiervan is die konstitusionele hersieningspraktyk van howe in Lesotho nie deurgaans in ooreenstemming met bogenoemde konstitusionele hersieningsraamwerk nie. Nie alleen het die ondergeskikte howe agterweë gebly wat betref die uitoefening van konstitusionele jurisdiksie nie; deur die trilogie van sake: *Morienyane*, *Chief Justice* en *Mota*, is die konstitusionele jurisdiksie van die Hoë Hof en die ondergeskikte howe geskrap en afgewater. Gevolglik is sowel die Hoë Hof as die ondergeskikte howe uitgesluit uit die uitoefening van konstitusionele jurisdiksie, met die Hoë Hof slegs in staat om dit te doen in direkte, maar nie indirekte nie, konstitusionele hersieningsverrigtinge. In die finale ontleding het die konstitusionele hersiening die Kontinentale model aanvaar en die Handves van Regte is nou gevertikaliseer.

Alhoewel 'n aantal faktore hierdie trajek verklaar, het die konstitusionele hersieningspraktyk nie alleen die algemene administrasie van die reg geraak nie, maar is die oorweldigende meerderheid van die mense van Lesotho ook gemarginaliseer wat konstitusionele reg betref, met die gevolg dat privaatreë afgeskerm word van die invloed van die Handves van Regte. Hierdie studie strewende daarna om die konstitusionele hersieningspraktyk met die konstitusionele hersieningsraamwerk te kalibreer.

## **SLEUTELWOORDE**

Handves van Regte, Grondwet van Lesotho, konstitusionalisering, konstitusionele reg, konstitusionele hersieningspraktyk, gedentraliseerde konstitusionele hersiening, horisontaliteit, horisontale effek, openbaar-private onderskeid, ondergeskiktheid.



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## ABREVIATIONS

ACHPR	African Charter on Human and People's Rights
CHRR	Charter of Human Rights and Responsibilities (State of Victoria)
DPSP	Directive Principles of State Policy
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
FCC	German Federal Constitutional Court
GG	German Grundgesetz (German Constitution)
ICHRP	International Council on Human Rights Policy
IEC	Independent Electoral Commission
LAC	Labour Appeal Court
NCA	National Constituent Assembly
NZBORA	New Zealand Bill of Rights Act
RAT	Revenues Appeals Tribunal
SDA	Selected Development Area
TEU	Treaty of European Union
UKHRA	United Kingdom Human Rights Act
UNHRC	United Nations Human Rights Committee
USA/US	United States of America



## CHAPTER 1: INTRODUCTION

### 1.1 Introduction

The Lesotho 1993 Constitution<sup>1</sup> was a relatively transformative legal instrument prescribing a multilevel system of constitutional review based on the horizontal application of the Bill of Rights and judicial subsidiarity. The prime objective of this constitutional framework was, among others, the constitutionalisation of private law and the attainment of constitutional justice in Lesotho. For a period of more than two decades since 1993,<sup>2</sup> constitutional review practice of the courts in Lesotho has taken a contradictory trajectory inimical to the prescribed framework. This has had a serious negative impact not only on constitutional justice but also on the administration of justice generally. This present study is a calibration and reconfiguration of the Lesotho's constitutional review practice in order to realign it to the 1993 constitutional review framework.

Historically, the period of two-year consultations, discussions, deliberations and decisions of the National Constituent Assembly (NCA)<sup>3</sup> was an important moment in the history of Lesotho. Although it was not a defining constitutional moment due, among others, to the differing views on the legitimacy of the NCA,<sup>4</sup> it was a moment when the nation took, once and for all,<sup>5</sup> a decisive break away from the consequences of a century-long British colonial imperialism and domination and more than two-decades of authoritarian and military rule.<sup>6</sup> The authoritarian and military rule was characterised by political intolerance, suspension of

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<sup>1</sup> Hereinafter the Constitution.

<sup>2</sup> From 1993 to 2015. This study was conducted from January 2015.

<sup>3</sup> The NCA, which was established in June 1990, began its work of considering and making recommendations "regarding a suitable Constitution for Lesotho" on 28 June 1990 and completed it in August 1992, adopting the 1966 Constitution as a working paper and framework for the new Constitution. The 144 amendments to the 1966 Constitution which were thereafter subjected to popular scrutiny through public consultations facilitated by the National Constitutional Commission established by the NCA, resulted in the 1993 Constitution. See NCA 1992:11-23. Also see the *National Constituent Assembly Order 4/1990*, sec 32(1).

<sup>4</sup> Maope 2001-2004:399.

<sup>5</sup> A similar process of constitutional making was conducted in 1963, resulting in the 1966 Constitution, which was suspended in 1970. See Cowen 1964:4-8; *Lesotho Independence Order 1172/1966*; Constitution of Lesotho 1966; *Constitution (Suspension) Order 2/1970*.

<sup>6</sup> Weisfelde 1976:24-30; Gill 1997:214-239; Gay 2006:83-90; Mahao 1997:176-179.

constitutions, insurgencies, sporadic violence and brutality, the introduction of draconian legislation and denial and violations of basic human rights.

The resultant 1993 Constitution became a foundational model<sup>7</sup> and programme<sup>8</sup> for transformation. It sought to reconstruct Lesotho as a nation based on the rule of law, democracy and respect for and protection of fundamental human rights. To this end, the Constitution became supreme and any other laws, which were inconsistent with it, were invalid because of the inconsistency.<sup>9</sup> It declared Lesotho as a democratic Kingdom<sup>10</sup> and provided for a justiciable Bill of Rights,<sup>11</sup> thus ushering in a new morality for Lesotho, which all the systems – political, socio-economic and legal – had to meet. In order to achieve constitutional justice for the masses of the people of Lesotho, the Constitution prescribed a horizontally<sup>12</sup> applicable Bill of Rights and the decentralised constitutional review based on the principle of judicial subsidiarity,<sup>13</sup> among others, as the cradle and anchors of the “constitutionalisation”<sup>14</sup> of the socio-legal order and politics in Lesotho.

Traditionally, and based on the public-private distinction,<sup>15</sup> human rights applied only to legal relationships between the state and an individual – vertical application<sup>16</sup> – and not between individuals *inter se*.<sup>17</sup> Horizontal application of human rights, on the other hand, means that the Bill of Rights applies not only on public-individual relationships but also regulates the legal relationships between private individuals *inter se*. Thus, the horizontal effect of human

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<sup>7</sup> According to Antony Allott (1980:168), all law is a model through which the lawgiver persuades its subjects to adopt or conform to the specific pattern of behaviour specified in the model.

<sup>8</sup> Law as a model for transformation is aimed at procuring certain results. See Allott 1980:174.

<sup>9</sup> The Constitution, sec 2.

<sup>10</sup> The Constitution, sec 1.

<sup>11</sup> Protection of fundamental human rights is the defining feature of post-1993 constitutionalism in Lesotho. To this end, Chapter II (sec 4 to 22) of the Constitution provides for the protection of the fundamental human rights and the enforcement of these protective provisions.

<sup>12</sup> The Bill of Rights applies as well in horizontal legal relationships. See the Constitution, sec 4(2).

<sup>13</sup> The Constitution, sec 22 and 128.

<sup>14</sup> This refers to the infusing of all laws with the human rights norms, values and principles. See Voermans 2006:23; Bruggermeier 2006:43; Banakas 2006:83; Lindenbergh 2006:97; Spann 2005:909; Rautenbach 2009:613; Moseneke 2009:3; Young 2013:69; Herresthal 2013:89; Bradley 2013:127.

<sup>15</sup> As to these distinctions, their rise and fall, see Horwitz 1982:1423; Semmelmann 2012:30-33; Harlow 1980: 241; Hunt 2002:73; Schoenhard 2008:636; Dodge 2008:371.

<sup>16</sup> Chirwa 2006:21.

<sup>17</sup> Woolman 1998:10-1.

rights implies that human rights values and norms should infuse and alter, where necessary, all spheres of life in Lesotho, including legal relationships between individuals<sup>18</sup> – clothing all laws “in the garb of constitutional law”,<sup>19</sup> human rights principles and values. The consequence of this should<sup>20</sup> be the constitutionalisation of Lesotho’s private law.<sup>21</sup>

The Constitution reposed in the judiciary of Lesotho the authority and power<sup>22</sup> to eventuate the transformative design of the Constitution by the enforcement of the Bill of Rights.<sup>23</sup> The allocation and regulation of constitutional jurisdiction by the Constitution to the judiciary is based on the principle of subsidiarity. This principle is of Catholic ecclesiastical origin<sup>24</sup> and amounts to the decentralisation of power of institutions operating within the same sphere or order from a more central level to the local level.<sup>25</sup> It is a structural principle that regulates the allocation and use of authority within a political or legal order, typically in those orders that disperse authority between a centre and various member units.<sup>26</sup> It is “the principled tendency towards solving problems at the local level”, rather than at the central or superior level.<sup>27</sup> In the context of a judicial system, the constitutional structural principle of subsidiarity emphasises decentralisation of judicial enforcement and application of the protective Bill of Rights from superior courts to the subordinate courts.

Consistent with the principle of subsidiarity, the Constitution of Lesotho prescribed a

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<sup>18</sup> See, for comparative purposes Nolan and Robertson 2012:1; Cane 2012:35; Beaver 2012:63; Du Bois 2012:89; Goldberg and Zipursky 2012:251; McBride 2012:331; Lucy 2009:47; Perry 2009:79; Smith 2009:113; Nolan 2009:165; Webb 2009:215; Du Bois 2013:12; Webster 2013:294; Laing and Visser 2013:330; Cabrelli 2013:391; Pretorius 2013:437; Feris and Gibson 2013:497.

<sup>19</sup> Spann 2005:710.

<sup>20</sup> I shall show below why this is not the case in Lesotho.

<sup>21</sup> Basutoland Council recognised the profound effect of “a court-enforced Bill of Rights, both on the existing body of law and on future transaction”. Basutoland Council 1963:82. This effect was also sought to be immediately effectuated when in 1992 the NCA recommended that, “no major changes [be] made” to protective human rights provisions in the 1966 Constitution that were adopted as the 1993 Constitution. See NCA 1992:26.

<sup>22</sup> The Constitution, sec 118.

<sup>23</sup> The Constitution, sec 22.

<sup>24</sup> Montgomery 2002:47; Strauss 2013:100-105; Murphy 1994:70; Green 1988:771; Widulsky 2005: 855-857; Bridge 1999:49-50; De Visser 2010:92-93.

<sup>25</sup> Du Plessis 2006:208-210; De Visser 2010:93-94.

<sup>26</sup> Follesdal 2013:37.

<sup>27</sup> Vischer 2001:103.

constitutional review framework in which subordinate courts<sup>28</sup> play a prominent role in the enforcement of the Bill of Rights in incidental constitutional review proceedings.<sup>29</sup> Consequently, constitutional issues – all legal issues involving, directly or indirectly, the application or interpretation of constitutional provisions or constitutional principles<sup>30</sup> – arising at any stage in any type of ordinary proceedings before the subordinate courts may be contested by any person who is a party thereto.<sup>31</sup> The Constitution has not excluded any court from exercising constitutional jurisdiction. Therefore, the subordinate courts' position in the hierarchy of judicial structure in Lesotho has no bearing on their constitutional power of review, except where their competence to discharge that power effectively and efficiently is doubtful, in which case the High Court is obliged to intervene through the referral procedure.<sup>32</sup>

Furthermore, the Constitution expressly empowers and authorises all courts of law in Lesotho to construe the existing laws<sup>33</sup> “with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with [the] Constitution”.<sup>34</sup> The Ugandan Constitutional Court, interpreting a similar provision in the Ugandan 1995 Constitution, held that this “provision was intended to empower all courts to modify existing laws without having to refer all such cases to the Constitutional Court”.<sup>35</sup> According to the Ugandan Constitutional Court, the modification of existing laws can be achieved by “[clearing] away the existing laws that [the courts] find to be inconsistent with any provision of the Constitution”.<sup>36</sup> The Constitution, therefore, in the words of the Ugandan Constitutional Court, requires “every court, tribunal or administrative body ... to apply and enforce the provisions of [section 156(1)]” against any law in existence prior to 1993 when the

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<sup>28</sup> Section 154 of the Constitution defines “subordinate court” to mean any court of law other than the Court of Appeal, the High Court, a court-martial and a tribunal exercising a judicial function.

<sup>29</sup> See the Constitution, sec 22, 128 and 154(1).

<sup>30</sup> See Spyropoulos 2002:234.

<sup>31</sup> As to the exercise of constitutional jurisdiction in incidental constitutional review, see the report of the *European Commission for Democracy Through Law*, the Venice Commission 2011:15, available at <[http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2010\)039rev-e](http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e)> (accessed on 20 February 2015).

<sup>32</sup> See Geck 1966:273-278.

<sup>33</sup> See the Constitution, sec 156(5).

<sup>34</sup> The Constitution, sec 156(1).

<sup>35</sup> *Uganda Association of Women Lawyers v Attorney General* 2/2003:26 (per Twinomujuni JA).

<sup>36</sup> *Uganda Association of Women Lawyers*:17 (per Okello JA).

Constitution came into force.<sup>37</sup>

Where constitutional issues arise during ordinary proceedings before the subordinate courts, these courts are bound to decide the issue or, in appropriate circumstances, refer them to the High Court.<sup>38</sup> From that moment, the decision in the ordinary proceedings is dependent on the final decision of the High Court on the constitutional issues.<sup>39</sup> The referral arises in two instances: either where a question as to the contravention of the Bill of Rights arises during the proceedings in the subordinate courts<sup>40</sup> or where a question as to the interpretation of the Constitution arises during the proceedings in the subordinate courts.<sup>41</sup> Whether to refer the constitutional issues to the High Court is the discretion of the subordinate courts. Where, however, a party to the proceedings has requested the court for a referral and conditions for referral are satisfied, the court is bound to refer the matter to the High Court.<sup>42</sup>

The Nigerian judicial authorities are settled on the interpretation of similar provisions to sections 22(3) and 128(1) of the Constitution. According to these authorities, reference or referral under sections 22(3) and 128(1) of the Constitution will be made to the High Court only if there had been no guidance or clarification from the High Court or Court of Appeal on the constitutional issue in question to be decided by the subordinate court.<sup>43</sup> Where there is already such a clarification or guidance, it will be “frivolous and vexatious” to request a referral, or the question for interpretation will not be said to amount to “substantial question of law”, as the case may be, and that if the question is not about *interpretation* but the

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<sup>37</sup> *Advocates For Natural Resources v Attorney General* 40/2013.

<sup>38</sup> The Constitution, sec 22(2) and 128(1); Ferejohn and Pasquino 2012:294.

<sup>39</sup> The Constitution, sec 128(2). For comparative purposes, see Paris 2014:24 a research paper available at <<http://ssrn.com/abstract=2501936>> (accessed on 20 March 2015); also see Neuman 2010:19-21.

<sup>40</sup> The Constitution, sec 22(3).

<sup>41</sup> The Constitution, sec 128(1).

<sup>42</sup> See the Constitution, sec 22(3), sec 128(1); *Sir Chunilal Mehta v Century Spinning and Manufacturing Co* 1962 SCR Supl. 3 549; *Kondiba Dagadu Kadam v Savitribai Sopan Gujar* 1999 (3) SC 163; *State Bank v Goyal* (2008) 8 SCC 92; *Bamaiyi v AG Federation* (2001) 7 SC (Pt.II) 62; *Olawoyin v Police (No.2)* (1961) 2 SCNLR 278; *Mukoro v Tebite* (2013) LPELR 20882 (CA); *Nkwocha v Governor* (1984) NSCC 484.

<sup>43</sup> *Alliance for Democracy v Fayose* CA/IL/FP/GOV/3/03; *Polyhumpson & Co. (W.A.) Ltd v Gyimah* [2008] 2 NWLR (Pt.1071); *Abubakar v AG, Federation* (2007) 6 NWLR (Pt.1031) 626; *Ekere Afia v Emmanuele Ekpenyong* CA/C/NAEA/272/2011.

*application* of the Constitution, the matter should not be referred to the High Court.<sup>44</sup> By deciding constitutional issues and having a “quasi-monopoly of the referral”<sup>45</sup> of constitutional issues to the High Court in appropriate cases, the subordinate courts play a crucial active role in defending constitutional rights by the enforcement of the Bill of Rights before and after the decision of the High Court on referral. As Ferejohn and Pasquino aptly put it, without the subordinate courts’ cooperation, the High Court “would be a *vox clamans in deserto*”.<sup>46</sup>

Regard being had to the fact that human rights values and norms are more relevant at the grassroots levels of the Lesotho public order, the constitutional architectural structuring and configuration of the direct and incidental constitutional review were based on the principle of subsidiarity. This was intended to ensure organic linkages and relationship between the High Court on the one hand, and the subordinate courts on the other, through the above filter referral and screening mechanism and procedure. Finally, the Constitution placed in the hands of the judiciary “a proportionality test”<sup>47</sup> as a fundamental constitutional adjudication tool not only for the determination of the scope of constitutional rights and their limitation, but also in resolving clashes and conflicts between competing human rights.<sup>48</sup>

## 1.2 Main research problem statement

However, between the constitutional review framework and the intended constitutionalisation goal is the interplay of a panoply of impediments and hurdles in the form of constitutional review practice and other factors. Firstly, the judicial enforcement of the Bill of Rights, instead of being diffused and decentralised, remains concentrated and centralised at the High Court – thus taking a contradictory centralist European or Kelsenian model of constitutional review,<sup>49</sup> according to which constitutional review is monopolised by the High

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<sup>44</sup> *Jude v Sekandi* 0028/2012.

<sup>45</sup> Ferejohn and Pasquino 2012:307.

<sup>46</sup> Ferejohn and Pasquino 2012:307. Emphasis in the original.

<sup>47</sup> For conceptual and theoretical framework, normative content and application of this test see, generally, Barak<sub>1</sub> 2012:245-378; Barak<sub>2</sub> 2012:738-755; Susnjar 2010:81-241; Schlink 2012:719-725.

<sup>48</sup> See for example, the Constitution, sec 11(3), 13(6), 14(3), 15(3) and 16(3); *Attorney-General v Mopa* LAC (2000-2004) 427:439-440; *Ts’epe v Independent Electoral Commission* LAC (2005-2006) 169:181-182; *R v Oakes* (1986) 26 DLR (4<sup>th</sup>) 200 (SCC):226-227.

<sup>49</sup> Institutional model or design devised by Hans Kelsen in which the specialised organ (constitutional court) outside the conventional hierarchy of judicial structure has major or exclusive authority on

Court. The constitutional review practice trajectory towards a centralised Kelsenian model has been concretised by the High Court and Court of Appeal's separatist approach to the interpretation of the *Constitutional Litigation Rules*.<sup>50</sup> The High Court and Court of Appeal's trilogy of cases<sup>51</sup> have laid down the principle that a court exercising a particular jurisdiction (for example, ordinary jurisdiction) should not deal with the separate constitutional issue arising therein, but that such a constitutional issue shall only be dealt with by the High Court sitting in its constitutional jurisdiction under appropriate rules.

While the principle on its own and for application to the High Court may be correct as far as direct constitutional review is concerned,<sup>52</sup> the unfortunate spill-over effect of this principle is that the High Court and the subordinate courts sitting in their respective ordinary jurisdictions are incapacitated from determining constitutional issues arising during the ordinary case hearing. This is so because there are no specific constitutional rules and therefore no constitutional review power for these courts in ordinary proceedings. The trilogy has effectively excised the High Court and subordinate courts' constitutional jurisdiction in incidental constitutional review proceedings. The consequence is that the High Court and subordinate courts are excluded from controlling the constitutionality of laws and conduct in ordinary proceedings before them.

Secondly, notwithstanding sections 22(1) and 4(2) of the Constitution, the Bill of Rights continues to apply predominantly in vertical legal relationships functioning as a "shield" in the hands of a private actor against the might of the state. The horizontal application of the Bill of

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constitutionality of other laws (the centralisation of constitutional review). See, for example, Garoupa and Ginsburg 2011:1-3; Garoupa 2011:26-33; Garlicki 2007:44-50.

<sup>50</sup> *Morienyane v Morienyane* 204/2003, the unreported High Court decision available online at <<http://www.lesotholii.org/ls/judgment/high-court/2004/83>> (accessed on 28 August 2015); *Chief Justice v Law Society* 59/2011, the unreported decision of the Court of Appeal available online at <<http://www.lesotholii.org/ls/judgment/court-appeal/2012/3>> (accessed on 28 August 2015); and *Mota v Director of Public Prosecutions* 473A/2013, the unreported High Court decision available online at <<http://www.lesotholii.org/ls/judgment/high-court/2014/42>> (accessed on 28 August 2015).

<sup>51</sup> *Morienyane*, *Chief Justice* and *Mota*.

<sup>52</sup> The principle is correct only to the extent that an applicant who *directly* applies to the High Court is obliged to make use of and follow the *Constitutional Litigation Rules* and not ordinary *High Court Rules*. It is a different thing altogether, and certainly inconsistent with the constitutional review framework, that when an ordinary case is before the High Court in its ordinary jurisdiction, and a constitutional issue arises, then that constitutional issue should not be dealt with by the High Court together with the ordinary issues.

Rights – the reliance by a private actor and the enforcement by a court of a Bill of Rights provisions against another private actor in private-law disputes – is strikingly a rarity. The High Court’s constitutional cases record reflects a very bleak state of constitutional review involving the horizontal application of the Bill of Rights. Over a period of 14 years,<sup>53</sup> a very low average of seven cases *per annum* involving a direct constitutional challenge has been filed with the Court, with 2006 recording only 1 case, and 2013 the highest record of only 16 cases. None of these cases involves the horizontal application of the Bill of Rights.

Furthermore, the excising of constitutional jurisdiction by the trilogy of *Morienyane*, *Chief Justice* and *Mota* from the High Court and the subordinate courts has further made it impossible for a private actor to rely on and enforce the Bill of Rights against another private actor in private-law disputes. This is because, in order to enforce the Bill of Rights in private-law disputes, the High Court and the subordinate court have to exercise constitutional jurisdiction. It was for this reason that the Constitution integrated constitutional jurisdiction into ordinary jurisdiction. In such an integrated system, Barak points out, a court “can freely choose between direct and indirect horizontal [application]”<sup>54</sup> of the Bill of Rights during incidental constitutional review proceedings. With the separation of constitutional jurisdiction from ordinary jurisdiction brought about by the trilogy, the private law is shielded from interacting with the Bill of Rights and the objective value system that underpins Lesotho’s constitutional order. As a result, the Bill of Rights and the constitutional values fail to influence and to alter the private law to conform to the constitutional standards. The constitutionalisation agenda is thereby made impossible to achieve.

A number of factors account for the disparity between the constitutional framework of decentralised constitutional review and horizontal application of the Bill of Rights on the one hand, and, on the other, the aberrant constitutional review practice. While these factors will be dealt with in detail in succeeding chapters of this study, it suffices to highlight a few for the present purpose. Firstly, private-law disputes adjudication in Lesotho is performed on the corrective justice base on which the wrongdoer and victim are treated on formal equality correlated by the wrong that was done and the harm that was sustained. The focus of corrective justice is to restore the parties to the formal equality with which the parties first entered into the legal relationship without taking any factors extraneous to that relationship into account.<sup>55</sup> As a result, the corrective justice paradigm does not factor into the decision any constitutional or distributive demands such as fairness, substantive equality and other

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<sup>53</sup> For the period between 2002 and February 2015.

<sup>54</sup> Tushnet 2008:197.

<sup>55</sup> Weinrib 2002:349, 350-352; Mbazira 2009:106, 109-111; Laing and Visser 2013:333.



societal values.<sup>56</sup> Unresponsive to national values and prescribing “mechanical application of legal rules”,<sup>57</sup> corrective justice paradigm for private-law dispute adjudication is therefore inimical to distributing the Bill of Rights principles and values into private law.<sup>58</sup>

Secondly, the descriptive and positivist approach to legal dualism or legal pluralism by the courts and legal writers has played a major role in inhibiting Lesotho’s plural legal orders, in particular, customary justice system and the human rights system, from interacting and influencing each other. This approach used legal dualism as a vehicle for the continued domination, control, management and subordination of indigenous society, customary law and customary justice system by western cultural imperialism on racial and tribal grounds.<sup>59</sup> Approaching customary law and the Bill of Rights on the colonial paradigm,<sup>60</sup> the courts and legal writers focused on forging conflict of law rules to enable the former to make a choice of one legal order over another for application to resolve a dispute in a particular case.<sup>61</sup> They therefore considered multiple legal orders as only conflict generating and neglected the most important aspect of legal pluralism: to develop the model for the interaction, interrelationship, interpenetration and hybridisation of Lesotho’s plural legal orders.<sup>62</sup> This hybridisation or, as Svensson calls it, the “interlegality”<sup>63</sup> of plural legal orders, is one of the foci of the contemporary paradigm of legal pluralism.

Thirdly, at the dawn of the new constitutional dispensation, the High Court and the Court of Appeal announced a restrictive reception policy for the enforcement of the Bill of Rights provisions.<sup>64</sup> Based on the common law,<sup>65</sup> *locus standi* in constitutional litigation continues to be granted only to those persons who are able to show that they have a substantial interest in the subject matter of the litigation. A person who is not able to indicate how he is prejudiced in his own rights or interests is denied standing to sue or to enforce the Constitution. This means that many issues of great concern to the public such as the

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<sup>56</sup> Sanders 1985:63; Roach 1991:886-887; Barnard-Naudé 2013:40; Reichman 2001:247.

<sup>57</sup> Sanders 1985:63.

<sup>58</sup> Klare 1998:151.

<sup>59</sup> Maqutu and Sanders 1987:379; Pimentel 2011:67.

<sup>60</sup> Maqutu and Sanders 1987:387; Melissaris 2013:173.

<sup>61</sup> McLachlan 1988:381.

<sup>62</sup> Griffiths 1998:859; McLachlan 1988:372.

<sup>63</sup> Svensson 2005:74. Also see Hoekema 2008:3-4.

<sup>64</sup> See *Lesotho Human Rights Alert Group v Minister of Justice and Human Rights* LAC (1990-1994) 652.

<sup>65</sup> See *Wood v Ondangwa Tribal Authority* 1975 2 SA 294(A):305-306.

maintenance of the rule of law remain unenforced simply because none among the affected public stands out as having a substantial interest in the matter more than the rest of the public. The pedantic rules of standing have immunised otherwise unconstitutional laws and conduct from constitutional scrutiny by closing the judicial doors to the public interest litigants who raise distributive concerns against the law or conduct.<sup>66</sup>

Fourthly, through the pedagogies and methodologies developed during the colonial era, which did not consider the social and constitutional context of Lesotho,<sup>67</sup> legal education in Lesotho continues to produce lawyers and judges who become self-centred “technocrats” removed from the concerns of the public.<sup>68</sup> Unleashed onto the society ill-equipped and lacking the necessary skill to tackle the societal problems,<sup>69</sup> lawyers and the Law Society have failed to take measures, including legal measures prescribed by the *Law Society Act*,<sup>70</sup> to reform the law, better the administration of justice and improve the practice of the law. They have thus failed to use their legal capital to “renegotiate the changing and porous boundary between social relations and legitimate legal processes”<sup>71</sup> by applying constitutional distributive demands in private-law disputes through, among others, *pro bono* legal services to the marginalised and poor or public interest litigation. The effect of this is that in the majority of private-law disputes, much of the private law and conduct is not challenged on constitutional grounds. Cowen recalls how Basotho pinned their hopes on the vibrant legal education, the legal profession and the judiciary for the constitutionalisation project:

... the legal profession and the judiciary [will] become more efficient, more sophisticated, and more learned. What we need is sound and liberal legal education as an essential corollary to the introduction of a Bill of Rights. Indeed, *unless our people and our lawyers are educated in the use of a Bill of Rights, and in the values which they are meant to preserve, the whole exercise [of the inclusion of court-enforced Bill of Rights in the constitution] may become a*

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<sup>66</sup> According to Kaufman (2013:107), restrictive standing rules immunise unlawful governmental activity from judicial review, as in many cases there will be no one (or one with means) who will challenge the governmental action.

<sup>67</sup> Jessup 2002:387. On teaching methods and methodologies suitable for African legal education, see Manteaw 2008:950-952; Ndulo 1985:449-454.

<sup>68</sup> Rasekoai 2014:7; Also see Weeramantry 1997:57.

<sup>69</sup> Manteaw 2008:936.

<sup>70</sup> See *Law Society Act* 13/1983, sec 4.

<sup>71</sup> Dezalay and Garth 2011:3.

farce.<sup>72</sup>

While a horizontally applicable “court-enforced Bill of Rights” would, within a “foreseeable future” – Basotho had hoped – be “the answer” to their socio-legal and political problems,<sup>73</sup> the cumulative effect of the above factors is to increase the gap between the constitutional promise and the harsh reality within which the marginalised and poor masses of the people of Lesotho find themselves. At the heart of the constitutional framework based on decentralised constitutional review and the horizontal application of the Bill of Rights lie the attainment of constitutional justice, the rule of law, constitutionalism and the protection of the fundamental rights and freedoms. However, the constitutional review practice of the courts in Lesotho has depleted these transformative constitutional tools. The consequences of the constitutional review practice trajectories in the direction of verticalisation of the Bill of Rights and the centralised constitutional review are that the overwhelming number of Basotho have been priced out of the constitutional system as they are banished to the margins of constitutional justice.

Secondly, the general administration of justice has also suffered immensely under the impact of the constitutional review practice trajectories. The excising of the High Court and subordinate courts’ constitutional jurisdiction in incidental constitutional review proceedings has resulted in the bifurcation of proceedings: ordinary and constitutional proceedings. Because the High Court and subordinate courts no longer have constitutional jurisdiction in ordinary proceedings, an aggrieved party must of necessity refer constitutional issues to the High Court (sitting as the so-called Constitutional Court) whenever constitutional questions arise during ordinary proceedings. This parallelism has not only burdened the under-resourced judicial system, but it is also time-consuming, inconvenient and expensive for the litigants.<sup>74</sup>

Regard being had to the original 1993 constitutional review design and the goals of constitutionalisation of private law it was intended to achieve, on the one hand and, on the other, the constitutional review practice that is out of step with the constitutional framework and the social and legal ramifications of this practice, it is apposite to ask: has Lesotho’s transformative Constitution been rendered a mere token of the fundamental human rights it

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<sup>72</sup> Cowen 1964:13 Emphasis supplied.

<sup>73</sup> Cowen 1964:12.

<sup>74</sup> For example, in *Mota*: [27], the High Court directed the accused to launch a parallel constitutional case to determine a constitutional question arising out of ordinary criminal proceedings. Also see *Nova Scotia v Martin* [2003] 2 SCR 504:529.

proudly proclaims to protect? How does one align the constitutional review practice with the constitutional review framework in which all adjudicative functions and processes in Lesotho are underpinned by human rights values, norms and principles, with the resultant constitutionalisation of the private law and the attainment of constitutional justice?

### 1.3 Main research questions

The study is aimed to address the following questions: Firstly, does the constitutional Bill of Rights apply horizontally in Lesotho? Secondly, is Lesotho's constitutional review model as prescribed by the Constitution centralised in the High Court, or is it diffused so that even the lower levels of judicial structures and hierarchy – the subordinate courts – have constitutional review power?

Thirdly, what is the horizontal effect of human rights on the private law of Lesotho and how is it effectuated? Fourthly, is Lesotho's constitutional review practice aligned with the constitutional review framework based on the horizontal application of the Bill of Rights and judicial subsidiarity, and what are the consequences of the disparity between the two? Finally, what legal and other measures should be put in place in Lesotho to calibrate the constitutional review practice to comply with the constitutional framework of the horizontal application of Bill of Rights and the decentralised constitutional review, the achievement of the constitutionalisation of private law and the attainment of constitutional justice in Lesotho?

### 1.4 Objectives of the study: the rationale

The aim of this study is five-fold: Firstly, the study aims at providing a theoretical clarification of the doctrine of horizontality and the principle of subsidiary. Through the lens of the principle of subsidiarity, this study locates the nature, content and application of the constitutional review model that the Constitution of Lesotho prescribes.

Secondly, the study will provide practical solutions to the present structural problem of the centralisation and concentration of constitutional review in the High Court, and attempt the reconfiguration and realignment of the Lesotho's constitutional review practice landscape to reflect a broad-based multilevel system of constitutional review.

Thirdly, the alignment of the constitutional review practice with the constitutional review framework is not the sole purpose of this study; the resultant or consequential constitutionalisation of private law, the protection of the fundamental rights and freedoms and the attainment of constitutional justice by the masses of the people of Lesotho are the main objectives of this research.

Fourthly, the thesis will provide a basis for an impetus for the development of interest and

the attainment of knowledge, not only in the interaction and influence between the Bill of Rights and the normative objective values underpinning Lesotho's constitutional order, on the one hand and, on the other, Lesotho's private law, in particular customary law, but also in the use of processes and methodologies to effectuate the horizontal effect of the former on the latter in litigation. The study therefore enlists judges and judicial officers, legal practitioners, legal educators, legal educational institutions and the administration of justice institutions (for example, the law Society and the Office of the Attorney General) in the great project of the constitutionalisation of Lesotho's private law.

Finally, the thesis grounds, for academic purposes, a foundational theoretical argumentation for an elementary knowledge and appreciation of these constitutional transformative twin-anchors (horizontality and subsidiarity) and their place and application in Lesotho. It is in this regard a trigger for further elaborate and critical academic discussions on these, and certainly other related, important aspects of relationship between the Constitution and other laws.

### 1.5 Theoretical framework

The conceptual analysis of constitutional review models and the doctrine of horizontality in national and supra-national jurisdictions has been a subject of contemporary comparative constitutional theory.<sup>75</sup> This provides a helpful theoretical framework for comparative purposes of the study. The analysis of constitutional review has focused not only on the general differences in architectural structuring of the power of review around the globe but also on the content and application in specific jurisdictions.<sup>76</sup> The structuring, content and application of the constitutional review of the European Union (EU) vis-à-vis national jurisdictions have also received much attention and elaboration,<sup>77</sup> thereby adding to the jurisprudence on constitutional review. In this study, however, the focus of the discussion of constitutional review will not dwell on a specific jurisdiction, except to exemplify a particular model of constitutional review architecture or aspects thereof.

The same applies to the discussion of the doctrine of horizontality. While no specific jurisdiction is a focus of analysis in the general discussion of the variants of the doctrine of horizontal application of the Bill of Rights, the German perspective, in particular the German

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<sup>75</sup> See, for example, Leczykiewicz 2013:479; Donnelly 2014:143.

<sup>76</sup> See Harutyunyan and Mavcic 1999 Chapter1, an unpaginated constitutional monograph available online at <<http://concourt.am/Books/harutyunyan/monogr3/book.htm>> (accessed on 26 June 2015).

<sup>77</sup> See, for example, Besselink 2013:19; Gerards 2014:13.

Federal Constitutional Court's jurisprudence<sup>78</sup> is used for its importance in the understanding of the origins and normative content of the doctrine. Consequently, judicial decisions from a number of jurisdictions, including the FCC's that deal with the doctrine of horizontality, its application and effect as well as the architecture of constitutional review, form part of the theoretical framework that will be explored and analysed in an effort to shed light on the content and application of these thematic issues in relation to Lesotho.

#### 1.6 Research methodology

A large part of this study is based on desktop research. It is both historical and comparative in its approach. It traces the historical origins of the public-private distinctions that formed a normative basis for the vertical application of human rights, the rise and fall of those distinctions, and the advent of the doctrine of horizontality of human rights. It also traces the origins, normative content and application of the principle of subsidiarity. It then proceeds, in a comparative way, to critically analyse and evaluate the doctrine of horizontal application of a Bill of Rights and the structuring of constitutional review models based on comparative constitutional theory. Based on this comparative constitutional theory, the study locates the content, place and application of the doctrine of horizontality and the constitutional review model in the context of Lesotho.

#### 1.7 Limitations of the study

It will be attempting the impossible, given the temporal and spatial limits of this research, to discuss the horizontal effect of human rights on every distinct components of the private law of Lesotho. The study will therefore be limited to a few branches of private law: contract law and customary law.

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<sup>78</sup> Hereinafter the FCC.

## CHAPTER 2: HORIZONTAL APPLICATION OF THE BILL OF RIGHTS: COMPARATIVE PERSPECTIVE

The effective protection of fundamental human rights does not depend merely on *what* is entrenched in a Bill of Rights but also on *how* entrenchment is procured.

-Du Plessis and Corder<sup>1</sup>

### 2.1 Introduction

Societies' written constitutions are expressions of an unwavering commitment not only to break away from the unhappy past, but also to usher into their respective states the new power configurations, socio-political order, principles, norms and values, among others. One of the most important chapters in a constitution is the chapter on the Bill of Rights. The primary purpose of the Bill of Rights is to introduce contemporary principles, norms, values and standards into the governance of a country.<sup>2</sup> In contrast to a constitution itself, which commonly prescribes *what* can be done, a constitution's Bill of Rights normally contains provisions on fundamental human rights and freedoms as not only guarantees to individuals but also prescribing, "what ... cannot be done".<sup>3</sup>

While the substantive content of any Bill of Rights is essential, the mode of securing these guarantees and prescriptions is of greater importance. Precisely so, since the effectiveness of a Bill of Rights turns "crucially upon its context"<sup>4</sup> and the essential conditions<sup>5</sup> geared towards translating its rhetoric into reality. Impressive as it may seem, a Bill of Rights will be of little or no impact on the lives of the people if it does not incorporate a review mechanism to test, ensure and enforce its compliance.<sup>6</sup>

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<sup>1</sup> Du Plessis and Corder 1994:108.

<sup>2</sup> Jayawickrama 2002:98.

<sup>3</sup> Lewis 2002:4.

<sup>4</sup> Strossen 1994:51.

<sup>5</sup> Scalia 1994:89. Vanberg 2005:19-23; Du Plessis and Corder (1994:191) identify a range of factors as necessary conditions in this regard as including political willingness; widespread knowledge of the Bill of Rights; accessibility and legitimacy of rights protection among the population as a whole; a capable and sensitive legal profession; and, most importantly, the interpretative policy adopted by members of the courts whose task is to give life to the words used in a Bill of Rights.

<sup>6</sup> Jayawickrama 2002:124.

Lesotho's Constitution<sup>7</sup> contains a Bill of Rights incorporating several provisions on fundamental human rights and freedoms. The Constitution's Bill of Rights provisions have predominantly been relied on by private persons or entities (private actors) in the enforcement of their fundamental rights and freedoms against the state, organ of state or public authority. The Constitution (or any provision of the Bill of Rights) has rarely been applied in the enforcement of a private actor's rights against other private actors. In its enforcement against the state or public authorities, the Bill of Rights is said to apply vertically. The enforcement of the Bill of Rights by a private actor against other private actor(s) presents some difficulty in the landscape of Lesotho's human rights application. Does Lesotho's Bill of Rights apply "horizontally"? This mode of securing the enforcement of the Bill of Rights – the horizontal application – forms the nub of this chapter.

The question of the horizontal application of the Bill of Rights will be unpacked in five parts. Part I gives a summary of the content of the Bill of Rights and the bearers or beneficiaries of these rights. Part II discusses the traditional "categorical approach"<sup>8</sup> to public and private law, the rise and fall of public-private distinction, how the traditional public-private dichotomy grounded the vertical application of human rights and the impact or problems this verticality presents in the enforcement of human rights in the private sphere. Part III analyses the doctrine of horizontal application of the Bill of Rights and its essential variants or models. It examines, in comparative approach, how one of the critical models of the doctrine of horizontal application, the indirect horizontal application, has been applied in Germany. This provides a foundation, in the context of Lesotho, for the understanding of the interaction and interpenetration of customary law and the Bill of Rights discussed in chapter 4. Drawing lessons from the doctrinal framework and the comparative constitutional theory, Part IV locates the doctrine of horizontality, its normative content and application in Lesotho's constitutional framework through the methodology of constitutional textual analysis and relevant judicial *dicta*. The final part, Part V, provides the conclusion of the chapter. The comparative constitutional analysis is of great importance to Lesotho's nascent constitutional jurisprudence regard being had to both the legal culture and the judicial approach to private-law disputes adjudication, which are inimical to the Bill of Rights influencing Lesotho's private law.<sup>9</sup> With the assistance of this comparative constitutional law, Barak appositely points out:

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<sup>7</sup> The Constitution, Chapter II (sec 4 up to 24).

<sup>8</sup> Oliver and Fedtke 2007:23.

<sup>9</sup> On these issues, see chapters 4 and 5.



... we succeed in separating ourselves from thought patterns we have become accustomed to, and from distinctions that appear essential to us. In their stead comes a comprehensive view as to the essence of the order and its goals, and its place in the systematic and social structure. By means of comparative law, our horizons are broadened. We consider additional possibilities and new solutions, and understand better the normative potential concealed in the local order. Surely comparative law is a guide to finding the appropriate solution. It grants comfort to the judge and gives him the feeling that he is treading on safe ground, and it also gives legitimacy to the chosen solution.<sup>10</sup>

## PART I

### 2.2 Lesotho's constitutional Bill of Rights

#### 2.2.1 The Constitution: generally

The Lesotho Constitution, a product of a two-year period of deliberations and discussions, came into force and operation on 2 April 1993. In terms of section 2 thereof, the Constitution is supreme and any other law inconsistent with it is void to the extent of its inconsistency.<sup>11</sup> It declares Lesotho a democratic Kingdom and establishes the three arms of government – a bicameral parliament, the executive and the judiciary – as well as other important national institutions.<sup>12</sup> In Chapter VII, the Constitution entrenches important constitutional provisions such as the Bill of Rights and prescribes a modality for their amendment or alteration.<sup>13</sup>

The Constitution provides, in Chapter II, for a court-enforced Bill of Rights, which essentially consists of civil and political rights, and the manner, the duration and procedures through which the fundamental human-rights provisions may be derogated from during periods of war or public emergency that threaten the life of the nation.<sup>14</sup> In our new constitutional normative order, the Bill of Rights occupies a pivotal position. In the hands and at the disposal of a private actor, the Bill of Rights stands between the push towards compliance with fundamental human rights and constitutional supremacy and the pull by state authorities and other private actors in the direction of non-compliance and rights contravention. Thus,

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<sup>10</sup> Barak 1996:242.

<sup>11</sup> The Constitution, sec 2. The legal effect of the supremacy clause in the normative hierarchy will be discussed in chapter 4.

<sup>12</sup> For example, the Ombudsman (see the Constitution, Chapter XII); the Human Rights Commission (see *Sixth Amendment of the Constitution Act 13/2011*, sec 10).

<sup>13</sup> The Constitution, sec 85.

<sup>14</sup> The Constitution, sec 4-24.

the Bill of Rights “reinforces the supremacy of the Constitution and demands that all law and conduct must be consistent with its provisions”<sup>15</sup> – it is “the cornerstone of democracy”.<sup>16</sup>

Following after the Nigerian and Indian approaches, the Constitution however provides, in Chapter III, for non-justiciable socio-economic rights as directive principles of state policy (DPSP) which are meant to guide the Government and public authorities, in the performance of their functions, to realise them progressively, by social welfare legislation or otherwise, subject to the economic capacity and development of Lesotho.<sup>17</sup> These DPSPs include equality and justice;<sup>18</sup> protection of health;<sup>19</sup> provision for education;<sup>20</sup> opportunity to work;<sup>21</sup> just and favourable conditions of work;<sup>22</sup> protection of workers’ rights and interests;<sup>23</sup> protection of children and young persons;<sup>24</sup> rehabilitation, training and social resettlement of disabled persons;<sup>25</sup> economic opportunities;<sup>26</sup> participation in cultural activities;<sup>27</sup> and protection of the environment.<sup>28</sup>

### 2.2.2 Civil and political rights

Chapter II of the Constitution guarantees for “every person in Lesotho”,<sup>29</sup> regardless of race, colour, sex or language, sixteen fundamental rights and freedoms. These are: (a) the right to life; (b) the right to personal liberty; (c) freedom of movement and residence; (d) freedom from inhuman treatment; (e) freedom from slavery and forced labour; (f) freedom from arbitrary search or entry; (g) the right to respect for private and family life; (h) the right to a fair criminal trial and to a fair determination of one’s civil rights and obligations; (i) freedom of

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<sup>15</sup> Moseneke 2007:5.

<sup>16</sup> Ndimma 2007:75.

<sup>17</sup> The Constitution, sec 25-36.

<sup>18</sup> The Constitution, sec 26.

<sup>19</sup> The Constitution, sec 27.

<sup>20</sup> The Constitution, sec 28.

<sup>21</sup> The Constitution, sec 29.

<sup>22</sup> The Constitution, sec 30.

<sup>23</sup> The Constitution, sec 31.

<sup>24</sup> The Constitution, sec 32.

<sup>25</sup> The Constitution, sec 33.

<sup>26</sup> The Constitution, sec 34.

<sup>27</sup> The Constitution, sec 35.

<sup>28</sup> The Constitution, sec 36.

<sup>29</sup> It is important to note that these rights are entitlements not only of the citizens, but every person “in” Lesotho.

conscience; (j) freedom of expression; (k) freedom of peaceful assembly; (l) freedom of association; (n) freedom from arbitrary seizure of property; (o) freedom from discrimination; (p) the right to equality before the law and the equal protection of the law; and (q) the right to participate in government.<sup>30</sup> As stated before, these rights and freedoms are enforceable before the courts of law.<sup>31</sup>

### 2.2.3 The bearers of rights

The Bill of Rights not only describes legal entitlements but also identifies the bearers of the rights as well as the persons who have correlative duty to respect them (rights).<sup>32</sup> In terms of the Constitution, “every person in Lesotho” is entitled to the fundamental human rights and freedoms as encapsulated in the Bill of Rights.<sup>33</sup> It is apparent that any natural person in Lesotho, whether a citizen or an immigrant of any migration status, is a bearer of these rights.<sup>34</sup> Juristic persons are also bearers of some of these rights, depending on the nature of the right and of the juristic person.<sup>35</sup>

### 2.2.4 Application of the Bill of Rights

Where enforcement of the Bill of Rights is taken against the State or public authority as the violator of rights, the Bill of Rights is said to apply vertically. Taking into account the historical context of the Lesotho Constitution, the Bill of Rights has predominantly been relied on by private persons and entities to thwart the unwarranted executive and legislative excesses that contravene the private actor’s fundamental rights.<sup>36</sup> Whether the Bill of Rights applies horizontally, that is, in legal relationships between private actors *inter se*,<sup>37</sup> will be unpacked below.

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<sup>30</sup> See the Constitution, sec 5-20.

<sup>31</sup> See the Constitution, sec 22(1).

<sup>32</sup> See Vrancken 2009:39; Christie 2011:13; De Waal *et al* 1999:27; *Bulane v Lerotholi Polytechnic* 8/2008; Fagan 2001:78.

<sup>33</sup> The Constitution, sec 4(1); *Otubanjo v Director of Immigration* LAC (2005-2006) 336:340.

<sup>34</sup> The protection may extend to unborn children in certain circumstances. See Palmer and Poulter 1972:338-339; Saha 2010:69-70.

<sup>35</sup> See *Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC); *R v Big M Drug Mart Ltd* 18 DLR (4<sup>th</sup>) 321; Anderson 2013:361-390; Moolman 1998:10-6.

<sup>36</sup> See *Seeiso v Minister of Home Affairs* LAC (1990-1994) 665; *Director of Public Prosecutions v Lebona* LAC (1995-1999) 474; *Commander, Lesotho Defence Force v Rantuba* LAC (1995-1999) 687; *Sekoati v President, Court-Martial* LAC (1995-1999) 812.

<sup>37</sup> See Hunter-Henin 2007:98; Roederer 2009:472; Van der Walt 2003:312.

## PART II

### 2.3 The public-private distinction: grounding verticality

#### 2.3.1 The rise of the public-private distinction

Distinctions permeate all spheres of life:<sup>38</sup> from ordinary life issues to world legal systems. Distinctions as “an intellectual framework”<sup>39</sup> or conception, result in classification and categorisation, in order to understand and attain knowledge to manage<sup>40</sup> life and solve real life problems. Schoenhard emphasises that at the very early stage of human development, conceptions of distinction are traceable.<sup>41</sup> According to Rosiers, knowledge requires categorisations.<sup>42</sup> In order to understand the world around us better, “we arrange it in boxes that serve to highlight similarities and differences”.<sup>43</sup> Rosiers concludes that public-private distinction is one of those categorisations that have been used in almost all disciplines,<sup>44</sup> including law.

The taxonomy of relationships into public and private is usually associated with liberal political theory<sup>45</sup> and owes its origin from the Roman *Corpus juris*, the collection of the norms of Roman civil code.<sup>46</sup> According to Cobetti, the Roman *Corpus juris* reads: “public law is that which regards the establishment of the Roman commonwealth, private that which regards individuals’ interests, some matters being of public and others of private interest”.<sup>47</sup> This definition was borrowed by political thinkers and, divorced from its juridical context, can be found in the works of, among others, Thomas Hobbs, John Locke, Jean-Jacques Rousseau and Emmanuel Kant.<sup>48</sup>

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<sup>38</sup> Gobetti 1992:1; Supiot 1996:653.

<sup>39</sup> Freyfogle 2006:19; also see Rosiers 2003:vii.

<sup>40</sup> Freyfogle 2006:15.

<sup>41</sup> Schoenhard 2008:637-638.

<sup>42</sup> Rosiers 2003:vii.

<sup>43</sup> Rosiers 2003:vii.

<sup>44</sup> Rosiers 2003:vii.

<sup>45</sup> Cane 1987:57; Horwitz 1982:1423. Liberalism consists in the structuring of individual interactions in society based on a set of rights that require human beings to respect each other’s liberty and equality. See Charvet and Kaczynska-Nay 2008:3.

<sup>46</sup> Gobetti 1992:1; Reich 2010:56.

<sup>47</sup> Gobetti 1992:1.

<sup>48</sup> Cobetti 1992:1.

### 2.3.2 The rationale of the dichotomy

The rationale for the categorisation of law into public and private lies in the different methods regulating legal relationships in a society. While public law is a method of legal centralisation in which state or public authority plays a leading role in determining the legal position of the individuals in relation to the state, private law amounts to a decentralisation of legal power in terms of which private actors may regulate their own affairs. Thus, public law emphasises regulation, while private law grounds personal autonomy of self-regulation by providing legal tools to private actors to be their own legislators.<sup>49</sup>

Reich describes the justification for the characterisation and categorisation model as based on “a separation between the state area where political prerogatives prevail, and the private sphere where autonomous persons interact according to their own preferences”.<sup>50</sup> Thus, public-private differentiation, as a social construct, is not only “a strategy that can be used in socio-spatial conflicts;”<sup>51</sup> the division has been justified by the importance of the values of liberty, autonomy and privacy.<sup>52</sup>

### 2.3.3 Public-private distinction, human rights and verticality

The public-private distinction portrays the world as a continuum, the one side of which is occupied by the state and the other by individuals, with a dividing line between public power and private right.<sup>53</sup> On this theory, human rights act as a legal tool that mediates between these extremes and never between the individuals themselves.<sup>54</sup> According to this traditional approach, human rights values are articulated “within the terminology of public law”<sup>55</sup> and their function is to guard against the state interfering in private affairs.<sup>56</sup> Thus, drawing from the fountain of traditional thinking, human rights are regarded as constituting “shields with which the individual protects himself against the all-encompassing power of the state”<sup>57</sup> and

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<sup>49</sup> Froneman 2007:15-16.

<sup>50</sup> Reich 2010:56.

<sup>51</sup> Belina 2011:15.

<sup>52</sup> Gardbaum 2003:394.

<sup>53</sup> Horwitz (1982:1424) points that “one of the central goals of [liberal legal thought] was to create a clear separation between constitutional, criminal, and regulatory law – public law – and the law of private transactions – torts, contracts, property, and commercial law”.

<sup>54</sup> Horwitz 1982:1424.

<sup>55</sup> Reid and Visser 2013:2.

<sup>56</sup> Smits 2006:19.

<sup>57</sup> Barnard-Naude 2013:38.

are therefore enforceable against the state *only*.<sup>58</sup>

This liberal conception continues to pose problems for the effective realisation of fundamental rights by private actors<sup>59</sup> since human-rights law, seen as an aspect of public law, should only apply in state-individual relationships – vertically – and not in legal relationships between private actors *inter se* – horizontally. According to Oliver and Fedtke, the “traditional distinctions between ‘public’ and ‘private’ law still affect the thinking about the application of human rights in the private sphere in many systems and, more importantly, lead to real practical difficulties”.<sup>60</sup>

The consequence of this is that private actors violate human rights, but they are not legally liable. They are thus insulated from human rights principles and values. It is only when the law begins to “move beyond the boundaries between the ‘private’ and the ‘public’ and “intervene in private relationships”<sup>61</sup> that private actors may be subjected to a human rights protective and liability framework.<sup>62</sup>

#### 2.3.4 The fall of the distinction: critiques and blurring of the divide

The early attack on the characterisation and classification of law into public and private was launched by Karl Marx and Max Weber in the late 19<sup>th</sup> century and early 20<sup>th</sup> century, respectively. This was followed by the American Legal Realists<sup>63</sup> in the 1920s and 1930s. The Critical Legal Studies movement weighed in with their critique in the 1970s and 1980s<sup>64</sup> and the Feminists called for the collapse of the distinction.<sup>65</sup> Because of the sustained

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<sup>58</sup> Smits 2006:19; Chirwa 2006:21; Van der Walt 2003:317.

<sup>59</sup> Pieterse 2003:2.

<sup>60</sup> Oliver and Fedtke 2007:22-23.

<sup>61</sup> Pieterse 2003:2.

<sup>62</sup> However, some commentators have highlighted on the risks of the blurring of the public-private divide. See Barney 2003:101-107; Horwitz 1982:1428; Kamin 2004:85.

<sup>63</sup> Horwitz 1982:1426. Horwitz states: “Culminating in the Legal Realist Movement of the 1920's and 1930s, judges such as Holmes, Brandeis, and Cardozo and legal theorists such as Roscoe Pound, Walter Wheeler Cook, Wesley Hohfeld, Robert Lee Hale, Arthur Corbin, Warren Seavey, Morris Cohen, and Karl Llewelyn devoted themselves to attacking the premises behind the public/private distinction.”

<sup>64</sup> See Tushnet 1984:632; Kennedy 1991:327.

<sup>65</sup> The feminists have called for the collapse of the distinction since the “private” home has become the capital of women’s harassment, abuse, victimisation and human rights violation. See Rosiers 2003:viii; Schneider 2001:973.

critique, Cobetti observes, there is “a progressive erosion of the private domain, and a blurring of the boundary-line separating it from the public” and the private sphere can no longer be considered “as a prerequisite for life in public”.<sup>66</sup> Recognising the deconstruction of the divide, Oliver and Fedtke confirm that in practice, “there are sliding scales of ‘publicness’ or ‘privateness’ of institutions or functions in many democracies, and that a categorical approach is perhaps artificial and difficult to sustain”.<sup>67</sup>

### 2.3.5 Disposition towards horizontal application

There is contemporary disposition and inclination worldwide to recognise a need for the Bill of Rights to afford private actors the protection not only against the abuse of state power but also against the exertion of superior social and economic power of other private actors in modern-day societies.<sup>68</sup> Van Aswegen recognised a gradual shift from the traditional approach and the concomitant gradual erosion of the boundaries between public and private sphere during the twentieth century. According to him, this shift resulted in the expansion of fundamental human rights into the relationships between private actors.<sup>69</sup> Thus, the positivisation – the constitutionalisation in written documents – of fundamental rights and freedoms to govern also private relationships constitutes the modern constitutional law or theory.<sup>70</sup>

The tendency is not without justification. In the modern context, Gardbaum argues, “constitutional rights and values may be threatened by extremely powerful private actors and institutions as well as governmental ones, and the vertical position automatically privileges the autonomy and privacy of such citizen-threateners over that of their victims”.<sup>71</sup> Gardbaum continues to observe that, in the vertical application of the human rights, the autonomy of rights violators is “categorically preferred to that of those harmed or excluded by their actions, without any obvious justification in terms of an overall assessment of net gains and

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<sup>66</sup> Cobetti 1992:147. According to Supiot (1996:654), the public-private distinction is a deceptive dichotomy whose deceptiveness is revealed on close scrutiny.

<sup>67</sup> Oliver and Fedtke 2007:23.

<sup>68</sup> Du Plessis and Corder 1994:113.

<sup>69</sup> Van Aswegen 1995:51.

<sup>70</sup> Van der Walt (2003:317) argues, “horizontal application of fundamental rights, to the extent that a particular legal system actually endorses it, must be said to constitute a new development in constitutional theory”.

<sup>71</sup> Gardbaum 2003:395.

losses in autonomy”.<sup>72</sup> According to Barak, since the danger to human rights emanates from public authorities (state) as well as from private actors, there should be a general standard cutting across public and private sectors.<sup>73</sup> The horizontal position therefore guarantees “fairness in the relationship between individuals” by providing “minimum social justice” to the “weaker” party.<sup>74</sup>

The second justification for the disposition towards horizontal application of the Bill of Rights is that a constitution as an expression of a society’s fundamental values should be applicable to all its members – the state and private actors.<sup>75</sup> Thirdly, the coherence and practicability of the distinction are questionable in the light of privatisation of governmental services and activity.<sup>76</sup> For these reasons, the idea that Bills of Rights are shields against the state only is thus challenged by the horizontal application of Bills of Rights.<sup>77</sup> Horizontal application of the Bill of Rights, therefore, emphasises the interpenetration of constitutional principles, norms and values into private law, resulting in what is called “horizontal effect”.<sup>78</sup>

Notwithstanding the deconstruction or the blurring of the public-private divide, the distinction cannot be entirely obliterated from legal conception and theory.<sup>79</sup> Since the public-private distinction is essentially not “a universal line in the sand but rather a boundary on any set of relationships – what is public in relation to one party may be private in relation to another” – the distinction, approached with care, “can and will remain a useful legal fiction”.<sup>80</sup> In particular, the utility of the public-private distinction between the constitutional Bill of Rights and the private law is of critical importance since to eliminate the distinction completely, would be to remove, among other things, the ability to identify, with relative certainty, the

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<sup>72</sup> Gardbaum 2003:395.

<sup>73</sup> Barak 2001:15.

<sup>74</sup> Sever 2014:41.

<sup>75</sup> Gardbaum 2012:178.

<sup>76</sup> Gardbaum 2012:178.

<sup>77</sup> Rivera-Perez 2012:174-175.

<sup>78</sup> As to the horizontal effect of the Bill of Rights on private law, refer to chapter 4.

<sup>79</sup> Alexander (1993:369) argues that “no matter how enormous the effects of the private sphere on the public, and no matter how bad some of those effects, nothing immediately follows regarding altering the private sphere, much less eliminating it. The spill-over effects on both the public and private spheres can only be assessed case by case. And the existence of these spill-over effects does not negate the separate existence of public and private spheres”.

<sup>80</sup> Schoenhard 2008:637. Turner (2012:1005) posits, “to ignore the distinction ... is to miss the most basic sorting criterion in our legal system. Indeed, separating public from private is an inevitable task in *any* legal system”.



situations in which entrenched constitutional limits apply and do not apply.<sup>81</sup> Schoenhard argues, “the public-private distinction is alive and well, but that principled use of the distinction requires a more rigorous approach”.<sup>82</sup> This observation has led Kennedy to conclude that the distinction is “dead, but it rules us from the grave”.<sup>83</sup>

### PART III

#### 2.4 The Bill of Rights: horizontal application models

Notwithstanding that the doctrine of horizontal application of the Bill of Rights forms part of modern constitutional law or theory, different national legal systems, depending on their legal culture, constitutional history and conceptions of human rights, have recognised, accepted and/or developed the doctrine to a lesser or greater extent.<sup>84</sup> While the doctrine has been expressly stated in a constitution in some countries,<sup>85</sup> in other states the constitution remains silent or ambiguous on the issue, leaving its determination and articulation to the judiciary.<sup>86</sup> Comparative constitutional law, various judicial decisions and academic scholarship have discussed the doctrine of horizontal application of a Bill of Rights. Based on this comparative constitutional law, different models of this doctrine have emerged. Of central importance to the question whether and to what extent a Bill of Rights applies in private sphere, is the normative force of the constitutional norms in a given constitutional system. On this score, O’Cinneide makes the following apposite observation:

If these [constitutional] norms are envisaged as primarily concerned with controlling the functions of public bodies, then there may be some reluctance to apply them in the private

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<sup>81</sup> Schoenhard 2008:636.

<sup>82</sup> Schoenhard 2008:637. Also see Gavison 2001:224; Froneman 2007:20; Kocan 2008:3, a working paper available at <http://www.eurosphere.uib.no/knowledgebase/workingpapers.htm> (accessed on 4 May 2015); Brett 2003:72-73; Moran 2009:18-19.

<sup>83</sup> Kennedy 1982:1353.

<sup>84</sup> Van Aswegen 1995:51.

<sup>85</sup> Section 8(1) and (2) of South African Constitution, for example, provides that the Bill of Rights applies to all law, binds the legislature, the executive, the judiciary and all organs of state, and that “a provision of the Bill of Rights binds a natural person or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

<sup>86</sup> Barak 2001:14. In India, for example, “several [fundamental rights] which either expressly apply to private action or are ambiguous in their application or even the ones which are expressly available only against the state have found liberal application in the hands of the courts, thus ensuring the wide application and protection of human rights ...” See Singh 2007:197.

sphere. However, if constitutional norms are seen as fundamental legal principles that should permeate all law, whether public or private, and which all legal actors should respect, then there may be much greater willingness to apply these norms in private law.<sup>87</sup>

From the comparative constitutional landscape, Barak identifies the “four most popular models”,<sup>88</sup> while Barkhuysen and Van Emmerik<sup>89</sup> distil six models of horizontal application. Only five models relevant for this study are discussed below; the minimalist application model, direct application model, indirect application model, application to the judiciary model and indirect legislative implementation model.

#### 2.4.1 Minimalist horizontal application model

Under this model, a Bill of Rights as such does not apply in private legal relationships, but only towards and against the state, unless there is also an element or degree of state involvement.<sup>90</sup> This means that a private actor cannot invoke a Bill of Rights provision in litigation with another private actor, unless he or she can show that the state has been involved in one way or the other in the conduct by which he or she is aggrieved. This model, therefore maintains the traditional public-private distinction,<sup>91</sup> except that an individual may be allowed to rely on a Bill of Rights against another individual if the use of state power is involved or can be discerned to be part of the impugned conduct. The minimalist horizontal application model is known as the doctrine of state action,<sup>92</sup> both in the US and Canada. About this doctrine in relation to the US constitutional law, Hershkoff clarifies:

Constitutional rights either apply because government action is involved or do not apply because private action is involved: with rare exceptions, common-law doctrines of torts, contracts, and property are off the constitutional radar ... On first consideration, ‘horizontal’ and the accompanying idea of radiating effect might appear alien to U.S. legal thinking. For more than a century, the state action doctrine has allowed the most minimal space for raising the Constitution as a shield against ‘merely private conduct’; the Court instead takes a binary

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<sup>87</sup> O’Cinneide 2007:214.

<sup>88</sup> Barak 2001:14.

<sup>89</sup> Barkhuysen and Van Emmerik 2006:45-46.

<sup>90</sup> Barendt 2007:400.

<sup>91</sup> The courts of law supervise the “high wall” separating the public from the private. See *Plaut v Spendthrift Farm Inc.* 514 US 211 (1995):245.

<sup>92</sup> In relation to this doctrine and its application, see, for example, *Virginia v Rives* 100 US 313 (1879):318 in which the US Supreme Court stated that the provisions of the Fourteenth Amendment of the US Constitution “all have reference to State Action exclusively, and not to any action of private individuals”.

approach that treats '[t]he wrongful act of an individual' as 'simply a private wrong'.<sup>93</sup>

The Canadian case of *Retail, Wholesale & Dep't Store Union v Dolphin Delivery Ltd*<sup>94</sup> involved a private company that sought and obtained an injunction under common law for inducement of breach of contract against the trade union picketing on its premises. The trade union relied on the *Charter* right of freedom of expression for its conduct. The Canadian Supreme Court held that the *Charter* applied to "government" and not to private persons, and consequently the *Charter* would apply to common law only when some government action infringed a *Charter* right.<sup>95</sup> To hold the "court order" to be equivalent to "government action", and so requiring the invocation of the *Charter* would, the Supreme Court further held, "widen the scope of Charter application to virtually all private litigation".<sup>96</sup>

According to the doctrine of state action, the US Supreme Court ordinarily finds that, although the conduct complained of has been committed by a private defendant (in which case ordinarily the fundamental rights would not apply), a state is involved and therefore fundamental human rights apply, in certain circumstances.<sup>97</sup> Consequently, the Bill of Rights would apply in private-law disputes, for instance, where a private person performs functions traditionally exclusively reserved for the state,<sup>98</sup> where the state has significantly participated in the conduct,<sup>99</sup> where the state provided significant encouragement or authorisation for the

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<sup>93</sup> Hershkoff 2011:455,457.

<sup>94</sup> *Retail, Wholesale & Dept Store Union v Dolphin Delivery Ltd* [1986] 2 SCR 573, hereinafter, *Dolphin Delivery*.

<sup>95</sup> *Dolphin Delivery*:599-603. In *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130:170-1172, the Supreme Court further elaborated that where government conduct violated the *Charter* right, that would establish a cause of action under the *Charter*, but that in private disputes where private actors rely on common law's inconsistency with the *Charter* as a cause of action, that would not create any cause of action as the private parties do not owe each other any constitutional duty. In the latter instance, the parties should rely on common law causes of action.

<sup>96</sup> *Dolphin Delivery*:43].

<sup>97</sup> Gardbaum 2003:412-414; Chirwa 2006:24.

<sup>98</sup> The Supreme Court applied constitutional guarantees where a political party conducted elections (primaries or pre-primaries) and some African-Americans were excluded from participation. See *Smith v Allwright* 321 US 649 (1944); *Terry v Adams* 345 US 461 (1953).

<sup>99</sup> In *Burton v Wilmington Park Authority* 365 US 715 (1961), the majority of the US Supreme Court held that a private restaurant owner violated the constitutional right prohibition of racial discrimination when he declined to serve black people. As the restaurant was situated in a building owned by a state-created parking authority and leased from that authority, there was sufficient public involvement in the private decision to satisfy the state action doctrine. By taking rent from

conduct;<sup>100</sup> and where a court order is involved enforcing voluntary private action resulting in violation of a right. Thus, the US and Canadian constitutional doctrine of state action results in the Bill of Rights playing a minimal or limited role in regulating the private sphere.

#### 2.4.2 Direct horizontal application model

The genesis of the idea whether, and if so, to what extent, a constitutional Bill of Rights applies, and therefore has influence, in horizontal relationships between private actors, is traceable to the German constitutional legal thought.<sup>101</sup> The German Constitution – the *Grundgesetz*, the Basic Law adopted in 1949 – provides for a catalogue of constitutional rights<sup>102</sup> and imposes a constitutional duty “to all state power”<sup>103</sup> to take regard of and protect the dignity of a person. The German Constitution further establishes the Federal Constitutional Court (FCC) with the constitutional power to declare unconstitutional any law inconsistent with the Constitution.<sup>104</sup> In 1954, in a case<sup>105</sup> involving the demand against the journal to retract certain defamatory statement, the German civil courts resolved the disputes placing their respective reliance on either the statute<sup>106</sup> or the civil law.<sup>107</sup> When the matter finally came to the Federal Court of Justice, the highest civil court in Germany, the court resolved the matter on an entirely different basis: the infringement of the Plaintiff’s constitutional personality rights. It held that the constitutional right to dignity was a private right of the private actor which had to be *universally respected* insofar as it did not infringe another person’s right or was in conflict with the constitutional order or morality. This decision is regarded as the “birth certificate” of direct horizontal application (*unmittelbare*

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the restaurant owner, the Supreme Court held, the state had significantly involved itself with his discriminatory practices.

<sup>100</sup> See *Reitman v Mulkey* 387 US 369 (1967).

<sup>101</sup> On historical development of the concept of “horizontal effect” – the German conception of the horizontal application of human rights in the field of private law – see Brüggemeier 2006:59-63; Fedtke 2007:125-139.

<sup>102</sup> German Constitution (or GG), Art 1-19. In terms of Art 1 thereof, “human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority”.

<sup>103</sup> The GG binds the legislature, the executive and the judiciary; see GG, Art 1(1)(ii), and Art 1(3)).

<sup>104</sup> GG, Art 93-94; Art 100(1) is the supremacy clause.

<sup>105</sup> *BGHZ* 13, 334. The English translation of this case is available at <http://www.ulc.ac.uk/laws/global-law/german-cases> (accessed on 20 April 2015).

<sup>106</sup> The Hamburg court of first instance relied on the breach of protective statute in upholding the Plaintiff’s claim.

<sup>107</sup> The appellate court rejected the claim because of lack of professional reputation.

*Drittwirkung*) of fundamental human rights in German private law.<sup>108</sup>

Direct horizontal application model entails that, just as human rights are directly and fully applicable and enforceable in vertical legal relationships, such rights are equally directly and fully applicable and enforceable by a private person against another private person without having to resort to a private-law tool.<sup>109</sup> It means that the Bill of Rights sets duties directly on private actors, the breach of which is actionable by the aggrieved party.<sup>110</sup> Under this model, the Constitution imposes full constitutional obligations on private actors. A private actor may directly apply to the court based on the Bill of Rights and obtain a relief, which “would not be available otherwise”.<sup>111</sup> The Bill of Rights therefore has a direct and immediate impact on the private law.<sup>112</sup>

India, Spain and Ireland have adopted this model.<sup>113</sup> In numerous cases, the Irish Supreme Court has held that the Irish Bill of Rights is directly applicable in private disputes.<sup>114</sup> Violations of the Bill of Rights by private actors give rise to “a cause of action known as ‘constitutional tort’”.<sup>115</sup> The Irish Supreme Court developed this remedy as an essential “safety net” for private actors’ violations of the Bill of Rights.<sup>116</sup> The direct horizontal application of the Bill of Rights entails the full and direct application of the Bill of Rights to the conduct of the private actors and to the law that forms the basis or the authority of such

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<sup>108</sup> Brüggenmeier 2006:65.

<sup>109</sup> Barkhuysen and Van Emmerik 2006:46; Barak 2001:14.

<sup>110</sup> Phillipson 1999:826; Gardbaum 2003:404.

<sup>111</sup> Barak 2001:14; also see *Ramakatsa v Magashule* 2013 2 BCLR 202 (CC) where, for the first time, the South African Constitutional Court allowed a direct application of the Constitution in private litigation.

<sup>112</sup> Cherednychenko 2007:2.

<sup>113</sup> Singh 2007:197-198; Liboreiro 2007:388-389; O’Cinneide 2007:214; Oliver 2008:11.

<sup>114</sup> In *CM v TM* [1991] ILRM 268, the Irish Supreme Court held that the common-law doctrine that a wife’s domicile was dependent on that of her husband was inconsistent with the Irish constitutional principles of equality before the law and equality. The same Court in *Meskeil v Coras Iompair Eireann* [1973] IR 121:133 held that “if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who infringed that right”.

<sup>115</sup> O’Cinneide 2007:214.

<sup>116</sup> O’Cinneide 2007:215. In both *Meskeil* and *Glover v BLN Ltd* [1973] IR 388, the Irish Supreme Court held that the infringement of the private actor’s human rights by other private actors – companies, trade unions, etc. – constituted constitutional tort, to which the Courts will provide appropriate remedies.

private conduct.<sup>117</sup>

#### 2.4.3 Indirect horizontal application model

According to the indirect horizontal application model, a Bill of Rights applies in the private sphere, but its application is indirect. This means that the Bill of Rights of itself does not permeate private law, but rather by means of existing or new private law doctrines, rules and principles.<sup>118</sup> The plaintiff approaches the court in the ordinary way using the “existing cause of action” and then argues that “the courts’ duty to act compatibly with [the Constitution] requires it to interpret or develop the common law so as to find for [him or her]”.<sup>119</sup> In this way, the constitutional norms, which are higher on the normative hierarchy of the legal system, have an impact on the private-law norms, which are lower on the hierarchy. This is done, as pointed out by Barkhuysen and Van Emmerik, through the interpretation – compatible interpretation, as Oliver calls it<sup>120</sup> – of applicable general legal rules and principles of, for example, good faith, reasonableness, fairness and due care to conform to constitutional imperatives or normative structure.<sup>121</sup> According to Barak, the indirect horizontal application model “works within the old private-law system, imbuing old tools with new contents or creating new tools with traditional private-law techniques”.<sup>122</sup>

The indirect horizontal application originally emerged from German constitutional law concept or principle of *mittelbare Drittwirkung*, which means “third party effect of constitutional rights”.<sup>123</sup> The concept emerged amidst academic debate and judicial

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<sup>117</sup> However, it is argued by some commentators that it is conceptually that conduct, and not the authorising law, which is the cause of action of the aggrieved party. Also see Phillipson 1999:828; Michelman 2009:6-7. On the arguments whether a Bill of Rights applies *directly* to both private conduct and private law or only to private conduct, see Gardbaum 2011:394; De Waal *et al* 1999:43-67; Gardbaum 2012:180; Cherednychenko 2007:3; Michelman 2009:6-7.

<sup>118</sup> Barak 2001:21. Barak 1996:225-226; Phillipson (1999:826) points out that indirectly horizontally applicable Bill of Rights means that rights “cannot be applied directly to the law governing private relations and are not actionable *per se* in such a context, [but] they may be relied upon indirectly, to influence the interpretation and application of pre-existing law”.

<sup>119</sup> Phillipson 1999:820.

<sup>120</sup> Oliver 2008:12.

<sup>121</sup> Barkhuysen and Van Emmerik 2006:46.

<sup>122</sup> Barak 2001:22.

<sup>123</sup> Fedtke 2007:126; Gardbaum 2003:403. Principally, the concept recognises that human rights apply in vertical relationships, but do have an effect on the “third” private person: the first person being the individual, the second person, the state, and the third person, another individual.

decisions questioning whether constitutional fundamental rights should apply directly (unmittelbare Drittwirkung) in horizontal legal relationship.<sup>124</sup> In 1958, the FCC – as the “guardian of the German Constitution”<sup>125</sup> – settled the debate in a groundbreaking decision of *Lüth*.<sup>126</sup> The decision, Bomhoff argues on the half-century anniversary of that decision, triggered an expansion of the sphere of influence of fundamental human rights that has rippled through diverse countries and international institutions and grounded a new constitutional-rights adjudication paradigm.<sup>127</sup> The FCC held that although a private person may not institute a direct constitutional action against another private person, parties in ordinary private litigation before all the German ordinary courts may rely or raise constitutional law rights in support of their claims or defence, as the case may be, through the general clauses, concepts, principles and doctrines of private law.

The basic underlying assumption of this principle is that all public authorities, including the courts of law, are bound by constitutional norms and principles, so that when the courts are faced with a private dispute involving a constitutional issue, the indirect *Drittwirkung* imposes the constitutional duty on the courts to engage into a two-pronged judicial process. Firstly, the courts must interpret the ordinary norms in the light of the relevant Bill of Rights considerations, and then, secondly, apply the “modified” law to the case in hand.<sup>128</sup> What is clear from this is that whenever there is inconsistency between the ordinary law and the constitutional norm, the former shall be modified in order to find application in the matter before court.

The facts upon which *Lüth* was decided were very short. Erich Lüth was a member of a group whose purpose was to effect reconciliation between the Christian and the Jews during the post-Nazi regime in Germany. When one film director famous for producing anti-Jewish films during the Nazi regime sought to produce one such film for public viewing in 1950, Lüth called for a public boycott of the new film as, according to him, it eroded the conciliatory efforts. The film director and distributor applied for an injunction against Lüth. The lower court upheld the claimants’ action, holding that Lüth’s conduct constituted an actionable

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<sup>124</sup> Chirwa 2006:31; Fedtke 2007:140-141. It is said that most of the decisions laying down direct horizontal application of constitutional rights were given by Hans Carl Nipperdey, the President (1954-1963) of the German Federal Labour Court.

<sup>125</sup> It is said that the FCC perceives itself as the guardian of the German constitution. See *BVerfGE* 1, 184:195 (1952); Rösler 2009:413.

<sup>126</sup> *BVerfGE* 7, 198.

<sup>127</sup> Bomhoff 2008:121.

<sup>128</sup> Fedtke 2007:138, 142.

incitement under the German Civil Code. An appeal by Lüth to the Court of Appeal was dismissed. Lüth filed a “constitutional complaint” to the FCC, alleging that the lower courts had violated his constitutional right to freedom of expression guaranteed by Art 5(1) of the German Constitution. The central issue before the FCC was whether constitutional rights applied only as defensive provisions against the state or whether they had “horizontal effect” and applied in private relationships. Accepting the main purpose of the fundamental human rights as being to safeguard the liberties and freedoms of a private person against the interferences by the state or public authorities, the FCC went further to state that the German Constitution:

erects an objective system of values in its section on basic rights ... This system of values, centering on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.<sup>129</sup>

Balancing the constitutional imperatives against the private enterprise’s vested economic interests, the FCC, on the facts of the case, held that the film director and distributor had infringed Lüth’s constitutional right to freedom of expression. The decision is important in four fundamental respects. Firstly, the Bill of Rights influences the development of private law by imposing obligations on private actors through the provisions of private law, which literally involves the modification of private law.<sup>130</sup> In this way, the Bill of Rights “radiates” through the whole of public or legal order.<sup>131</sup> Secondly, it is through the judicial interpretation of the private-law principles and doctrines that the Bill of Rights will penetrate the public-private divide into the private sphere. Thirdly, as public authorities,<sup>132</sup> the courts are constitutionally bound to interpret private-law principles and doctrines consistently with the spirit and values of the Constitution. Thus, the German civil court judge, being part of the judiciary, and therefore part of the public authority, was bound by the Constitution.<sup>133</sup> Finally, failure by the lower courts to interpret the private-law principles and doctrines consistently

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<sup>129</sup> *BVerfGE* 7, 198. The English translation or version of this decision is available online at [http://www.ucl.ac.uk/laws/global\\_law/german-cases/cases\\_bverge.shtml?15jan1958](http://www.ucl.ac.uk/laws/global_law/german-cases/cases_bverge.shtml?15jan1958) (accessed 20 April 2015).

<sup>130</sup> Rösler 2009:424.

<sup>131</sup> Lytvynyuk 2009:206.

<sup>132</sup> GG, Art 1(3).

<sup>133</sup> Brügge-meier 2006:70.



with the constitutional guarantee infringes a private actor's constitutional right and freedom – Lüth's constitutional right to freedom of expression.<sup>134</sup>

Through indirect horizontal application of the constitutional right by the decision in *Lüth*, the FCC pulled, as it were, the golden thread, and bound together the new constitutional regime and the old private-law norms into one legal order. Observing the impact of the decision in *Lüth* on the German legal system and public order, Fedtke states that the private law which was regarded as autonomous part of the German legal order and therefore independent of constitutional considerations “changed dramatically” and “suddenly fell foul of constitutional standards” established by the new constitutional order.<sup>135</sup> He concludes that the introduction by *Lüth* of the new constitutional order “profoundly affected the whole legal system, which had to be brought in line with these new values”.<sup>136</sup>

#### 2.4.3.1 Weak indirect horizontal application

Indirect horizontal application model can be subdivided into two further forms: the weak and strong forms.<sup>137</sup> The difference lies in whether the courts apply to the private law the *Bill of Rights (principles)* themselves or *values underlying those principles* in ensuring its conformity with the Constitution. The Bill of Rights not only contains the constitutional principles governing the public and private conduct, but also incorporates fundamental and important social ethos and values underpinning these principles.<sup>138</sup> These values should, because of a supreme constitution, spread through the entire legal order.<sup>139</sup> While a private actor may not directly sue another private actor on the basis of the Bill of Rights when a matter has been instituted in a court of law in the ordinary way, the claimant has a right and the courts a duty, to apply and develop the existing private law in the light, not of the Bill of Rights provisions *per se*, but of the *values* as represented by the relevant applicable provision of the Bill of Rights.<sup>140</sup> This is the weak form of indirect application.

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<sup>134</sup> *BVerfGE* 7, 198. Also see Brüggemeier 2006:70; Rösler 2009:424; Chirwa 2006:32; *BVerfGE* 30, 173 (1971). The English translation of this case, referred to as *Maphisto*, is available online at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=1478](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=1478) (accessed on 30 March 2015).

<sup>135</sup> Fedtke 2007:132.

<sup>136</sup> Fedtke 2007:132.

<sup>137</sup> Rivera-Pérez 2012:180.

<sup>138</sup> *Bolof v Director of Public Prosecutions* LAC (1995-1999) 231:248.

<sup>139</sup> Phillipson 1999:830.

<sup>140</sup> Phillipson 1999:830; Rivera-Pérez 2012:180-181; Beale and Pittam 2001:135-136.

#### 2.4.3.2 Strong indirect horizontal application

Between the extremes of “no effect” and direct horizontal effect, lies the “strong indirect horizontal effect”.<sup>141</sup> This model is said to aim at achieving a compromise between the two and is placed closer to direct horizontal effect than to “no effect”.<sup>142</sup> Under this model, the courts will not allow a private actor to rely on otherwise unconstitutional private law in order to defend or enforce his rights-infringing actions.<sup>143</sup> Instead, they will fully apply the Bill of Rights to the impugned private law or conduct.<sup>144</sup> This, it is said, arises out of the inclusion of the judiciary as “state authority” or “public authority” as well as the supremacy of the Constitution over private law.<sup>145</sup> Thus, the courts have the obligation always to act compatibly with the Constitution, including when they sit in judgment over purely private-law disputes.<sup>146</sup> This inclusion is geared towards ensuring that all private law is compatible with the Bill of Rights.<sup>147</sup> Thus, this form of indirect horizontal application, according to Phillipson, places an absolute constitutional duty on the courts to ensure that “all existing laws” are compatible with the Bill of Rights “rather than just requiring them merely to have regard for it”, and that the courts “must strive to ensure compatibility with the rights themselves, not merely the ‘values’ represented by them”.<sup>148</sup> The difference between strong indirect horizontal application and the direct horizontal application is that “the courts are not allowed to create entirely new causes of action”, thereby going beyond their legitimate function of developing common law.<sup>149</sup>

#### 2.4.4 Application to the judiciary model

This model, as its name suggests, means that the Bill of Rights is applicable to or against the judiciary. In this regard, whenever a matter is brought before the judiciary, the courts have a constitutional duty to develop the common law (including private law) or to grant the relief, in a manner consistent with the constitutional norms. They are thus prohibited from

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<sup>141</sup> Cherednychenco<sub>1</sub> 2007:142.

<sup>142</sup> Cherednychenco<sub>1</sub> 2007:142.

<sup>143</sup> Cherednychenco<sub>1</sub> 2007:142.

<sup>144</sup> Gardbaum 2003:387; Phillipson 1999:830.

<sup>145</sup> Cherednychenco<sub>1</sub> 2007:143.

<sup>146</sup> Cherednychenco<sub>1</sub> 2007:143.

<sup>147</sup> Cherednychenko 2007:15.

<sup>148</sup> Phillipson 1999:831; Gardbaum 2012:180; Cherednychenko 2007:16-17.

<sup>149</sup> Cherednychenco<sub>1</sub> 2007:143. However, see chapter 4 on the power of the courts under section 156(1) of the Constitution of Lesotho.

making a decision (judgment) or granting relief (order) that violates the Bill of Rights.<sup>150</sup> This is justified on the grounds that not only is the judiciary a part of the “state”,<sup>151</sup> but also on the fact that in a constitutional system where constitutional norms are higher in the hierarchy and supreme, any judicial order or remedies, being part of the law, must of necessity not be inconsistent with the Constitution. This model puts constitutional constraints and obligations on the judges and judicial officers in the performance of their duties.<sup>152</sup>

It has been said that when a court issues an order for the enforcement of, for example, a discriminatory contract as was the case in *Shelley v Kraemer*, it places in the hands of the private party who is infringing the constitutional right to equality, the power of the state, including the enforcement by contempt of court procedures, against the aggrieved party.<sup>153</sup> Thus, it is concluded, the court violates the state’s constitutional duty not to discriminate and infringe the rights (to equality and equal protection of the law) of the aggrieved person.<sup>154</sup> The application to the judiciary model has been adopted by the US Supreme Court in a number of cases.<sup>155</sup>

#### 2.4.5 Indirect legislative implementation model

The final model, the indirect legislative implementation model, posits that where legislation

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<sup>150</sup> Barkhuysen and Van Emmerik 2006:46-47.

<sup>151</sup> The court, Barak (1996:239) states, “is an arm of the government. When the court speaks, the state speaks, and when the court acts, the state acts. The judiciary is a government authority, and human rights must receive protection from it as well.” Also see Phillipson 1999:827.

<sup>152</sup> See, for example, *Shelley v Kraemer* 334 US 1 (1948).

<sup>153</sup> Barak 2001:26.

<sup>154</sup> Barak 2001:26.

<sup>155</sup> *New York Times v Sullivan* 376 US 1 (1948). The Supreme Court has stated that, with the exception of the Thirteenth Amendment of the American Constitution which proscribes slavery, all other amendments are addressed to the “state”, and the courts being part of the state, have constitutional obligation, in the “state action” of developing common law and granting appropriate remedies, to ensure that such development and remedies do not infringe the guaranteed rights. The court then adjusted common law defamation rules in the *Sullivan* case to conform to the constitutional freedom of expression right. In *Shelley*, the US Supreme Court dismissed an African-American claim based on the infringement of equality right arising out of a contract provision, prohibiting sale to African-American on the basis that equality right did apply in the case as the infringement did not constitute “state action”. The Court, however, refused to enforce the discriminatory provision of the contract as judicial enforcement constituted “state action” and to do so would amount to enforcing a discriminatory contract. See *Shelley*:19.

operationalises or implements a constitutional right that applies in the relationship between private actors, the private actor whose right has been infringed may approach the courts of law to enforce such a statutory right.<sup>156</sup> The constitutional rights thus find indirect enforcement.

## PART IV

### 2.5 The horizontal application of Lesotho's constitutional Bill of Rights

#### 2.5.1 Lesotho's Constitution: avoiding the application doubt

In some jurisdictions, whether a Bill of Rights applies horizontally has been obscured behind constitutional lack of an express provision and the determination of the application has been left for judicial determination. Apparently this may be the case when regard is had to section 22(1) of the Constitution of Lesotho. In terms of that section, "if any person alleges that any of the provisions" of the Bill of Rights "has been, is being or is likely to be contravened in relation to him" or, in the case of a detained person, in relation to that other person, may apply to the High Court for redress.<sup>157</sup> Regard being had to the normative structure of the Bill of Rights,<sup>158</sup> the reading of this section does not discriminate against private actors and public authorities or state as duty-bearers and against whom an application to the High Court may be made in the event of the contravention of the guaranteed right or freedom. It can therefore be concluded that the Bill of Rights applies both against the state and against private actors at the instance of a private actor.

If there is any doubt whether section 22(1) of the Constitution is the basis of the horizontal application of the Bill of Rights, the Constitution has taken an express route in an attempt to avoid any such doubt. It declares in no uncertain terms and without any equivocation:

For avoidance of any doubt and without prejudice to any other provision of this Constitution it is hereby declared that the provisions of this Chapter shall, except where the context otherwise requires, apply as well in relation to things done or omitted to be done by persons acting in a private capacity (whether by virtue of any written law or otherwise) as in relation to things done or omitted to be done by or on behalf of the Government of Lesotho or by any

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<sup>156</sup> Barkhuysen and Van Emmerik 2006:46.

<sup>157</sup> The Constitution, sec 22(1).

<sup>158</sup> The normative structure of the Bill of Rights consists of: (a) the subject or beneficiary of the right or right-holder, (b) the duty-bearer who is obliged not to contravene the guaranteed right, (c) the object or content of the right, and (d) implementation or set of measures geared towards the realisation of the right.

person acting in the performance of the function of any public office or any public authority.<sup>159</sup>

From this unambiguous constitutional declaration, two important considerations relating to the application of the Bill of Rights are easily discernible, while others may require a further textual analysis. Firstly, the Constitution shatters the public-private wall of liberal philosophical and legal thinking which has been a mainstay and linchpin of the state action doctrine both in the US and Canada, but applies the separation on normative basis.<sup>160</sup> Thus, the Bill of Rights applies equally in private legal relationships as in vertical state-individual relationships.<sup>161</sup> This was confirmed in *Radeby v National Executive Committee*<sup>162</sup> where the applicant, a member of the second respondent party, challenged the nomination of the fourth respondent's name as the representative of the party for the Matsieng constituency in relation to the 1998 general elections, on the grounds that the decision of the party's executive committee, the first respondent, nominating the fourth respondent as the party's constituency representative, contravened her constitutional rights to participate in government entrenched in section 20 of the Constitution. The High Court stated that the Constitution applied to anybody, public or private, and therefore the court had the power to determine "the consistency or inconsistency of any act, provision or directive made by anybody public or private to ensure that the contents thereof accord[ed] with the principles of the Constitution".<sup>163</sup> The court went further to state that notwithstanding that the nomination was the party's internal, and therefore private, matter, it was "not a 'closed house' and out of bounds when the fundamental provisions of the Lesotho Constitution [were] imperilled(sic), or when principles of fairness and natural justice [were] compromised".<sup>164</sup> The court, thus

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<sup>159</sup> The Constitution, sec 4(2).

<sup>160</sup> Clearly, taking into account (1) the nature of the rights, for example, the right to fair trial and the right to privacy, (2) the corresponding obligations that the various rights impose and (3) the very fact of the Constitution maintaining the definition of the "public office", among others, are indicative of the rational and normative approach to the public-private divide by the Constitution of Lesotho. Also see Phillipson 1999:827-828; Gardbaum 2003:395.

<sup>161</sup> See Palmer and Poulter 1972:339. While Palmer and Poulter's observations related to the Bill of Rights as contained in the 1966 Constitution, similar views are applicable to the 1993 Constitution as the Bill of Rights provisions in the two Constitutions are nearly identical. Reference to these authors hereunder is made with this understanding in mind.

<sup>162</sup> *Radeby v National Executive Committee* 159/1998.

<sup>163</sup> *Radeby*:5.

<sup>164</sup> *Radeby*:10. While clearly this is a case of direct horizontal application of the Bill of Rights, reference to "principles" is also an indication of *strong indirect horizontal application* of the Bill of Rights to private legal relationships in Lesotho. Also see *Ramakatsa v Magashule* 2013 2 BCLR

applying the Constitution in horizontal legal relationship between the party and its members, declared the said nomination null and void.

Secondly, the Bill of Rights undoubtedly applies in horizontal relationships “except where the context otherwise requires”.<sup>165</sup> This is a constitutional recognition that, placed in context, some of the fundamental human rights provisions impose constitutional obligations on, and exact respect from, the state or state authorities only, private actors or both.

## 2.5.2 Application to Lesotho judiciary: judges, judicial officers as “public officers”

### 2.5.2.1 Constitutional textual reading: the “public office”

The Constitution of Lesotho binds the legislature, the executive and any person acting in the performance of function of any public office or any public authority.<sup>166</sup> While section 4(2) of the Constitution clearly identifies the Government of Lesotho and persons acting in the performance of public office or public authority as being bound by the Bill of Rights, the answer to the question whether the Lesotho judiciary is equally bound is not an apparent one, and would require further textual reading of the Constitution. The interpretation section<sup>167</sup> of the Constitution casts a definitional net wide and defines “public office” as “any office of emolument in the public service”, while “public service” is defined as “subject to the provisions of this section, the service of the King in respect of the Government of Lesotho” and a “public officer” as “a person holding or acting in any public office”. Whether “public office” refers also to the office of judges and judicial officers is put beyond any doubt by the Constitution as follows:

In this Constitution, unless the context otherwise requires, reference to an office in the public service shall be construed as including reference to the office of a judge of Court of Appeal, of a Judge of the High Court and the office of a member of any subordinate court or tribunal....<sup>168</sup>

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202 (CC) in which, for the first time in the constitutional history of the new democratic South Africa, the South African Constitution was applied directly horizontally. The matter involved internal party wrangling. The Constitutional Court held that “the constitution and rules of political parties must be consistent with the [South African] Constitution which is our supreme law”.

<sup>165</sup> The Constitution, sec 4(2). Also see Palmer and Poulter 1972:339-343.

<sup>166</sup> The Constitution, sec 4. See, for example, Galligan and Sandler 2004:26.

<sup>167</sup> The Constitution, sec 154(1).

<sup>168</sup> The Constitution, sec 154(1). “Subordinate court” is defined as “any court of law established for Lesotho other than (a) the Court of Appeal; (b) the High Court; (c) a court-martial; and (d) a

It is clear from the above section that the office of the judges of the Court of Appeal and of the High Court as well as the office of the magistrates and other judicial officers in the subordinate courts – the judiciary – are public officers whose offices are in the public service, “unless”, of course, “the context requires”. This expression is also employed in section 4(2) of the Constitution, which provides for the application of the Bill of Rights on the persons acting in the performance of the functions of any “public office”. It is apparent from this that some other provisions of the Constitutions, except section 4(2) and section 154(3) may provide the necessary context. This directs us to Chapter XI dealing with the judicature. Under Chapter XI, the Constitution vests judicial power to a Court of Appeal, a High Court, Subordinate Courts and Court-martial and such tribunals exercising a judicial function as may be established by Parliament. The appointment of the Chief Justice<sup>169</sup> and the President of the Court of Appeal<sup>170</sup> is done by the King acting in accordance with the advice of the Prime Minister, while the appointment of the Justice of Appeal,<sup>171</sup> puisne judges of the High Court<sup>172</sup> and other judicial officers<sup>173</sup> is done by the King acting in accordance with the advice of the Judicial Service Commission. Furthermore, the removal of or disciplinary powers over the Judges of the Court of Appeal and those of the High Court are exercised by the tribunal constituted for that purpose,<sup>174</sup> while the Judicial Service Commission exercises disciplinary powers over the rest of the judicial officers.<sup>175</sup>

From the above analysis, it is clear that the “context” that requires exclusion of the judges and judicial officers from the definition of “public office” is only in relation to the appointment, discipline and removal from the public office. Otherwise, the judges and judicial officers

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tribunal exercising a judicial function”.

<sup>169</sup> The Constitution, sec 120(1). Section 137 (3)(a) under Chapter XIII of the Constitution exempts the office of the judge of the High Court from appointment by the Public Service Commission.

<sup>170</sup> The Constitution, sec 124(1). Section 137 (3)(a) under Chapter XIII of the Constitution exempts the office of the judge of the Court of Appeal from appointment by the Public Service Commission.

<sup>171</sup> The Constitution, sec 124(2). Section 137 (3)(a) under Chapter XIII of the Constitution exempts the office of the judge of the Court of Appeal from appointment by the Public Service Commission.

<sup>172</sup> The Constitution, sec 120(2). Section 137 (3)(a) under Chapter XIII of the Constitution exempts the office of the judge of the High Court from appointment by the Public Service Commission.

<sup>173</sup> The Constitution, sec 133(1) and (3), but does not include the members of the Court-martial or tribunal. See sec 133(5). Section 137 (3)(e) under Chapter XIII of the Constitution exempts the office of the judicial officers who are appointed by the Judicial Service Commission in terms of section 133 of the Constitution from the appointment by the Public Service Commission.

<sup>174</sup> The Constitution, sec 121(3) to (7); sec 125(3) to (7).

<sup>175</sup> The Constitution, sec 133(1) and (3).

(including members of the tribunals) in presiding over cases before them are acting in the performance of the function of “public office” and therefore the Bill of Rights is applicable to them. This much has been accepted by the High Court in *Lepule v Lepule*.<sup>176</sup>

#### 2.5.2.2 Constitutional textual reading: express duties of the judiciary

Besides application of the Bill of Rights to the judges and judicial officers as “public officers”, the Bill of Rights speaks directly and imposes express constitutional obligations on the judiciary in two fundamental ways: firstly, an obligation to afford a fair trial and fair determination of civil rights and obligations. Secondly, there is a constitutional obligation not to permit any person to rely on any provision of the law during rights adjudication over specific provisions of the Bill of Rights unless certain conditions placed by the non-reliance clauses have been satisfied.

##### 2.5.2.2.1 Courts and the fair trial right

Of the provisions of the Bill of Rights, none speaks more clearly and directly to the judiciary than the right to a fair trial and fair determination of civil rights and obligation.<sup>177</sup> In terms of section 12(1) of the Constitution, an independent and impartial court established by law must afford a criminal case a fair hearing within a reasonable time.<sup>178</sup> In civil matters, the similar constitutional obligations are imposed on the courts of law. In any proceedings before a court or adjudicating authority for the determination of the existence or extent of any civil right or obligation, the case “shall be given a fair hearing within reasonable time”.<sup>179</sup>

In *Bolofo v Director of Public Prosecutions*,<sup>180</sup> the Court of Appeal recognised the constitutional imperative of fairness as an obligation devolving on the entire “cohesive unit” involved in the administration of justice, from police officers during the arrest stage, to correctional institutions after the sentencing stage. In that case, the Court of Appeal dealt

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<sup>176</sup> *Lepule v Lepule* Constitutional Case 4/2013:[37]. The Court accepted as a correct position of the law “that every Court of the land, the Court of Appeal included is bound by the Constitution and to exercise its powers in accordance with the provisions thereof”. Also see *Sechele v Public Officers’ Pension Fund* 43B/2010.

<sup>177</sup> The Constitution, sec 12(1); sec 12(8).

<sup>178</sup> On the general fundamental principle of fairness (*audi alteram partem*), see *Matebesi v Director of Immigration* LAC (1995-1999) 616:621-626. In the context of constitutional adjudication, see, for example, *Ketisi v Director of Public Prosecutions* LAC (2005-2006) 503:508-509.

<sup>179</sup> The Constitution, sec 12(8).

<sup>180</sup> *Bolofo v Director of Public Prosecutions* LAC (1995-1999) 231.



with issues relating to delay in criminal trials and lengthy detentions of prisoners without trial contrary to the accused persons' right to personal liberty and right to a fair trial guaranteed by the Constitution. The Court said that these rights could "only be meaningful if all those involved in the administration of justice perform their duties in a manner consistent with the ethos and the values that underpin them".<sup>181</sup> The Court found that the obligation rested, among others, on not only the police officers and the prosecuting authority, correctional institution and the social services, but also, importantly, on the "judicial officer[s]", "the High Court and this [Court of Appeal] as the final arbiters of the fate of the accused".<sup>182</sup>

#### 2.5.2.2.2 Non-reliance clauses and the courts

The second way in which the Bill of Rights expressly addresses, and thereby imposes constitutional duties on the judiciary, is through the non-reliance clauses. There are seven of these clauses.<sup>183</sup> The non-reliance clauses of the Bill of Rights impose a duty on the courts not to permit any person in any judicial proceedings to rely upon a provision of a law limiting or derogating the relevant constitutional right and freedom on account of the stated interests or purposes in that law. An exception is made where such a person "satisfies the court that the provision, or ... the thing done under the authority thereof does not abridge the rights and freedoms guaranteed" to a greater extent than is necessary in a practical sense in a democratic society.<sup>184</sup>

#### 2.5.2.3 Consequences of application to the judiciary model

The "application to the judiciary" model has specific legal ramifications and implications, not only on the judiciary but also on the private law. Firstly, this means that the Bill of Rights fully extend to all private litigation and private law. This is evident from *Bolofo v Director of Public Prosecutions* where the Court of Appeal stated that the Bill of Rights, in particular, the right to personal liberty and the right to a fair trial, can only be meaningful "if all those involved in the administration of justice perform their duties in a manner consistent with the ethos and

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<sup>181</sup> *Bolofo*:248-249.

<sup>182</sup> *Bolofo*:248-249. Perhaps it is crucial to indicate that reference by the Court of Appeal to "ethos and values" underpinning the Bill of Rights principles, consistent with which the "cohesive unit" involved in the administration of justice must perform their functions, is a clear acceptance of the "indirect horizontal application" of the Bill of Rights in Lesotho.

<sup>183</sup> The Constitution, sec 7(3)(a) proviso; sec 10(3); sec 11(3); sec 13(6); sec 14(3); sec 15(3); sec 16(3).

<sup>184</sup> *Seeiso v Minister of Home Affairs* LAC (1990-1994) 665:679:681.

values that underpin” it (the Bill of Rights).<sup>185</sup> Perhaps it was with the full realisation of this effect that the Canadian Supreme Court rejected the application of the Canadian *Charter* to the Canadian judiciary. The Canadian Supreme Court lamented that, to regard a court order as “an element of governmental intervention necessary to invoke the *Charter* would ... widen the scope of *Charter* application to virtually all private litigation”.<sup>186</sup> Consequently, the Lesotho judiciary has a constitutional duty and obligation to interpret the existing private law and articulate, formulate and develop new rules where none already exist, or the existing ones do not conform to the Bill of Rights or are inadequate to protect the Bill of Rights, or where there is insufficient statutory protection.<sup>187</sup> The High Court recognised this constitutional duty in *Radeby v National Executive Committee*, a case involving private actors, when it emphatically stated that “the Courts of law have a sacred duty to see that the fundamental rights and freedoms of the citizen are not abridged or compromised”.<sup>188</sup>

Secondly, as state or public authority, the judiciary is equally the subject of contravention of the Bill of Rights through judicial action or inaction.<sup>189</sup> The judiciary is required not to issue an order that contravenes the private actor’s fundamental human rights and freedoms.<sup>190</sup> This is because the court order itself constitutes the state action. “Contravention” includes “failure to comply” with the constitutional requirement or duty.<sup>191</sup> Therefore, failure by the judiciary not only to “ensure the effective operation of the enforcement of court orders”<sup>192</sup> but also, in appropriate circumstances, to “forge new tools and shape innovative remedies”<sup>193</sup> in

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<sup>185</sup> *Bolofa*:248-249.

<sup>186</sup> *Dolphin Delivery*:196.

<sup>187</sup> The Constitution, sec 156(1); sec 128(1); also see Oliver 2008:12; Oliver 2007:73; Woolman 1998:10-1058; Cherednychenko 2007:15-16.

<sup>188</sup> *Radeby*:10.

<sup>189</sup> See Rautenbach and Malherbe 2004:309; Oliver and Fedtke 2007:5.

<sup>190</sup> See, for instance, *Magano v District Magistrate* 1994 4 SA 172 (W):176; *Davids v Van Straaten* 2005 4 SA 468 (C):486. See, however, *Lepule v Lepule* Constitutional Case 4/2013, discussed in chapter 5.

<sup>191</sup> The Constitution, sec 24(1). Under the Bill of Rights Chapter, “‘contravention’ in relation to any requirement, includes a failure to comply with that requirement, and cognate expression shall be construed accordingly”.

<sup>192</sup> Rautenbach and Malherbe 2004:309.

<sup>193</sup> *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC):826; also see the Constitution, sec 22(2); *Jooste v Botha* 2000 2 SA 199 (T):206; *Attorney General v Mopa* LAC (2000-2004) 427:441; *Director of Public Prosecutions v Lebona* LAC (1995-1999) 474.

order to protect and enforce the fundamental human rights and freedoms,<sup>194</sup> may constitute the contravention of the Bill of Rights.<sup>195</sup> Finally, the common-law judicial immunity,<sup>196</sup> which ordinarily protects judicial officers from civil or criminal liability for errors committed in the performance of their judicial functions, may not protect such judicial officers from constitutional damages claims based on the contravention of constitutional rights and freedom.<sup>197</sup> Whether the judges and judicial offices are personally liable or it is the state, which is vicariously liable for judicial errors, is a subject of fierce debate elsewhere.<sup>198</sup>

### 2.5.3 The Bill of Rights: direct and indirect horizontal application

#### 2.5.3.1 Direct horizontal application of the Bill of Rights

In horizontal legal relationship, a Bill of Rights may be applied directly on private conduct or private law.<sup>199</sup> There are broadly two ways or scenarios in which a private actor's conduct may contravene the Bill of Rights. The first is where a private actor *purely* acts<sup>200</sup> in his or her private capacity without the authority of any law, or his or her conduct is not traceable to

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<sup>194</sup> In *Radeby*:12-13, the High Court did not only declare a paternalistic constituency nomination of a party candidate for a general election null and void and ordered a re-election, but also ingeniously crafted an order to ensure that the right to participate in general election was not dealt a fatal blow by the statutory time-limitations for the submission of the nominated candidates to the Independent Electoral Commission (IEC).

<sup>195</sup> Contrast this position with the Indian constitutional position where the "state", by constitutional definition (Article 12 of the Indian Constitution), includes only the legislature and the executive, and not the judiciary. Because of this, Singh (2007:196) notes, "the judiciary is competent to make a right or wrong determination. A wrong determination in such a case does not constitute a breach of any fundamental right by the court. It is a genuine mistake, which it is competent – though not expected – to make. The remedy against such a mistake is not to allege a breach of [fundamental rights] by the court and approach the appropriate court under Article 32 or 226 for nullifying or voiding the determination, but to allege that the determination is not consistent with the [fundamental rights] and approach the appropriate court with such allegation in appeal."

<sup>196</sup> See *Telematrix v Advertising Standards Authority* 2006 1 SA 461 (SCA); Waters 1987:469-470.

<sup>197</sup> *Director of Public Prosecutions v Lesupi* LAC (2007-2008) 403:409-411; also see *Maharaj v Attorney General* [1979] AC 385 (PC):399; *Minister of Immigration v Udompun* [2005] NZCA 128; *R v Williams* 2007 3 NZLR 207 (CA); *McKean v Attorney General* 2007 3 NZLR 819; *Taunoa v Attorney General* 2007 5 LRC 680 (NZSC).

<sup>198</sup> See, for example, Okpaluba 2011-2012:1-36.

<sup>199</sup> De Waal *et al* 1999:51; *Ramakatsa v Magashule* 2013 2 BCLR 202 (CC).

<sup>200</sup> This word was used to include also the "omission" to act, in appropriate circumstances.

any legal authority and the purely private conduct infringes the guaranteed right of some other private actor.<sup>201</sup> The second is where the private actor, by express or implied authority of some law, mostly legislative enactment, conducts himself or herself in a manner that contravenes another private actor's constitutional rights and freedoms. In this instance, not only the private actor's conduct, but also the legal authority upon which he or she acted would be the subject of the determination by the courts whether it matches up with the Bill of Rights standards.

The Constitution recognises these two forms as ways of contravention of other private actors' rights and freedoms.<sup>202</sup> In section 4(2), the Constitution declares that the Bill of Rights applies "as well *in relation to things done or omitted to be done* by persons acting in private capacity".<sup>203</sup> This is an indication that the Bill of Rights governs private *conduct*, at least in the first scenario sense – purely private conduct. Nevertheless, the section goes further to state that the Bill of Rights will apply to such private conduct "whether [committed or omitted] *by virtue of any written law or otherwise*".<sup>204</sup> This confirms the application of the Bill of Rights to the private conduct in the second scenario – private conduct based on authority of some law. Furthermore, the non-reliance clauses<sup>205</sup> of the Constitution indicate that both conduct and law may be assessed for compliance with the Bill of Rights.<sup>206</sup>

Where private conduct or law contravenes another private actor's entrenched rights and freedoms, the latter may apply directly to the High Court for relief.<sup>207</sup> The High Court has original jurisdiction to apply the Bill of Rights provision directly on such conduct or law and to grant appropriate remedies for the purpose of enforcing or securing the enforcement of the Bill of Rights.<sup>208</sup> Once access to the constitutional jurisdiction of the High Court has been accessed under section 22(2) of the Constitution, the High Court may, as Barak puts it, "can freely choose between direct and indirect horizontal [application]"<sup>209</sup> of the Bill of Rights. This

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<sup>201</sup> See, for example, *Radeby*.

<sup>202</sup> The Constitution, sec 4(2).

<sup>203</sup> The Constitution, sec 4(2); emphasis supplied.

<sup>204</sup> The Constitution, sec 4(2); emphasis supplied.

<sup>205</sup> See, for example, the Constitution, sec 10(2)(b); sec 11(2)(b); sec 13(5)(b); sec 14(2)(b); sec 15(2)(b); sec 16(2)(b); sec 17(4)(a)(iii).

<sup>206</sup> See, for example, the Constitution, sec 10(3); sec 11(3); sec 13(6); sec 14(3); sec 15(3); sec 16(3); sec 17(4)(a).

<sup>207</sup> The Constitution, sec 22(1).

<sup>208</sup> The Constitution, sec 22(2).

<sup>209</sup> Tushnet 2008:197.

will apply equally where constitutional jurisdiction of the High Court has been accessed in incidental constitutional review proceedings.<sup>210</sup>

### 2.5.3.2 Problems associated with direct application model

Constitutional law commentators have identified practical problems concomitant with the model of direct application in legal relationships between private actors, and have suggested indirect horizontal application as a favourite or preferred model.<sup>211</sup> While there are dissenting opinions on this issue,<sup>212</sup> these commentators point out that the direct application model tends to ignore the established private law by granting relief, which comes directly from the constitutional Bill of Rights. This, it is said, may disrupt the private law by leaving a “gap” or a “lacuna” in private law, and which the court may have no constitutional power to fill, as this is the primary role of the legislature in a democratic state.<sup>213</sup> The role of the judiciary is limited only to developing the law to be consistent with the Bill of Rights in necessary and appropriate circumstances.<sup>214</sup> Secondly, it is argued that direct application of the Bill of Rights in horizontal relationships would amount to negating fundamental rights.<sup>215</sup> The argument proceeds on the basis that the Bill of Rights does not form a homogenous category as it is cast in general and abstract terms, not only granting guarantees, but also imposing positive obligations. In direct constitutional litigation, to uphold a right of the private actor involves the negation of the other private actor’s right<sup>216</sup> where the Constitution does not clearly identify how the limitation of conflicting private actors’ rights and freedoms should

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<sup>210</sup> This is when ordinary proceedings (whether civil or criminal) assume the constitutional nature because of a constitutional issue arising during any stage of such proceedings. See the Venice Commission 2011:15, available online at <[http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2010\)039rev-e](http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e)> (accessed on 20 February 2015).

<sup>211</sup> Du Bois (2012:112) argues that horizontal application of fundamental rights “is best treated as indirect rather than direct” because “it absorbs fundamental rights into a balancing exercise” and “allows private law to relate these rights to the full complexity of interpersonal interactions”.

<sup>212</sup> The main argument of these dissenting opinions is that, notwithstanding conceptual, doctrinal and methodological differences relating to the direct and indirect horizontal application of a Bill of Rights, the horizontal effect on private law is the same. See Gardbaum 2012:180-181; Gardbaum 2003:404; Michelman 2009:7-9; Froneman 2007:13,24; *Holomisa v Argus Newspaper* 1996 2 SA 588 (W):597-598.

<sup>213</sup> Barak 2001:29-31; also see *Du Plessis v De Klerk* 1996 3 SA 850 (CC):[53]-[59].

<sup>214</sup> *Du Plessis*:[61]; also see *R v. Salituro* [1992] 8 CRR (2d) 173 (Can.).

<sup>215</sup> O’Cinneide 2007:232-236.

<sup>216</sup> See, for example, *SPUC (Ireland) Ltd v Grogan* [1989] IR 753; O’Cinneide 2007:232-236.

be resolved, with the obvious result that judges would have to make judicial limitation clauses.<sup>217</sup> It is said that this is not desirable in the context of the absence of normative background provided by private law for coherent and justified judicial decisions.<sup>218</sup>

Because of these problems, the majority of states that have adopted direct horizontal application of the Bill of Rights have had to find ways to ameliorate or tame its impact.<sup>219</sup> Thus in Ireland, the direct horizontal application will be resorted to in exceptional circumstances, that is, where the ordinary law does not provide adequate and effective protection of the fundamental right and freedom.<sup>220</sup> In *McDonnell v Ireland*, the Irish Supreme Court stated that it was the primary role of the legislature to ensure a constitutional balance of human rights, and that it was only when the legislature had failed in that regard that the judiciary would have to fashion its own appropriate remedy to vindicate the constitutional rights. According to the Irish Supreme Court:

If however a practical method of defending or vindicating the right already exists, at common law or by statute, there will be no need for this court to intervene ... constitutional rights should not be regarded as wild cards which can be played at any time to defeat all existing rules.<sup>221</sup>

Realising the practical problems from these jurisdictions, the framers of the Lesotho

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<sup>217</sup> Barak 2001:17.

<sup>218</sup> Akrivopoulou 2007:177. According to O’Cinneide (2007:249), the application of constitutional norms in the private sphere “should in normal circumstances start from the existence of the relevant common law and statutory private law frameworks, and then develop that law to ensure that its application meets the requirements of the Constitution. Such an approach would ‘piggyback’ upon the greater certainty and precision of existing private law, utilising it as a stable and relatively clear framework, while modifying it as necessary to achieve the constitutionally appropriate result.”

<sup>219</sup> For example, Ireland and Italy. In Italy, direct application is allowed only where there is a gap in the legislation in protecting the private actor’s fundamental right and freedom.

<sup>220</sup> See, for example, *Hanrahan v Merck Shape and Dohme* [1988] ILRM 629 (SC):636 where the Irish Supreme Court stated that “the courts are entitled to intervene only when there has been a failure to implement or, where the implementation relied on is plainly inadequate, to effectuate the constitutional guarantee in question.... A person may of course in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right ...; but when he founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional right.” Also see *McDonnell v Ireland* [1998] 1 IR 134 (SC).

<sup>221</sup> *McDonnell*:147–148; also see a similar approach adopted by South African Constitutional Court in *Minister of Health v New Clicks South Africa* 2006 2 SA 311 (CC):[96]-[97].

Constitution adopted the direct horizontal application of the Bill of Rights and granted the High Court the discretion to decline to apply the Bill of Rights where the Court is satisfied of the availability and the adequacy of means of redress under any other law for the alleged contravention of the Bill of Rights.<sup>222</sup> Furthermore, the framers of the Constitution avoided a direct application of the Bill of Rights on the customary law as far as the issue of the eradication of discrimination from that law is concerned, opting as they did, for an evolutionary model where the Bill of Rights would be applied indirectly.<sup>223</sup> According to them the direct application was revolutionary and would result in legal chaos.<sup>224</sup>

### 2.5.3.3 Indirect horizontal application and compatible interpretation principle

#### 2.5.3.3.1 Interpretation: identifying constitutional and private-law conflict

Several courts and tribunals have been established in Lesotho with specific subject-matter jurisdictions.<sup>225</sup> When sitting in judgment over ordinary cases before them, these courts apply private-law norms, principles and doctrines, whether based on common law, statute or common law as adapted by a statute. Since the Constitution came into force, a new normative order was ushered in Lesotho, it is not uncommon that the courts and tribunals normally face the situation where private-law norms, principles or doctrines applicable in concrete private disputes are inconsistent with the Constitution. To determine the consistency or inconsistency, the courts have to interpret not only the applicable private-law doctrines, but also the constitutional principle or provision governing the particular aspect of the private dispute.

In these circumstances and notwithstanding the *Morienyane* principle<sup>226</sup> which divests courts

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<sup>222</sup> The Constitution, sec 22(2), the proviso. Indeed adequate redress may be available under the private law or relevant legislation if the remedy thereunder adequately protects the rights and freedoms in question; but, as Palmer and Poulter argue, “if the nonconstitutional remedy does not exist or is inadequate, clearly the court can take jurisdiction” under section 22(2) of the Constitution. See Palmer and Poulter 1972:343.

<sup>223</sup> See Maope 2001-2004:399-400.

<sup>224</sup> See Maope 2001-2004:399-400. On the evolutionary model for the elimination of discrimination in customary law, see chapter 4.

<sup>225</sup> The Constitution, sec 118(1) (the judiciary), sec 119(1) (High Court jurisdiction), sec 123 (Court of Appeal jurisdiction), sec 127 (subordinate courts and tribunals jurisdiction). On specific jurisdiction of the various courts, see the relevant Acts granting such jurisdiction.

<sup>226</sup> The *Morienyane* principle was laid down by Nomngongo J in *Morienyane v Morienyane* 204/2003 by holding that where in an ordinary case before the High Court a constitutional issue is pleaded or

sitting in their respective ordinary jurisdiction the power of constitutional review whenever a constitutional issue arises, it is clear from the analysis of the doctrine of horizontal application of the Bill of Rights that these courts and tribunals have a constitutional duty to decide on the conflict between the constitutional imperative and the private-law norm, principle or doctrine, through the interpretative process. While the High Court under section 22(2) of the Constitution has the power to declare any private-law principle or rule void for inconsistency with the Constitution, the fundamental question, however, is whether our “courts” (which includes the High Court itself),<sup>227</sup> have the constitutional jurisdiction to control the constitutionality of private law and private conduct in ordinary proceeding before them.

While this issue will be addressed in the next chapter, it suffices, for present purposes, to make the following three important observations: Firstly, in the context of Lesotho, *constitutional review* is not identical to *judicial review* in normative content, scope of application and remedies.<sup>228</sup> Secondly, supremacy of the Constitution of necessity requires *all courts* in Lesotho not to apply any norm, principle or doctrine of any private or common law inconsistent with the Bill of Rights or the Constitution itself.<sup>229</sup> At any rate, once any other norm, principle or doctrine is inconsistent with the constitution, it becomes void. It is not the court’s declaration of inconsistency which makes it void; the Constitution itself voids it.<sup>230</sup> These suggests that, unless the Constitution expressly excludes them, subordinate courts and tribunals have the power to apply the Bill of Rights and to identify, through interpretative processes the conflict between the Bill of Rights and the relevant law they are respectively called upon to apply.

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arises, the High Court has no jurisdiction to entertain and decide that issue, and the issue must come to the High Court in its constitutional jurisdiction through the *Constitutional Litigation Rules* 2000 procedures. This principle was confirmed by the Court of Appeal in *Chief Justice v Law Society* 59/2011:[13]. This principle – and its adoption by the Court of Appeal – is critiqued in chapter 5.

<sup>227</sup> For the purposes of the Bill of Rights (Chapter II of the Constitution, “court” means “a court of law having jurisdiction in Lesotho” other than a disciplinary court for disciplined forces; see the Constitution, sec 24(1). See chapter 3 for full discussion of this issue.

<sup>228</sup> For a detailed discussion, see chapter 3.

<sup>229</sup> Courts interpret and apply the law. If any “law” (of course, it is not law!) inconsistent with the Constitution is applied by courts, then the courts “permit themselves to be ... ‘fit agents’ in abetting ... illegality”. Kramer 2004:103.

<sup>230</sup> The judicial declaration of void and nullity “is merely descriptive of a pre-existing state of affairs”. See *Fose*:835 (footnote 200).



#### 2.5.3.3.2 Modifying private law for constitutional conformity

Where, through the process of interpretation, the court finds a private-law norm, principle or doctrine which has to be applied in a concrete case before the court inconsistent with the Constitution, the court has a constitutional duty not to apply it, but to modify it in such a manner as to ensure its conformity with the Constitution. This constitutional duty follows from two basic sources. The first source of this constitutional duty on the courts is inextricably tied to the horizontal application of the Bill of Rights itself discussed above. Secondly, the duty is expressly mandated constitutionally.<sup>231</sup>

Concerning the second point, it is important to note that the coming into operation of the Constitution in 1993 ushered in Lesotho a new constitutional and normative order. A lot of private-law norms, principles and doctrines predating the Constitution may have been inconsistent with the new order.<sup>232</sup> These norms, principles and doctrines have to conform to the new order or they have no force or effect.<sup>233</sup> A constitutional “window” through which otherwise inconsistent pre-existing laws can escape *alive* into the new order is placed on the cut-off *wall*, as it were, separating the old and the new constitutional order and the four-fold legal management strategy governs the transition of private law<sup>234</sup> into the new normative dispensation. Part of this strategy is that the courts are obliged to effect “such modifications, adaptations, qualifications and exceptions as may be necessary” to bring otherwise inconsistent pre-existing laws “into conformity with [the] Constitution”.<sup>235</sup> Thus, applying the Bill of Rights indirectly in horizontal orderings, as Kokott and Kaspar observe, involves “the

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<sup>231</sup> See the Constitution, sec 156(1).

<sup>232</sup> See, for example, *Monyau v R LAC* (2005-2006) 44:52.

<sup>233</sup> Palmer and Poulter (1972:335) correctly posit that the constitutional supremacy clause “operates to conform every aspect of the legal pyramid including not only the laws to be found in the statute books and the case reports but the Sesotho customary law, the imported South African common law ..., and the conventions and practices of the Constitution (imported or indigenous) as well”.

<sup>234</sup> Clearly, the constitutional transitional provisions do not only apply to private law but also to all laws pre-dating the Constitution. Private law is singled out here merely because it is relevant for present purposes of the study.

<sup>235</sup> Section 156(1) of the Constitution employs the four-fold management system to regulate the transition from the old order to the new constitutional order: first, constitutional recognition and continuance of pre-existing laws (including private law); second, supremacy of the Constitution and the requirement that all other laws conform to the Constitution, failing which any other law is invalid; third, supervision of compliance with transition by the courts; and finally, modification and adaptation of the private law by the courts in the event of inconsistency with the Constitution. For more details on this issue, see chapter 4 of this study.

court ... assess[ing] the issues of ordinary law and – if necessary – correct[ing] the result in view of the constitutional law. This may require the interpretation of ordinary law in conformity with the constitution or even the annulment of specific norms of ordinary law”.<sup>236</sup> This is referred to as the principle of compatible interpretation,<sup>237</sup> which consists of identification of conflict between private law and the Bill of Rights through the process of interpretation, and where there are inconsistencies, the modification of private law to conform to the Bill of Rights.<sup>238</sup>

#### 2.5.4 Bill of Rights and the indirect legislative implementation model

The Constitution adopts, under Chapter III, principles of state policy. These principles are socio-economic, cultural and environmental rights and the protection of vulnerable persons – the social welfare goods.<sup>239</sup> These principles are not enforceable by any court, but “shall guide the authorities and agencies of Lesotho, and other public authorities” to achieve progressively “by legislation or otherwise, the full realization of these principles”.<sup>240</sup> Most of these principles have been implemented through the adoption of relevant social welfare legislation,<sup>241</sup> which, in part, regulates private conduct. Notwithstanding the non-justiciability of the state principles, where a private actor contravenes or is likely to contravene the state principle that has been implemented by the relevant legislation, the aggrieved private person may approach the appropriate courts for relief.

Although involving a public authority, *Khathang-Tema-Baits’okoli v Maseru City Council* is illustrative as to when recourse may be had to the courts involving state principles. In that case, the street vendors who had been removed by the respondent Council from the streets

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<sup>236</sup> Kokott and Kaspar 2012:810.

<sup>237</sup> Oliver 2008:12.

<sup>238</sup> The Constitution, sec 156(1); also see Oliver 2008:12; *Commissioner of Customs and Excise v Container Logistics* 1999 3 SA 771 (SCA):786.

<sup>239</sup> The Constitution, Chapter III (sec 25-36).

<sup>240</sup> The Constitution, sec 25.

<sup>241</sup> For example, *Legal Capacity of Married Persons Act* 9/2006 and *Local Government (Election) Act* 9/1998, implementing equality and justice principle (sec 26); *Education Act* 3/2010, the provision of education principle (sec 28); *Children’s Protection and Welfare Act* 7/2011, the protection of children and young persons’ principle (sec 32); *Environmental Act* 10/2008, the protection of environment principle (sec 36); *Labour Code Order* 24/1992, *Labour Code (Amendment) Act* 3/2000, *Labour Code (Amendment) Act* 5/2006, *Labour Code (Codes of Good Practice)* 4/2003, the protection of workers’ rights and interests principle and just and favourable conditions of work principle (sec 31 and 30), etc.

where they sold their wares, approached the High Court on the basis that the removal constituted a contravention of their right to livelihood (a state principle under section 29). They argued that the removal contravened their guaranteed right to life (under section 5). The Court of Appeal stated as follows:

That is not to say that the provisions of s.29, like those of adjacent provisions regarding matters such as health, education, protection of children, workers' rights and interest and the environment, may not *in appropriate circumstances and in appropriate ways find implementation, and that recourse may be had to the courts in that regard*. But that is not a matter that falls to be determined in this case. It is however to say that the opportunity to gain a living by work – in other words, to secure a livelihood – is expressly dealt with outside the ambit of s.5 (*and thus outside the means for enforcement for chapter II rights in terms of s.22, which is expressly confined to Chapter II rights*).<sup>242</sup>

It is clear from this dictum that recourse to the courts may be had based on the DPSP where the principle has found legislative implementation. This was placed beyond any doubt by the decision of the Court of Appeal in *Ts'epe v Independent Electoral Commission*. In that case, the appellant sought to challenge the constitutionality of the legislative enactment which sought to implement the DPSP on equality and justice (section 26) in favour of women by reserving one-third of seats in every council for women, while the remainder of the seats was contested by men and women alike. The appellant argued that such reservation was unconstitutional as it was inconsistent with the entrenched right to participate in government (section 20) and the freedom from discrimination (section 18). The Court of Appeal held that “to the extent that laws are made pursuant to section 26(2) directed at ‘removing any discriminatory law’ courts must give effect to them. Such laws are authorized by the Constitution”.<sup>243</sup>

It is also clear from the dictum in *Khathang-Tema-Baits'okoli* that the legislatively implemented DPSP cannot find judicial enforcement through the direct constitutional application under section 22 constitutional enforcement machinery – machinery confined to a Bill of Rights (Chapter II) violations only – unless it is the constitutionality of the very same social welfare legislative enactment in question.<sup>244</sup> Thus, a litigant must rely on non-constitutional causes of action to enforce the relevant legislation implementing these social

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<sup>242</sup> *Khathang-Tema-Baits'okoli v Maseru City Council* LAC (2005-2006) 85:94; emphasis supplied.

<sup>243</sup> *Ts'epe v Independent Electoral Commission* LAC (2005-2006) 167:176; also see *Bulane v Lerotholi Polytechnic* 8/2008.

<sup>244</sup> For instance, *Ts'epe* involved the constitutional challenge of the local government electoral law itself.

welfare goods, and consequently indirectly rely on the DPSP not only as constitutional values but also as positive constitutional obligations on the state. It would seem, in the circumstances, and following the Indian Supreme Court in *Morcha v Union of India*, that the state is bound “to ensure observance of various social welfare ... laws enacted by Parliament for the purpose of securing ... a life of basic human dignity in compliance with the [DPSP]”.<sup>245</sup> In this way, the otherwise non-justiciable DPSPs are indirectly enforced or, to use *Ts’epe v Independent Electoral Commission* expression, “give[n] effect to”,<sup>246</sup> not in or by themselves, but through the relevant social welfare legislation implementing the specific state principles.

## PART V

### 2.6 Conclusion

The Bill of Rights is enforceable against all state authorities – the legislature, the executive and the judiciary – to the extent that their actions influence the entrenched rights. In this chapter, I have attempted to provide a theoretical framework and application of the doctrine of horizontal application of the Bill of Rights, by defining the doctrine and its important variants or models, in particular, the indirect horizontal application model. The doctrinal analysis and application in practical judicial decisions provided a prism through which the doctrine’s normative content and application were located in the Lesotho Constitution. In the final analysis, the textual reading of the Constitution reveals that the Lesotho Constitution removes the apologia for the liberal public-private distinction, with the consequence that the Bill of Rights also applies, to the extent the context requires, in horizontal legal relationship as well as in vertical orderings.

It is evident from the above exposé that the Constitution prescribes all five models discussed above: direct horizontal application, application to the judiciary, indirect legislative implementation and indirect horizontal application of the Bill of Rights models. It has been said that it is possible to blend these different models, while the application to the judiciary model “can be used to complete all the other models”.<sup>247</sup> The legal consequences of the Bill of Rights binding the judiciary have been identified as implying, among others, the constitutional duty of the courts, through the constitutional principle of compatible interpretation, to develop the private law and that the courts, as part of state authorities, are also subjects of rights contraventions. Courts should therefore avoid contravening the

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<sup>245</sup> *Morcha v Union of India* 1984 AIR 802 (SC):812.

<sup>246</sup> *Ts’epe*:176.

<sup>247</sup> *Barak* 1996:226.

entrenched rights and freedoms in handing down judgments and issuing orders.

Section 156(1) of the Constitution clearly mandates the employment of indirect horizontal application of the Bill of Rights and, consequently, the development of the private law through the invocation of the principle of compatible interpretation, which involves interpretation and modification. In my considered view, taking into account the impact of the direct horizontal application experienced by those states which have adopted it, for example, Ireland, the drafters of the Lesotho Constitution, while retaining the direct application model for appropriate cases, seem to have preferred the indirect horizontal model for securing human rights enforcement, and only allowed direct application where common law or legislation would not adequately provide an appropriate remedy. This is particularly so when dealing with discriminatory aspects of customary law.<sup>248</sup>

While it is the focus of this study under chapter 4 to discuss the effect of the horizontal application of the Bill of Rights, it is, however, of critical importance to answer the fundamental anterior question first: do all courts in Lesotho, including the subordinate courts, have the constitutional power to apply the Bill of Rights? Put differently, is the constitutional review the preserve of the High Court and Court of Appeal? This issue is discussed in the next chapter.

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<sup>248</sup> See Maope 2001-2004:399-400. Also see chapter 4 for a full discussion on this point.

## CHAPTER 3: LESOTHO'S CONSTITUTIONAL REVIEW FRAMEWORK THROUGH THE PRISM OF THE PRINCIPLE OF SUBSIDIARITY

If democracy is understood not as a right to vote, but as a right to participate in public deliberation that result in a decision that shapes social life, the state courts with constitutional review jurisdiction proffer an arena to enhance the possibility of citizen participation, otherwise not available if interpretation is exclusively given to the federal.

- David Garcia Sarubbi<sup>1</sup>

### 3.1 Orientation

Translating the Bill of Rights' rhetoric into social reality depends not only on the content and application thereof, but also on the institutions and structures for its implementation and enforcement. One such institution is the judiciary. Judicial review is arguably one of the most important constitutional tools in ensuring "constitutional efficacy".<sup>2</sup> The judiciary transmutes the otherwise general and vague Bill of Rights provisions into "more concrete" and "practical realities".<sup>3</sup> That Lesotho's Constitution vests judicial power and authority in the courts of Lesotho to check unwarranted, and therefore unconstitutional, incursions and intrusions into the Bill of Rights, is incontrovertible.<sup>4</sup> In this chapter, the discussion is not about how the Lesotho judiciary has effected or optimised constitutional efficacy or constitutional justice. It is about a *fundamental* anterior question: whether *all the courts* with jurisdiction in Lesotho (including subordinate courts) have this constitutional review power and authority or not. The question seems to be too elementary to merit discussion in this fashion in view of the incontrovertible fact of the judicial power being vested in the judiciary, which presupposes the inclusion of the subordinate courts in supervising the Bill of Rights landscape. However, looking at the constitutional review practice<sup>5</sup> in Lesotho where, effectively, only the High Court (sitting as the so-called Constitutional Court) and the Court of Appeal are the only

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<sup>1</sup> Sarubbi 2011:57

<sup>2</sup> Saha (2010:43) argues that "without judicial review no Constitution can be truly democratic in nature." Also see Kokott and Kaspar 2012:795-796. According to Kokott and Kaspar "constitutional efficacy relates to the difference between the 'written' constitution and constitutional reality". The authors suggest that "the smaller the difference, the higher the degree of efficacy".

<sup>3</sup> Coppelletti 1989:118.

<sup>4</sup> See the Constitution, sec 118(1); sec 22(1).

<sup>5</sup> For elaborate discussion on this issue, see chapter 5.

courts with exclusive constitutional review power, the anterior question becomes more pertinent and merits investigation. This chapter therefore enters the slippery terrain<sup>6</sup> of decentralisation/concentration dialectics of constitutional review power between the superior courts and subordinate courts in Lesotho, and hopes to come out unscathed to tell where, constitutionally, the balance of this power should lie.

The discussion is divided into four parts. Part I discusses the principle of subsidiarity, which in general terms operates to decentralise the power and competences in the multi-tier hierarchical political or legal orders from the superordinate to the subordinate actors and governs relationships between those actors. Through the lens of this principle, Part II of the study dissects from a broad and general canvas of judicial review concept a specialised constitutional review – a rights-based review – and lay it down as a foundational crucible firstly, for shaping the discussions on the models of constitutional review in Part III and, secondly, for normatively locating Lesotho’s constitutional review framework in Part IV. Part V gives an overview and conclusions of the discussion.

## PART I

### 3.2 The principle of subsidiarity

#### 3.2.1 Meaning, historical origins and development

Subsidiarity is a versatile principle whose meaning depends much on the context in which it is used.<sup>7</sup> Subsidiarity is a structural principle of prominence both in political and legal theory for the allocation, fragmentation and coordination of power, competences and relationships in multi-tiered political or legal order.<sup>8</sup> In political thought, the principle of subsidiarity directs that the *locus* of decision-making should repose in the lower appropriate governance level functionaries closest to the ordinary citizens.<sup>9</sup> The principle regulates authority and power

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<sup>6</sup> It would seem that all the actors travelling on the decentralisation-concentration continuum of the constitutional review – judges, judicial officers and lawyers – consciously or unconsciously have steered a course very close to the concentration camp.

<sup>7</sup> Evans 2013:44. Donati (2009:211) describes subsidiarity as slippery, multifaceted and polysemic concept. Endo (1994:650) records that, although the principle takes a decentralising character, some have warned that it is “a Trojan Horse” that may “bring about the over-centralised” power and authority.

<sup>8</sup> Follesdal 2013:37. Blank (2010:512) sums up subsidiarity as a “model for the politics and administration of problems that require multilevel or multi-sphere involvement”.

<sup>9</sup> Stoa 2014:31; Blank 2010:532-533; Du Plessis 2006:207-208.

within a political order, “directing that powers or tasks should rest with the lower-level sub-units of that order unless allocating them to a higher-level central unit would ensure higher comparative efficiency or effectiveness in achieving them”.<sup>10</sup> Endo identifies the justification for the intervention by the higher level of authority into the competency or function of the lower level as predicated on reasons of, among others, “*better attainment, effectiveness, efficiency and necessity*”.<sup>11</sup>

Furthermore, the principle of subsidiarity organises the relationships between the superordinate and subordinate within the multi-tiered hierarchy or order.<sup>12</sup> The principle not only requires the superordinate institution not to interfere in the performances of competences allocated to the subordinate institution, thus allowing the latter to make its own contribution to the common good, but also mandates the former to assist the latter if the latter cannot perform its functions effectively or achieve the desired goals efficiently by itself.<sup>13</sup> According to Gussen, “the principle places a constitutional responsibility on higher levels of government not only to enable the autonomy of lower levels, but to provide these lower levels with necessary support”.<sup>14</sup> Gussen identifies three sub-principles or rules subsumed under the subsidiarity principle:<sup>15</sup> firstly, it is a positive “rule of assistance” which requires “the central government to support local communities where they cannot perform the functions of governance”.<sup>16</sup> The second is a negative sub-principle of “ban on interference” where “the central government is prohibited from interfering in the affairs of local government”.<sup>17</sup> The final sub-principle “derives from the first two and limits the legitimate support of higher levels of government to ‘helping local governments help themselves’”.<sup>18</sup> Thus, the principle of subsidiarity is not only a decentralisation of competencies scheme; the principle imposes both positive and negative obligations

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<sup>10</sup> Follesdal 1998:231; Follesdal 2013:37.

<sup>11</sup> Endo 1994:638-637. Emphasis in the original.

<sup>12</sup> Blank 2010:511; Aroney 2007:163; Donati 2009:218. Du Plessis (2006:210) points out that before subsidiarity applies to the institutional actors, they must share some degree of relatedness between them.

<sup>13</sup> Blank 2010:542; Carozza 2003:44.

<sup>14</sup> Gussen 2014:124.

<sup>15</sup> Gussen 2014:129.

<sup>16</sup> Gussen 2014:129. Kelley (2010:8-9) calls it the principle of “empowerment”.

<sup>17</sup> Gussen 2014:129. Or, the principle of “non-arrogation”, according to Kelley (2010:8-9).

<sup>18</sup> Gussen 2014:129. Or, the principle of “collaborative pluralism”, according to Kelley (2010:8-9).



particularly on the superordinate organs.<sup>19</sup>

Finally, the subsidiarity principle involves the need for solidarity amongst all members of the order or hierarchy involved in the pursuit and attainment of the common good.<sup>20</sup> Strauss quotes Monsma as saying that, under solidarity, “all individuals are involved as members of the social totality in the common social destiny of this totality”.<sup>21</sup> Should the link connecting the members of the order break, there would be “a collapse of the qualities of the people sharing it because human qualities depend on the link itself”.<sup>22</sup> In summation, as Evans appositely puts, the principle of subsidiarity, in political theory:

... recognizes that individuals must be empowered to autonomously deal with issues directly affecting them. Similarly, groups closest to the individual, such as family and community organisations, must also have the autonomy to deal with matters affecting them, rather than having a larger body that is more removed from the problem intervening. Thus, subsidiarity in a political sense discourages centralisation and advocates that matters should be resolved locally, and closest to the individual, wherever possible.<sup>23</sup>

The prominence of the principle of subsidiarity arose because of the necessity to deal with fears and problems associated with centralisation of power or authority within a political or legal order. The importance of the principle lies not only in providing a buffer against centralisation and consolidation of power in the superordinate authority and all the social ills concomitant therewith,<sup>24</sup> but also in guaranteeing relative efficiency. As far as efficiency is concerned, decisions at the local level provide a relatively effective antidote for overloads

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<sup>19</sup> According to Endo (1994:642), the negative obligations “refers to the *limitation* of competences of the ‘higher’ organisation in relation to the ‘lower’ entity”, while positive concept of subsidiarity “represents the *possibility* or even the *obligation* of interventions from the higher organisation”.

<sup>20</sup> Organ 2008:265; Aroney 2007:168; Evans 2013:51-54; Strauss 2013:96-99; Donati 2009:211-115,118. According to Donati, “subsidiarity cannot work without solidarity” and that the common good “resides within the relationships that connect the subjects”. Solidarity is “a firm and persevering commitment to commit oneself to the ‘common good’ for oneself and for the others”. See Ioannes Paulos PP.II, *Sollicitudo Rei Socialis* [On Social Concerns], paragraph 38 (Dec, 30 1987), available online at <[http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_30121987\\_sollicitudo-rei-socialis.html](http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis.html)> (accessed on 2 June 2015); also see Organ 2008:265; Du Plessis 2006:210.

<sup>21</sup> Monsma 2006:7, quoted by Strauss 2013:99.

<sup>22</sup> Donati 2009:219.

<sup>23</sup> Evans 2013:55.

<sup>24</sup> Stoa 2014:31.

and ensure effective provision of public goods.<sup>25</sup>

Etymologically, the word “subsidiarity” derives from the Latin *subsidium*, which means “to help or to aid”.<sup>26</sup> This root, argues Sirico, implies that the usurpation by the higher order of the functions and competencies of the lower order “is to be ruled out”.<sup>27</sup> Historical accounts trace subsidiarity to the philosophical works of Aristotle, Thomas Aquinas, Johannes Althusius, and John Stuart Mill.<sup>28</sup> However, the principle finds articulation and systematisation in the late nineteenth-century Catholic social thought, as formulated by the papal encyclicals of Pope Leo XII<sup>29</sup> and Pope Pius XI.<sup>30</sup> In the encyclical entitled *Quadragesimo Anno*, the latter Roman Pontiff gave explicit formula to the principle and declared:

Just as it is gravely wrong to take from individuals what they can accomplish by their own

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<sup>25</sup> Follesdal 2013:45. “Public goods” relevant to this study is the provision of constitutional justice to the masses of the people of Lesotho. On the linkages between justice and the common good, Donati (2009:227-228) points out that justice generates the common good “only if it works through an active complementarity between solidarity and subsidiarity”. On the pros and cons of decentralisation generally, see The International Council on Human Rights Policy *Local Rule: Decentralisation and Human Rights* (2002:8), a report available online at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1551231](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551231)> (accessed on 4 June 2015).

<sup>26</sup> Evans 2013:44; Schütze 2009:525. Endo (1994:632) states that “subsidium” initially meant something in reserve, or more specifically, reserve troops. Then it was used for the reinforcement or fresh supply of troops. Halberstam points out that “subsidium” referred specifically to the auxiliary troops of the Roman military. See Halberstam 2009:34. These troops, Donati clarifies, were used “in the case of necessity” and remained “prepared to help those who find themselves in trouble on the front line”. See Donati 2009:211.

<sup>27</sup> Sirico 1997:551.

<sup>28</sup> Evans 2013:44; Aroney 2007:163-167; Poplawska 1997:107-108; Endo 1994:632-628.

<sup>29</sup> According to the monumental landmark encyclical issued by Pope Leo XIII in 1891, “whenever the general interest or any particular class suffers, or is threatened with harm, which can in no other way be met or prevented, the public authority must step in to deal with it.” This must be done, however, within the limits that “must be determined by the nature of the occasion which calls for the law’s interference – the principle being that the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief.” See the encyclical of Leo XIII, *Rerum Novarum* [The New Things], paragraph 36 (15 May 1891) available online at <[https://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum.html](https://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html)> (accessed on 2 June 2015). Also see Endo 1994:627; Strauss 2013:100-101; Carozza 2003:41.

<sup>30</sup> Halberstam 2009:34; Endo 1994:627.

initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.<sup>31</sup>

### 3.2.2 Subsidiarity in legal context

The subsidiarity principle has not only been the bedrock of centrifugalisation of power and authority and regulation of relationships between territorial organisations and entities in federalist governance and local government systems in monist or unitary states,<sup>32</sup> but has also formed a foundational premise for decentralisation and relationship regulatory framework in international institutional landscapes.<sup>33</sup> As a principle of constitutional law, subsidiarity is not limited to the identification and conferment of power, competence and

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<sup>31</sup> See the encyclical of Pius XI on reconstruction of the social order, *Quadragesimo Anno*, paragraph 79 (15 May 1931) available online at [http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadragesimo-anno.html](http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html) (accessed on 2 June 2015). In terms of the principle of subsidiarity, the Catholic catechism prescribes in clearer terms: "a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good". See Catechism of the Catholic Church, paragraph 1883, available at <http://www.vatican.va/archive/ENG0015/P6G.HTM> (accessed on 2 June 2015). Also see Halberstam 2009:34; Evans 2013:45; Strauss 2013:100-101; Donati 2009:213; Bianchi 1996:53-54.

<sup>32</sup> In the federal system, Halberstam (2012:592) states, the center will assist the constituent units of government (only) in case of the need and help to coordinate their activities with the rest of the society with a view to the common good. Also see Mills 2010:377; Endo 1994:614-607; Evans 2013:55; Taylor 2006:115-121; the GG, art 72(2); Canada's *Constitution Act* 1982, Peace Order and Good Governance (POGG) clause, sec 91. In unitary states, power and authority is fragmented through decentralisation between the central administration and local administration, with the latter given separate legal personality. See Bartole 2012:615; also see the Constitution, sec 106; *Theko v Minister of Home Affairs* LAC (1995-1999) 207:209.

<sup>33</sup> In international human rights systems, supranational institutions defer decision-making power to the constituent states or organs, unless it is necessary or efficient for the former to act. See *Maastricht Treaty*, art 3b; *Treaty of the European Union (TEU)*, art 5; *European Convention on Human Rights (ECHR)*, art 1, 13 and 26; *African Charter on Human and People's Rights*, (ACHPR), art 1 and 56(5); also see Sibanda 2007:434, 441-442; Endo 1994:609-595; Du Plessis 2006:210; Schütze 2009:526-531; Carozza 2003:46-63; Bianchi 1996:43-48; Follesdal 2013:50-56.

authority on the appropriate institutional actor; it extends also to guiding<sup>34</sup> the competent institutions, in adjudicating cases before them, on the choice and applications of constitutional or non-constitutional norms – the normative (or adjudicative) subsidiarity.<sup>35</sup> In other words, whereas institutional (or jurisdictional) subsidiarity prefers jurisdiction of lower and more local courts for adjudication of cases than the courts higher on the judicial hierarchy, normative or adjudicative subsidiarity prefers, from the normative hierarchy, the choice and the application of lower norms (non-constitutional norms) than the higher norms (constitutional norms), on normative basis. Of necessity, normative subsidiarity is applicable in the context of hierarchical normative pluralism – a situation where both constitutional and non-constitutional norms are applicable. On the difference between institutional (jurisdictional) subsidiarity and normative (adjudicative) subsidiarity, Du Plessis succinctly posits thus:

... jurisdictional subsidiarity assigns adjudicative responsibility to an appropriate forum, thereby evincing, in constitutional interpretation and adjudication, the broader principle of subsidiarity in its institutional signification. Adjudicative subsidiarity, on the other hand, is ‘mode- or issue-centric’: it enjoins one and the same forum to prefer an a constitutional (or, at least, an indirectly constitutional) to a strictly constitutional mode of adjudication whenever the solution of a legal question admits of the former (and does not of necessity require the latter). The highest authority of the Constitution is, in other words, not to be overused to decide issues that can be disposed of with reliance on specific, subordinate and non-constitutional precepts of law.<sup>36</sup>

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<sup>34</sup> In its guiding role or, as Klare calls it, gate-keeping function, subsidiarity principle “instructs courts to answer certain threshold questions before entertaining suits seeking to vindicate a constitutional right or to obtain constitutional damages or other special relief on the Constitution itself (‘Constitution-based remedies’). In principle, subsidiarity analysis tells a court whether to proceed with an action styled as a claim on the Constitution itself (or for Constitution-based remedies); or whether, in the alternative, to limit the claimant to such rights and entitlements as are available within the compass of a pertinent statute giving effect to the constitutional right, if any, or the common law, if not.” See Klare 2008:138. In the European Union context, Von Staden aptly captures the guiding role of the subsidiarity principle in the context of normative pluralism and states, “it is international courts’ exercise of decision-making authority in their own right in the interpretation of indeterminate norms that triggers the applicability of normative subsidiarity as a guiding principle”. See Von Staden 2012:1036.

<sup>35</sup> See Du Plessis 2006:209-218; Von Staden 2012:1033-1039.

<sup>36</sup> Du Plessis 2006:215. Courts avoid deciding constitutional questions where a decision may be reached on non-constitutional basis in the same matter. See *Khalapa v Commissioner of Police LAC* (2000-2004) 151:159; *Lesotho Teachers Trade Union v Director Teaching Service*

The principle has been applied in non-constitutional legal matters. Two instances will sufficiently serve the purpose of illustration. Firstly, in inter-country adoption of minor children cases, the principle requires priority to be given to placement of the minor child within the family in the country of origin and that domestic measures be preferred over inter-country adoption.<sup>37</sup> Secondly, where a relief is available concurrently in the higher court and the lower court, the applicant should pursue such remedy in the lower court or apply for leave from the higher court to seek relief in the higher court.<sup>38</sup>

## PART II

### 3.3 Dissecting the rights-based review from the judicial review canvas

Before dealing with the models of constitutional review and relationships thereof with the principle of subsidiarity, it is important to first clarify the conceptual differences between the judicial review as understood generally and the specialised constitutional review (the rights-based review). While there exists a broad and general legal tapestry of judicial review spanning the continuum from traditional judicial review to strong-form and weak-form judicial review,<sup>39</sup> the present study bases its thesis on a specialised and narrow form of judicial review, the specialised constitutional review or rights-based review. From the broad canvas of judicial review, I will therefore dissect portions relevant for the full appreciation of conclusions reached in this study, in view of the limited space. It is argued that, while on the one hand, section 119(1) of the Constitution constitutionalises the common-law review framework and grants general constitutional review to the High Court to supervise the

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*Department LAC (2000-2004) 803:809-810; S v Mhlungu 1995 3 SA 867 (CC):[59]. Also see Van der Walt 2012:36.*

<sup>37</sup> See *De Gree v Webb* 2007 5 SA 184 (SCA); *AD v DW* 2008 3 SA 183 (CC); *United Nations Convention on the Rights of the Child*, art 21(b).

<sup>38</sup> See *High Court Act 5/1978*, sec 6.

<sup>39</sup> Not only the heads on which the judicial review may be undertaken, but also the judicial review itself is expanding. See Alder *General Principles of Constitutional and Administrative Law* (2002); Forsyth *Judicial Review and the Constitution* (2000); Cappelletti *The Judicial Process in Comparative Perspective* (1989); Elliott *The Constitutional Foundations of Judicial Review* (2001); Van der Schyff *Judicial Review of Legislation: A Comparative Study of the United Kingdom, the Netherlands and South Africa* (2010); Zurn *Deliberative Democracy and the Institutions of Judicial Review* (2007); Kramer *The people Themselves: Popular Constitutionalism and Judicial review* (2004); Gordon and Ward *Judicial review and the Human Rights Act* (2000); Ginsburg *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003); Tushnet 2003:813; Tushnet 2011:321; McEldowney 1993:1-16.

constitutional landscape, sections 2, 22 and 156(1) of the Constitution, on the other hand, found a specialised constitutional review jurisdiction, the rights-based review, in terms of which the courts shepherd the limits and contours of the Bill of Rights through constitutional adjudication.

### 3.3.1 Nature and scope of judicial review

The content and scope of judicial review are generally accepted as that which is found in the “time-honoured classification”<sup>40</sup> and articulation by Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council*.<sup>41</sup> According to Innes CJ, judicial review has three distinct and separate meanings. Firstly, judicial review, in contradistinction to an appeal, refers to the process according to which decisions of inferior courts are brought before a superior court in respect of grave irregularities or illegalities occurring during the course of such proceedings.<sup>42</sup> These may include absence of jurisdiction, bias or corruption on the part of the presiding officer and the admission of inadmissible evidence. Innes CJ calls this the “first and most usual signification” of judicial review. The second species of judicial review is one which is generally understood in the administrative law sense. Under this species of judicial review, a superior court scrutinises and sets aside the decision of public functionaries<sup>43</sup> on the grounds, among others, of disregard of important provisions of the statute, gross irregularity, disregard of principles of fairness (*audi alteram partem*) or illegality in the performance of the duty or making of the decision.<sup>44</sup>

The third, and wider, type of review relates to special instances where, by statute, the

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<sup>40</sup> The expression was used by the South African Constitutional Court in *President of the Republic of South Africa v Gauteng Lions Rugby Union* 2002 2 SA 64 (CC):73.

<sup>41</sup> *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111:114-117.

<sup>42</sup> See *Teaching Service Commission v Judge of the Labour Court* LAC (2007-2008) 284:287; *Lerata v Scott Hospital* LAC (1995-1999) 147:158-160; Hoexter 2000:66.

<sup>43</sup> Although traditionally, judicial review was confined to ‘reviewing activities of a public nature as opposed to those of a purely private or domestic character’ (*R v BBC, Ex parte Lavelle* [1983] ICR 99:109), its frontiers have, however, been pushed to also cover the decisions of private actors where such decisions affect vital private interests or public interest. The focus has since moved from the source of the power or function to nature of the function itself, using the “public function” test. See, *R v Panel on Takeovers and Mergers Ex parte Datafin* [1987] 2 WLR 699 CA; *O’Reilly v Mackman* [1983] 2 AC 237; Oliver 2000:19-27.

<sup>44</sup> See *Rakhoboso v Rakhoboso* LAC (1995-1999) 331:335-340; *Lesotho Electricity Corporation v Mafoso* LAC (1995-1999) 538:541-542.

legislature has conferred statutory power of review upon the court.<sup>45</sup> This review power, though ordinarily referred to as “wide” as it combines both aspects of review and appeal,<sup>46</sup> depends much on the relevant enabling statutory enactment.<sup>47</sup> There is, however, a fourth type of review. This is a judicial review in the constitutional law sense generally,<sup>48</sup> which I call *general constitutional review*. This form of review is discussed below under the heading “constitutionalising judicial review”.

### 3.3.2 Judicial review: aims and relief

Judicial review is essentially aimed at the maintenance of legality, being a means by which those in authority are compelled to behave lawfully; it is therefore not directed at the decision on its merits.<sup>49</sup> The recognised exception is the third type of review, in terms of which a superior court, as though sitting on appeal, may decide the matter afresh, “with the additional privileges of being able, after setting aside the decision arrived at ..., to deal with the whole matter upon fresh evidence”.<sup>50</sup> The fourth type of review is also an exception since it is aimed at the legality not only of the decision, but also of the law and mandates the employment of constitutional adjudicative toolkit in constitutional disputes adjudication.<sup>51</sup> The first, second and third types of judicial review have some recognised limitations.<sup>52</sup> In a

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<sup>45</sup> *Johannesburg Consolidated Investment Co*:115-116.

<sup>46</sup> *Johannesburg Consolidated Investment Co*:116-117.

<sup>47</sup> *Gilbey Distillers and Vintners (Pty) Ltd v Morris* 1991 1 SA 648 (A):655-656; *Nel v The Master* 2005 1 SA 276 (SCA):[23].

<sup>48</sup> Hoexter 2002:66.

<sup>49</sup> *Teaching Service Commission*:287; *Judicial Service Commission v Chobokoane* LAC (2000-2004) 859:864; *Moonlite Taxis v Seboka* LAC (2007-2008) 132:135; *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 2 SA 385 (SCA):401-402.

<sup>50</sup> *Johannesburg Consolidated Investment Co*:117.

<sup>51</sup> Constitutional adjudication toolkit or methodology include, for example, wide and purposive judicial interpretation of the Constitution; appropriate constitutional test (for, example *Oakes Test*) in determining legitimate or justifiable limitation of the Bill of Rights; constitutional justificatory onus; etc. See *Sekoati v President Court-Martial* LAC (1995-1999) 812:820-828; *Minister of Labour and Employment v Ts’euoa* LAC (2007-2008) 289:294-297; *Attorney General v Mopa* LAC (2000-2004) 426.

<sup>52</sup> Hoexter 2002:121-122. First, where the decision of the functionary or an inferior court involved the exercise of discretion, the power of the superior court on review is circumscribed; it may not set aside the decision merely because it is of the view that the decision is wrong; the exercise of such discretion may only be attacked on review on the basis, for example, that the functionary or the inferior court failed to exercise the discretion at all, acted *mala fide* or was motivated by improper

successful review, the general principle is that a review court, when setting aside<sup>53</sup> the decision of an inferior court or administrative authority, will not correct the decision by substituting its own decision for that of the inferior court or administrative authority, but it will remit the matter back to the decision-maker for the latter to decide the matter again, unless exceptional circumstances exist.<sup>54</sup>

### 3.3.3 Constitutionalising judicial review

Section 119(1) of the Constitution introduces a fourth type of review – the *general constitutional review*. In terms of this section, the High Court has:

... *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, quasi-judicial or public administrative

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considerations. See *Judicial Service Commission v Chobokoane*:863; *Mensah v Adjudicator Reaching Service Commission* LAC (2005-2006) 468:476; *Krumm v The Master* 1989 3 SA 944 (D&CLD):951-952; *Nel v The Master* 2005 1 SA 276 (SCA):284-285; *President of the Republic of South Africa v Gauteng Lions Rugby Union* 2002 2 SA 64 (CC):73-74. The second limitation is that the superior courts or judges of the superior courts are themselves not amenable to judicial review, except where, in the case of the High Court, there are exceptional circumstances justifying the Court of Appeal to intervene, such as failure of justice, gross irregularity or illegality rendering the High Court's decision a nullity. See *Bolofo v Director of Public Prosecutions* LAC (1995-1999) 231:241-242; *Mosuo v Judge Peete* LAC (2007-2008) 275:277-278.

<sup>53</sup> The reliefs available under judicial review are not limited to the setting aside of the decision or action, but may include, in appropriate circumstances, issue of *mandamus*, *certiorari*, interdict, declarator, etc.

<sup>54</sup> For this general principle, see *Premier Mpumalanga v Association of Estate Agents School* 1999 2 SA 91 (CC):[50]; *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board* 2001 12 BCLR 1239 (C):1259-1260; *Gauteng Gambling Board v Silverstar Development Ltd* 2005 4 SA 67 (SCA):[29]; *Nkuebe v Attorney General* LAC (2000-2004) 295:301. As to what amounts to exceptional circumstances, it was stated in *Western Cape v Member of the Executive Committee for Health and Social Services* 1998 3 SA 124 (C):131 that "where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter ... where undue delay would cause unjustifiable prejudice to the applicant ... where the functionary or tribunal has exhibited bias incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again ... where the court is in a good position to make the decision itself as qualified should take the decision of the administrator's powers or functions. In some cases however, fairness to the applicant may demand the court should take such a view". Also see Hoexter 2002:290.



functions *under any law* and such jurisdiction and powers as may be conferred on it by this Constitution or by or under any other law.<sup>55</sup>

In terms of this general constitutional review, a superior court has the power to supervise compliance with the Constitution generally, including the Bill of Rights violations.<sup>56</sup> Any law, action or conduct that is inconsistent with the justiciable provisions of the Constitution, may be reviewed and set aside by the superior court on a constitutional basis.<sup>57</sup> Under this form of review, the question in each case is whether the impugned law, decision or conduct is or is not consistent with the Constitution.<sup>58</sup> Besides the general constitutional supervisory power, section 119(1) of the Constitution has another legal importance: it raises the first three (common law) forms of judicial review to the status of constitutional law, so that:

... the common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.... What would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them.<sup>59</sup>

Important observations can be made from section 119(1)'s double-pronged functionality. Firstly, it is the High Court specifically, as a superior court, which is bestowed not only with the general supervisory competence to shepherd the contours of the constitutional landscape, but also to define and articulate, by the process of review, the precise legal limits of the powers of subordinate courts or inferior courts, court-martials, tribunals, boards or officers (which I shall call, for present purposes, the public functionaries).<sup>60</sup> Secondly, the above public functionaries themselves do not have the review power; they are the objects of review. Thirdly, the review power by the High Court is available where, specifically, these functionaries are "exercising judicial, quasi-judicial or public administrative functions", which,

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<sup>55</sup> The Constitution, sec 119(1). Emphasis added.

<sup>56</sup> *Bolofo*:241-257; *Davids v Van Straaten* 2005 4 SA 468 (C):486. Also see *Attorney General v Lesotho Teachers Trade Union* LAC (1995-1999) 129:130; *CGM Industrial v LECAWU* LAC (1995-1999) 791:797.

<sup>57</sup> *Hoexter* 2002:277.

<sup>58</sup> *Commissioner, Customs and Excise v Container Logistics* 1999 3 SA 771 (SCA):785-786.

<sup>59</sup> *Pharmaceutical Manufacturers Association: In re Ex Parte President* 2000 2 SA 674 (CC):[33], [50].

<sup>60</sup> *Pharmaceutical Manufacturers Association*: [39].

essentially, are public functions. The provision is silent about the review of purely private conduct.<sup>61</sup> Fourthly, the functions are those exercised under *any law*, which includes the Constitution itself.<sup>62</sup> Finally, the High Court (and the Court of Appeal) or judges thereof, are not susceptible to judicial review under section 119(1) of the Constitution.<sup>63</sup> This immunity extends to statutory tribunals presided over by the judge of a superior court.<sup>64</sup>

However, in the previous chapter, the conclusion was reached that the horizontal application of the Bill of Rights has certain legal duties with concomitant legal ramifications and implications on the judiciary. It is in relation to the application of that doctrine and the exercise of the constitutional jurisdiction by the courts of law in order to enforce the horizontally applicable Bill of Rights that a fifth type of constitutional review which addresses the above four issues or concerns raised in relation to section 119(1) of the Constitution can be established.

#### 3.3.4 Specialised constitutional review: rights-based review

The fifth type of review is what I refer to as a specialised constitutional review. Unlike general constitutional review in terms of which the superior court supervises compliance with the whole of the Constitution, specialised constitutional review is based on the provisions of the Constitution geared towards the enforcement and the protection of the fundamental human rights and freedoms. These provisions are firstly, the enforcement of the Bill of Rights provisions. In terms of section 22(2) of the Constitution, the High Court has “original

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<sup>61</sup> Under common law, the susceptibility of public and private actors to judicial review was based on the “public function” test. Importantly, a private actor’s power or decision would be amenable to judicial review where it could be shown that, in the relevant circumstances, it exercised “public function”. See *R v Panel on Takeovers and Mergers Ex Parte Datafin* [1987] 2 WLR 699 CA.

<sup>62</sup> This is a clear indication that bodies and organs exercising power under the Constitution will be subjected to scrutiny by the High Court, not only on the basis of the traditional judicial review approach, but also on the basis of the very Constitution under which they exercise their functions to determine the legality of the exercise of such power by them.

<sup>63</sup> In *Re Racal Communications* [1981] AC 374:[17], Lord Diplock put the question beyond any doubt as follows: “Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes of law made by judges of the High Court acting in their judicial capacity as such can be corrected only by means of appeal to an appellate court; and if, as in the instant case, the statute provides that the judge's decision shall not be appealable, they cannot be corrected at all.” Also see *Bolofa*:241-242.

<sup>64</sup> *Mosuo*:277-278; *R v Cripps Ex Parte Muldoon* [1984] QB 68.

jurisdiction to hear and determine any application<sup>65</sup> in which it is alleged by an appropriate person that “any provision of [the Bill of Rights] has been, is being or is likely to be contravened<sup>66</sup> and to make appropriate remedies “for the purpose of enforcing or securing the enforcement of any of the provisions of [the Bill of Rights]”.<sup>67</sup> It would seem that, not only the High Court has this jurisdiction on this score, but also the subordinate courts are apparently<sup>68</sup> roped in to take some action where “in any proceedings in any [of these courts] any question arises as to the contravention of any of the provisions of [the Bill of Rights]”.<sup>69</sup>

The second provision in which the courts have constitutional jurisdiction to enforce and protect rights and freedoms is the supremacy clause of the Constitution.<sup>70</sup> Although the courts in Lesotho have not yet employed section 2 of the Constitution specifically for this purpose, comparative constitutional law clearly finds constitutional jurisdiction under the supremacy clause to enforce and protect private actor’s entrenched rights and freedoms.<sup>71</sup> The third constitutional provision aimed at protecting the private actors’ fundamental rights is section 156(1) of the Constitution. In terms of this section, where the “existing law”– the law that pre-dates the Constitution<sup>72</sup> – is inconsistent with the Constitution, for example, the Bill of Rights, the courts have power and obligation to modify and develop such law so as to be compatible with the Constitution. Thus, for example, where a common-law rule infringes a private actor’s entrenched rights and freedoms, the courts are enjoined to develop such a rule to meet the Bill of Rights standards.

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<sup>65</sup> The Constitution, sec 22(2). The argument here is that if the general constitutional review under section 119(1) of the Constitution had been sufficient to secure the enforcement of the Bill of Rights provisions, it would not have been necessary to specifically grant yet another “original jurisdiction” to the High Court under section 22(2), unless the respective “original jurisdictions” have conceptual, theoretical, methodological and/or structural differences.

<sup>66</sup> The Constitution, sec 22(1).

<sup>67</sup> The Constitution, sec 22(2).

<sup>68</sup> See below for a discussion as to whether or not the subordinate courts have similar constitutional powers, within their respective jurisdictions, as the High Court does.

<sup>69</sup> The Constitution, 22(3).

<sup>70</sup> The Constitution, sec 2.

<sup>71</sup> See *R v Big M Drug Mart* [1985] 1 SCR 295:312-316; *Schachter v Canada* [1992] 2 SCR 679:700-702; *Osborne v Canada* [1991] 2 SCR 69:77-78,103; *McAllister* 2004:2-3,21-43; *Roach* 2013:474,490-509; *Roach* 1987:233-249; *Hogg* 2007: Chapter 2; *Klaaren* 1998:4-8; *Currie and De Waal* 2005:191, 195-196, 226-227; *De Waal et al* 1999:164-186; *Devenish* 1999:572-575; *Linnington* 2012:68-72.

<sup>72</sup> See the Constitution, sec 156(5).

In this sense therefore, the specialised constitutional review is a *rights-based review*, which entails measuring the compatibility or congruency of any law, decision, action or conduct with the Bill of Rights provisions with the consequence of invalidity<sup>73</sup> and inapplicability<sup>74</sup> in the event of inconsistency.<sup>75</sup> Under this form of review, the courts test both the *legality* and the *legitimacy* of laws on the Bill of Rights' principles and value system benchmark.<sup>76</sup> It is a special jurisdiction<sup>77</sup> over human rights violation disputes<sup>78</sup> in terms of which, as the Nigerian Supreme Court appositely announced, "the courts have been appointed sentinels to watch over the fundamental rights secured to the people ... and to guard against any infringement of those rights by the state".<sup>79</sup> I would add, private conduct,<sup>80</sup> in the context of Lesotho.

Thus, sections 2, 22 and 156(1) of the Constitution introduce the rights-based review and place it "on an altogether different and more straightforward footing than the traditional grounds of review" by making the Bill of Rights "capable of vindication otherwise than via the circuitous methodology" of the traditional theory of judicial review.<sup>81</sup> The design of these sections, to adopt the expression of Palmer and Palter, is to secure the enforcement of Chapter II but not the rest of the Constitution.<sup>82</sup> This specialised constitutional review differs

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<sup>73</sup> "Invalidity" is indicative of the legal status of any law, act or conduct, which is found to be inconsistent with the Constitution. "Invalidation" presupposes a positive act of the judicial officer. All laws inconsistent with the Constitution "shall ... be void" by operation of section 2 of the Constitution, and not because a judicial officer takes a positive action. For further discussion, see chapter 4.

<sup>74</sup> The judicial officer has a constitutional duty not to apply invalid laws.

<sup>75</sup> See Van der Schyff 2010:5.

<sup>76</sup> See Van Der Schyff 2010:135-137. As Van der Schyff states, the purpose of the *legality* requirement is to check whether a norm that purports to be law is in fact law, while *legitimacy* analysis concerns itself with the value system underlying that law.

<sup>77</sup> Dada (2013:4) refers to section 46(2) of the Nigerian Constitution, with which Lesotho's section 22(2) of the Constitution is in *pari materia*, as special jurisdiction to hear and determine allegations of human rights violation.

<sup>78</sup> Human rights violation disputes are based on the Bill of Rights and require the court "to decide the limits of the law in the sense of when the legal rights of individuals should give way to the public welfare". See Alder 2002:419.

<sup>79</sup> *Olawoyin v Attorney General, Northern Region* (1962) 1 ANLR 324:327.

<sup>80</sup> See the Constitution, sec 4(2) and sec 22(1).

<sup>81</sup> Elliott 2000:272. Human rights adjudication involves distinct structural methodology in the enforcement of the Bill of Rights provisions, from one employed by traditional theory of judicial review. Also see Raine and Walker 2004:113.

<sup>82</sup> Palmer and Poulter 1972:275.

from the other forms of review, and in particular, the general constitutional review form to the extent that the latter does not include Chapter II of the Constitution, in four principal ways.

Firstly, the rights-based review introduces deontological standards<sup>83</sup> for decisions of any public officers or public authorities. As a result, not only procedural but also substantive aspects of such decisions must be compatible with the principles and values underpinning the Bill of Rights.<sup>84</sup> The rights-based review further requires judges and judicial officers to adopt a teleological methodology in the interpretative determination of whether such decisions constitute a justified limitation of a protected provision of the Bill of Rights.<sup>85</sup> The interpretation of the Bill of Rights provisions “entails a broad purposive or teleological approach”.<sup>86</sup> In the context of the rights-based review, the Bill of Rights provisions are “interpretative constructs”<sup>87</sup> or “regulatory regime”,<sup>88</sup> which do not only shape the internal limits of discretionary powers, but also measure their compatibility with the Bill of Rights’ objective normative standards.

Secondly, rights-based review is not concerned with the exercise of power and the nature of the function – that is the concern of the traditional *vires-based* review;<sup>89</sup> its focus is the

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<sup>83</sup> Deontologically, public officers or public authorities, in making their decisions must consider the constitutional limits set by the Bill of Rights by ensuring that such decisions do not contravene any relevant fundamental right or freedom of any concerned person. See Feldman 2000:258. The decision may be reasonable in the *Wednesbury* sense (*Associated Provincial Picture House v Wednesbury Corporation* [1984] 1 KB 223), but still be incompatible with the Bill of Rights standards.

<sup>84</sup> While Feldman (2000:264) posits that the Bill of Rights provisions are “relevant considerations” – and I will add, constitutional duties – “to be taken into account by a public authority which makes a decision or takes action which potentially might affect a right”, Galligan and Sandlera (2004:26) identifies the Bill of Rights as a regulatory regime which form “a system of standards, institutions, and processes that are designed to control the actions of those involved in certain activities in order to achieve certain goals”. Also see Elliott 2001:203.

<sup>85</sup> Teleological methodology is a consequentialist approach in terms of which judges measures the constitutionality or otherwise of the decision of any public officer or public authority not on rationality or irrationality (reasonableness) grounds in the *Wednesbury* sense, but in the light of its purpose or consequences or impact not only on the protected right but also on the wider democratic society’s interests. See Feldman 2000:263; Elliott 2001:203.

<sup>86</sup> *Sekoati v President Court-Martial* LAC (1995-1999) 812:821.

<sup>87</sup> Elliott 2000:277-278.

<sup>88</sup> Galligan and Sandler 2004:26-29.

<sup>89</sup> The *vires-based* review entails “judicial enforcement of the internal limits of discretionary powers”

supervision of the impact and effect of any law, rule, practice, conduct or decisions on the rights and freedoms of the bearer or beneficiary of the Bill of Rights.<sup>90</sup> Thus, the judges or judicial officers at the justification stage of human rights adjudication concern themselves with the question whether the impugned decision, law or conduct does not restrict the right or freedom in question “to a greater extent than is necessary in a practical sense in a democratic society”.<sup>91</sup> Thirdly, based on the doctrine of horizontality subsumed under sections 4(2) and 22(1) of the Constitution, the rights-based review does not discriminate on whether the impugned conduct or decision is that of public or private functionary or actor.<sup>92</sup> Since the horizontal application of the Bill of Rights imposes an obligation on the judges and judicial officers not to contravene the Bill of Rights provisions in the exercise of their judicial functions, and attaches certain legal consequences and ramification on the judiciary, not only the subordinate courts or inferior courts, but also the High Court itself and the Court of Appeal for that matter, are subject to this specialised constitutional review.<sup>93</sup> Finally, the power of a court exercising a rights-based review is not limited to a particular defined remedy nor is the court supposed to be deferential<sup>94</sup> to the decisions of the depository of

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and not the external compatibility of such discretionary powers and the effect of the decision arising therefrom with some higher normative principles, for example, the Bill of Rights provisions. See Elliott 2000:274.

<sup>90</sup> See Elliott 2001:203. Also see Feldman 2000:263.

<sup>91</sup> See, for example, the Constitution, sec 7(3); sec 10(3); sec 11(3); *Mopa*:439-440; *Ts’euoa*:295-296; *Ts’epe v Independent Electoral Commission* LAC (2005-2006) 169:181-186.

<sup>92</sup> Although section 119(1) of the Constitution is concerned with the public power which is the subject of review, modern public law transcend the descriptive classical public-private distinction, and has adopted a normative posture towards this characterisation, according to which “it is the nature and purpose of the power, not necessarily its source or its repository, which determines whether or not its exercise is a public function”. See Sedley 2000:298. In terms of sections 4(2) and 22(1) of the Constitution, it really does not matter whether the decision or conduct that contravenes the guaranteed rights and freedoms is that of public or private functionary or actor.

<sup>93</sup> In *Lepule v Lepule* 4/2013, the High Court however refused to find the order of the Court of Appeal subject to constitutional scrutiny simply on the basis that the Court of Appeal is an apex court in the judicial system and therefore, it was said, its decisions bind all the other courts lower on the hierarchy, including the High Court by virtue of *stare decisis* doctrine. See chapter 5 for the discussion of this decision.

<sup>94</sup> Although the constitutional function of courts in human rights adjudication prevents them from being deferential, a proper balance between activism and deference must be struck. See *Ts’epe v Independent Electoral Commission* LAC (2005-2006) 169:186; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC):[48].

power or administrative action; the court may give appropriate remedies in order to enforce or secure the protection of the fundamental right or freedom concerned.<sup>95</sup> This includes even developing the applicable common law or customary law in appropriate circumstances to be in conformity with the normative standards of the Bill of Rights.<sup>96</sup>

It is the Lesotho Constitution's architectural structure, features and contours of the fifth form of review, which is discussed below. However, first it is important to look at the comparative constitutional theory on constitutional review by identifying different architectural structuring of constitutional review and determine which model conforms to the principle of subsidiarity.

### PART III

#### 3.4 Comparative constitutional architecture of constitutional review

Notwithstanding counter-majoritarian argumentation,<sup>97</sup> constitutional review has proved to be a citadel of constitutionalism in constitutional democracies.<sup>98</sup> In their 1999 unpaginated monograph, Harutyunyan and Mavcic observe that the constitutional review plays “a serious preventive role” in stimulating “both the bodies of state authority as well as each individual member of society to the legally and constitutionally acceptable way of life” and identify the three-fold principal mission of the constitutional review: “to secure the supremacy and stability of the Constitution, to retain the constitutional separation of powers and to guarantee the protection of the constitutionally established human rights and freedoms”.<sup>99</sup>

Judicial control of “the mastodon legislator and the leviathan administrator”<sup>100</sup> as well as private actors has been the epicentre for the protection of minorities' civil liberties from

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<sup>95</sup> See the Constitution, sec 22(2).

<sup>96</sup> *Radeby v National Executive Committee* 159/1998; the Constitution, sec 156(1); sec 128(1); also see Oliver 2008:12; Oliver 2007:73; Woolman 1998:10-1058; Cherednychenko 2007:15-16.

<sup>97</sup> These are arguments that challenge the authority and legitimacy of the courts, manned by few unelected judges, to declare unconstitutional the laws passed by the legislature, which represents the majority of the electorate. See Leon 2010:25-40; Ginsburg 2003:21-22, 47-76.

<sup>98</sup> In *Larbi-Odam v Member of Executive Council for Education* 1998 1 SA 745 (CC):[27]-[28], the Constitutional Court of South Africa stated that the role of the judiciary is to protect groups that are particularly vulnerable to the tyranny of the majority in the society. As an important tool for constitutionalism, Van der Schyff (2010:10) hastens to warn, constitutional review should however, be understood within the context of a particular constitutional system.

<sup>99</sup> Harutyunyan and Mavcic 1999: Chapter 1, an unpaginated constitutional monograph available online at <<http://concourt.am/Books/harutunyan/monogr3/book.htm>> (accessed on 26 June 2015).

<sup>100</sup> Cappelletti 1989:19.

majoritarian zeal, respect for the rule of law and the attainment of constitutionalism.<sup>101</sup> Comparative literature traces the evolution of this important constitutional tool from the pre-World War II traditions when it reposed in few high courts, through the 1950s when many civil and common-law countries rejected parliamentary supremacy to embrace and prioritise fundamental human rights and reposed the potent arsenal in the Constitutional Courts, to the 1990s where a basic pattern<sup>102</sup> had been entrenched by many constitutional democracies.<sup>103</sup> Although constitutional review may differ both in content and in form from one legal system to another, comparative literature identifies the two most consolidated models of constitutional scrutiny in the world, with a hybrid model also developing.<sup>104</sup> Owing to their generally accepted place of provenance, these two models are known, respectively, as American<sup>105</sup> and European<sup>106</sup> models of constitutional review. The different architectural structure or organisation of constitutional review will be analysed under these models below.

### 3.4.1 American model of constitutional review

#### 3.4.1.1 Structural features of the American model

In terms of Article III of the US Constitution, the judicial power of the United States is vested in one Supreme Court and in such inferior federal courts as the Congress may ordain and establish from time to time.<sup>107</sup> The Supreme Court has final appellate – and limited review – jurisdiction in all federal matters including constitutional matters.<sup>108</sup> There are also several

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<sup>101</sup> See Kokott and Kaspar 2012:805. Albers *et al* 2012:72.

<sup>102</sup> This pattern involves the supremacy of a written constitution, a Bill of Rights entrenchment and the constitutional review power to the courts to enforce the Constitution. See Sweet 2012:816; Cappelletti 1989:132.

<sup>103</sup> Sweet 2012:816-820; Cappelletti 1989:120-132; Jackson and Tushnet 2006:497-551. Harutyunyan and Mavcic (1999 Chapter 1) classify the conversion and development of constitutional review systems into four stages: 1803-1920, 1920-1940, 1945-1990 and Following 1990.

<sup>104</sup> Medécigo 2013:9.

<sup>105</sup> Although the origins of the decentralised constitutional review model are traceable to the continental Europe, it is generally accepted that this model found articulate formulation by the American courts.

<sup>106</sup> The centralised model of constitutional review is also known as “Kelsenian”, “Austrian”, “Continental”, “Concentrated” or “Centralised” model. It was named after Professor Hans Kelsen who rejected the American model and developed a concentrated model for his home country, Austria, in the 1920s.

<sup>107</sup> The US Constitution, art III.

<sup>108</sup> The US Supreme Court hears federal statutory and administrative law cases, as well as



state courts in each of the US states with federal constitutional review power.<sup>109</sup> The US Constitution is the supreme law and binds all judges and judicial officers in every state of the US.<sup>110</sup> The US Supreme Court is not a specialist court in the sense that it also adjudicates on other legal issues under federal law. The jurisdiction to entertain constitutional questions is, however, not limited to the US Supreme Court, but also extends to *all* judicial organs – federal or state – in the US legal system.<sup>111</sup> All federal courts and state courts, therefore, share constitutional jurisdiction and are co-interpreters of the US Constitution and federal laws.<sup>112</sup> In a *habeas corpus* case of *Robb v Connolly* where it was argued that state courts did not have jurisdiction to determine matters involving constitutional rights of individuals under the US Constitution or the construction of the US Constitution, the US Supreme Court, rejecting the argument, stated that:

... a state court of original jurisdiction, having the parties before it, may, consistently with existing federal legislation, determine cases at law or in equity, arising under the constitution or laws of the United States, or involving rights dependent upon such constitution or laws. Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.' If they fail therein, and withhold or deny rights, privileges, or immunities secured by the constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided, to this court for final and conclusive determination.<sup>113</sup>

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constitutional cases. See Kende 2009:45.

<sup>109</sup> In *Robb v Connolly* 111 US 624 (1884):637.

<sup>110</sup> The US Constitution, art VI.

<sup>111</sup> Jackson and Tushnet 2006:465; Motala and Ramaphosa 2002:55. It has been argued that the involvement of all US courts in judicial review has had profound effect on public policy. Comparatively, state supreme courts are the most effective in protecting civil liberties as they “invalidate about one hundred twenty state laws per year” compared to “twenty-two state laws” invalidated by the US Supreme Court over the same period. See Manweller 2006:68.

<sup>112</sup> Sarubbi 2011:50-51; Jackson and Tushnet 2006:501.

<sup>113</sup> *Robb*:637. Defining this characteristic feature of the American model, Harutyunyan and Mavcic (1999: Chapter 1) state that the model is “decentralized review, by any court, non-systematically, when hearing any specific case, if the law or regulation is concerned with the specific interests of

Therefore, whenever any constitutional question arises in any litigation before any US court of law, such a court has jurisdiction to deal with and decide on such a question, including the invalidation of that law on federal or state constitutional grounds.<sup>114</sup> The nature of the dispute is irrelevant to determine whether a constitutional question may be raised and decided.<sup>115</sup> On the judicial power of US courts to review the law, Kommers posits that:

The American model empowers all courts to hear and decide constitutional cases and controversies. Any judge, state or federal, may nullify any law he or she finds unconstitutional. More precisely, judicial review in the United States includes the power of federal or state judges to void state laws on state or federal constitutional grounds.<sup>116</sup>

Because of this key characteristic of placing constitutional review in the judicial system as a whole, the American constitutional review model has been described as “decentralised”, “dispersed” or “diffused” system.<sup>117</sup> The decentralised constitutional review arises out of concrete cases or disputes between litigants<sup>118</sup> and it is therefore not abstract.<sup>119</sup> The importance of the decentralised constitutional review is highlighted by Kokott and Kaspar

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the plaintiff.”

<sup>114</sup> The seminal decision of the US Supreme Court in *Marbury v Madison* 5 US (1 Cranch) 137 (1803) did not only imply judicial review from the US Constitution but also the constitutional jurisdiction of all courts in the US to uphold the US Constitution in the face of a conflict between the Constitution and any other law. Also see Van der Schyff 2010:77; Manweller 2006:45, 68.

<sup>115</sup> De Andrade 2001:979.

<sup>116</sup> Kommers 2005:209; Jackson and Tushnet 2006:501. According to the Venice Commission (2010:11), a decentralised model entitles ordinary courts to assess the constitutionality of any legal norm or individual act and enables Judges of such courts to disapply any norm or act which they hold to be unconstitutional. See Venice Commission report available online at <[http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2010\)039rev-e](http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e)> (accessed on 16 June 2015). If constitutional review is decentralised, Kokott and Kaspar argue, all ordinary courts in a legal system will apply constitutional law to their case and, if necessary, invalidate ordinary legislation that conflicts with the Constitution. See Kokott and Kaspar 2012:810,813.

<sup>117</sup> Jackson and Tushnet 2006:465; Michelman 2011:278; De Andrade 2001:979; Finck 1997:126; Motala and Ramaphosa 2002:55.

<sup>118</sup> Manweller 2006:66; De Tocqueville 2010:169-170; De Andrade 2001:979.

<sup>119</sup> Kokott and Kaspar (2012:805) state that concrete judicial review is applied with regard to actual legal cases that raise constitutional questions in the context of ordinary litigation, while abstract review entails specific procedures in a Constitutional Court, usually initiated by “privileged actors.” According to Van der Schyff (2010:108-109), abstract review involves cases “where a court judges the compatibility of ordinary norms with higher norms without there being a factual dispute between litigants”.

who observe that:

Decentralised review guarantees that all aspects of a case are dealt with by the same court: it will assess the issues of ordinary law and – if necessary – correct the results in view of constitutional law. This may require the interpretation of ordinary law in conformity with the constitution or even the annulment of specific norms of ordinary law.<sup>120</sup>

### 3.4.1.2 The American model rationale

The rationale for involving the judicial system as a whole in constitutional review has been stated to be both logical and simple.<sup>121</sup> Without express constitutional provision, the US Supreme Court (Chief Justice Marshall) in *Marbury v Madison*<sup>122</sup> opined that it was the duty of the courts to interpret the law and to apply it to concrete cases before them; where any two laws are inconsistent with each other,<sup>123</sup> it is the province of the judge to determine which one prevails and is applicable. Since the US Constitution enjoys the highest force in the normative hierarchy,<sup>124</sup> it will prevail over any other law inconsistent with it.<sup>125</sup> On this basis, any judge or judicial officer sitting over a judgment in which any other law conflicts with the Constitution must not “close his eyes to the Constitution and see only the law” but must disregard or disapply the other norm and apply the Constitution, as this is “the very essence of judicial duty”.<sup>126</sup> The duty, therefore, of any US judge or judicial officer, to uphold

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<sup>120</sup> Kokott and Kaspar 2012:810.

<sup>121</sup> Cappelletti 1989:135; Finck 1997:126. Where constitutional supremacy is applied, the logical consequence is that the courts must have the power to decide which norm, in the event a constitutional norm and other norms conflict, to apply. This is particularly clearer where the Constitution itself declares any law inconsistent with it to be void.

<sup>122</sup> *Marbury*:137.

<sup>123</sup> Where the laws inconsistent with each other, courts resolve the conflict by invoking *lex superior derogate legi inferior*; *lex posterior prior derogate*; *generalia specialibus non derogant*.

<sup>124</sup> In terms of article VI, clause 2, the US Constitution “and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, *shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding*”. Emphasis supplied.

<sup>125</sup> Also see the American doctrine of federal pre-emption, which posits that any US state laws that conflicts with the US federal law are without effect. It has been said that it is basic to the constitutional command of the supremacy of the US Constitution that all conflicting state provisions be without effect. See *Maryland v Louisiana* 451 US 725 (1981):746; Manweller 2006:49.

<sup>126</sup> *Marbury*:178; Cappelletti 1989:135; Finck 1997:126. According to Harutyunyan and Mavcic (1999:

the US Constitution in the face of conflict with any other law, arises from the supremacy of the Constitution.<sup>127</sup> De Tocqueville summarises the rationale as follows:

In the United States, the constitution dominates the legislators as well as ordinary citizens. It is, therefore, the highest law and cannot be modified by a law. So it is right that the courts obey the constitution in preference to all laws and by doing so, they do not make themselves masters of society since the people, by changing the constitution, can always reduce the judges to obedience. So American judges refuse without hesitation to apply laws that seem to them contrary to the constitution. This follows from the very essence of the judicial power: to choose from among legal provisions those that bind him most strictly is in a way the natural right of the magistrate.<sup>128</sup>

### 3.4.1.3 The effect of “disregarding” or “disapplying” the law and the *inter partes* effects

The question of interest is what is the legal effect of disregarding or disapplying the law or declaration of invalidity of the law, which is inconsistent with the Constitution according to the American decentralised model of constitutional review? Is the relevant law rendered null and void and removed from the US statute book or normative order? Alternatively, is the effect limited to the case before the court dealing with the matter? In principle, a judicial decision of unconstitutionality in a diffused system of constitutional review has *inter partes*, and not *erga omnes*, effects only. This is aptly stated by Medécigo as follows:

In the American Model the ability to review the constitutionality of legislative action – and directly provide a remedy for a breach – represent a significant judicial power regardless of whether the courts involved are federal or local. Constitutional review is thus carried out directly within ordinary judicial procedures and only insofar it is necessary to resolve the legal dispute brought before the court. While these review powers include the ability to evaluate the constitutionality of the laws such as statutes, the court’s decision regarding the unconstitutionality of the statute has – in principle – only effects *inter partes*. This means ... that such a judgment is binding exclusively upon the parties to litigation.<sup>129</sup>

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Chapter 4), this is an indirect or accessory nature of constitutional review, “rooted in the American system”, which essentially arises out of ordinary concrete cases, according to which “an unconstitutional rule (statute) is not applied to a specific dispute”.

<sup>127</sup> The European Court of Justice (ECJ) adopted the American model of review into the European Union in *Simmenthal* [1978] ECR 629:[22]-[24]. Also see Comella 2011:275.

<sup>128</sup> De Tocqueville 2010:173.

<sup>129</sup> Medécigo 2013:11. Also see De Tocqueville 2010:173-174; De Andrade 2001:979; Kokott and Kaspar 2012:814.

While, on the positive side, disregarding or disapplying the law which is inconsistent with the US Constitution means in practical terms that “there are, in fact, very few laws that can by nature escape judicial analysis”,<sup>130</sup> on the negative side, the indirect attack may obviously lead to legal uncertainty and unpredictability. This is because different courts may come to different conclusions on the interpretation of the same point. However, it is for this reason that the traditional common-law mechanisms of *stare decisis* and the procedure of appeal<sup>131</sup> (or review) become crucial in a decentralised constitutional review to ensure uniformity and consistency of interpretation of the federal constitutional law.<sup>132</sup> In terms of the doctrine of *stare decisis* a decision of the higher or highest court in the judicial structure or hierarchy binds the lower courts and the latter are expected to decide future cases consistently with precedent set by the higher or highest court. Thus, where a matter has been decided by the US federal court, whether exercising its original or appellate jurisdiction, that decision is binding on all state courts, and therefore, it can be argued that it has real *erga omnes* effects equivalence.<sup>133</sup> The position is articulated by De Andrade as follows:

... in the United States the problem of conflicting decisions regarding the ultimate interpretation of the Constitution is resolved by conferring upon the Supreme Court the power to review any decision issued by a lower court. This mechanism is essential to balance the lack of *erga omnes* effects of the Supreme Court's judgments. In sum, review by the Supreme Court leads to a judgment limited in principle to the case decided, although its decision has general authority for the lower courts.<sup>134</sup>

### 3.4.2 European model of constitutional review

#### 3.4.2.1 Origins and structural features of the European model

Comparative literature traces the origins of the European model to Hans Kelsen who, leaving

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<sup>130</sup> De Tocqueville 2010:173-173.

<sup>131</sup> Identifying that the decentralised constitutional review may lead to uncertainty and disharmony in the legal system, Kokott and Kaspar (2012:810,814) go further and observe that in such a review model “a system of appeals can then be used to ensure the coherence of the legal system”.

<sup>132</sup> Baude 2007:20; Medécigo 2013:11; Finck 1997:132; Hardisty 1979:55.

<sup>133</sup> See *Cooper v Aaron* 358 US 1 (1958):18; Farber 1982:411-412. Also see Venice Commission 2010:47-48. According to the Venice Commission, the doctrine of *stare decisis* exists in systems where there is no concentrated constitutional review, and “ensures a large degree of coherence of the courts’ decisions and comes close to the *erga omnes* effect in civil law systems”. Venice Commission 2010:48.

<sup>134</sup> De Andrade 2001:980.

the US and dissatisfied with the decentralised model of constitutional review, developed a “European” model of review as an alternative to the American prototype.<sup>135</sup> It is said that Hans Kelsen, the Austrian legal theorist, introduced the European model of review in the Constitution of his own country, Austria in the 1920s.<sup>136</sup> From this Kelsenian template, some countries adopted the European model after the World War I,<sup>137</sup> while many others adopted it after World War II.<sup>138</sup> It is said that today the European model of constitutional review has become a defining feature of constitutionalism in most of European and other countries.<sup>139</sup>

The characteristic features of the European model of constitutional review are four-fold: concentration or centralisation of judicial review; monopoly on interpretation and application of the Constitution; detachment from legislative, executive and judicial branches of government; and abstract review.<sup>140</sup> Firstly, the European model has a dualist judicial structure which is characterised by special courts and the Constitutional Courts,<sup>141</sup> with the latter having exclusive or close to exclusive jurisdiction to determine constitutional matters<sup>142</sup> – a monopoly on invalidation of other norms as unconstitutional – and which judges of

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<sup>135</sup> Sweet 2012:817.

<sup>136</sup> Cappelletti 1989:136. It is stated that Kelsen drafted the 1920 Austrian Constitution and created a special Constitutional Court for Austria. Also see Moon 2003:230.

<sup>137</sup> Comella 2004:461; Sadurski 2005:1-2. Australia and Czechoslovakia adopted the model in 1920, Spain in 1931.

<sup>138</sup> Dietze 1956:313-318; Sadurski 2005:2-4; Motala and Ramaphosa 2002:55; Harutyunyan and Mavcic 1999:Chap1.

<sup>139</sup> Comella 2004:461-462; Jackson and Tushnet 2006:466; Ferejohn 2002:53. According to Harutyunyan and Mavcic (1999: Chapter 5), statistical data indicates that of the 217 constitutional review systems around the world, 116 have European model character.

<sup>140</sup> Sweet 2012:818; Sadurski 2005:5. As Sadurski states, there are, however, some variations or departures from this dominant model, in the sense that some Constitutional Courts may be empowered to exercise *ex post* concrete constitutional review. This is a constitutional review in terms of which ordinary courts, faced with the constitutionality of the law in concrete cases before them, refer the issue to the Constitutional Court for determination.

<sup>141</sup> In some countries, this monopolistic constitutional function is performed by institutions or organs called “Constitutional Councils” or “Constitutional Chambers of Supreme Courts”. See Harutyunyan and Mavcic 1999: Chapter 4. In this study, I refer to any of these institutions as “Constitutional Courts”.

<sup>142</sup> Jackson and Tushnet 2006:466; Sweet 2012:817-818; De Andrade 2001:980-981; Besselink 2013:18-19; Ferejohn and Pasquino 2012:300. According to Cappelletti (1989:133), the European model confines constitutional review power “to a single judicial organ”. Also see Comella 2004:463; Finck 1997:125-126.

ordinary courts are not permitted to participate in.<sup>143</sup> Constitutional Courts are “specialist” courts in constitutional decision making and use specialised procedures.<sup>144</sup> Secondly, the monopoly extends also to the interpretation and application of the Constitution. Within a European model, there is at least one separate “Supreme Court” that sits at the apex of the judicial hierarchy or has final appellate jurisdiction over the ordinary law or particular branch of law.<sup>145</sup> This structure is referred to as the ordinary courts. Where ordinary courts are confronted with constitutional questions, whether the interpretation or application of any constitutional provision, such questions *must* be referred to the Constitutional Court for decision.<sup>146</sup> Harutyunyan and Mavcic state that, in terms of the European system of constitutional review,

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<sup>143</sup> Ferejohn 2002:50-51; Sadurski 2005:5; Motala and Ramaphosa 2002:55; Garlicki 2007:44.

<sup>144</sup> Jackson and Tushnet 2006:466. The main approaches to Constitutional Courts are first, abstract review, in terms of which political institutions are allowed to question the constitutionality of any statute by asking the Constitutional Court to assess its conformity with the Constitution without there being a need for a concrete case or specific infringement being present; second, concrete review preliminary reference or referral, in terms of which constitutional issues arising out of concrete ordinary cases before ordinary courts, are referred by the ordinary courts to the Constitutional Court for decision; and finally, constitutional complaints procedure, (or *juicio de amparo* – writ of *amparo* – as it is known in Latin American constitutional tradition) in terms of which any natural or juristic person is allowed to bring a constitutional case directly to the Constitutional Court, usually after exhaustion of all other legal remedies. See Kokott and Kaspar 2012:807-812; Gentili 2011:710; Comella 2011:267-268; Sweet 2012:823.

<sup>145</sup> In most of European countries, the judiciary is organised according to the subject matter (area of law): it is common to differentiate among categories of litigation, such as administrative, civil, commercial, social, or criminal, and to have them decided by different courts of law. In each area of law, there are specialised courts headed by a Supreme Court. There are thus, many supreme courts with no single court to unify them. See Comella 2004:466; De Andrade 2001:981; Garlicki 2007:44.

<sup>146</sup> D’Amico 2013:209-212; Harutyunyan and Mavcic 1999: Chapter 3; Sadurski 2005:19-25. The Venice Commission points out that, whereas in some states, ordinary courts have no discretion even to interpret the Constitution and that “as soon as they detect issues that could create doubts concerning the constitutionality of a provision they need to apply in a given case, the courts would be obliged to introduce a preliminary request before the constitutional court”. In other states, “ordinary judges can refer a preliminary question to the constitutional court only if they are convinced of a normative act’s unconstitutionality and of the inexistence of an interpretation that would permit a constitutional application of the law”. See Venice Commission 2010:56-57. Also see Ferejohn and Pasquino 2012:300-315. In any case, the ordinary courts are excluded from determining the validity of the impugned law or act.

... it is obligatory for ordinary courts to present a case of potential unconstitutionality to the Constitutional Court; in the event that a court, in deciding a concrete case, concludes that a statute which it must apply is unconstitutional, it must stay the proceedings and initiate proceedings before the Constitutional Court. The proceedings in the court may be continued after the Constitutional Court has issued its decision.<sup>147</sup>

The Constitutional Court may invalidate the statute on reference by ordinary judges. The decision of the Constitutional Court on these questions is final. It is said that the role of the ordinary judges through this reference or referral procedure is that of “policemen” and not judges,<sup>148</sup> in that “they are enlisted to help [Constitutional Courts] detect unconstitutional laws and practices”.<sup>149</sup> The third feature of the European model is that, although the Constitutional Courts may have links with the ordinary courts, they are formally organically detached from legislative, executive and *judicial* branches of government. Jackson and Tushnet state that the Constitutional Courts “sit outside of, rather than on top of, the normal structure of judicial jurisdiction”.<sup>150</sup> As pointed out by Sweet, the Constitutional Court judges occupy their own “constitutional space” which is “neither clearly ‘judicial’ ... nor ‘political’”.<sup>151</sup> Finally, most Constitutional Courts may review statutes in abstract with *erga omnes* effects.<sup>152</sup> Abstract review involves the determination of the constitutionality of a statute not in the context of a concrete case but *in abstracto*.<sup>153</sup>

In the final analysis, and owing to the monopoly of constitutional review by the specialised

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<sup>147</sup> Harutyunyan and Mavcic 1999: Chapter 3. Sadurski (2005:19) opines that this European constitutional jurisprudence is a reduction of the ordinary courts’ role to that of “docile supplicants who should defer to constitutional courts whenever they have any doubts as to the constitutionality of a law”.

<sup>148</sup> Comella 2004:465.

<sup>149</sup> Sweet 2012:823.

<sup>150</sup> Jackson and Tushnet 2006:466. According to Garlicki (2007:44), the European model situates the Constitutional Court “outside the traditional structure of the judicial branch.” Also see Comella 2011:265.

<sup>151</sup> Sweet 2012:818.

<sup>152</sup> Sweet 2012:818; Comella 2004:462-464; Kokott and Kaspar 2012:814; Sadurski 2005:66. According to the Venice Commission, “a typical attribute of constitutional courts, following the European model, is the *erga omnes* effect of their decisions”. See Venice Commission 2010:45-47.

<sup>153</sup> Sadurski 2005:5. As Sadurski states, the judges in abstract review assess “the textual dimension of the rule rather than its operationalisation in application to real people and real legal controversies”.



Constitutional Courts, the European model of constitutional review is “centralised” or “concentrated”. It is of great importance to note that the existence of the European model in any legal system is not a matter that may be left out for judicial interpretation or inference but a matter of *express* declaration by a Constitution. As Jackson and Tushnet put it, “the concentrated system of judicial review can only exist when it is established *expressis verbis* in a Constitution, and it cannot be developed by interpretation of the principle of the supremacy of the Constitution”.<sup>154</sup>

#### 3.4.2.2 European model rationale

Whereas the American constitutional review has found favour with common-law countries, the European model of constitutional review has been adopted mainly in countries with civil law traditions. There are generally three reasons that account for the adoption of the centralised constitutional review. Firstly, the civil law tradition of rigid adherence to the doctrine of separation of powers and supremacy of statutory law – associated with parliamentary sovereignty – influenced Kelsen to formulate an alternative to the American model of constitutional review.<sup>155</sup> Perceiving the review and invalidation of statutes as essentially a political act, and therefore at variance with democratic principles, centralised systems refuse to grant such power to the judiciary generally.<sup>156</sup> The Constitutional Court judges, who have a quasi-political role to play in a constitutional order, are seen as “negative legislators” whose “lawmaking authority is restricted to the annulment of legal norms that conflict with the constitutional law”.<sup>157</sup> In his Report at the Venice Commission Conference in 1994, Luis Lopez Guerra, the Vice President of the Spanish Constitutional Court, stated:

The constitutional court's control over the constitutionality of norms passed by the legislative powers has always been the common denominator and traditional nucleus of constitutional jurisdiction. From a Kelsenian perspective, this competence would be the very justification for the existence of these courts, having a monopoly on the power to reject laws passed by Parliament when they are considered to be unconstitutional.<sup>158</sup>

Secondly, due to the absence in the civil law tradition of a doctrine equivalent to the

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<sup>154</sup> Jackson and Tushnet 2006:489.

<sup>155</sup> Jackson and Tushnet 2006:466; Sweet 2012:818.

<sup>156</sup> Cappelletti 1989:137; Comella 2011:270.

<sup>157</sup> Sweet 2012:819; Sadurski 2005:88.

<sup>158</sup> *Guerra* 1994 para 4, an unpaginated Report submitted at the Venice Commission Conference, Bucharest, available at <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1994\)010-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1994)010-e)> (accessed on 25 June 2015).

common-law jurisdictions' *stare decisis*,<sup>159</sup> the concentrated model provides the necessary harmonisation, certainty and consistency of the constitutional law.<sup>160</sup> The attempt is thus to avoid the risk of fragmentation, disharmony and uncertainty concomitant with the decentralised review where all the courts have power of review with the result of inconsistent and conflicting interpretation of the Constitution.<sup>161</sup> In the civil law traditions, the lower courts are technically free to deviate from the decisions or views of the Supreme Courts.<sup>162</sup> Thirdly, Cappelletti observes that in most civil law countries, the traditional highest courts (the Supreme Courts) "lack structure, procedures and mentality required for effective constitutional adjudication"<sup>163</sup> with "continental judges" usually being "career judges" whose professional training "develops skills in technical application of statutes rather than in making policy judgments".<sup>164</sup> These career judges lack the required expertise necessary in constitutional litigation.<sup>165</sup>

### 3.4.3 Hybrid models and the erosion of the European model

The constitutional review is not compartmentalised into two different models with one model on each sides of the Atlantic, but should be seen as a continuum on which there may exist hybrid models which essentially adopt some features of decentralised and concentrated constitutional review.<sup>166</sup> Jackson and Tushnet argue that under hybrid models "the ordinary courts may have the power to refuse to apply unconstitutional law, but only a single court has the power to declare a law invalid" or that "systems formally organized around centralized review by specialized constitutional courts are increasingly incorporating

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<sup>159</sup> According to the Venice Commission (2010:48), *stare decisis* exists in systems where there is no concentrated review.

<sup>160</sup> Cappelletti 1989:138-142.

<sup>161</sup> Comella 2011:268.

<sup>162</sup> Comella 2011:268.

<sup>163</sup> Cappelletti 1989:142-143. Cappelletti states that structurally, there are several of the high courts, for example, in Germany, where each has jurisdiction in civil, criminal, administrative, tax disputes, labour problems and social legislation, and divisions within those high courts each of which sits and decides cases independently of the other division. Procedurally, it is said that the highest (supreme) courts, in most civil law countries, lack discretionary power to refuse jurisdiction, leading to thousands of cases per year. Taking into account the workload, the constitutional cases would not be afforded time and consideration necessary for constitutional cases.

<sup>164</sup> Cappelletti 1989:143.

<sup>165</sup> Comella 2011:269.

<sup>166</sup> Cappelletti 1989:146-147.

elements of decentralized review of the legality of government”.<sup>167</sup>

Constitutional comparative scholars observe that the European model of centralised constitutional review with its defining feature of the monopoly by the Constitutional Court is continually losing prominence because of both internal and supranational forces.<sup>168</sup> For instance, Comella observes that in the EU, not only are there internal pressures such as delays pulling the model in the direction of decentralisation but also external pressures, exerted by the ECJ<sup>169</sup> requiring and empowering all national courts and judges to set aside national law that is incompatible with EC law without first referring the matter to the national constitutional court. Consequently, Comella points out, this imposes a decentralised constitutional review of national legislation, removes the constitutional review monopoly from the national Constitutional Courts and frees national ordinary courts and judges to engage in constitutional review.<sup>170</sup>

## PART IV

### 3.5 Constitutional review framework in Lesotho

#### 3.5.1 Structural organisation of Lesotho’s judicial system

##### 3.5.1.1 Judicial structure: historical perspectives

The present organisational structure of Lesotho’s judicial system may be fully understood in the light of the legal institutional framework during the colonial administration of Basutoland, as Lesotho was then called. As it was typical in any African society where the colonial authority reached out, colonial rulers divided Basotho, the people of Lesotho, into two societies or cultures: “the *traditional culture* found in the rural areas where the great majority of the people lived and which was largely outside the framework of colonial elitism and the *modern culture* found in urban areas”<sup>171</sup> and then attached to those societies or cultures court streams, respectively, in order to regulate them. By the 1884 British High Commissioner’s *General Law Proclamation*,<sup>172</sup> dualism was not only introduced in the law, but also became a colonial legal foundation for the dualist or so-called “parallel” court

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<sup>167</sup> Jackson and Tushnet 2006:466.

<sup>168</sup> See Comella 2004:470-485; Comella 2011:275-276; Jackson and Tushnet 2006:466-467.

<sup>169</sup> See *Simmenthal* [1978] ECR 629.

<sup>170</sup> See Comella 2004:470-485; Comella 2011:275-276; Jackson and Tushnet 2006:466-467.

<sup>171</sup> Hatchard *et al* 2004:14.

<sup>172</sup> *General Law Proclamation* 2B/1884. See Allott 1962:183.

structure in Lesotho since that year.<sup>173</sup> In terms of the *General Law Proclamation*, the law that should be administered in all suits, actions and proceedings, whether civil or criminal, should be the common law of South Africa, as nearly as the circumstances of Lesotho would permit, “provided, however, that in any suits, actions or proceedings in any Court, to which all the parties are African, and in all suits, actions or proceedings whatever before any Basuto Court, African law may be administered”.<sup>174</sup> As a result, not only did the indigenous customary law become and evolved as a separate body of law applicable between and amongst the so-called “African natives” administered by customary chiefs and later the Basotho courts (the current Central and Local Courts), but also the general law, the common law and statutory law, found separate application by a different stream of the judicial structure – the Magistrate Courts and the High Court.<sup>175</sup>

The present High Court of Lesotho and the Magistrates Courts are a reconstitution of the former Court of Resident Commissioner<sup>176</sup> and the Court of Assistant Commissioner, respectively, which operated from 1884 when Lesotho became a British colony to 1938. In 1938, major and fundamental changes took place on the judicial institutions. The *High Court Proclamation* abolished the Court of the Resident Commissioner and replaced it with the “High Court” on which was conferred jurisdiction equivalent to the Supreme Court of South Africa to hear cases in which parties were “African”.<sup>177</sup> On the same year, by *Subordinate*

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<sup>173</sup> Poulter 1979:14-15; Pholo 2013:31-35. Report by Pholo is available online at <[http://www.osisa.org/sites/default/files/afrimap\\_lesotho\\_justice.pdf](http://www.osisa.org/sites/default/files/afrimap_lesotho_justice.pdf)> (accessed on 20 May 2015). Maqutu (1990:56) goes on to show that, because of the dualism in the law, there are two hierarchies of courts. The courts structures introduced in 1884 cannot be appropriately be described as “parallel” since an appeal from the chiefs’ courts lay with the Joint Court of the Chief and Assistant Commissioner and ultimately with the Court of Resident Commissioner. See *Proclamation R8 of 1884*. I argue below that Lesotho’s judicial structure is not “parallel” as that presumes that it is multi-peaked and there is no point of convergence in the structure.

<sup>174</sup> *General Law Proclamation 2B*, sec 2.

<sup>175</sup> It is stated that while the customary law was applicable to the natives, the common law was introduced specifically to meet the needs of the European and Christian part of the Lesotho populace. See Poulter 1979:14.

<sup>176</sup> The Resident Commissioner’s Court, manned by the Resident Commissioner (or later Deputy Resident Commissioner) who was both the political administrator with judicial functions had unlimited civil and criminal jurisdiction. See *Proclamation 1B 1889*; *Proclamation 10/1916*; *Proclamation 10/1928*; Palmer and Poulter 1972:475-476; Poulter 1970:202-203.

<sup>177</sup> *Proclamation 57/1938*, sec 2 and 4; Palmer and Poulter 1972:476; Poulter 1979:14. The single judge of the High Court was however shared between the High Courts of the Bechuanaland

*Courts Proclamation*,<sup>178</sup> the Court of Assistant Commissioner was abolished and replaced by Magistrates' Courts – the courts of colonial districts officers located in major towns of the country – divided into classes, to deal with less important cases. The judicial authority of the traditional chiefs, sub-chiefs and headmen,<sup>179</sup> located within Basotho communities, were replaced by statutory courts established under the *Native Courts Proclamation* (which was later named *Central and Local Courts Proclamation*).<sup>180</sup>

A period between 1944 and the independence in 1966 saw a creation of new actors on the judicial institutional landscape. The Judicial Commissioner's Courts were established in 1944 with equivalent jurisdiction to that of the Magistrates' Court of first class except that they had no original jurisdiction over any civil suit or action or other proceedings.<sup>181</sup> Governed by *Judicial Commissioners Proclamation*,<sup>182</sup> these courts exercise appellate jurisdiction over matters from the Central and Local Courts and their final decisions are appealable to the High Court on points of law.<sup>183</sup> Since 1884, Lesotho never had a Court of Appeal. Decisions of the Court of Resident Commissioner or as it was later reconstituted, the High Court, were appealable directly to the Judicial Committee of Privy Council in London, the latter being the court of final instance. In 1954, a Court of Appeal for Lesotho, Bechuanaland Protectorate and Swaziland was established,<sup>184</sup> but lasted only up to 1966 when Lesotho attained independence.<sup>185</sup> Besides integrating the "Basotho Courts" into the "Subordinate Courts" or

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Protectorate and Swaziland.

<sup>178</sup> *Proclamation 58/1938*.

<sup>179</sup> Every chief or sub-chief had judicial power prior to 1884 and thereafter and exercised jurisdiction over subjects within his chieftom area. See *R v Rantletse* [1926-1953] HCTLR 226:228.

<sup>180</sup> *Proclamation 62/1938*; Poulter 1979:14-15; Palmer and Poulter 1972:489; Rosenberg and Weisfelder 2013:220. The *Native Courts Proclamation* was renamed the *Central and Local Courts Proclamation* in 1965 by Reg. 22 of the *Native Courts Proclamation and Rules (Amendment) Regulations 12/1965*.

<sup>181</sup> *Proclamation 16/1944*.

<sup>182</sup> *Proclamation 25/1950* as amended by *Judicial Commissioners (Amendment) Order 19/1988*.

<sup>183</sup> Palmer and Poulter 1972:487; Poulter 1979:15; Poulter 1970:210-211; *Proclamation 62/1938*, sec 28(3).

<sup>184</sup> This was a joint Court of Appeal for the three countries, established under section 4 of *The Basutoland, Bechuanaland Protectorate and Swaziland Court of Appeal Order in Council 1369/1954*. Appeals from the joint Court of Appeal lay with the Judicial Committee of the Privy Council. See *The Basutoland, Bechuanaland Protectorate and Swaziland (Appeals to Privy Council) Order in Council 1370/1954*.

<sup>185</sup> See *The Lesotho Independence Order 1172/1966*, sec 2(2).

inferior courts system,<sup>186</sup> the Lesotho 1966 Constitution established the Court of Appeal for Lesotho with appellate jurisdiction from decisions of the High Court.<sup>187</sup> An appeal from the decisions of the Court of Appeal, however, lay with the Judicial Committee of the Privy Council.<sup>188</sup> The appeals to the Judicial Committee of the Privy Council were abolished in 1970, rendering the decisions of the Court of Appeal final in Lesotho.<sup>189</sup>

To complete the historical antecedents, it is important to state that in 1978, two crucial Acts consolidating and amending the law relating to the High Court of Lesotho and the Court of Appeal, the *High Court Act*<sup>190</sup> and the *Court of Appeal Act*,<sup>191</sup> respectively, were enacted. These Acts dealt with substantive and procedural, but not structural, issues relating to those Courts, respectively.<sup>192</sup> As far as the Magistrates' Courts were concerned, the *Subordinate Courts Order 1988* was promulgated to regulate them and to deal with the relationship between them and the High Court.<sup>193</sup>

### 3.5.1.2 The judicial structure and system under the 1993 Constitution

Although the general opinion is that the customary law and general law streams of judicial structure have not in any way been rejected by the 1993 Constitution or a totally different and new judicial structure put in place thereby,<sup>194</sup> my opinion is that such dual structure was dealt a deadly and final blow since 1966 when the customary law court stream was "integrated" into the single system of "Subordinate Courts".<sup>195</sup> In 1963, the Basutoland Council, lamenting the "Basotho Courts" whose jurisdiction was "confined to Africans" and "whose general position in the overall judicial system is obscure", recommended the

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<sup>186</sup> Basutoland Council 1963:76-77.

<sup>187</sup> The 1966 Constitution, sec 115, 121.

<sup>188</sup> The 1966 Constitution, sec 121, 122.

<sup>189</sup> See *Court of Appeal and High Court Order 17/1970*, sec 7(1)(a). It is stated that, following the suspension of the 1966 Constitution in 1970, the then Chief Justice left for South Africa and refused to return to Lesotho citing the legal uncertainty brought about by the said suspension, but three months thereafter, with the *Court of Appeal and High Court Order 17/1970* then in place, the then Chief Justice resumed the sessions of the High Court. See Palmer and Poulter 1972:443.

<sup>190</sup> *High Court Act 5/1978*.

<sup>191</sup> *Court of Appeal Act 10/1978*.

<sup>192</sup> There are subsequent amendments to the two Acts, but similarly, do not affect the structure of the said Courts. See *High Court (Amendment) Act 34/1984*; *Court of Appeal (Amendment) Act 8/1985*.

<sup>193</sup> *Subordinate Courts Order 9/1988*. Also see *Subordinate Courts (Amendment) Act 6/1998*.

<sup>194</sup> Rosenberg and Weisfelder 2013:220.

<sup>195</sup> Basutoland Council 1963:76-77.

integration of Basotho Courts into the Magistrates' Courts' system. According to the Basutoland Council:

*Judicial Commissioners' Courts should be abolished, and appeals should lie direct to the High Court ... The present system of Subordinate Courts should continue, subject to the "integration" of the Basotho Courts in the Subordinate Courts system. We recommend that the Basotho Courts be united or 'integrated' with the Subordinate Courts in a single system of Inferior Courts of limited jurisdiction. More particularly, any existing limitation of jurisdiction based on race should be eliminated ... The integration of Basotho Courts into a single system of Inferior Courts, on non-racial basis, appears to us to be long overdue and to require no special justification.*<sup>196</sup>

This recommendation was successfully carried out and implemented, as Basotho Courts together with the Judicial Commissioners' Court never featured as distinct institutional organs under the 1966 Constitution, which referred to the inferior court system simply as "subordinate courts".<sup>197</sup> This unified structure of subordinate courts was adopted by the 1993 Constitution.<sup>198</sup> The judicial institutional horizons are however extended by the 1993 Constitution by the addition of "such tribunals exercising a judicial function as may be established by Parliament" to the repository of judicial power in Lesotho.<sup>199</sup> Many tribunals are dotted across the institutional landscape of Lesotho, and it will be beyond the scope of this study to attempt to delineate which of these are performing judicial as opposed to administrative functions.<sup>200</sup> Such tribunals exercising judicial function in Lesotho include Revenue Appeals Tribunal (RAT),<sup>201</sup> Labour Court and Labour Appeal Court<sup>202</sup> and possibly

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<sup>196</sup> Basutoland Council 1963:76-77. Emphasis supplied.

<sup>197</sup> The 1966 Constitution, sec 139(1).

<sup>198</sup> The Constitution, sec 118(1), 154(1). It would seem that no legislative measures were ever taken to ensure the unified system of the subordinate courts system. The Central and Local Courts and the Judicial Commissioner's Court, on the one hand, and, on the other, Magistrates' Courts, continue to operate in the pre-constitutional bifurcated manner, the constitutional validity of which is highly suspect.

<sup>199</sup> The Constitution, sec 118(1)(d). Also see sec 127.

<sup>200</sup> On what constitutes "judicial function", see Hawke and Parpworth 1998:159; *General Medical Council v British Broadcasting Corporation* [1998] 3 All ER 426.

<sup>201</sup> The RAT was established in terms of the *Revenue Tribunal Appeals Act 2/2005*, sec 3.

<sup>202</sup> *Labour Code Order 24/1992*, sec 22; *Labour Code (Amendment) Act 3/2000*, sec 8. Although previously, it has been held that the Labour Court and Labour Appeal are specialised tribunals and not "courts" of law (*Attorney General v Lesotho Teachers Trade Union* LAC (1995-1999) 119:132-133; *CGM Industrial v LECAWU* LAC (1995-1999) 791:796-797; *Ts'euo*:299-301), such

others.<sup>203</sup> These are specialised tribunals established by parliament and thereby conferred jurisdiction to deal with tax assessment disputes and labour matters, respectively. To complete the structure, there are Courts-Martial, the Court-martial and Court-Martial Appeal Court, which exercise original and appellate jurisdiction, respectively, over the disciplined forces, the Lesotho Defence Force.<sup>204</sup> While the decisions of any Court-Martial are reviewable by the High Court, and consequently subject to appeal to the Court of Appeal,<sup>205</sup> the decision of the Court-Martial Appeal Court is final.<sup>206</sup>

With the intended constitutional integration of Central and Local Courts not implemented, Central and Local Courts' territorial and subject matter jurisdiction continue to be exercised and are circumscribed by the *Central and Local Courts Proclamation* 1938. Operating within their respective dispersed localities or communities<sup>207</sup> and exercising the original jurisdiction ordained in the warrants,<sup>208</sup> these courts administer customary law and a limited range of

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reasoning and conclusions, so the High Court (constitutional jurisdiction) held, are no longer applicable post-2000, and therefore, the Labour Court, reconstituted in 2000, and regard being had to the *Administration of the Judiciary Act* 16/2011, is now a proper court of law subordinate to the High Court. See *Security Lesotho v Moepa* 12/2014. The same applies to *Labour Appeal Court*. See *Labour Code (Amendment) Act* 3/2000, sec 8; the Constitution, sec 154(1). In this study, I shall therefore treat the Labour Court and the Labour Appeal Court, not as tribunals, but as "subordinate courts", properly so called.

<sup>203</sup> In view of the conclusions reached below, it really does not make any difference whether a body or organ is a court, a tribunal or administrative body. As long as such a body or organ has the necessary (ordinary) jurisdiction to determine questions of law under its constituent Act, it has the concomitant constitutional jurisdiction to dispose of constitutional questions arising in the ordinary proceedings before it, since such a constitutional question is "a question of law", albeit a fundamental one, it is empowered to dispose of. See below.

<sup>204</sup> See *Lesotho Defence Force Act* 4/1996, sec 92, 138(1) and 139; *First Amendment of the Constitution Act* 1/1996, sec 3. A Minister responsible for defence convenes a Court-Martial.

<sup>205</sup> The Constitution, sec 119(1).

<sup>206</sup> *Lesotho Defence Force Act* 4/1996, sec 147(3).

<sup>207</sup> According to Lesotho 1996 Official Yearbook (1996:33) published by Ministry of Information and Broadcasting, each of Lesotho's ten districts has one Central Court which also serves as a court of first instance in customary issues including chieftainship affairs. On the other hand, the number of Local Courts varies from district to district, with the total number being 63.

<sup>208</sup> These warrants are issued by the responsible Minister acting in concurrence with the Chief Justice. See *Proclamation* 62/1938, sec 2(1), 6 and 7. The civil and criminal jurisdiction of the Courts, including their financial jurisdictional limits, is set out in those warrants.



statutory provisions, but have no common-law powers.<sup>209</sup> While Central Courts also have original jurisdiction, they exercise appellate jurisdiction over decisions of Local Courts. Appeals from the Central Courts lie to the Judicial Commissioner's Court, then to the High Court and finally to the Court of Appeal. This is the customary law stream of the judicial system. The purpose of Central and Local Courts is "to bring justice to the people at the grassroots in an affordable way".<sup>210</sup>

At the base of the general law stream lie the Magistrates' Courts, also known as Subordinate Courts, and the tribunals performing judicial functions. With the exception of Maseru,<sup>211</sup> there is one Subordinate Court for each of the ten districts of Lesotho. The Magistrates' Courts also work as Children's Courts,<sup>212</sup> District Land Courts<sup>213</sup> and the so-called Small Claims Courts.<sup>214</sup> Appeals from the Magistrates' Courts and the RAT lie with the High Court<sup>215</sup> and finally with the Court of Appeal, while appeals (or reviews) from the Labour Court lie with the Labour Appeal Court (LAC), and finally with the Court of Appeal. The High Court is a superior court of record, with unlimited civil and criminal jurisdiction, including review power over subordinate courts or inferior courts, tribunals or public functionaries exercising judicial, quasi-judicial or public administrative functions.<sup>216</sup> It is clear that the High Court is a court of general jurisdiction; it is not a specialised court in the European constitutional jurisprudential sense. The High Court has a number of Divisions: the Land Court Division,<sup>217</sup> Court of Disputed Returns,<sup>218</sup> and the so-called Commercial Court.<sup>219</sup> The appeals from the High

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<sup>209</sup> *Proclamation 62/1938*, sec 9.

<sup>210</sup> Ministry of Information and Broadcasting 1996:33.

<sup>211</sup> In the Maseru district, there are Subordinate Courts in the Maseru City and at Mhale.

<sup>212</sup> See *Children's Protection and Welfare Act 2011*.

<sup>213</sup> See *Land Act 8/2010*.

<sup>214</sup> See *Subordinate Courts (Small Claims Procedure) Implementing Rules 30/2011*. In the context of arguments about the legal capacity to create courts or confer jurisdiction through the medium of Rules instead of substantive statutory or constitutional law, it is doubtful whether "Small Claims Court" exists as a "court" legally and properly so called, within the Lesotho's judicial structural framework.

<sup>215</sup> The Constitution, sec 130; *High Court Act 5/1978*, sec 8.

<sup>216</sup> The Constitution, sec 119(1); also see *High Court Act 5/1978*, sec 7(1).

<sup>217</sup> Established in terms of *Land Act 8/2010*,

<sup>218</sup> *Court of Disputed Returns (National Assembly Election Petition) Rules 54/1993*.

<sup>219</sup> Established in terms of the *High Court (Commercial Court) Rules 159/2011*. On whether a court of law may be created or established or jurisdiction be conferred thereon through the medium of rules governing practice and procedure, see *Roby v Corporation of Lloyds* 796 F. Supp. 103 (1992):110-

Court, and from any Division of the High Court, lie with the Court of Appeal, which is a court of final instance.<sup>220</sup> In the light of the constitutional integration of Basotho Courts with the Magistrates' Courts into a single system of Subordinate Courts, the Lesotho's judicial structure and system can best be described as *unified broad-based pyramidal structure and system*.<sup>221</sup> Describing the structure and system as "parallel" is not entirely correct as parallelism presupposes a multi-peaked structure or system.<sup>222</sup>

### 3.5.2 Rights-based constitutional review in Lesotho

#### 3.5.2.1 Constitutional jurisdiction and transition to a democratic Lesotho

Drafted in the wake and/or based on the painful historical or prevalent upheavals, and in order to thwart their recurrence, Constitutions usually bear "the stamp of past fears" and a legal imprimatur for a better future.<sup>223</sup> The commitment by any society to break with the bad experiences of the past and to embrace the democratic constitutional order based on the rule of law is demonstrated, among others, not only by the incorporation of a catalogue of human rights provisions but also the institutionalisation of an organ or body – usually the courts<sup>224</sup> – with the power and competence of a guardian, protector and defender of the

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111; *Ogunremi v Dada* (1962) NSCC 419:422; *Siemens Telecommunications v Datagenics* 2013 1 SA 65 (GNP):68; *United States v Sherwood* 312 US 348 (1941):589-590; *Famfa Oil Limited v Attorney-General* (2003) 11 MJSC 66; *Belgore v Ahmed* (2013) 8 NWLR (P.1355-1356) 1:3; Sanni 2011:526; Peete 2009:3.

<sup>220</sup> The Constitution, sec 129; *Court of Appeal Act* 10/1978, sec 7, 16-19.

<sup>221</sup> The same conclusion can be made even without the integration argument as the customary law stream "integrates" into the general stream through the appeal process from the Judicial Commissioners' Courts to the High Court.

<sup>222</sup> On the difference between a unified and multi-peaked judicial system, Michelman (2011:278) states: "A system of ordinary courts may be unified, with all cases entering the system potentially subject to review by a single top court ..., or it may be multi-peaked, with separate divisions for (say) civil, criminal, and administrative matters, each headed by its own court of last resort ..."

<sup>223</sup> Maruste 2007:9

<sup>224</sup> Since the late 1940s, the new constitutional wave ushered in not only the adoption of new constitutions but also a new general constitutional model, structured after the American model of constitutional supremacy and judicial review, which involved constitutional protection of fundamental human rights and freedoms, and the judiciary being entrusted with the constitutional duty of protection and enforcement of those rights and freedom. See Barroso 2010:589. In some countries, however, the determination of constitutional validity is the function of political organs, such as a State Councillor, a President's Council or a standing parliamentary judicial committee.

guaranteed constitutional principles and values.<sup>225</sup> An independent judiciary is thus an indispensable fundamental requirement in the democratisation process and maintenance of constitutional supremacy through the exercise of “constitutional jurisdiction”,<sup>226</sup> which differs from “ordinary jurisdiction”.<sup>227</sup> Michelman describes “constitutional jurisdiction” as “the power of a court (or similar body) to pronounce on the compatibility of questioned laws and acts with constitutional requirements, with some measure of decisive effect on legal outcomes”.<sup>228</sup> Such “decisive effect on legal outcomes” may involve court’s attaching of legal consequences of invalidity or disregarding (disapplication) of the impugned measure in order to uphold the constitutional norm applicable in the relevant context.<sup>229</sup> Although constitutional jurisdiction is usually associated and therefore understood in the context of courts’ control of laws and conduct in order to ensure the supremacy of the Constitution, the term is not limited to this narrow sense.<sup>230</sup> On the objective for establishment of the constitutional jurisdiction, Guerra states:

... the establishment of constitutional jurisdiction is linked with the desire to guarantee

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See Asmal 1991:315.

<sup>225</sup> The Center for Constitutional Transitions (2013:2) observes that new democracies face the pressing question of how to enforce the new constitution, and that, after World War II, it has become standard practice to entrust the judiciary with the responsibility of interpreting the constitution and determining whether government decisions and actions are constitutional. The Centre advises that careful thought must be given to the judicial enforcement mechanism design and structuring. The Briefing paper of the Centre is available online at <[http://constitutionaltransitions.org/wp-content/uploads/2013/10/CT-DRI-BP-EN\\_Constitutional\\_Review\\_in\\_New\\_Democracies\\_2013.pdf](http://constitutionaltransitions.org/wp-content/uploads/2013/10/CT-DRI-BP-EN_Constitutional_Review_in_New_Democracies_2013.pdf)> (accessed on 22 June 2015).

<sup>226</sup> See *Marbury*:177; Barroso 2010:597.

<sup>227</sup> The legal term “jurisdiction” refers to the power or competence of a court to adjudicate on, determine and dispose of the matter. See *Ewing McDonald v M & M Products Co* 1991 1 SA 252 (A):256; *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 2 SA 420 (A):424.

<sup>228</sup> Michelman 2011:278. Cf. Snyckers and Unterhalter 1996:741. “Ordinary jurisdiction” by contrast, as Michelman puts it, means “the usual power of a court to construe and apply non-constitutional law.”

<sup>229</sup> *Marbury*:177-178.

<sup>230</sup> Ulukapi 2014:110; Mendez 2013:553-554. In its broad sense, Ulukapi points out, constitutional jurisdiction includes any judicial process which directly intends to ensure compliance with the Constitution, or, as Mendez, quoting some other authors, describes it, it refer to “that jurisdiction which judges the whole activity of power from the point of view of the Constitution; that which has the function of ensuring the constitutionality of the activity of power.” In this study, the term constitutional jurisdiction is used in its narrow sense.

democratic constitutional stability in the light of past and present dangers and to prevent constitutional mandates from being eroded and eventually suppressed by a parliamentary majority which disregards the Constitution. The objective of constitutional jurisdiction is to defend the Constitution from possible situations which might threaten its integrity.<sup>231</sup>

Nohlen identifies, without attempting to define, what he calls “spheres of constitutional jurisdiction” which he observes vary “in time and place as the problems facing politics and law are met”. On the closer analysis, these spheres of constitutional jurisdictions are specific areas of concern or great importance to which the constitutional jurisdiction is intended to have application, protect or control. According to Nohlen, the spheres of constitutional jurisdiction are human and fundamental rights,<sup>232</sup> states of emergency,<sup>233</sup> separation of powers<sup>234</sup> and electoral norms.<sup>235</sup>

Within a period of three decades, Lesotho has attempted two transitions from colonialism in 1966 and from authoritarian rule in 1993, respectively. At independence, the 1966 Constitution which declared itself as supreme law<sup>236</sup> provided for a catalogue of rights under Chapter II which, true to the Basutoland Council recommendation, were to be “court-enforced”.<sup>237</sup> With the 1966 Constitution suspended in 1970 by the authoritarian

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<sup>231</sup> *Guerra* 1994 para 2. Nohlen (2009:11-12), finding a causal relationship and nexus between constitutional jurisdiction and democracy, concluded that the former’s function is to consolidate the latter.

<sup>232</sup> This is the sphere of constitutional jurisdiction in terms of which a court of law protects and enforces the fundamental human rights and freedoms of individuals within the constitutional democracy. See Nohlen 2009:18.

<sup>233</sup> According to Nohlen (2009:18), this sphere of constitutional jurisdiction concerns constitutional jurisdiction only when challenges of the political-military kind lead the executive to declare the state of emergency as a means to handle the situation, and do affect fundamental rights.

<sup>234</sup> Separation of powers is there to assure one of the fundamental constitutional principles that of limited government. Nohlen 2009:19.

<sup>235</sup> Nohlen (2009:19) points out that just as constitutional jurisdiction oversees the political process, the function of the sphere of electoral norms is to oversee the electoral process, ensuring compliance with constitutional and legal norms, and to provide electoral justice. It is important to note, however, that in Lesotho, the sphere of electoral norm is not the subject of constitutional jurisdiction as electoral issues are dealt with by a Court of Disputed Returns (Electoral Court) in terms of *National Assembly Electoral Act* 14/2011.

<sup>236</sup> See the 1966 Constitution, sec 2.

<sup>237</sup> See Basutoland Council 1963:81; the 1966 Constitution, sec 4 up to 20.

government,<sup>238</sup> the NCA was established in 1990 and, through the National Constitutional Commission, collated public opinion on the suitable Constitution for Lesotho.<sup>239</sup> Using the 1966 Constitution “as a working paper and a framework for a new constitution”,<sup>240</sup> the resultant 1993 Constitution, the supreme law of Lesotho,<sup>241</sup> retained the same structure, form and content of the Bill of Rights which is legally enforceable,<sup>242</sup> except that the 1993 Constitution introduced non-justiciable socio-economic rights as DPSP.<sup>243</sup> It can be concluded therefore that the 1993 Constitution, to adopt Nohlen’s terminology, expressly created the Bill of Rights as a “sphere of constitutional jurisdiction”. As indicated above, this constitutional jurisdiction can be decentralised and therefore be exercisable by all the courts, or be concentrated in a single specialised court.<sup>244</sup>

### 3.5.2.2 Lesotho’s rights-based constitutional review: the constitutional textual analysis

#### 3.5.2.2.1 High Court’s constitutional jurisdiction and direct and indirect access thereto

There is no doubt that the High Court and the Court of Appeal, as superior courts of general unlimited jurisdiction and appellate jurisdiction, respectively, are empowered to exercise review jurisdiction based on fundamental human rights and freedoms. The Constitution provides that if any person alleges actual or potential contravention of the Bill of Rights provision in relation to himself or in relation to a detained person, he may apply to the High Court for redress.<sup>245</sup> The High Court is expressly granted “original jurisdiction to hear and determine” any application made in terms of section 22(1) of the Constitution and “to make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any provision” of the Bill of Rights.<sup>246</sup> Besides section 22, section 2 of the Constitution provides to the private actor access to the constitutional jurisdiction of the High Court. Section 2 of the Constitution is not only remedial; it is also a source of constitutional jurisdiction.<sup>247</sup> Clearly, sections 2 and 22(1)

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<sup>238</sup> See the *Constitution (Suspension) Order 2/1970*; *the Lesotho Order 1/1970*.

<sup>239</sup> See *Lesotho National Constituent Assembly Order 4/1990*

<sup>240</sup> NCA 1992:12.

<sup>241</sup> The Constitution, sec 2.

<sup>242</sup> The Constitution, sec 4 up to 20.

<sup>243</sup> See the Constitution, Chapter III (sec 25-36).

<sup>244</sup> Michelman 2011:278.

<sup>245</sup> The Constitution, sec 22(1).

<sup>246</sup> The Constitution, sec 22(2).

<sup>247</sup> See *Big M Drug Mart*:312-316; *Schachter*:700-702; *Osborne*:77-78,103; *McAllister* 2004:2-3,21-

of the Constitution have created, through direct application procedure, direct access to the High Court's constitutional jurisdiction by any aggrieved person,<sup>248</sup> or one with sufficient interest in the matter.<sup>249</sup> Thus, sections 2 and 22(2) of the Constitution establish a direct constitutional review. The Court of Appeal hears final decisions made by the High Court in the exercise of its direct constitutional review powers under sections 2 and 22 of the Constitution.<sup>250</sup>

Nevertheless, access to the High Court's constitutional jurisdiction is not only through direct application procedures; it may also be incidental or indirect. Incidental or indirect access, and therefore incidental or indirect constitutional review, takes place when in an ordinary case filed in the ordinary jurisdiction of the High Court – whether civil or criminal – constitutional questions arise so that the case or part of it “assumes a constitutional dimension”<sup>251</sup> and the court invokes its constitutional jurisdiction to determine such constitutional question. Section 2 and 156(1) of the Constitution are the sources of constitutional jurisdiction in incidental constitutional review. While constitutional jurisdiction under section 2 of the Constitution applies to all laws in force before and after the Constitution came into operation, constitutional jurisdiction under section 156(1) of the Constitution applies only to “existing laws” – those that pre-date the Constitution.<sup>252</sup> The invocation of the High Court's constitutional jurisdiction during ordinary criminal or civil proceedings, to adopt the Canadian Supreme Court's expression, is “natural enough in today's context”.<sup>253</sup> However, the approach by the Court of Appeal and High Court in civil and criminal proceedings has differed. In ordinary criminal proceedings, whenever constitutional jurisdiction is invoked, the trial judge (High Court) is required to enquire into all the relevant *ordinary law questions and constitutional questions* raised and make a finding or decision on those issues.<sup>254</sup>

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43; Roach 2013:474,490-509; Roach 1987:233-249; Hogg 2007: Chapter 2; Klaaren 1998:4-8; Currie and De Waal 2005:191,195-196,226-227; De Waal *et al* 1999:164-186; Devenish 1999:572-575; Linington 2012:68-72.

<sup>248</sup> Direct application, as Palmer and Poulter (1972:350) argue, is a fundamental right that ensures access to the High Court.

<sup>249</sup> On public interest litigant standing under section 2 of the Constitution, see chapter 5.

<sup>250</sup> The Constitution, sec 129(1)(b); *Court of Appeal Act* 10/1978, Part II and Part III (sec 7-19).

<sup>251</sup> *Mota v Director of Public Prosecutions* 473A/2013:

<sup>252</sup> See the Constitution, sec 156(5).

<sup>253</sup> *Douglas v Douglas College* [1990] 3 SCR 570:600; also see *Mills v Queen* [1986] 1 SCR 863:953.

<sup>254</sup> *Ketisi v Director of Public Prosecutions* LAC (20005-2006) 503:510; *Millenium Travel Tours v*

In ordinary civil proceedings, however, the High Court and Court of Appeal have adopted a segregationist piecemeal approach and require the trial judge (High Court) or judicial officer (subordinate courts) to deal with the ordinary law questions only as they have no power to deal with constitutional questions. The trial judge may only deal with the constitutional questions under the *Constitutional Litigation Rules* as the so-called Constitutional Court.<sup>255</sup> While a full critique of this approach is undertaken in chapter 5, it is important for present purposes, to state the following: firstly, the segregationist piecemeal approach in ordinary civil proceedings where constitutional jurisdiction is sought to be invoked, fails to take into account that access to the constitutional jurisdiction of the High Court is either direct or indirect. Secondly, apart from referrals from the subordinate courts, the purpose of the *Constitutional Litigation Rules* is to govern and regulate direct access to the High Court and therefore direct constitutional review by the High Court. The instrumentalism of the *Constitutional Litigation Rules* as a vehicle for the prohibition of incidental or indirect constitutional review is not only unfortunate but has serious implications for constitutional justice as those *Rules* were never intended to govern and regulate the indirect or incidental review, in the first place.<sup>256</sup> Thirdly, there is no justification in law, policy framework or practical considerations why constitutional questions in ordinary civil proceedings cannot be dealt with and decided upon together by the same court, while in criminal proceedings that is the position.<sup>257</sup>

Fourthly, to follow this approach means that litigants would be forced either to launch two separate cases in relation to the same cause of action, or where they have instituted the

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*Director of Public Prosecutions* LAC (2007-2008) 27:30-32; *Fath v Minister of Justice* LAC (2005-2006) 436:450-452; *Director of Public Prosecution v Lesupi* LAC (2007-2008) 403:411-412; *Ntaote v Director of Public Prosecution* LAC (2007-2008) 414:418. See, however, *Mota* where Makara J understood, correctly in our view, that *Moriényane* principle denies the High Court, sitting in its ordinary jurisdiction – whether civil or criminal – to decide the matter on constitutional grounds.

<sup>255</sup> See *Moriényane v Moriényane* 204/2003; *Chief Justice v Law Society* 59/2011.

<sup>256</sup> As Makara J in *Mota*: [21] noted, the Court of Appeal in *Chief Justice v Law Society* did not address a situation “where the High Court is incidentally faced with a constitutional application in the course of hearing a case in the exercise of its ordinary jurisdiction”.

<sup>257</sup> In fact, policy and practical considerations point in the direction of deciding all the issues, ordinary law and constitutional questions, in the same proceedings. See, for example, *Douglas and Douglas College* [1990] 3 SCR 570:590-605; *Tetreault-Gadoury v Canada* [1991] 2 SCR 22:35-37. While these Canadian decisions dealt with this subject in the context of administrative tribunals’ proceedings, such considerations apply, with necessary modifications, to the proceedings before the courts of law.

matter in the ordinary jurisdiction of the High Court and the constitutional questions are then raised, to withdraw the case and/or have it referred – surprisingly – to the same court under direct access route.<sup>258</sup> The approach is clearly inconvenient and produces unjust results, “so that forcing litigants” to refer constitutional questions to the same High Court in the constitutional jurisdiction would “result in costly and time-consuming bifurcation of proceedings”, to adopt the Canadian Supreme Court description.<sup>259</sup> Finally, the approach flies in the face of the mandatory constitutional authority and duty to all the courts of law involved in the interpretation and application of law in ordinary proceedings before them, to construe laws that are inconsistent with the Constitution “with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution”, and is on that account unconstitutional.<sup>260</sup>

#### 3.5.2.2.2 Constitutional jurisdiction of the subordinate courts in Lesotho

It is clear that both the High Court and the Court of Appeal have constitutional jurisdiction to determine constitutional questions. The question is whether the subordinate courts have such constitutional jurisdiction. It has already been indicated that there are three main sources of constitutional jurisdiction under the Constitution: firstly, the supremacy clause;<sup>261</sup> secondly, the Bill of Rights Chapter;<sup>262</sup> and thirdly, existing laws development clause.<sup>263</sup> Comparative constitutional jurisprudence confirms that these clauses are not only remedial but are also the sources of constitutional jurisdiction.<sup>264</sup> I shall attempt to determine whether

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<sup>258</sup> As Justice Makara noted, the approach “introduced two separate procedural regimes in which one applies to the ordinary litigation in which the Court is exercising its ordinary jurisdiction as opposed to when it is being seized with a constitutional matter.” See *Mota*: [18].

<sup>259</sup> *Nova Scotia v Martin* [2003] 2 SCR 504:529. Recognising the effect of the *Constitutional Litigation Rules* 2000 on constitutional justice, Justice Makara pointed out in *Mota* that “what appears to be a challenge ahead is for the Rules to provide for a mechanism which would render justice easily accessible *speedier, economically and simply*”. See *Mota*: [25].

<sup>260</sup> See the Constitution, sec 156(1).

<sup>261</sup> See the Constitution, sec 2. Threshold issues of *locus standi* and jurisdiction under section 2 of the Constitution are more liberal and broader than under section 22 of the Constitution. See *Big M Drug Mart*: 312-316; *R v Ferguson* [2008] 1 SCR 96: [45], [58]-[59]; Roach 2013:491-492.

<sup>262</sup> See Chapter II of the Constitution, in particular sec 24(1) (“court”), sec 22(1)-(4), sec 7(3) (proviso), sec 10(3), sec 11(3), sec 12(8), sec 13(6), sec 14(3), sec 15(3), sec 16(3).

<sup>263</sup> See the Constitution, sec 156(1).

<sup>264</sup> See *Big M Drug Mart*: 312-316; *Schachter*: 700-702; *Osborne*: 77-78, 103; McAllister 2004: 2-3, 21-43; Roach 2013: 474, 490-509; Roach 1987: 233-249; Hogg 2007: Chapter 2; Klaaren 1998: 4-8; Currie and De Waal 2005: 191, 195-196, 226-227; De Waal *et al* 1999: 164-186; Devenish



subordinate courts have constitutional jurisdiction under eight heads: firstly, the power to determine questions as to the contravention of the Bill of Rights and the interpretation of the Constitution; secondly, the power to dispose of the case after the referral to the High Court; thirdly, subordinate courts being “courts with jurisdiction in Lesotho”; fourthly, the authority and power of subordinate courts to construe the “existing law” with necessary modifications in conformity with the Constitution; fifthly, the horizontal application of the Bill of Rights and the constitutional duty of the subordinate courts not to contravene the Bill of Rights; sixth, the constitutional duty of the subordinate courts to afford cases “a fair hearing”; seventh, historical, prudential and ethical arguments, and finally, the supremacy clause and judicial power of the subordinate courts. I deal with these points in that order below. Before attempting to answer the above crucial question, it is imperative first to note the important observation made by Hatchard *et al* about the lower tiers of the judicial structure in the whole of the Commonwealth. The learned authors observe:

Magistrates are often the ‘forgotten’ persons in discussions on judicial independence. This is most unfortunate for they play a crucial role in the entire judicial system given that they hear the vast majority of criminal cases and make other key decisions such as the granting of bail. Magistrates’ courts are also the places where the most impoverished, powerless and defenceless in society often come. If they have no confidence in magistrates and their court officials, perceiving them to be pro-executive and pro-police, this has a significant detrimental effect on society. Not only does it impact adversely on the administration of justice but also it carries with it significant social and economic consequences including potential resort to instant justice.<sup>265</sup>

#### 3.5.2.2.2.1 First indicator: power to determine contravention and interpretation questions

The above observation is true not only in relation to the discussion about judicial independence, but also in relation to the “constitutional jurisdiction” of Magistrates (subordinate courts) in the enforcement and protection of the Bill of Rights.<sup>266</sup> By constitutional definition, the term “subordinate court”, whenever used in the Constitution,

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1999:572-575; Linington 2012:68-72.

<sup>265</sup> Hatchard *et al* 2004:162.

<sup>266</sup> In Lesotho, the constitutional jurisdiction of the subordinate courts has never been discussed anywhere. In South Africa, however, the Magistrates’ Courts’ constitutional jurisdiction of is a subject of heated debate. See *Quozeleni v Minister of Law and Order* 1994 3 SA 625 (E); *Mendes v Kitching* 1996 1 SA 259 (E); *Municipality of the City of Port Elizabeth v Prut* 1996 4 SA 318 (E). Also see South African Law Commission 1998:7-12, a Report on the Constitutional Jurisdiction of Magistrates’ Courts available on line at <[http://www.justice.gov.za/salrc/reports/r\\_prj111\\_magjurs\\_1999dec.pdf](http://www.justice.gov.za/salrc/reports/r_prj111_magjurs_1999dec.pdf)> (accessed on 26 June 2015).

means, “any court of law established for Lesotho other than (a) the Court of Appeal; (b) the High Court; (c) a court-martial; and (d) a tribunal exercising a judicial function”.<sup>267</sup> By subordinate courts therefore, reference is made, and so in this study, to Central and Local Courts, the Judicial Commissioners’ Court, Magistrates’ Courts, the Labour Court and the Labour Appeal Court, collectively.<sup>268</sup>

Employing the above definition, sections 22(3) and 128(1) of the Constitution prescribe, respectively, that if any constitutional questions of “contravention” of the Bill of Rights and of the “interpretation of the Constitution” arise out of ordinary proceedings before the subordinate courts, the person presiding may refer such questions to the High Court. The person presiding may refuse a referral where, in the case of questions as to the contravention, the request to refer such questions is “frivolous or vexatious” and, in the case of the interpretation of the Constitution, they do not involve “substantial question of law”.<sup>269</sup> Sections 22(3) and 128(1) of the Constitution make four important points. Firstly, the constitutional questions as to the contravention of the Bill of Rights or interpretation of the Constitution may arise in ordinary proceedings before any subordinate court in which the parties pursue the ordinary law remedies.<sup>270</sup> When such questions arise in this way, parties in the case should be able to have access to the constitutional jurisdiction of the subordinate court. The question, however, is whether a subordinate court or a person presiding has “jurisdiction” to deal with and determine the constitutional questions arising in this incidental or indirect way.

The second point is that, unlike the European model of constitutional justice according to which an ordinary court is constitutionally obliged to refer the constitutional questions to the Constitutional Court once constitutional questions arise in the ordinary proceedings,<sup>271</sup> Lesotho’s Constitution does not prohibit the person presiding in the subordinate court from dealing with the constitutional questions that arise incidentally.<sup>272</sup> Instead, the Constitution

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<sup>267</sup> The Constitution, sec 154(1). Emphasis supplied.

<sup>268</sup> As to the “subordinate court” status of the Labour Court, refer to *Security Lesotho v Moepa* 12/2014. Similar considerations apply to the Labour Appeal Court.

<sup>269</sup> The Constitution, sec 22(3), sec 128(1).

<sup>270</sup> The plaintiff may have approached the subordinate court on its ordinary jurisdiction, but is met by a defendant’s defence on constitutional grounds.

<sup>271</sup> D’Amico 2013:209-212; Harutyunyan and Mavcic 1999: Chapter 3; Sadurski 2005:19-25.

<sup>272</sup> Modelled after the Nigerian Constitution (see Roberts-Wray 1968:916; Read 1973:23; Cowen 1964:6-7; section 295 of Nigerian Constitution 1999), both section 22(3) and 128(3) of the Constitution require that certain conditions be met before a referral is made to the High Court. In

empowers him or her to determine such questions or refer them to the High Court.<sup>273</sup> In *Phaila v Principal Secretary*, the High Court dismissed a referral under section 128(1) of the Constitution on the ground that it was improper as it failed to establish the necessary conditions. According to the High Court, firstly, there must be proceedings before the subordinate court. Secondly, a question as to the interpretation of the Constitution must arise in those proceedings. Thirdly, the subordinate court must form the opinion that the question involves a substantial question of law. Finally, the subordinate court may (and not must) refer the constitutional question to the High Court.<sup>274</sup>

The third point is that the obligation to refer the matter to the High Court arises only where, in relation to the interpretation of the Constitution in terms of section 128(1), one of the parties to the proceedings had requested such a referral. Even then, the referral is not there for the taking; the person presiding must have formed an opinion that the interpretation issue involved “the substantial question of law”. It is only then that he or she is “obliged to [make a referral] if a party so requests”.<sup>275</sup> As far as section 22(3) referral is concerned, a request has to be subjected to a “frivolous or vexatious” test. In either case, the request will be “frivolous or vexatious” and any question as to the interpretation of the Constitution will not involve “substantial question of law” if there has already been an authoritative decision and therefore guidance by the High Court or Court of Appeal on the constitutional question sought to be referred.<sup>276</sup> Unlike in India where the High Court has the power to withdraw cases from the subordinate courts involving substantial questions of law,<sup>277</sup> the purpose of Lesotho’s referral system is absolutely for “the guidance” and “support” of the subordinate courts by the High

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*Mothobi v Crown* LAC (2009-2010) 465:471, the Lesotho Court of Appeal held that it is the duty of the High Court to enquire into the propriety and validity of the referral, by deciding whether the question is properly referred.

<sup>273</sup> The subordinate court “seems to be given complete discretion” in the determination of whether the request for referral is “frivolous or vexatious” or the interpretation involves a “substantial question of law” under section 22(3) and 128(1) of the Constitution. See Palmer and Poulter 1972:356-357; also see *Phaila v Principal Secretary* 9/2014:[42].

<sup>274</sup> *Phaila*: [38]. Also see the Nigerian Supreme Court decision in *Audu v Attorney General* (2012) LPELR-19653 (SC) interpreting section 295(2) of the Nigerian Constitution, Lesotho’s section 128(1) equivalent.

<sup>275</sup> *Phaila*: [38].

<sup>276</sup> Palmer and Poulter 1972:357. Also see *Alliance for Democracy v Fayose* CA/IL/FP/GOV/3/03 available online <[http://www.yusufali.net/reports/ad\\_v\\_fayose\\_2.pdf](http://www.yusufali.net/reports/ad_v_fayose_2.pdf)> (accessed on 24 June 2015).

<sup>277</sup> Indian Constitution, art 228.

Court on difficult constitutional questions.<sup>278</sup> This is consistent with the structural principle of subsidiarity in terms of which a superior institution gives guidance and support to the subordinate institution where the latter cannot discharge its mandate efficiently and effectively.<sup>279</sup>

It is clear that the Constitution grants the persons presiding in proceedings before subordinate courts the authority and competence to decide constitutional questions involving a contravention of the Bill of Rights and interpretation of the Constitution arising out of those proceedings and which are not referred to the High Court, whether because there was no request for referral at all, or, where a referral was requested, the request was not granted. The power to determine the frivolity of the request to refer constitutional questions and to determine the substantiality of constitutional questions under section 22(3) and section 128(1) of the Constitution, respectively, necessarily includes the concomitant constitutional power to determine such questions if the referral is refused. Palmer and Poulter correctly conclude that “what remains essential” from the reading of section 22(3) of the Constitution is the “implied recognition that all such subordinate courts are competent to adjudicate questions of fundamental rights that are not transferred”.<sup>280</sup> As the Canadian Supreme Court stated in *Nova Scotia v Martin* in the context of administrative tribunals, which apply with even greater force in relation to the courts of law:

... the power to interpret law is not one which the legislature has conferred lightly upon administrative tribunals. When a legislature chooses to do so, whether explicitly or by implication, the courts must assume that the administrative body at issue was intended to be an appropriate forum for the resolution of complex legal issues, including the interpretation and application of the *Charter*.<sup>281</sup>

#### 3.5.2.2.2 Second indicator: the power of disposition after referral

Where constitutional questions are referred to the High Court in terms of section 22(3) and section 128(1) of the Constitution, or reach the Court of Appeal, the High Court or the Court of Appeal merely provide the authoritative answer to the constitutional questions so referred,

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<sup>278</sup> See *Phaila*: [46]. To the extent that the High Court in *Phaila* referred to article 228 of the Indian Constitution, it erred.

<sup>279</sup> See Gussen 2014:124; Kelley 2010:8-9.

<sup>280</sup> Palmer and Poulter 1972:354. At p351 of their work, the learned authors include in a list of factors that the High Court may consider in exercising its discretion to refuse to invoke its constitutional jurisdiction under section 22 of the Constitution, the High Court’s confidence in the *subordinate court’s capacity to make the correct constitutional judgment*.

<sup>281</sup> *Martin*:536.

and the case is returned to the subordinate court, where the subordinate court “shall *dispose of the case in accordance with [the] decision*” of the High Court, or, as the case may be, of the Court of Appeal.<sup>282</sup> Is this a constitutional authority for the subordinate courts to dispose of cases on constitutional grounds? Before proffering an answer, perhaps the following relevant example would put the issue and the answer thereto in a clearer perspective.

Suppose in a customary law civil trial before the Ts’ifa-Li-Mali Local Court, the plaintiff husband claims “divorce” and the particulars of claim upon which the claim is founded, perhaps on the authority of the law, are not annexed to the claim.<sup>283</sup> Suppose during the trial, the defendant wife raises the point that, owing to the lack of particulars of claim, she was not aware on what grounds the claim was based, therefore she could not prepare properly for her defence, and that in the circumstances she sought a postponement. When the person presiding overruled her on the basis that both the *Central and Local Court Proclamation 1938* and the *Basuto Courts (Practice And Procedure) Rules 1961* state, for argument’s sake, that “the plaintiff shall not furnish to the defendant any particulars of the claim”, and then sought to proceed with the case, the defendant’s wife requested the person presiding to refer the following constitutional question to the High Court in terms of section 22(3) of the Constitution: whether the *Proclamation 1938* and the *Rules 1961* contravene the defendant’s right to a fair civil trial in terms of section 12(8) of the Constitution to the extent that the *Proclamation* and the *Rules* authorise the exclusion of particulars from the claim.

Suppose, further, that the High Court, or on subsequent appeal, the Court of Appeal, answers the constitutional question in the affirmative.<sup>284</sup> The case would then be brought to the Ts’ifa-Li-Mali Local Court for the latter to “dispose of” it “in accordance with the decision” of the Court of Appeal. Would the Ts’ifa-Li-Mali Local Court proceed to hear the case without the necessary particulars notwithstanding the decision of the Court of Appeal? The only valid legal conclusion that the Ts’ifa-Li-Mali Local Court can come to in the circumstances is that

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<sup>282</sup> The Constitution, sec 22(4), 128(2).

<sup>283</sup> It is surprisingly the usual practice in the Central and Local Courts that the summons which are issued at the instance of plaintiffs merely indicate the claim with such brevity and lack in details that the defendant is sometimes totally left in the dark, not only in relation to the particulars or grounds for the claim, but in some instances, as to the claim itself. When the plaintiff gives evidence during the trial the defendant will get to know the basis of the claim or in some cases, the claim itself. This procedure somewhat denies the defendant an opportunity to fully prepare his case in order to meet the plaintiff’s evidence.

<sup>284</sup> Such a decision would not have been to *declare* the *Proclamation* and the *Rules* *invalid* as that would not have been the question before the High Court in the first place.

“the *Proclamation* and the *Rules* are therefore void to the extent of their inconsistency with the Constitution”. The “legal outcomes” from this conclusion, if the conclusion was to have the “decisive effect”,<sup>285</sup> are firstly, the *invalidity* of the relevant provisions of the *Proclamation* and the *Rules* arising out of the interpretative process in the High Court (or Court of Appeal). Secondly, the Ts’ifa-Li-Mali Local Court would have to declare or disregard (*disapply*)<sup>286</sup> those provisions because of their invalidity. Finally, Ts’ifa-Li-Mali Local Court would have to direct that the plaintiff should furnish to the defendant the relevant particulars of claim.

The similar consequences would still arise where the constitutional question was not referred to the High Court and the interpretative process was undertaken by the Ts’ifa-Li-Mali Local Court itself.<sup>287</sup> Thus, whether the person presiding in the subordinate court does not refer the constitutional questions to the High Court, or refers them to the High Court and then later disposes of them in accordance with the decision of the High Court or of Court of Appeal, as the case may be, in terms of section 22(4) or section 128(2) of the Constitution, in the final analysis, the person presiding in the case would be pronouncing “on the compatibility of questioned laws and acts with constitutional requirements, with some measure of decisive effect on legal outcomes”.<sup>288</sup> In fact, it is the determination of *that constitutional question* which would inform the person presiding whether the impugned law he or she is about to apply to the case is in fact *law* or not (its legality and legitimacy), and if it is not, to modify or develop it to conform to the constitutional normative imperative, or apply any other law (including the constitutional provision) applicable to the situation.<sup>289</sup>

Since the phrase “dispose of” means “to settle a matter finally”,<sup>290</sup> it is clear that the Constitution authorises the person presiding in the subordinate court “to settle the case

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<sup>285</sup> Michelman 2011:278.

<sup>286</sup> *Marbury*:177-178.

<sup>287</sup> As it was stated in *Marbury*:177-178, to resolve conflicting legal norms or provisions both applicable to the case is the very essence of the function of the judicial officer. Courts have resolved such a conflict by the employment of legal strategies which find articulation in the maxims such as *lex posterior derogant priori* and *generalia specialibus non derogant* in terms of which, respectively, provisions later in time attenuate provisions prior in time, or provisions of law dealing with the subject matter specifically will attenuate those dealing with it generally. The provisions thus attenuated are *disapplied* to the case. See Devenish 1992:279:287. The major difference is that whenever the Constitution is involved in such a conflict, the other law is visited with the necessary legal consequence of invalidity because of the supremacy of the Constitution.

<sup>288</sup> Michelman 2011:278.

<sup>289</sup> *Martin*:528-529; Kokott and Kaspar 2012:810; the Constitution, sec 156(1).

<sup>290</sup> Blackwell 2008:143.

finally” and that case, it will be remembered, involved the constitutional questions that have been clarified by the High Court or the Court of Appeal, as the case may be. In settling the case finally, the person presiding in the subordinate court would have to assess the effect of the constitutional dimension of the case to the totality of the case ultimately, or, at least, the aspect of the case to which the question is relevant.<sup>291</sup> It is in this way that the case can be said to have been disposed of “in accordance” with the decision of the High Court or of the Court of Appeal.

### 3.5.2.2.2.3 Third indicator: constitutional jurisdiction of “a court of law having jurisdiction in Lesotho”

Although the Constitution does not have a general limitation clause, its scheme, however, is very clear.<sup>292</sup> It would provide for a right generally, and then continue to circumscribe that right with a belt of limitations which contains *public overrides*.<sup>293</sup> The Constitution then would allow the limitation of a relevant right based on public overrides provided certain threshold requirements set out in *Oakes* be fulfilled.<sup>294</sup> For example, in terms of the non-reliance clause of section 7(3) of the Constitution dealing with the right to movement which may be limited by law making provision for imposition of restrictions of such freedom on account of defence, public safety, public order, etc.:

A person shall not be permitted to rely in any judicial proceedings upon such a provision of law ... except to the extent to which he satisfies the *court* that the provision or, as the case may be, the thing done under the authority thereof does not restrict the movement or residence within Lesotho or the right to leave Lesotho of the person concerned to a greater extent than is necessary in a practical sense in a democratic society in the interests [those specified public overrides].<sup>295</sup>

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<sup>291</sup> The particular interpretation by the High Court or the Court of Appeal will have to be taken into account and used for the disposition of the case itself.

<sup>292</sup> See *Mopa*:439.

<sup>293</sup> I use this term to indicate those factors and considerations which form a legitimate limitation of the respective rights, and the law containing such public interests considerations will be referred to as “public overrides law”. The Constitution, sec 4(1). Such public overrides include limitations on account or in the interest of public health, public safety, public order, public morality, and national security.

<sup>294</sup> Alder 2002:446. *Oakes* formulation is used to test the authorized limitation of the Bill of Rights provision. According to *R v Oakes* (1986) 26 DLR (4<sup>th</sup>) 200 (SCC):226-227, the limitation of the Bill of Right provision should first, be prescribed by law; second, be *reasonable* and third, be *demonstrably justified in a free and democratic society*. Also see *Mopa*:439-440.

<sup>295</sup> The Constitution, sec 7(3). Emphasis supplied. For other non-reliance clauses, see the

Before the “court” allows the person relying on the public overrides law as a justification for the limitation of the relevant right or freedom, it must be satisfied that the *Oakes* test has been passed; otherwise, the “court” would find that the other person’s right or freedom has been unjustifiably contravened. It is hard to argue that the whole process is not an exercise of the constitutional jurisdiction by the “court”. The question is, however, to which *court* does the Constitution refer in this respect? The relevant provision is section 24(1) of the Constitution. In terms of this section, “in [the Bill of Rights] Chapter, unless the context otherwise requires, ‘court’ means a *court of law having jurisdiction* in Lesotho” other than a court-martial.<sup>296</sup> This means that whenever the Bill of Rights provisions employ the term “court”, reference is made to a court of law which has jurisdiction in Lesotho except a court-martial.

The phrase “a court of competent jurisdiction” has been a subject of wide-ranging judicial discussion in Canada in the context of whether administrative tribunals are also included so that they may exercise constitutional jurisdiction in terms of the section 24 of *Canadian Charter on Human Rights and Freedoms* (the *Charter*).<sup>297</sup> To be a court of competent jurisdiction so as to exercise constitutional jurisdiction, the Canadian courts have applied the “functional and structural” test<sup>298</sup> and the following considerations, among others, have been taken into account to make a determination of bodies included in that phrase.<sup>299</sup> Firstly, as the *Charter* is the supreme law of Canada, and any law inconsistent therewith is void,<sup>300</sup> three legal effects flow from that supremacy. The first legal effect is that the *Charter* must be respected by all the courts and the tribunals when called upon to interpret and apply the law they are empowered to administer.<sup>301</sup> This respect implies that when the court or tribunal finds any law it has to apply inconsistent with the *Charter* it must treat it as having no force or effect,<sup>302</sup> or “disregard the provision on constitutional grounds and rule on the applicant’s

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Constitution, sec 10(3), 11(3), 13(6), 14(3), 15(3) and 16(3).

<sup>296</sup> Emphasis supplied.

<sup>297</sup> *Douglas and Douglas College* [1990] 3 SCR 570; *Tetreault-Gadoury v Canada* [1991] 2 SCR 22; *Martin*:504; *Northern Telecom v Travailleurs* [1983] 1 SCR 733; *Cuddy Chicks v CRTO* [1991] 2 SCR 5; *Mills v The Queen* [1986] 1 SCR 863; *Cooper v Canada* [1996] 3 SCR 854; *R v Conway* [2010] 1 SCR 765.

<sup>298</sup> See *R v 974649 Ontario* [2001] 3 SCR 575:[41]-[75].

<sup>299</sup> See the majority decision handed down by McIntyre J in *Mills*:950.

<sup>300</sup> The *Charter*, art 52(1).

<sup>301</sup> *Cuddy Chicks*:13-14.

<sup>302</sup> *Douglas*:594.



claim as if the impugned provision was not in force”.<sup>303</sup>

The second effect is that the supremacy clause creates a presumption of constitutional jurisdiction.<sup>304</sup> The question whether a tribunal has constitutional jurisdiction to answer *Charter* questions, “can be answered by applying a presumption, based on the principle of constitutional supremacy ..., that all legal decisions will take into account the supreme law of the land”.<sup>305</sup> Whereas there is a presumed concomitant constitutional jurisdiction in the supremacy clause itself, “it is not an independent source for the administrative tribunal’s jurisdiction to address constitutional issues” since it does not specify which bodies may consider and rule on *Charter* questions”.<sup>306</sup> The final effect is that, the supremacy clause is remedial.<sup>307</sup> It was stated in *Conway* that, “a constitutional remedy is also available under s. 52(1) of the [*Charter*]”.<sup>308</sup>

Secondly, the presumption created by the supremacy clause will be confirmed by the fact that the tribunal itself already has the jurisdiction to determine “questions of law” under its constituent or enabling Act. Since constitutional questions are themselves “questions of law”,<sup>309</sup> the tribunal would have jurisdiction to determine those threshold constitutional questions too. This is because “the subject matter and the remedy in such a case are premised on the application of the *Charter*”.<sup>310</sup> As Gonthier J stated in *Martin*, if the tribunal, or worse still, a government official:

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<sup>303</sup> *Martin*:531-532; *Tetreault-Gadoury*:35. In *Martin*:528, the Court went further to say that “by virtue of s. 52(1) [supremacy clause], the question of constitutional validity inheres in every legislative enactment. Courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state.” Otherwise if that were not so, warned the Canadian Supreme Court, it “would deal a heavy blow to the authority of the Constitution, since it would in practice mean that statutes would take precedence over the Charter” before such tribunals. See *Douglas*:604.

<sup>304</sup> See *Cuddy Chicks*:13-14. Also see *Cooper*:887.

<sup>305</sup> *Martin*:532.

<sup>306</sup> *Cuddy Chicks*:14.

<sup>307</sup> As a practical corollary to constitutional supremacy, the citizens “should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts.” See *Martin*:529.

<sup>308</sup> *Conway*:773.

<sup>309</sup> *Cuddy Chicks*:15. Such constitutional questions may be pertinent and germane to the issues before the Court. See for example, *Ntaote v Director of Public Prosecution* LAC (2007-2008) 414:418.

<sup>310</sup> *Martin*:532.

... is endowed with the power to consider questions of law relating to a provision, that power will normally extend to assessing the constitutional validity of that provision. This is because the consistency of a provision with the Constitution is a question of law arising under that provision. It is, indeed, the most fundamental question of law one could conceive, as it will determine whether the enactment is in fact valid law, and thus whether it ought to be interpreted and applied as such or disregarded.<sup>311</sup>

Whether a tribunal has the authority to determine questions of law, and therefore has jurisdiction, is a matter that must be determined by reference to the enabling Act itself, as the Parliament may, in the relevant Act constituting the tribunal, confer or restrict the tribunal from considering “questions of law”.<sup>312</sup> To be able to determine questions of law, and therefore be said to have jurisdiction, a tribunal must have the statutory power, express or implied, over the parties, the subject matter of the dispute and the remedy sought.<sup>313</sup> As it was stated in *Cuddy Chicks*, “a tribunal prepared to address a *Charter* issue must already have jurisdiction over the whole of the matter before it, namely, the parties, the subject matter and the remedy sought”.<sup>314</sup> The question is not whether Parliament intended the tribunal to have constitutional jurisdiction to apply the *Charter*, but rather whether the empowering Act “implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law” under the Act.<sup>315</sup> If it is so empowered:

... then the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of the *Charter*, unless the legislator has removed that power from

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<sup>311</sup> *Martin*:528-529.

<sup>312</sup> The enquiry must begin with the examination of the empowering stature of the tribunal as the mandate given by Parliament on the tribunal “will normally be the most important factor in determining whether the tribunal has the power to find a legislative provision to be inconsistent with the *Charter*.” See *Tetreault-Gadoury*:32.

<sup>313</sup> *Douglas*:595; *Mills*:954-955. It is therefore clear that where any of the three (parties, subject-matter and remedy) is lacking in any proceedings, the court or tribunal involved does not have jurisdiction to determine and dispose of any question of law involved in the dispute (except of course to dispose of the very preliminary question whether it has the necessary jurisdiction in those proceedings). For example, the remedy of *mandamus*, *certiorari* and *prohibition* are beyond the jurisdiction of the Magistrates’ Court, and therefore any, and therefore the Magistrates’ Court will not have constitutional jurisdiction surrounding those remedies or questions of law. See *Mills*:955.

<sup>314</sup> *Cuddy Chicks*:14.

<sup>315</sup> *Martin*:533. According to Gothier J, such an attribution of legislative intent would not only “be artificial, given that many of the relevant enabling provisions pre-date the *Charter*”, but would also “be incompatible with the principle ... that the question of constitutional validity inheres in every legislative enactment by virtue of [the supremacy clause].”

the tribunal. Thus, an administrative tribunal that has the power to decide questions of law arising under a particular legislative provision will be presumed to have the power to determine the constitutional validity of that provision. In other words, the power to decide a question of law is the power to decide by applying only valid laws.<sup>316</sup>

Finally, the tribunal that has jurisdiction to determine questions of law under its empowering Act has the constitutional jurisdiction to determine not only constitutional issues arising in the proceedings. It may therefore determine the constitutionality of its own enabling Act since that constitutional question is part of the questions of law it is empowered to decide<sup>317</sup> or “a necessary incident of a trial process”.<sup>318</sup> As pointed out in *Conway*, if there is such a statutory jurisdiction to answer questions of law, “and if *Charter* jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate”.<sup>319</sup> In *Cooper v Canada*, the point was put beyond any doubt when the court held that “if the tribunal does have the power to consider questions of law, then it follows by operation of s 52(1) [supremacy clause] that it must be able to consider constitutional issues, including the constitutional validity of its enabling statute”.<sup>320</sup>

The above legal principles apply equally to the determination of the question whether a court of law has jurisdiction to determine constitutional questions in Lesotho. There is no doubt that, within their respective enabling statutes, subordinate courts in Lesotho, as courts of law, are “courts with jurisdiction in Lesotho” in the sense of having the power to determine questions of law within their respective areas of competence. In the case of Central and Local as well as Magistrates’ Court, their constituent Acts specifically admit of the Constitution conferring constitutional jurisdiction over such courts.<sup>321</sup> It can therefore be argued that, wherever the Constitution refers to a “court” under the Bill of Rights provisions,

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<sup>316</sup> *Martin*:533; *Cuddy Chicks*:13

<sup>317</sup> *Conway*:780.

<sup>318</sup> *Mills*:955; *Cuddy Chicks*:15-16.

<sup>319</sup> *Conway*:780.

<sup>320</sup> *Cooper*:887.

<sup>321</sup> For example, in terms of *Proclamation 62/1938*, Central and Local Courts, apart from the customary subject-matter jurisdiction, they have the authority to administer “*the provision of any law which [they are], by or under such law, authorised to administer; and the provisions of any law which [they] may be authorised to administer ...*” See *Proclamation 62/1938*, sec 24. While under the *Subordinate Courts Order 9/1988*, certain matters are placed beyond the jurisdiction of the Magistrates Court, such courts, with regard to causes of action, have “such *other jurisdiction as shall be specially conferred by any other law.*” The Constitution is one such other law.

it refers to any court of competent jurisdiction exercising its ordinary jurisdiction. The Constitution authorises the same court to determine constitutional questions which arise in the ordinary proceedings before it, subject to a caveat that the court must have the necessary jurisdiction (over the parties, the subject-matter or the remedy sought) in the first place.<sup>322</sup> Put differently, constitutional jurisdiction operates within and not without the ordinary jurisdiction; where there is no ordinary jurisdiction either because one or more of the incidents of jurisdiction is/are absent there will be no constitutional jurisdiction. As it was stated in *Martin*, the critical question is whether the statutory grant of jurisdiction:

... confers upon the tribunal the power to decide questions of law arising under the challenged provision, in which case the tribunal will be presumed to have jurisdiction to decide the constitutional validity of that provision. The *Charter* is not invoked as a separate subject matter; rather, it is a controlling norm in decisions over matters within the tribunal's jurisdiction.<sup>323</sup>

In the final analysis, subordinate courts, as courts "of law having jurisdiction in Lesotho" have the necessary constitutional jurisdiction, not only to determine constitutional questions arising out of ordinary proceedings before them, but also to determine the constitutionality of the provisions of their respective enabling statutes. Their respective enabling statutes are the law they are called upon to apply and when the constitutionality of this law is placed into dispute, they have the concomitant power to determine such a dispute. As Gonthier J pointed out, a court "which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid".<sup>324</sup> In that determination, lies the constitutional power to develop the impugned laws to conform to the Constitution, if the law happens to be inconsistent with the Constitution, to which point I now turn.

#### 3.5.2.2.4 Fourth indicator: the authority and power to construe "existing law" in conformity with the Constitution

Most of the statutes that establish the subordinate courts in Lesotho predate the Constitution.<sup>325</sup> The same is true about the common law (or customary law) that these courts

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<sup>322</sup> For example, a Magistrate Court may not have the power to determine constitutional questions "in matters in which the dissolution of a marriage" is involved, as such questions have been put beyond the jurisdiction of the Magistrates' Court in terms of section 29(a) of the *Subordinate Courts Order 9/1988*.

<sup>323</sup> *Martin*:535.

<sup>324</sup> *Martin*:532.

<sup>325</sup> For example, *Subordinate Courts Order 9/1988*; *Central and Local Courts Proclamation 62/1938*;

apply within their respective jurisdictions. Because of the supremacy of the Constitution, any law that is inconsistent with the Constitution is void to the extent of inconsistency.<sup>326</sup> The Constitution therefore imposes a duty that these pre-constitution laws be construed in conformity with the Constitution. In terms of section 156(1) of the Constitution:

Subject to the provisions of this Constitution, the existing laws shall continue in force and effect on and after the coming into operation of this Constitution and shall then have effect as if they had been made in pursuance of this Constitution, but they shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.<sup>327</sup>

From the reading and interpretation of similar and equivalent provisions in Uganda,<sup>328</sup> Tanzania,<sup>329</sup> Zimbabwe<sup>330</sup> and UK,<sup>331</sup> the purpose of section 156(1) of the Constitution is four-fold. Firstly, section 156(1) of the Constitution is a constitutional mechanism and tool for the discovery and eradication (or modification) of all unjust and archaic laws of the colonial administrator and the authoritarian ruler in Lesotho. Where these laws are inconsistent with the new morality and human rights value system of the new constitutional order ushered in by the Constitution – the Constitution’s harmonisation or constitutionalisation project,<sup>332</sup> they have to be eradicated through the employment of section 156(1) of the Constitution. Secondly, section 156(1) of the Constitution enlists all courts in the project of discovery and elimination (or modification) of unconstitutional pre-constitution laws by mandating them to modify, adapt, qualify or read in exceptions, and therefore to develop such law if they find it otherwise inconsistent with the Constitution, so as to conform to the Constitution.<sup>333</sup> It is

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*Judicial Commissioners’ Court Proclamation 25/1950; Labour Code Order 24/1992.*

<sup>326</sup> The Constitution, sec 2.

<sup>327</sup> The Constitution, sec 156(1). Also see *Human Rights Act 1998* (UK) (UKHRA), sec 3(1).

<sup>328</sup> *Pyarali v Sibbo* 9/1997; *Attorney General v Osotraco* 32/2002; (see article 273 old Constitution, or article 274 of the new 1995 Constitution of Uganda).

<sup>329</sup> *Ephraim v Pastory* (2001) AHRLR 236 (TzHC 1990); (see section 5 of Tanzanian Constitution 1984).

<sup>330</sup> *Bull v Minister of Justice* (1987) LRC (Const) 547 (see section 4 of Zimbabwean Constitution 1980).

<sup>331</sup> *Donoghue v Poplar Housing* [2001] 4 All ER 604; *R v Lambert* [2001] UKHL 37 (see section 3(1) of UKHRA 1998).

<sup>332</sup> See *Uganda Association of Women Lawyers v Attorney General* 2/2003:17 (per Okello JA); *Ephraim*:[28]-[29].

<sup>333</sup> See *Osotraco*:6; *Uganda Association of Women Lawyers*:25-26 (per Twinomujuni JA); *Ephraim*:[20]; *Advocates of Natural Resources v Attorney General* 40/2013:11; *Uganda*

through section 156(1) of the Constitution that the constitutionalisation project can be effectively enforced and realised.

Thirdly, section 156(1) of the Constitution seeks to ensure accessible and expeditious constitutional justice by enabling the citizens' participation<sup>334</sup> and easy access to the courts closest to them to claim the enforcement of their constitutional rights and freedoms without the need of having to refer the cases to the High Court under section 22(1) of the Constitution.<sup>335</sup> Finally, section 156(1) of the Constitution grants the necessary jurisdiction to all bodies responsible for the construction and application of existing law and empowers them to achieve the three purposes mentioned above.<sup>336</sup> Concerning the purpose of the similar provision in the Ugandan Constitution 1995 (article 274), the Ugandan Constitutional Court in *Advocates of Natural Resources v Attorney General* stated that:

The Constitution clearly envisages that existing laws would in one way or the other be inconsistent with its provisions. It is therefore not necessary that every time a law is found to be inconsistent with the Constitution, recourse is made to [the Constitutional Court]. Some of the inconsistencies such as the impugned section 7 (1) of the *Land Acquisition Act* are too obvious and require no interpretation by this court. The purpose of Article 274 of the Constitution was to avoid a situation where each and every provision of the old laws, those that pre-date the 1995 Constitution, found to be inconsistent with the Constitution had to end up in this court, for interpretation and for declarations to that effect. All courts of law have the power to do that. To enforce and put into effect Article 274 of the Constitution.<sup>337</sup>

It is clear that section 156(1) of the Constitution explicitly grants to all the courts in Lesotho the power (constitutional jurisdiction) to construe and interpret the relevant laws in conformity with the Constitution and, where such laws are at variance with the Constitution, to modify

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*Association of Women Lawyers*:5-6 (per Mpagi-Bahigeine JA)

<sup>334</sup> A regime in which constitutional review is shared between the higher and the lower courts “enhances the chances of the citizen participation by means of litigation capable of shaping society in ways that are often unattainable by majorities ...” Sarubbi 2011:57-58.

<sup>335</sup> While in *Osotraco*:6, the Ugandan Supreme Court stated that article 274 of the Ugandan Constitution “enables the court to expedite justice by construing unjust and archaic laws and bringing them in conformity with the Constitution, so that they do not exist and are void”, Mpagi-Mahigeine JA in *Uganda Association of Women Lawyers*:6, echoed the same sentiments and stated that article 274 enables a court to “grant redress as conveniently and as speedily as possible”.

<sup>336</sup> *Baloro v University of Bophuthatswana* 1995 4 SA 197 (B):243-245.

<sup>337</sup> *Advocates of Natural Resources*:10; *Osotraco*:6. Similar views were expressed by the Tanzanian High Court in relation to section 5 of Tanzanian Constitution 1984. See *Ephraim*:[28]-[29].

and develop them. However, this authority or obligation is not limited to the courts only.<sup>338</sup> In the words of the Ugandan Constitutional Court in *Advocates of Natural Resources v Attorney General*, “every court, tribunal or administrative body is required to apply and enforce the provisions” of section 156(1) of the Constitution.<sup>339</sup> In fulfilling this constitutional obligations, such courts, tribunals and administrative bodies will have to adapt their role from that of merely identifying the intention of the legislature in adopting the statute or law<sup>340</sup> to a remedial role. Under the latter role, the adjudicative bodies have to “remedy all the unjust existing laws which must be subjected, as the occasion arises, to rigorous tests and meticulous scrutiny to make sure that they are in consonance with the Constitution”.<sup>341</sup> They have to do this in line with section 2 of the Constitution which enshrines the sovereignty and supremacy of the Constitution, and thereby “salvage and free” them from their “stunted and deprived past”<sup>342</sup> – a task which, in the first place is that of these adjudicatory front-liners.<sup>343</sup> As a supreme law, the Constitution thus cannot be ignored by any court, tribunal or administrative body “however inconvenient its provisions may in a particular case seem to be”.<sup>344</sup>

In the constitutional authority to interpret and construe the laws in conformity with the Constitution, necessarily lies the power and capacity to determine the legality and legitimacy of laws – the threshold analysis which involves the question whether the impugned law or conduct limits the entrenched rights or freedoms and whether the limitation is reasonable or

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<sup>338</sup> See for example, *Sekoati v President, Court of Appeal LAC* (1995-1999) 812:826-828; *Phaila*:446; Currie and De Waal 2005:65, footnote 131.

<sup>339</sup> *Advocates of Natural Resources* 40/2013:11; also see *Martin*:528.

<sup>340</sup> *Donoghue*:75].

<sup>341</sup> See *Uganda Association of Women Lawyers*:5-6 (per Mpagi-Bahigeine JA); also see *Pyarali*:6. In *Lambert*:6], [42], the House of Lords stated that section 3(1) of the UKHRA which is equivalent to section 156(1) of the Constitution “must be given its full import and that long or well entrenched ideas may have to be put aside, sacred cows culled.”

<sup>342</sup> See *Gumede v President* 2009 3 BCLR 243 (CC):[22]; also see *Monyau v R LAC* (2005-2006) 44:52-53; Fedtke 2007:138,142.

<sup>343</sup> Medécigo 2013:41; Harutyunyan and Mavcic 1999: Chapter 1; *Robb v Connolly* 111 US 624 (1884):637. In view of the volume of cases coming before these courts as compared to the High Court, subordinate courts, tribunals and administrative bodies are indeed at the frontline in the application of ordinary laws and the detection of constitutional problems in the relevant laws and the upholding of the constitutional supremacy. Also see Venice Commission 2010:54; Hatchard *et al* 2004:162; Sadursky 2005:19.

<sup>344</sup> See *Mothobi v Crown LAC* (2009-2010) 465:473.

justifiable.<sup>345</sup> With the exception of the evolutionary model for the elimination of discriminatory aspects of customary law,<sup>346</sup> no legal norm within the legal normative order can be at variance with the Constitution and at the same time evade the supremacy sting of invalidity chambered in section 2 of the Constitution from 2 April 1993 when the Constitution came into force. The modification and development of laws in terms of section 156(1) of the Constitution, therefore, involves constitutional balancing of sub-constitutional existing laws. According to Barak, constitutional balancing is “designed to determine the constitutionality of sub-constitutional law”.<sup>347</sup> If the existing law is found wanting or inconsistent with the Constitution, it must be developed to be in conformity with the Constitution. That exercise will involve ensuring the proportionality between the Constitution and the existing law though the application of *Oakes* test rules.<sup>348</sup> As Barak points out, “every development of the common law must be conducted in accordance with rules of proportionality”.<sup>349</sup> Thus, the subordinate courts, as part of the adjudicative bodies entrusted with the constitutional balancing of existing laws, have the necessary constitutional jurisdiction to determine the constitutionality of those laws. They perform this function, consistently with the principle of subsidiarity, closer to the people whom they serve.

#### 3.5.2.2.2.5 Fifth indicator: horizontality and the constitutional duty of judicial officers as “public officers” not to contravene the Bill of Rights

The determination was made in chapter 2, firstly, that a private actor has a constitutional entitlement or right to rely on the Bill of Rights provisions in any proceedings against another private actor.<sup>350</sup> Secondly, it was established that members of any subordinate court or tribunal (that is, magistrates and judicial or presiding officers) as “public officers”<sup>351</sup> are bound by the Bill of Rights provisions.<sup>352</sup> It was indicated that the horizontal application of the Bill of Rights does not only impose constitutional duties on all courts, public authorities or

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<sup>345</sup> *Thebus v S* 2003 6 SA 505 (CC):[32]; *Govender v Minister of Safety and Security* 2001 4 SA 273 (SCA):[11]; Currie and De Waal 2005:67-68.

<sup>346</sup> See chapter 4.

<sup>347</sup> Barak<sub>1</sub> 2012:347.

<sup>348</sup> According to Barak, “the core concept of proportionality is the examination of whether a sub-constitutional law ... limiting a constitutional right is proportional” and the constitutional review is designed to examine that proportionality. See Barak<sub>1</sub> 2012:394-395.

<sup>349</sup> Barak<sub>1</sub> 2012:347.

<sup>350</sup> The Constitution, sec 4(2) and sec 22(1).

<sup>351</sup> The Constitution, sec 154(1) and (3).

<sup>352</sup> The Constitution, sec 4(3); sec 22(1); *Lepule v Lepule* 4/2013:[37]; *Sechele v Public Officers' Pension Fund* 43B/2010; Phillipson 1999.820; Brüggemeier 2006:70.



public officers to interpret and develop the laws in conformity with the Constitution, but also prohibits them from making decisions or granting judgments which contravene the Bill of Rights.<sup>353</sup> It is clear that when a private party to the proceedings before the subordinate courts raises a constitutional question as a result of the constitutional entitlement to do so, the magistrates and judicial officers before whom such a question is raised are constitutionally bound, and, by the same token, have constitutional jurisdiction to determine such a question.

Thus, subordinate courts have constitutional jurisdiction based on the doctrine of the horizontal application of the Bill of Rights. It would be anomalous for the Constitution to authorise the horizontal application of the Bill of Rights and to impose constitutional obligations on the judicial officers not to contravene such rights and freedom, on the one hand, while, on the other, and without an express provision to the contrary, the same judicial officers do not have the necessary constitutional jurisdiction to determine constitutional questions arising in proceedings before them.

#### 3.5.2.2.2.6 Sixth indicator: the constitutional duty of subordinate courts to afford cases “a fair hearing”

Subordinate courts hear both civil and criminal cases within their respective ordained ordinary jurisdictions. Section 12 of the Constitutions obliges them to afford such cases “a fair hearing”.<sup>354</sup> Fairness is not a condition limited to proceedings in the High Court, but extends to criminal and civil cases in the subordinate courts,<sup>355</sup> since the duty of a fair hearing is applicable to every court, tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.<sup>356</sup> The African Commission of Human and Peoples’ Rights (ACHPR), clarifying the essential elements of the right to a fair hearing, stated that the right includes “adequate opportunity to prepare a

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<sup>353</sup> Barak 1996:239; Barak 2001:26; Brüggemeier 2006:70; *Shelley v Kraemer* 334 US 1 (1948); *New York Times v Sullivan* 376 US 1 (1948).

<sup>354</sup> The Constitution, sec 12(1) and (8).

<sup>355</sup> “If any person is charged with a criminal offence ... the case shall be afforded a fair hearing ...” See the Constitution, sec 12(1). As far as civil proceedings are concerned, the Constitution imposes on “any court or other adjudicating authority” an obligation to afford the case “a fair hearing”. See the Constitution, sec 12(8). The concept of fairness of the proceedings before the High Court has found articulation in a number of cases. See, for example, *Ketisi v Director of Public Prosecutions* LAC (2005-2006) 503:505-510.

<sup>356</sup> See the Constitution, sec 12(8). Also see *Wood v Wood* (1874) LR 9 Ex. 190; *Ridge v Baldwin* [1964] AC 40:70.

case, *present arguments and evidence and to challenge or respond to opposing arguments or evidence*".<sup>357</sup> Thus, the obligation on the subordinate courts to afford a case a fair hearing involves a duty to deal with constitutional question arising in such a case.<sup>358</sup> Without express constitutional authority excluding such questions from the determination, it would be unfair to prohibit parties from challenging any law or conduct on constitutional grounds before the subordinate courts. A party's civil rights or obligations would be determined without the consideration of the most fundamental threshold issue before the court, the constitutionality of the law or conduct upon which such rights or obligations rest.

#### 3.5.2.2.2.7 Seventh indicator: historical, prudential and ethical support

The constitutional conferment of constitutional jurisdiction on subordinate courts is buttressed further by historical, prudential and ethical accounts. Historically, this intention is made clear from the constitution-making conversations<sup>359</sup> and the recommendations of 1963 and 1992, which resulted in the 1966 Constitution and the 1993 Constitution, respectively. It was the view of the Basutoland Council in 1963 that since the "general position" of the Central and Local Courts (Basotho Courts) "in the overall judicial system [was] obscure", the then obtaining "system of Subordinate Courts should continue, subject to 'the integration' of the Basotho Courts in the Subordinate Courts system" and that the said Basotho Courts should be "united or 'integrated' with the Subordinate Courts in a single system of Inferior Courts". With this integration in mind, and in relation to the Bill of Rights, the Council recommended that:

... a court-enforced *Bill of Human Rights and Freedoms* be entrenched in the new Constitution. *The Courts should have the power and the duty to enforce the guaranteed rights and freedoms* against unauthorized legislative and executive abridgements and infringements, and where appropriate, against the activity of private individuals and groups.<sup>360</sup>

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<sup>357</sup> ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, available online at <[http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33\\_guide\\_fair\\_trial\\_legal\\_assistance\\_2003\\_eng.pdf](http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf)> (accessed on 28 June 2015). Also see *Director of Public Prosecutions v Viljoen* [2005] 2 All SA 355 (SCA):[35]-[42].

<sup>358</sup> See *Matebesi v Director of Immigration* LAC (1995-1999) 616:623; *Ketisi*:509-510.

<sup>359</sup> These are the discussions of problems, conflicts, interests, preferences, and claims of need. See Banks 2008:1048.

<sup>360</sup> Basutoland Council 1963:81. Emphasis added. In 1992, using the 1966 Constitution as "a working paper and framework for a new [1993] Constitution" and making "no major changes ... to Chapter II [of 1966 Constitution]" except minor details in the content of the right to peaceful assembly and freedom of expression, the NCA finally recommended a "legally enforceable human rights" while

Cowen, the constitutional advisor to Basutoland Council, recalls how a provision for the judicially enforceable Bill of Rights came to find the place in the 1966 Constitution as follows:

At that time it was not generally considered either necessary or desirable to insert in the Constitution any specific protection for human rights; but in the intervening years, along with a rapidly mounting demand for independence, conviction grew in Basutoland that *a court-enforced Bill of Rights* should be included in a thoroughly revised new Constitution, designed to prepare the way for independent national status ... the basic plan of the proposed governmental structure is to provide Basutoland with ... *a Bill of Human Rights, and an independent judiciary charged with the duty of enforcing the Constitution.*<sup>361</sup>

Under the 1966 Constitution, the integrated subordinate courts were part of the independent judiciary and were therefore charged with the duty of enforcing the Constitution including the Bill of Rights.<sup>362</sup> In 1992, using the 1966 Constitution as “a working paper and framework for a new [1993] Constitution” and making “no major changes ... to Chapter II [of the 1966 Constitution]” except minor details in the content of the right to peaceful assembly and freedom of expression, the NCA finally recommended the “legally enforceable human rights” while placing the socio-economic rights beyond the direct enforcement by any court.<sup>363</sup> The 1993 Constitution maintained the judicial structure of the 1966 Constitution except that the former introduced “tribunals” and “courts-martial” as part of the judiciary.<sup>364</sup>

There is no single indication in the 1993 Constitution that by “a court-enforced” or “legally enforceable” Bill of Rights, reference was only made to the superior courts. Furthermore, unlike in other jurisdiction where subordinate courts have expressly been denied constitutional jurisdiction, the Constitution does not put any limitation on the constitutional jurisdiction of the subordinate courts.<sup>365</sup> Rather, the experiences of Basotho during the colonial and authoritarian rule periods, the socio-economic situation of Basotho and other factors, the costs and benefits of the pursuit of constitutional justice for all and the moral commitment of the people of Lesotho to the values enshrined in the Bill of Rights,<sup>366</sup> are the

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placing the socio-economic rights beyond judicial enforcement.

<sup>361</sup> Cowen 1964:4-5. Emphasis supplied. Professor D. V. Cowen acted as constitutional adviser to the Basutoland Council in view of the magnitude of the task and the need for expert advice on the technicalities of constitution making. See *School of Oriental and African Studies* 1958:143.

<sup>362</sup> See the 1966 Constitution, Chapter X.

<sup>363</sup> NCA 1992:26-29. See the Constitution, sec 25.

<sup>364</sup> See the Constitution, sec 118(1)(c) and (d).

<sup>365</sup> See the Constitution of South Africa 1996, sec 170.

<sup>366</sup> See, for example, Palmer and Poulter 1972:318.

fundamental postulates on which the constitutional jurisdiction of all the courts, including the subordinate courts, rests.

It is quite improbable, to say the least, that, taking into account the literacy and poverty levels of Basotho; the lack of affordability of legal services to meet the mandatory intricate procedural requirements for access to the High Court; the difficulties involved in traversing the terrains of Lesotho in 1963 and, to some degree, 1992; and the risks of misuse of power by chiefs and sub-chiefs as it happened during the colonial rule; the framers of the 1966 and 1993 Constitutions intended that all the people around Lesotho would be able to challenge the constitutionality of any measure only at the High Court in Maseru and not before the local and nearby courts. It is however clear that the introduction of section 156(1) for the first time in the 1993 Constitution, based on similar common-law jurisdictions such as Uganda and Tanzania, was influenced by, among others, the convenience and accessibility of constitutional justice without the need of referring constitutional questions to the High Court.<sup>367</sup> It was introduced in order to enable all courts in Lesotho, in particular, the subordinate courts, to grant constitutional redress “as conveniently and as speedily as possible”.<sup>368</sup>

#### 3.5.2.2.2.8 Eighth indicator: the supremacy clause and the “judicial power” of subordinate courts

As indicated earlier, sections 22(2) and 156(1) of the Constitution are not the only primary source of constitutional jurisdictions under the Constitution. The primary source of constitutional jurisdiction and remedial action lies in the supremacy clause in terms of which any law inconsistent with the Constitution is void.<sup>369</sup> Section 2 of the Constitution is not a rhetorical platitude, which merely promises private actors that any law or conduct that contravenes their entrenched rights is void; it grants constitutional jurisdiction to the courts to determine not only the validity of the laws and conduct which contravenes the guaranteed rights and freedom. It also provides remedial powers to those courts to protect and enforce those rights and freedoms, without the private actors being obliged to follow the enforcement machinery of section 22 of the Constitution in all cases where their rights and freedoms are infringed.<sup>370</sup> The supremacy clause therefore entitles the aggrieved private actor to raise before a court the issue of the law’s invalidity and obtain a remedy in order to enforce and

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<sup>367</sup> See *Advocates of Natural Resources*:10; *Osotraco*:6; *Ephraim*:[28]-[29].

<sup>368</sup> *Uganda Association of Women Lawyers*:6.

<sup>369</sup> See *Cuddy Chicks*:13-14. Also see *Cooper*:887; *Martin*:532.

<sup>370</sup> *Big M Drug Mart*:312-316, 353; *Schachter*:700-702; *Osborne*:77-78,103; *Roach* 2013:474,490-509; *McAllister* 2004:2-43; *Roach* 1987:233-249.

protect his or her rights and freedoms.<sup>371</sup> That court is obligated not to apply an invalid law but to respect and uphold the Constitution.<sup>372</sup> As it was stated in *Nova Scotia v Martin*:

From this principle of constitutional supremacy also flows, as a practical corollary, the idea that [citizens] should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts.<sup>373</sup>

The constitutional jurisdiction under the supremacy clause derives from the very fact that all legal decisions will take into account the supreme law of the land.<sup>374</sup> Legal decisions are made, predominantly, by those organs with judicial power.<sup>375</sup> Subordinate courts are expressly granted judicial power in terms of section 118 of the Constitution.<sup>376</sup> In the “performance of *their functions under this Constitution or any other law*”, subordinate courts “shall be *independent and free from interference* and subject only to this Constitution and any other law”.<sup>377</sup> From the above analysis, it is clear that the supremacy clause is the source of constitutional jurisdiction for the subordinate courts. It is also clear that subordinate courts, being part of the institutions granted judicial power by the Constitution, and which power has not been circumscribed or limited anywhere thereby, have the necessary constitutional jurisdiction to control the constitutionality of laws and conduct in ordinary proceedings before them.

## PART V

### 3.6 Lesotho’s constitutional review framework – an overview

Based on the above exposition, the following conclusions can be drawn about the constitutional review framework in Lesotho. Firstly, in Lesotho, enforcement and protection of fundamental rights and freedoms and therefore the pursuit and attainment of constitutional justice is a shared constitutional responsibility of the superior courts and the subordinate

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<sup>371</sup> *Douglas*:604; Roach 2013:473,492.

<sup>372</sup> *Martin*:[28]; *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315:[61]; *Douglas*:594; *Cuddy Chicks*:13-14.

<sup>373</sup> *Martin*:[29].

<sup>374</sup> *Martin*:[34].

<sup>375</sup> Judicial power is the power of a court to decide and pronounce a judgment and to carry it into effect between persons and parties who bring a case before it for decision. See *Muskrat v United States* 219 US 346 (1911):361

<sup>376</sup> The Constitution, sec 118(1)(c).

<sup>377</sup> The Constitution, sec 118(2). Emphasis added.

courts.

Consistent with subsidiarity principle in terms of which power and relationships are coordinated in the multi-tiered legal order such as a unified broad-based pyramidal judicial structure of Lesotho, the bulk of constitutional scrutiny of laws, acts and conduct on the basis of the Bill of Rights, in the conception of the Constitution, is a primary task that should be fulfilled by the subordinate courts in ordinary proceedings within their respective ordinary jurisdictions. This is because subordinate courts are better placed than the High Court in terms of proximity to the people of Lesotho, the identification of laws, acts or conduct that violates the Bill of Rights and the effective and convenient provision of constitutional justice as part of "public goods".<sup>378</sup> As the ECtHR in *Handyside v UK* said in the context of the ECHR:

The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.<sup>379</sup>

The role of the High Court's constitutional jurisdiction is two-fold: *standard setting* and *unification* (or *supervisory*). In its standard-setting role, the High Court, through the interpretation process and decisions in direct or incidental constitutional review, plays a guiding role<sup>380</sup> by not only establishing the meaning of the respective Bill of Rights provisions, but also defining the minimum level and threshold of the Bill of Rights protection that must be guaranteed and enforced by the subordinate courts.<sup>381</sup> Since the involvement of all courts in constitutional review would lead to different, and in most cases conflicting, interpretations and decisions – resulting in legal uncertainty and unpredictability – it is the role of the High Court, through the normal processes of appeal or review and precedent, to *unify* and harmonise the law by *supervising* the content and processes of decisions of

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<sup>378</sup> Follesdal 2013:45; Hatchard *et al* 2004:162; Ministry of Information and Broadcasting 1996:33.

<sup>379</sup> *Handyside v UK* [1976] ECHR 5:[48]. In the context of Lesotho, it is clear that subordinate courts are in a better position than the High Court, to identify human rights violations and to deal with them early as and when they are raised in judicial proceedings, the greater majority of which take place before these lower courts.

<sup>380</sup> Médécigo 2013:8-9. Also see *Phaila*: [45]-[46].

<sup>381</sup> See Gerards 2014:16.

subordinate courts.<sup>382</sup> The guiding role of the High Court's constitutional jurisdiction is made clear in referral procedures where it is the referring courts which finally "dispose of the case in accordance with the decision" of the High Court or the Court of Appeal.<sup>383</sup>

Secondly, and in view of the foregoing, Lesotho's constitutional review structure has been modelled after the American constitutional review prototype according to which all courts in the judicial system have constitutional power and responsibility to supervise the constitutionality of laws, acts or conduct in the pursuit of constitutional supremacy and integrity. Lesotho's constitutional review framework cannot be classified as "hybrid" because subordinate courts are not only entitled to "disapply" the law they find inconsistent with the Constitution, nor is the High Court a sole arbiter of Constitutional questions – defining features of hybrid models<sup>384</sup> – but they are also specifically constitutionally authorised to modify and develop that law to conform to the constitutional normative imperatives, the authority that carries with it the power to declare unconstitutional laws invalid.<sup>385</sup> Since the High Court and the Court of Appeal as well as all subordinate courts are co-interpreters of the Constitution and have constitutional authority to participate in constitutional review and constitutionalisation of Lesotho's legal order, Lesotho's constitutional review framework is best described as decentralised or diffused.<sup>386</sup> It is a system in which constitutional jurisdiction is not separated from ordinary jurisdiction. The two forms of jurisdiction are integrated to enable the courts to control the constitutionality of laws and conduct in ordinary proceedings. Whenever a constitutional question arises in ordinary proceedings, whether before the High Court or subordinate courts, such a court is obliged to determine such a question. As Jackson and Tushnet correctly point out:

A non-constitutional process must be initiated before a court ... before a diffuse system of

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<sup>382</sup> See De Andrade 2001:980; Kokott and Kaspar 2012:810,814; Venice Commission 2010:48; also see *Demopoulos v Turkey* (Admissibility) (2010) 50 EHRR SE14:[69].

<sup>383</sup> The Constitution, sec 22(3), 128(1).

<sup>384</sup> Jackson and Tushnet 2006:466.

<sup>385</sup> For a thorough discussion of this point, see chapter 4 of this study.

<sup>386</sup> Although in their monograph, Harutyunyan and Mavcic (1999: Chapter 1) classify Lesotho under "systems without constitutional/judicial review", this is entirely not correct as I have indicated in this study. Perhaps, the study by the learned authors may well have been undertaken during the authoritarian rule in Lesotho, during which time it has been opined that, following a colonial rule where judicial review was "virtually non-existent", judicial review "waxed and waned over time". See Ellett 2012:21, a Freedom House Southern Africa Report available online at <<https://freedomhouse.org/report/special-reports/politics-judicial-independence-lesotho#.VZcDHDZFDIU>> (accessed on 24 June 2015).

judicial review of unconstitutionality can operate. The question of the unconstitutionality of a law and of its inapplicability may be raised in such an instance so long as the issue of the validity of the law is considered to be, by the judge, relevant to the decision in the case.... All courts have the power and duty of applying the Constitution and the laws, and therefore, to give preference to the Constitution over statutes which violate it, and to declare them unconstitutional and inapplicable to the concrete process developed before them. This power and duty ... can only be exercised in a particular process initiated by a party, where the constitutional question is only an incidental matter, and when its consideration is necessary to resolve the case.<sup>387</sup>

If I am correct in this classification (which was hopefully indicated above), then all the courts in Lesotho have the necessary constitutional jurisdiction to determine the legality and legitimacy of laws in the pursuit of constitutional supremacy and integrity, subject to the caveat that such constitutional power is exercised within their respective ordained jurisdiction.<sup>388</sup> Therefore, of Lesotho's constitutional review framework, in the words of McLachlin J speaking of the Canadian *Charter* in her dissenting opinion in *Cooper*, it can be said:

The [Constitution] is not some holy grail which only judicial initiates of the superior courts may touch. The [Constitution] belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the [Constitution] is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.<sup>389</sup>

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<sup>387</sup> Jackson and Tushnet 2006:487-488.

<sup>388</sup> See Van der Schyff 2010:77.

<sup>389</sup> *Cooper*:899-900. Notwithstanding these views about the Lesotho's constitutional review framework, the same cannot be said about the constitutional review practice in Lesotho, as will be demonstrated in chapter 5.



**CHAPTER 4:**  
**HORIZONTAL EFFECT ON PRIVATE LAW:**  
**CONSTITUTIONALISATION OF LESOTHO'S PRIVATE LAW**

We live in 'the age of rights'. Ours is an era marked by the widespread legal positivisation of human rights in national constitutions ... Since their first appearance in the political thought of seventeenth and eighteenth-century Europe and North America, the influence of human rights has expanded not only across the globe but also well beyond their original field of application, the relationship between political authorities and citizens. Today, human rights frequently shape the law governing relations among citizens. Their impact has reached the heartlands of private law.

- François du Bois.<sup>1</sup>

#### 4.1 Orientation

The traditional public-private dichotomy according to which fundamental rights and freedoms are merely shields against the state has not been left to guesswork and interpretative conjecture by the Constitution of Lesotho. The Constitution not only entrenches a Bill of Rights; it also provides for the judicial enforcement and protection of the Bill of Rights for any person "if [he or she] alleges that any of the provisions of [the Bill of Rights] has been, is being or is likely to be contravened".<sup>2</sup> If that is not an express foundation for the horizontal application of the Bill of Rights, section 4(2) of the Constitution expressly puts any doubt to rest. The doctrine of horizontal application of the Bill of Rights, its variants and the corresponding constitutional duty of the courts not only to enforce the Bill of Rights, but also to ensure that the courts themselves do not contravene the provisions thereof, have been discussed in chapter 2. Whether the courts in Lesotho comply with this high constitutional duty is a subject for discussion in the next chapter. The focus of this chapter is how fundamental human rights and freedoms cross the public-private divide into the "heartlands" of Lesotho's private law through the application of the Bill of Rights principles and underlying normative values in horizontal legal relationships by all courts of Lesotho.

The influential authority of constitutional principles, norms and values on private law – the horizontal effect – prevents the obvious ossification of private law with the resultant enshrining of old and unjust principles and values in a legal order and shapes it to maximise

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<sup>1</sup> Du Bois 2013:12.

<sup>2</sup> The Constitution, sec 22(1).

its consistency with the Constitution.<sup>3</sup> Horizontal effect therefore, in this study, denotes the horizontal application of the Bill of Rights in the adjudication of private-law disputes between private actors, with the decisive influential effect of the Bill of Rights on the private-law doctrines, principles and norms where the latter do not conform to the former.<sup>4</sup> Since private law embodies liberal perspectives and encompasses the protection of certain aspects of human rights without expressly using that term and therefore constitutes a value system for the attainment of corrective justice,<sup>5</sup> the essence of the horizontal effect is the balancing of private-law corrective values with the *distributive* requisites of the Constitution in the promotion and apportionment or distribution of public goods such as constitutional justice on the basis of the Bill of Rights.<sup>6</sup> The influence of the Bill of Rights on private law may be direct or indirect – *direct horizontal effect* or *indirect horizontal effect* – depending on whether the Bill of Rights is applied directly or indirectly on the private law. The increasing influence of the Bill of Rights on the private law or the reach and effect of the Bill of Rights onto civil litigation between private actors results in the constitutionalisation of private law, or, stated in another way, the privatisation of the Bill of Rights.<sup>7</sup>

Any meaningful discussion of the horizontal effect of the Bill of Rights on private law essentially entails the determination of the relationship, interaction and interpenetration of the private-law values and the constitutional values. As Jacobsohn rightly points out, the fundamental rights (or what he calls, constitutional principles and values) are based on the history of a nation, constitute the constitutional compliance yardstick which shapes the substance of constitutional outcomes and are therefore an essential part of the landscape of constitutional adjudication.<sup>8</sup>

The discussion becomes necessary in the context of Lesotho for two important reasons. Firstly, the present Bill of Rights largely incorporates the value system of the pre-colonial Lesotho.<sup>9</sup> To this end, this study will situate the discourse on this topic partly within the

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<sup>3</sup> Moran 2009:20-22.

<sup>4</sup> See Oliver and Fedtke 2007:4; Rivera-Pérez 2012:190.

<sup>5</sup> See, for example, Friedmann and Barak-Erez 2001:2; Stevens 2009:149-162; Smith 2009:118-120; Voermans 2006:37; Alder 2002:423; Chamberlain 2009:309; Tan 2009:323; Duggan 2009:383; Visser 2013:331-332. On the difference between corrective justice and distributive justice, see below.

<sup>6</sup> Laing and Visser 2013:333; Alder 2002:419,426.

<sup>7</sup> Smits 2006:10; Lytvynyuk 2009:201; Clapham 1995:20.

<sup>8</sup> Jacobsohn 2012:777,785.

<sup>9</sup> See below.

historiography of the Four Kingdom Lesotho's value systems and/or the human-rights situations. The discourse will mainly be situated within the post-1993 normative hierarchical ordering and relationship.<sup>10</sup> The second reason is that the courts and legal writers in Lesotho have approached the concept of legal dualism or legal pluralism on a colonial paradigm whose descriptive and positivist approach to plural legal orders or systems did not interrogate their interrelationship, interaction and interpenetration. Under this paradigm, legal dualism became an instrument of control, management, domination and subordination of African cultural systems by western imperialism. In this study, I suggest a paradigm shift to contemporary conceptualisation or approach to legal pluralism. The suggested approach provides an opportunity for a rich development of customary law, common law and human rights norms consistently with the objective value system espoused by the Constitution.

The discussion is divided into five parts. Part I identifies different value systems that were embedded in the socio-political and legal systems of the pre-colonial and colonial Lesotho (*First Kingdom* and *Second Kingdom*) and the human rights and rule of law situation during the authoritarian rule in post-independence Lesotho (*Third Kingdom*) and analyses the fundamental values as entrenched by the 1993 Constitution (*Fourth Kingdom*) in the context of the 1966 constitutional development. In Part II, I discuss the concept of legal pluralism and the colonial and contemporary paradigms or approaches to plural legal orders. A pluralist framework is suggested for the management of conflicts between customary law and the Bill of Rights as well as the evolutionary model for the elimination of discriminatory laws and the establishment of gender equality and justice in Lesotho. In Part III, the role of constitutional jurisdiction in private-law litigation, the constitutional and private-law normative interaction and the horizontal effect of the Bill of Rights on private law are discussed. The use of the Bill of Rights as interpretative constructs through which constitutional values are transferred into private law including customary law is discussed in particular. It is demonstrated that, contrary to popular view in legal discourse, the Constitution does not constitutionalise or ring-fence customary law, in particular, customary law discrimination.

My arguments are based on several grounds. Firstly, the mutable nature of customary law;

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<sup>10</sup> The *First Kingdom* is the traditional polity of Basotho based solely on the customary way and mode of life and led by Moshoeshe I with the assistance of several chiefs and sub-chiefs from the time when the nation was founded until the time of formal annexation to the Colony of Good Hope in 1884. The *Second Kingdom* refers to Lesotho during the period of colonial rule from 1884 to its independence in 1966. The *Third Kingdom* refers to the independent Lesotho established under the 1966 Constitution, but it was dealt a deadly political blow in 1970 and only rose to its feet in 1993 as the *Fourth Kingdom* under the 1993 Constitution.

secondly, the constitutional duty of the courts to modify and develop customary law to be in conformity with the Constitution; and thirdly, the obligation and the requirement for the courts to recognise and identify the “living” customary law and the application of such version of the customary law to proceedings before them. I also demonstrate through the judicial lens of *Macfarlane v Tayside Health Board*<sup>11</sup> how corrective justice-based adjudication of private-law disputes is inimical to private law absorbing constitutional values within its (private law’s) normative structure and that it is through the distributive justice approach to private-law dispute adjudication that constitutional values can be transferred to private law, thereby constitutionalising private law.

In Part IV, the constitutional remedies available to the courts in rights-based review and the role of these remedies in recreating a Bill-of-Rights-compliant private-law world are discussed. I locate these remedies on the continuum of “strong” and “weak” review and tease out the orthodox view which assumes that declaratory powers or the powers of invalidation are the preserve of the superior courts. I argue that the whole panoply of remedies available under constitutional jurisdiction is exercisable by the subordinate courts as well. Thus, while in chapter 3, the *fora* of constitutional review have been identified, in this chapter the discussion will be centred on the *content* and the *consequences* of constitutional review in Lesotho.

## PART I

### 4.2 Normative values and rights situations in the First, Second, Third and Fourth Kingdom Lesotho

#### 4.2.1 The First Kingdom Lesotho: normative value system profile

In order to know and understand Lesotho’s present constitutionalism and in particular the normative pluralism and hierarchical relationship of the private-law norms and constitutional norms in our new Constitutional order, one must know and understand what the law and the values *were* and how they developed to be what they are today. This is predicated on the simple fact and rationale, as Holmes puts it, that:

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, the intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries,

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<sup>11</sup> *Macfarlane v Tayside Health Board* [1999] 4 All ER 963.

and it cannot be dealt with as if it contains only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it intends to become. We must alternatively consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what it is then understood to be convenient; but its form and machinery, and the degree which it is able to work out desired results, depend very much upon its past.<sup>12</sup>

With several clans and tribes coming from beyond the Zambezi as part of the migration of Bantu-speaking tribes into Southern Africa, the First Kingdom Lesotho did not come to prominence as a nation until the early 19<sup>th</sup> century when *Moshoeshoe* gathered together the remnants of various clans and tribes which had been scattered by insurgencies and raids orchestrated by *Chaka* of the Zulus.<sup>13</sup> African historiography identifies the Africans as having had established socio-political systems based on African customary normative values and tradition – the guiding principles found in any African society and which regulate not only the social relationships between the subjects, but also the exercise of political power by institutions of governance.<sup>14</sup> As part of traditional African socio-political systems, which were infused with democratic values and norms,<sup>15</sup> the First Kingdom Lesotho was no exception.

Although in a state of flux,<sup>16</sup> the socio-economic system of Basotho of the First Kingdom Lesotho had engendered values and cardinal principles of respect and honour for the elders, rulers and the society at large; unity, brotherhood, cooperation and hospitality; forgiveness, restorative justice, harmony and co-existence; truth, love and honesty; regard and appreciation of one's extended family and benefactors; self-control, courtesy and generosity; diligence and industry; respect for human rights which included individuality; personal responsibility, the dignity and integrity of every person, sacredness of life and religiosity. These were all based and subsumed in the tradition of communalism through which the sharing of a common social life, commitment to the social or common good of the community, appreciation of mutual obligations, caring for others, interdependence,

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<sup>12</sup> Holmes 1991:1-2.

<sup>13</sup> Ellenberger and MacGregor 1912:21; Weisfelder 1976:23; Mothibe<sub>1</sub> 2002:1-8; Mothibe<sub>2</sub> 2002:15-34; Juma 2011:97-100; Burman 1976:3; Eldredge 2007:21,28-29; Aston 1947:236; Mahao 1993:152-153; Department of Information 1969:209.

<sup>14</sup> By "values", reference is to a coherent set of African attitude, behaviour and action adopted and/or evolved by African community, the Basotho, as a standard to guide their behaviours and preferences. See Awoniyi 2015:4; Igboin 2011:98-99.

<sup>15</sup> Akuul 2010: 37; Ake 1991:34

<sup>16</sup> Gill 1993:62; Juma 2011:97.

commonality, collective responsibility and solidarity were expressed and the claims of individuality were recognised.<sup>17</sup> Speaking of the African communal values, which apply equally to African Basotho culture, Igboin appositely points out:

Africans place high value on communal living. Communal values express the worth and appreciation of the community; the values which guide the social interaction of the people towards a common goal. Interpersonal bonds go beyond biological affinity in expressing the values of commonality, Africans share mutually; they care for one another, they are interdependent and they solidarise. Whatever happens to one happens to the community as a whole. The joy and sorrow of one extend to other members of the community in profound ways. The willingness to help others for the development of the community is reciprocal. It is within this commonality that Africans are mostly fulfilled.<sup>18</sup>

With this emphasis of communalism, the African Basotho's philosophy of existence can be summed up in Mbiti's expression: "I am because we are, and because we are therefore I am".<sup>19</sup> In the area of law and governance, Basotho customary law not only regulated the dispensation of justice but also the conduct and exercise of political power. The administration of justice was the role of Moshoeshoe, all chiefs and sub-chiefs across the country – who possessed leadership<sup>20</sup> traits that engendered respect, unity, prosperity and progress of the community – through a decentralised traditional court system of *Khotla*.<sup>21</sup> The institution of *pitso* (public assembly) provided consultative platforms and a forum between chiefs and the subjects for discussion or deliberation and decision on issues of great importance or public concern.<sup>22</sup> Popular support was the foundation on which the political authority of the chief was based and by which it was maintained based on "a constant two-way stream of consultation and advice".<sup>23</sup> Without popular support, a chief could be removed or gotten rid of.<sup>24</sup>

Thus, the socio-political system of the traditional Basotho was founded on direct or participatory democratic principles which included popular will, consultation and consensus.

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<sup>17</sup> Gill 1993:49; Sanders 1985:57; Ambrose 1995:30-31,79; Juma 2011:98; Awoniyi 2015:8; Bá 1974:38-41; Cobbah 1987:320-324; Igboin 2011:98-101.

<sup>18</sup> Igboin 2011:99-100.

<sup>19</sup> Mbiti 1970:141.

<sup>20</sup> Leadership is a value itself. See Igboin 2011:100.

<sup>21</sup> Duncan 1960:vi-vii; Palmer and Poulter 1972:31-32; Juma 2011:100.

<sup>22</sup> Eldredge 2007:23; Ashton 1947:237; Gill 1993:49.

<sup>23</sup> Ashton 1947:241-242; Cowen 1964:5-6.

<sup>24</sup> Ashton 1947:241.

It was a polity in which major decisions were made on popular consent and direct popular participation in governance and the freedom of expression at the *pitso*.<sup>25</sup> The governance of his polity was characterised by checks and balances (which avoided power excesses), restorative justice, accountability, decentralisation of judicial and administrative power and protection of communal and individual rights.<sup>26</sup> It was a system that had been described as “a prototype for modern ‘African socialism’ where justice prevailed and civil liberties were protected” and which “provided the Basotho nation with indigenous concepts of free speech, equal justice, due process of law, tolerance for diversity, and accountability of public officials”.<sup>27</sup> As Cowen observed, “the general idea of constitutionalism, of limited government, has long been familiar to the Basotho”.<sup>28</sup>

The First Kingdom Lesotho’s socio-political system was, however, not without its Achilles heel. It was a system in which all power – administrative, executive, legislative and judicial – reposed in the hereditary chiefs with concomitant misuse thereof,<sup>29</sup> exploitation of the commoners, class domination,<sup>30</sup> control of means of production, unequal distribution of resources, and rule by an oligarchy<sup>31</sup> and gender discrimination.<sup>32</sup>

#### 4.2.2 The Second Kingdom Lesotho: normative value system and human rights profile

There is no doubt that, with the enactment of *Proclamation 2B of 1884* and other statutory instruments, the colonial administration ushered in not only many principles, values and norms foreign to the traditional Basotho society and legal order, but a completely new legal

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<sup>25</sup> Palmer and Poulter 1972:32; Gill 1993:49; Mothibe<sub>2</sub> 2002:30-31.

<sup>26</sup> Gill 1993:49-50; Weisfelder 1969:10-11; Mahao 2007:207; Kasozi 1997:137. Also see Akuul 2010:39-40; Ake 1991:34. On contrary views, see Mahao 1993:152-162.

<sup>27</sup> Weisfelder 1976:23; Mahao 1993:162-164.

<sup>28</sup> Cowen 1964:5.

<sup>29</sup> Weisfelder 1976:23; Casalis 1997:231; Mahao 2007:207. According to Weisfelder, the supporters and kinsmen of loyal chiefs were often favoured in judicial judgments or in allocation of land and cattle; industrious commoners had reason to fear confiscation of their resources under the pretext of witchcraft or some minor breach of law.

<sup>30</sup> Mothibe<sub>2</sub> 2002:32-33.

<sup>31</sup> Mahao 1993:154-157.

<sup>32</sup> Ambrose 1995:2-4; Gill 1993:49; Mothibe<sub>1</sub> 2002:9. Juma (2007:94), however, argues, “African customs have suffered so many distortions and alterations that they no longer bear the true essence of the African society” and that “such distortions have played a significant role in defining property relationships in traditional societies”.

system was introduced to Basotho's legal landscape.<sup>33</sup> A plethora of western politico-legal and social values were implanted in the Second Kingdom Lesotho and which were foreign to the First Kingdom Lesotho: rule of law, liberalism,<sup>34</sup> representative democracy and periodic electoral system, a limited government, judicial review, equality before the law, non-retroactive laws, presumption of innocence, trials that are regulated by due procedure and affirmation and upholding of human rights. Attendant with these politico-legal transplants are important values of legal certainty, predictability and coherence, accountability, deterrence and the autonomy of an individual.

Although there is reason to celebrate this politico-legal legacy of enlightenment,<sup>35</sup> the introduction of the above principles and values in the legal system of Lesotho was made on the "colonial chess-board" and subterfuge. Their first seepage was to serve racial and other purposes of European community in Lesotho while at the same time the colonial administration emasculated traditional institutions with serious impact on the lives and values of Basotho.<sup>36</sup> Firstly, concomitant with the colonial administration was the "introduction of such values as rugged individualism, corruption, capitalism and oppression",<sup>37</sup> the disruption of the traditional machinery, norms and values and cultural imperialism due to "a deeply engrained pattern of authoritarian, and often arbitrary, bureaucratic rule" of the colonial masters.<sup>38</sup> Basotho customary law, with its normative values indicated above, would continue to be administered in the Second Kingdom Lesotho's courts to the extent it was not repugnant to the coloniser's sense of justice and morality.<sup>39</sup>

Secondly, presented on the masked platter of non-interference and preservation of indigenous institutions, the dualism in the legal system was actually the colonial

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<sup>33</sup> Sakoane 2001-2004:373.

<sup>34</sup> According to the political theory of liberalism, an individual is regarded as *prima facie* sovereign and is presumed to be the best judge of how he or she should lead his or her life. See Táiwò 2010:171. Thus, liberalism "in both theory and practice is concerned to promote social outcomes that are, as far as possible, the result of free individual choices." See Charvet and Kacsynska-Nay 2008:2.

<sup>35</sup> Genuine motives have also been read by some into the colonisation of Lesotho. See, for example, Thabane (2002:79-88) who has argued that sympathy, careerism and prestige on the part of one Philip Worehouse, the Cape Colonial administrator, influenced the annexation of Lesotho to Cape Colony in 1871.

<sup>36</sup> Mahao 2007:212-213; Juma 2007:95-96.

<sup>37</sup> Igboin 2011:101; also see Weisfelder 1976:24.

<sup>38</sup> Weisfelder 1976:23; Mahao 2007:208-214.

<sup>39</sup> *Proclamation* 62/1938, sec 9. See Maqutu and Sanders 1987:379-382; Alias 1962:51.



mechanisation and ploy based on ethnocentrism and racist ideology to segregate the European “human beings” from African “sub-human beings”, “inferior human beings” or “lesser human beings”. The latter strata of the society was allowed to join the mainstream legal and judicial system intended for the humans only if they acquired the status of being human, thus denying African Basotho equality of treatment before the law.<sup>40</sup> This social stratification was concretised by the creation of an “elite” group in the Basotho polity and the total statutory incapacitation of “sub-human” Basotho to dispose of their property by a will and a choice to have their estates administered in terms of the *Administration of Estates Proclamation* until they have acquired the “human” status. A transformation from “sub-human” to “human” status required a proof that the African Basotho had “abandoned tribal custom and adopted a European mode of life”.<sup>41</sup> The social stratification was further achieved through the exclusion of legally qualified personnel in the administration of the so-called “native law”.<sup>42</sup> This was based, as Twaib puts it, on the perceived colonial attitude that “legally qualified judges, magistrates and advocates [were] anathema to native’s sense of justice”.<sup>43</sup>

Thirdly, because Basotho were perceived not to have legal subjectivity until they attained the status of human, they could not, in the colonial administration’s view enjoy the benefits of the rule of law and equal protection of the law. Legitimate questions by Basotho about the colonial rule amounted to sedition, treason, rebellion or unlawful acts intended to undermine the colonial government<sup>44</sup> – thus criminalising public discourse concerning genuine public issues. The colonial government would use its power discreetly when it favoured them, such

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<sup>40</sup> Táíwò 2010:180-182; Juma 2007:95.

<sup>41</sup> *Administration of Estates Proclamation* 19/1935, sec 3(b); *Makata v Makata* LAC (1980-1984) 198:200; *Ntsane v Thatho* LAC (2000-2004) 248:251-252. Also see *Law of Inheritance Act* 26/1873, sec 5. Unfortunately, this colonial perception of the “sub-human” nature of Basotho continues to even today, as they are held to have no competence and capacity to make a will disposing of their property (see *Motanteli v Tekane* LAC (2009-2010) 391:394-396), and thus condemning them eternally to the strictures of “custom” whatever their personal inclinations and choices can be (see *Khatala v Khatala* LAC (1955-1969) 73; see, however, *Rakhoabe v Rakhoabe* LAC (1955-1969) 261) and notwithstanding the fact that Basotho custom is always in a state of flux. On the principles determining application of customary law, though a judicial discretion, see Bennett 1995:52-53; Maqutu 2005:29, 52-53.

<sup>42</sup> *Proclamation* 62/1938, sec 20. However, there has been development in the law. See *Attorney General v Mopa* LAC (2000-2004) 427.

<sup>43</sup> Twaib 1997:46; also see Táíwò 2010:184.

<sup>44</sup> See Eldredge 2007:41-44.

as in the choice of 'M'ants'ebo as regent (*Regency case*) when the Paramount Chief Seeiso died in 1940,<sup>45</sup> and yet refused, on the basis of lack of *locus standi in judicio*, to apply the same principle of the *Regency case* when the widow of the late Paramount Chief Seeiso subsequently sought to inspect the property of the minor heir apparent Bereng Seeiso.<sup>46</sup> It has been argued that the real motive for a different decision was that "a judge sensed that sticking to the principle upheld in [the *Regency case*] would destabilise the Regency".<sup>47</sup> The continued enforcement by the colonial administration of the draconian *Public Order Proclamation* 1964<sup>48</sup> despite the safeguards of civil liberties entrenched in the 1965 Constitution was a clear total disregard of the rule of law by the imperialist government. Fourthly, while judges in Britain held office "during good behaviour", that was not applicable to colonial judges who, according to colonial policy, held office "during pleasure of the Crown" and could be dismissed "at the pleasure of the Crown".<sup>49</sup>

Finally, with no interest on the part of the colonial administration to ensure the organic growth and transformation of the whole legal and political system of the Second Kingdom Lesotho, the colonial administration unleashed, on the eve of independence, the whole legal package bound in the 1966 Independence Constitution. The legal package consisting of the Bill of Rights, separation of powers, supremacy of the Constitution and constitutionalism and many more was deposited into the local receptacles and state apparatus ill-prepared for their reception, nurturing and growth, thus paving a way for the immediate withering and death of

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<sup>45</sup> Mahao 2007:215-216; Eldredge 2007:164. *Bereng Griffith v 'M'ants'ebo Seeiso* (1926-1953) HCTLR 50. Being a weak regent though which the colonial administration would easily manipulate and push through the colonial policy and agenda, as against Bereng Griffith who had shown some hostility towards the colonial administration and whom the administration did not want as the Regent, 'M'ants'ebo Seeiso was the obvious colonial administrator's choice and went about to influence her final appointment and confirmation as regent by the courts which "were privy" to the colonial agenda and "handmaiden of the colonial administration". See Juma 2007:96; Kasozi 1997:139; Gocking 1997:78; Prempeh 2006:25.

<sup>46</sup> *M'abereng Seeiso v M'ants'ebo Seeiso* (1926-1953) HCTLR 212.

<sup>47</sup> Mahao 2007:216-217.

<sup>48</sup> The *Proclamation* was a security measure intended to forestall violence during the 1965 election period. It forced the accused persons to prove their innocence, allowed the Resident Commissioner to outlaw political organisations without due process of the law, and severely limited rights of free speech, movement and assembly.

<sup>49</sup> *Terrell v Secretary of State* [1953] 2 QB 482; *Dunn v R* [1896] 1 QB 116; *Mackay v Lord Advocate* 1937 SC 860. Also see Alias 1962:64-66; Shimba 1987:12; Prempeh 2006:25.

these politico-legal transplants.<sup>50</sup> These externally dictated transplants or foisted *sociocryonics* as Táíwò prefers to call them,<sup>51</sup> required “time and capacity to fully ensure compatibility” and fusing with the local context.<sup>52</sup> While the authoritarian colonial administration introduced the rule of law and liberalism in Lesotho, it “quickly orphaned them in ways that shed more light on why the ideals and practices failed to develop in the post-independence period”.<sup>53</sup> In the final analysis, the colonial administration was undemocratic and contributed to the poor human rights record in the Second Kingdom Lesotho.<sup>54</sup> As Ndulo points out, “human rights protections did not arise in the colonial period, as colonialism itself was premised on the violation of human rights”.<sup>55</sup>

#### 4.2.3 The Third Kingdom Lesotho and the human rights profile

Although the 1966 Constitution was a framework for liberal democratic governance in which indigenous institutions of monarchy and chieftainship played a political role<sup>56</sup> and which infused great expectations to the people of Lesotho,<sup>57</sup> the liberal values, ideals and principles of the Third Kingdom Lesotho, like in any post-independent African state, were emasculated by fascism, authoritarianism, oligarchy and dictatorship that soon after 1966 became the directing compass of the new born state. While the political and human rights situation in the Third Kingdom Lesotho has been recorded in the historiography of politics and law elsewhere<sup>58</sup> and which is unnecessary to repeat here, it suffices, however, for present purposes to highlight the following in relation to the 1966 to 1992 era. Firstly, it was an era which was punctuated with the suspension of the 1966 Constitution,<sup>59</sup> rule by decree and the continuous introduction of draconian legislation intended not only to suppress dissent but also to vest in the government officials great latitude to determine what

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<sup>50</sup> Mahao 1991:2-3.

<sup>51</sup> Táíwò 2010:25. *Sociocryonics*, explains Táíwò, is an “ignoble science” of cryopreservation (that is, extremely low temperature storage) of social norms and institutions, “arresting them and denying them”, and then deciding “what, how and when to keep” any of such norms and institutions.

<sup>52</sup> Sannerholm 2009:60.

<sup>53</sup> Táíwò 2010:157.

<sup>54</sup> Ambrose 1995:4-5; Kasozi 1997:139.

<sup>55</sup> Ndulo 2011:94.

<sup>56</sup> Mahao 1991:2.

<sup>57</sup> Kasozi 1997:139-140.

<sup>58</sup> Weisfelder 1976:25-31; Pule 2002:173-197; Mahao 1991:3-16.

<sup>59</sup> See *Constitution (Suspension) Order 2/1970*.

constituted an offence.<sup>60</sup>

Secondly, uprisings, sporadic violence and insurgencies involving atrocious and brutal assaults, killings and extrajudicial executions, coups and attempted coups, and declarations of states of emergency as well as clampdowns and harassment of trade unions and federations not aligned to the ruling party imprinted indelible mark on the political landscape of the Third Kingdom Lesotho.<sup>61</sup> Thirdly, the people of Lesotho became unfortunate victims at the receiving end of the authoritarian, arbitrary, bureaucratic and coercive state's unbridled brutalities, counter-attacks and atrocities, with their fundamental rights and freedoms not only drastically curbed and undermined but also became the repeated casualty as they (rights) took a downward trajectory.<sup>62</sup>

Finally, the last line in the defence of human rights and freedoms, the High Court, was dealt a deadly political blow when the Chief Justice had to suspend the sitting of the High Court in view of the alleged uncertainty of the constitutional position of the 1966 Constitution *vis-à-vis* the 1970 *Constitution (Suspension) Order*.<sup>63</sup> With the sitting of the High Court restored, and in particular after the appointment of Justice Mofokeng as the Chief Justice of Lesotho, the judiciary waged a struggle, and to some extent succeeded, for the protection and enforcement of fundamental human rights and freedoms, within the draconian legal framework of the authoritarian rule.<sup>64</sup>

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<sup>60</sup> *Suppression of Communism Order* authorised arrest and indefinite detention of persons suspected of "communism"; *Internal Security Act 1/1974* which made it a crime to embarrass the administration and authorised long detentions without trial, excluded judicial enquiries over the said detentions and access to the detained persons was on condition of ministerial consent. Also see Weisfelder 1976:26; Kasozi 1997:142.

<sup>61</sup> Pule 2002:181-189; Gay 2006:83-84; Matlosa 1991:9-13; also see *Moerane v R* LAC (1970-1979) 170; Amnesty International 1992:3-13 (the report of Amnesty International dated May 1992 is available online at <<https://www.amnesty.org/fr/documents/afr33/001/1992/en/>> (accessed on 25 July 2015).

<sup>62</sup> Pule 2002:186; Kasozi 1997:139-142; Guni 1997:148; Weisfelder 1976:29.

<sup>63</sup> The sitting of the High Court was only resumed by Jacobs CJ five months later when the *Court of Appeal and High Court Order 17/1970* had been enacted into law.

<sup>64</sup> See, for example, *Sello v Commissioner of Police* 1980 LLR 159; *Law Society v Minister in Charge of Defence and Internal Security* 111/1988; also see Maqutu 1990:87.

#### 4.2.4 The Fourth Kingdom Lesotho and the mix of liberal and traditional principles and values

The 1993 Constitution of Lesotho, like other constitutions, to adopt Mokgoro's description, is a reflection of the history of the First, Second and Third Kingdoms Lesotho, the fears and aspirations of the Basotho nation it was meant to serve.<sup>65</sup> Although the 1990-1992 constitution-making deliberations cannot be described as a constitutional moment<sup>66</sup> for Lesotho, the NCA ultimately came out with a draft document, which was finally adopted as the Constitution of Lesotho, incorporating not only liberal principles, norms and values but also those principles, norms and values, which formed the basis for the traditional social make-up of Basotho. These liberal ideals, among others, include representative democracy and a limited government that is periodically elected,<sup>67</sup> individual autonomy, liberty and equality entrenched through respect and protection of the individuals' fundamental rights and freedoms,<sup>68</sup> separation of powers,<sup>69</sup> the independence of the judiciary and the security of tenure of judges and judicial officers<sup>70</sup> and the rule of law.

On the other hand, the principles and the values underlying the traditional Basotho communal co-existence of an individual and the community found articulation not only in the Bill of Rights under the 1966 Constitution, but also in the present Bill of Rights of the 1993 Constitution. Inherent in the Bill of Rights are fundamental values of human dignity, liberty, equality, freedom and justice. The totality of these liberal ideals and the traditional Basotho value-laden communalism constitute Lesotho's present constitutional value system. They

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<sup>65</sup> Mokgoro 1997:1279.

<sup>66</sup> The constitution-making deliberations were a hurried process owing to the pressure on the then ruling military junta, which was not inclusive. An opportunity was not given to all Basotho to voice their own opinion on what would later be the Constitution of Lesotho while others called for the reinstatement of the 1966 Constitution. Some important stakeholders like the Law Society did not partake in the deliberations notwithstanding that the Society had been invited. See National Conference 1991, *Resolution of the National Conference on National Unity and Democratic Rule in Lesotho*; Amnesty International 1992:3.

<sup>67</sup> See, for example, the Constitution, sec 1(1);

<sup>68</sup> See, for example, the Constitution, sec 2; Chapter II (sec 4 – 24).

<sup>69</sup> The Constitution vests different powers and authority (legislative, executive and judiciary) in different institutions or organs. See, for example, the Constitution, Chapter VI (Parliament); Chapters VIII and XIII (the Executive); and Chapter XI (the Judiciary).

<sup>70</sup> See, for example, the Constitution, sec 118(2); sec 120; sec 121; sec 124; sec 125; sec 133(1)-(4).

are, to adopt *Oakes*' formulation, the fundamental values and principles essential for a free and democratic Basotho society, the genesis of the rights and freedoms now guaranteed by the Constitution and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.<sup>71</sup>

The Constitution fully expresses these values. With the exception of the right to equality before the law and the equal protection of the law,<sup>72</sup> all fundamental human rights and freedoms provisions, while recognising individual autonomy, liberty, equality and freedom, impose specified duties and obligations on the same individual through public override clauses which are meant to realise the greater public benefit to the community to which an individual belongs. In this regard, the Basutoland Council, in the context of the 1966 Constitution Bill of Rights whose structure and substance were adopted in the 1993 Constitution, conscious that "constitutionally guaranteed rights and freedoms cannot be absolute", and bearing in mind "the particular circumstances of Lesotho" and in order "to preserve the cohesion and security of Basotho Nation", recommended that these fundamental rights and freedoms be individually qualified.<sup>73</sup> The reason for adopting this kind of a Bill of Rights was stated plainly by the Council:

In advocating a Bill of Rights and Freedoms, we do not contemplate a dismembered society of self-sufficient individuals, where all the emphasis is on the rights of each, without regard to social duties and the establishment of a just social order. On the contrary, we would like to see established in Lesotho a polity in which the rights and obligations of individual citizens, one to the other, and the rights and obligations of the community to which they belong, are reconciled in a stable social order, and preserved from the abuse of power in any of its forms. And such a social order can, in our view, best be encouraged in the manner which we suggest.<sup>74</sup>

The present Chapter II of the Constitution is a Bill of Rights, to use Cowen's expression, "with a distinctively Basotho look about it; for it was essential to take account of [Lesotho's]

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<sup>71</sup> *R v Oakes* (1986) 26 DLR (4th) 200 (SCC):[64].

<sup>72</sup> The Constitution, sec 19. The reason that the right to equality and equal protection of the law is not hemmed in public override limitations is quite understandable in view of the colonial experience of Basotho where they were treated, through the medium of the law, as "sub-humans" who would enjoy the full benefits of imported legal system if they acquired the status of "human".

<sup>73</sup> Basutoland Council 1963:82. The NCA (1992:26,71) made no changes to the structure and contents of the Bill of Rights provisions, except changes with respect to the right of assembly, the right to freedom of movement, freedom of expression and the introduction of the right to participate in government, as well as the introduction of a non-justiciable DPSPs.

<sup>74</sup> Basutoland Council 1963:83.

specific needs and of many existing laws and customs which the people would not be willing to abandon”.<sup>75</sup> Although its provisions have been described elsewhere as “lacklustre guarantees heavily laden with claw-back provisions”,<sup>76</sup> it is a Bill of Rights in terms of which “all people should equally enjoy the benefit of the protection”<sup>77</sup> and whose dichotomous structure embodying *individual’s* clauses and *state’s* clauses (public overrides), to adopt Palmer and Poulter’s description, represents the dialectical claims between the individual against another individual and between the individual against the state.<sup>78</sup> The fundamental constitutional value of communalism is an overarching principle that runs through the material and contours of the Bill of Rights. Section 4(1) of the Constitution expresses the constitutional principle of communalism as well as the dialectical claims by stating that the human rights and freedoms protective provisions in the Bill of Rights are “subject to *such limitations of that protection as are contained in those provisions*”, which are “limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice *the rights and freedoms of others or the public interest*”.<sup>79</sup> In this study, the focus is on the dialectics of normative interaction between the Bill of Rights and the private law. It is in this area where the importance of the constitutional jurisdiction in effectuating the widespread influence and interpenetration of fundamental rights and freedoms and the private law lies. It is the area where the dialectical notion of transformation when the human rights and freedoms meet the private law, as Barnard-Naudé describes it<sup>80</sup> – occurs and the consequential optimisation of the distribution of public goods – the constitutional justice – to all Basotho takes place. I turn first to deal with the issue of legal pluralism that was instrumental in impeding the Bill of Rights’ influence over Lesotho’s private law.

## PART II

### 4.3 Legal pluralism: a framework for navigating the intersection between Lesotho’s legal orders

The horizontal effect of the Bill of Rights on Lesotho’s private law cannot be discussed

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<sup>75</sup> Cowen 1964:12-13.

<sup>76</sup> See, for example, Juma 2013:162.

<sup>77</sup> Cowen 1964:12-13. According to Palmer and Poulter (1972:317), the purpose of structure and content of the 1966 constitutional Bill of Rights – which, I argue, applies equally to the 1993 constitutional Bill of Rights – was to preserve or create “a just equilibrium between the competing claims of the individual and the state”.

<sup>78</sup> Palmer and Poulter 1972:322.

<sup>79</sup> Emphasis supplied.

<sup>80</sup> Barnard-Naude 2013:36.

meaningfully without engaging with the interrelationship, interaction and interpenetration of the legal sub-orders or systems that define the pluralist nature of Lesotho's legal order, the constitutional recognition and incorporation of these legal orders and the conflict resolution between them at the same time. The amalgamation of both African and Western values which are based on African and Western cultures into a single objective value system reflected in the Bill of Rights was always going to present more challenges than the promises. This is particularly so, since in its application, customary law is often discriminatory against women.<sup>81</sup> In the context of Lesotho, it has been argued that the Constitution excludes the application of personal laws and customary law from non-discrimination clause.<sup>82</sup> Legal pluralism that defines Lesotho's legal order presents the greatest challenge to the judiciary in resolving normative conflicts resulting from the African customary law and Western value-based laws.

Taking the "observer perspective" and simply recording "the fact of legal pluralism and remaining quiet on the substantive question of normative interrelationship between various legal orders",<sup>83</sup> colonial and postcolonial conceptions of legal pluralism significantly differ from contemporary conceptions, which place more emphasis on the interaction and interpenetration of plural legal orders. The contemporary conceptualisation and approach to legal pluralism provide an opportunity and a promise for a rich development of both customary law, common law and human rights norms consistently with the objective value system espoused by the Bill of Rights. This comprehension of the "richness and the limits of legal pluralism"<sup>84</sup> provides keys to the potential and limits of conflict resolution between the discordant legal systems. In this study, legal pluralism is discussed in relation to conflict-ridden intersection between customary law and the non-discrimination human rights provisions. I examine, through the lens of legal pluralism, the constitutional framework for the management of conflicts and interpenetration between customary law and the entrenched constitutional right to equality, with specific focus on gender equality and justice.

What is legal pluralism and how has post-colonial Lesotho responded to plural legal orders that were inherited from colonial administration? Does the Constitution provide mechanisms for resolution of conflicts emanating from the collision of these legal orders? These are some of the questions, which I shall shed some light on by analysing Lesotho's constitutional response to pluralistic legal system. I shall argue that while legal pluralism offers an

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<sup>81</sup> Ndulo 2011:88-89. For an overview of gender relations in Lesotho, see Juma 2013:184-192.

<sup>82</sup> See the Constitution, sec 18(4)(b) and (c). Also see Bond 2008:290.

<sup>83</sup> Melissaris 2013:173.

<sup>84</sup> Frémont 2009:149.



analytical framework for the reconceptualisation of the conflict resolution between customary law and the Bill of rights, the Constitution provides tools or the evolutionary technique for the elimination of discrimination from customary justice system and for the establishment of gender equality under that system. To echo the sentiments of Sanders which he expressed four decades ago, “the tools to solve the problem [of legal dualism] are readily at hand, and, if properly applied by ... the courts, will be able to create ... a system of truly national character”.<sup>85</sup>

#### 4.3.1 Legal pluralism: colonial and contemporary paradigms

As it was the case with other African states under colonialism, the colonial administration of Lesotho led to “a large-scale transfer of laws and legal institutions” from Western society into the African society, “each of which had its own distinct sociocultural organization and legal culture”.<sup>86</sup> According to Merry, the central feature of colonialism, the process in terms of which Western societies ruled and transformed the African societies by imposing a new culture on them, was enforced by the courts and the police force.<sup>87</sup> In Lesotho, *General Law Proclamation 2B* of 1884 became the foundation for legal pluralism not only in substantive law but also in the judicial structure or system.<sup>88</sup> As a pluralistic system, Lesotho’s legal system recognises the general law (consisting of a mixture of Roman-Dutch law and aspects of English law) and customary law as well as statutory law.<sup>89</sup> As far as substantive law is concerned, customary justice system, which largely dealt with matters of personal status (marriage, divorce, adoption, burial, devolution of property),<sup>90</sup> and the general law system were separately applicable to the indigenous community and European community, respectively. The supranational and international legal orders within which Lesotho operates cannot be ignored in discussing the topic of legal pluralism as Lesotho’s national law including private law is greatly influenced by these legal spaces.<sup>91</sup> In this regard, Quane is

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<sup>85</sup> Sanders 1985:63.

<sup>86</sup> Merry 1991:890.

<sup>87</sup> Merry 1991:890.

<sup>88</sup> Poulter 1979:2; Maqutu and Sanders 1987:378-389,392-393; Sanders 1985:48, 51-53.

<sup>89</sup> Sanders 1985:51-53; Maqutu and Sanders 1987:389.

<sup>90</sup> Sanders 1985:60; Banda 2006:13.

<sup>91</sup> Lesotho is a member of the United Nations, African Union and Southern African Development Community (SADC) whose legal orders influences the legislative adaptation and judicial interpretation of laws of Lesotho with a view to harmonisation and integration. See, for example, Van Niekerk 2002:312; Van Niekerk 2008:155; *Ts’epe v Independent Electoral Commission* LAC (2005-2006) 169:[17]-[22].

correct to observe that, “when viewed in conjunction with a state’s national law, the very existence of international human rights law represents a particular form of legal pluralism”.<sup>92</sup>

The colonial administration did not, however, treat the two systems of law – customary law and the general law – on the basis of equality as the customary law was marginalised and pushed to the periphery where it was distorted and ossified as will be indicated later. By contrast, the Western system took a central position and flourished. Customary law system took a subservient position to the general law<sup>93</sup> and the indigenous community was allowed to practise their traditions if they were not “repugnant to natural justice and morality” of the colonial masters.<sup>94</sup>

Garnering attention of legal anthropologist research in the 1970s,<sup>95</sup> the term *legal pluralism* refers to a normative situation where two or more legal systems coexist in the same social field or geographical area.<sup>96</sup> According to Woodman, legal pluralism is “the state of affairs in which a category of social relations is within the fields of operation of two or more bodies of legal norms”.<sup>97</sup> It is a situation, as one of the great developers of the theory clarifies,

in which law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities which may support, complement, ignore or frustrate one another, so that the 'law' which is actually effective on the 'ground floor' of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism and the like.<sup>98</sup>

Literature on legal pluralism identifies two types of legal pluralism: state-law pluralism, or “weak” legal pluralism, as Griffiths calls it,<sup>99</sup> and strong legal pluralism. Regarded as the primary type,<sup>100</sup> state-law pluralism refers to the legal pluralism that exists within the parameters of the state apparatus<sup>101</sup> where different legal orders are dependent from the overarching and controlling state law resulting from their recognition by the latter.<sup>102</sup> Under

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<sup>92</sup> Quane 2013:677.

<sup>93</sup> Sanders 1985:56-60.

<sup>94</sup> Banda 2006:13.

<sup>95</sup> See, for example, Hooker 1975:1; Moore 1978:1.

<sup>96</sup> Merry 1988:870; Quane 2013:676.

<sup>97</sup> Woodman 1996:157.

<sup>98</sup> Griffiths 1986:39.

<sup>99</sup> Griffiths 1986:5.

<sup>100</sup> Woodman 1996:158.

<sup>101</sup> Sartori and Shahar 2012:638.

<sup>102</sup> Griffiths 1986:5; Sartori and Shahar 2012:638-639.

state-law pluralism, the officially recognised legal orders coexist and interact in prescribed circumstances.<sup>103</sup> By contrast, in strong legal pluralism (or deep legal pluralism),<sup>104</sup> one or more of the co-existing legal orders do not belong to and therefore is not controlled by the same overarching legal system.<sup>105</sup> According to Van Niekerk, in situations of deep legal pluralism, the multiple legal orders in a legal system are based on equality and do not depend on state recognition.<sup>106</sup> Strong or deep legal pluralism is therefore an approach that rejects any supremacy of any one legal order over another. For purposes of the study, state-law pluralism is adopted.

Since colonial periods to the present constitutional dispensation, legal writers and the courts in Lesotho have approached the problem of *legal pluralism* entirely descriptively and on the colonial paradigm. This approach was essentially positivist<sup>107</sup> and invoked what Fischer-Lescano and Teubner refer to as “a characteristic legal reductionism”.<sup>108</sup> Instead of viewing it as a theory, legal writers and the courts spoke and continue to speak of “legal dualism” as two or more sets of legal rules that apply to a social situation.<sup>109</sup> An account of the interaction and interrelationship between the legal orders is lacking<sup>110</sup> because of their static view of customary law.<sup>111</sup> They have therefore used legal dualism as a vehicle for the domination, control, management and subordination of indigenous society, customary law and customary justice system by western cultural imperialism on racial and tribal grounds.<sup>112</sup> Influenced by the positivist paradigm, they have not “recognised” the actual customs and practices of the people as “law” simply because the state legal system has not accepted such custom and practices as law. The positivist approach has led to legal writers and the courts to oversimplify the manner in which norm conflicts are understood and to narrow the

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<sup>103</sup> Van Niekerk 2001:350-351.

<sup>104</sup> Rautenbach 2010:145.

<sup>105</sup> Sartori and Shahar 2012:639.

<sup>106</sup> Van Niekerk 2008:208.

<sup>107</sup> Maqutu and Sanders (1987:387) cite a Court of Appeal case in which the Court stated: “[Legal] dualism’ describes, and relates to the existence of two independent principles or systems of law. A person either has a choice between them or is compelled to be bound by a particular system. He cannot enjoy the two simultaneously”. Also see Forsyth 2009:30.

<sup>108</sup> Fischer-Lescano and Teubner 2004:1002.

<sup>109</sup> Hinz 2009:9.

<sup>110</sup> Griffiths 1998:859.

<sup>111</sup> Ndulo 2011:109.

<sup>112</sup> Pimentel 2011:67.

possible range of their solution.<sup>113</sup> The commentators and the courts further conceived the interface between the plural legal orders as one of conflict-generation incapable of production of new hybrid jural spaces, meaning and action. Taking a conventional approach of referring to the legal pluralism as *legal dualism*, courts have merely applied and formulated rules dealing with the internal conflicts of laws and the difficult choice of law questions to maintain the hegemony of western cultural values.

Coupled with the codified status of customary law, the status which, according to McLachlan, “fails to address the problems of *interaction* between customary laws and the general legal system”,<sup>114</sup> the conventional positivist approach entirely neglected the normative orientation of legal pluralism. This is because the colonial paradigm for the recognition of customary law was built on fundamental assumptions, which, according to McLachlan, formed the essential elements of the colonial plural legal order. Firstly, McLachlan points out that the colonisers’ own image of customary society was that of “unchanging and hierarchical” consistent with the English notion of custom having to exist from time immemorial.<sup>115</sup> This assumption, or version of legal pluralism, viewed customary law as static and as a result perpetuated the inequalities between men and women.<sup>116</sup> The image of hierarchy “squared with common conceptions about customary societies as bound by status and ruled by chiefs”.<sup>117</sup>

Secondly, the chiefs who occupied the apex of the hierarchy became the conduit between the colonisers and the colonised and through the policy of “indirect rule” built on the institution of chieftainship; social stratification and power configurations and consolidation were effectuated.<sup>118</sup> The indirect rule created rigid spheres of operation of the law: one for the colonial officials and settlers and the other for the natives. Through the instrumentality of indirect rule, McLachlan states, “racial status ... became the prime connecting factor in the application of laws”.<sup>119</sup> Indigenous women were denied the capacity “to advocate for themselves *within* their traditional society”.<sup>120</sup> The colonial model of legal pluralism did not

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<sup>113</sup> Fischer-Lescano and Teubner 2004:1002.

<sup>114</sup> McLachlan 1988:372. Emphasis in the original.

<sup>115</sup> McLachlan 1988:380.

<sup>116</sup> Pimentel 2011:70-71.

<sup>117</sup> McLachlan 1988:381.

<sup>118</sup> McLachlan 1988:381; Also see Forsyth 2009:30; Pimentel 2011:68. Social stratification and power configurations were not only created between the colonisers and the colonised, but also between men and women. See Bonthuys and Erlank 2004:64.

<sup>119</sup> McLachlan 1988:381.

<sup>120</sup> Pimentel 2011:70-71.

promote equality and justice.<sup>121</sup> The technical and complex branch of colonial law known as interpersonal conflict of law – “the jungle of legal pluralism” – was the “science of determining into which legal system a person fell”.<sup>122</sup> McLachlan concludes that because of the above fundamental assumptions, colonial masters viewed the fate of customary upon its “full impact of European contact as inevitably sealed” and consequently the pluralist legal system was a “temporary state of affairs”.<sup>123</sup> As Maqutu and Sanders point out, the colonial masters had expected customary law “to die out as people adopted European values”.<sup>124</sup>

The above colonial paradigm is essential in understanding the shift towards contemporary paradigm of normative legal pluralism based on multicultural conception of law and society. On this new paradigm, legal pluralism has made great contributions by opening up possibilities and providing lessons in shaping relationships and managing and resolving conflicts arising from situations of multiple legal orders.<sup>125</sup> Firstly, because of its varied investigative tools and terminology, legal pluralism provides new methodological approaches radically different from ones that were purely descriptive and positivist in orientation in analysing complex empirical situations such as multiple legal orders or systems that were adopted in colonial and postcolonial era.<sup>126</sup>

Secondly, as the focus of issues concerning legal pluralism should be structural in nature,<sup>127</sup> legal pluralism “confront[s] structuring elements of unity, or at least cohesion, beyond the diversity it reflects”.<sup>128</sup> Legal pluralism may achieve this without “subordinating diversity to some abrupt totality ... a formal or functional dominance of the state”.<sup>129</sup> Legal pluralism is thus justified as a tool of structuring or governance on pragmatic grounds.<sup>130</sup> Forsyth points out, however, that in order to realise this unity or cohesion, a judge would have to understand the nature of the links between one legal order and another and their position in relation to each other.<sup>131</sup> The dynamics of legal pluralism depend largely on the interlinkages

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<sup>121</sup> Ndulo 2011:95.

<sup>122</sup> McLachlan 1988:381.

<sup>123</sup> McLachlan 1988:382; also see Forsyth 2009:31.

<sup>124</sup> Maqutu and Sanders 1987:379.

<sup>125</sup> Forsyth 2009:44.

<sup>126</sup> Forsyth 2009:44; Griffiths 1998:613.

<sup>127</sup> Forsyth 2009:44.

<sup>128</sup> Fitzpatrick 1985:249.

<sup>129</sup> Fitzpatrick 1985:249.

<sup>130</sup> Griffiths 1986:5.

<sup>131</sup> Forsyth 2009:45.

between the multiple legal orders and their respective processes. These interlinkages are important conduits through which changes are conveyed.<sup>132</sup>

The third important contribution of legal pluralism is that it provides analytical tools for functional and pragmatic approach that bolsters adaptation and transformation of the plural legal orders through the influence of one over the other.<sup>133</sup> Legal pluralism allows different legal orders not only to continue to evolve and develop on the basis of their respective normative objective values but also lays down the foundation for the legal orders' mutual recognition, interconnection, interaction, interpenetration and overlapping. Contemporary model of legal pluralism thus preserves and respects cultural values and traditions of indigenous societies.<sup>134</sup> From this interaction and interpenetration, a new jural or legal space or product consistent with the constitutional normative value system – the *interlegality*<sup>135</sup> or *cross-fertilisation*<sup>136</sup> – develops or results. Von Benda-Beckman and Von Benda-Beckman have argued that, since transformation whose trends are bi-directional and not unidirectional is the integral part of legal pluralism, “under the conditions of legal pluralism elements of one legal order may change under the influence of another legal order, and new, hybrid, or syncretic legal forms may emerge and become institutionalised, replacing or modifying earlier legal forms”.<sup>137</sup> The processes of transformation and hybridisation “become the more multifaceted the more the law users and authorities primarily associated with one legal order concern themselves with the interpretation of other legal orders”.<sup>138</sup>

Hoekema defines interlegality as both the relational process and the outcome of that process. According to him, interlegality is a process of the adoption of elements of coexisting legal orders and “of the frameworks of meaning that constitutes these orders” as well as the outcome or the “hybridisation of the legal orders living together within one society or community”.<sup>139</sup> Santos states that out of the porosity and interpenetration of the multiple legal orders evolves “legal hybrids, that is, the legal entities or phenomena that mix different

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<sup>132</sup> Von Benda-Beckman and Von Benda-Beckman 2006:29.

<sup>133</sup> Forsyth 2009:45.

<sup>134</sup> Pimentel 2011:66; Degefa 2013:144.

<sup>135</sup> This is “the continual flow of legal perceptions, the dynamic force of pluralistic arrangement that reshapes state law to better accommodate the cultural distinctiveness of indigenous people”. See Svensson 2005:74.

<sup>136</sup> Van Niekerk 2008:219.

<sup>137</sup> Von Benda-Beckman and Von Benda-Beckman 2006:19.

<sup>138</sup> Von Benda-Beckman and Von Benda-Beckman 2006:20.

<sup>139</sup> Hoekema 2008:3-4.

and often contradictory legal orders or cultures, giving rise to new forms of legal meaning and action”.<sup>140</sup> Normative legal pluralism further shapes rules and procedures for judicial navigation of the interplay between the different legal contexts or systems, as well as how these contexts “*should* be related to each other”.<sup>141</sup> In its pursuit of appropriate and real solutions that take into account the interests of the stakeholders on multicultural basis, legal pluralist analysis therefore takes account of the complexities borne by pluralistic legal order<sup>142</sup> and uses legal pluralism as a program for the attainment of equality, for example.

Finally, since legal pluralism involves the interaction and interpenetration of two or more normative orders,<sup>143</sup> the role of the judicial system (the courts) in multiple legal orders, is to promote and facilitate dialogue and the diffusion of tension between the legal orders<sup>144</sup> taking into account the porous nature of these legal orders. The interlegality or relationship between coexisting legal orders may be relatively static or dynamic and may involve conflict and competition, peaceful coexistence, co-optation, cooperation, subordination, repression or destruction.<sup>145</sup> Perry confirms that the relationships between multiple legal orders “do not consist merely of conflict, rather, they are dialectic, mutually constitutive, fluid, and contested”.<sup>146</sup> According to Twining, who employs metaphorical terms to describe this relationship, the interaction of coexisting legal orders is “often more like that between waves or clouds or rivulets than between hard, stable entities like rocks or billiard balls”.<sup>147</sup> As Hoekema rightly points out, the “borders” of the coexisting legal orders are “fluid and porous”<sup>148</sup> and “pristine orders do not exist”.<sup>149</sup> Hoekema observes that the “crossing of borders, now almost a universal phenomenon, *makes legal orders and cultures more fluid than ever*”.<sup>150</sup> Santos argues that the porous nature of the boundaries of the multiple legal

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<sup>140</sup> Santos 2006:46.

<sup>141</sup> Eckes and Hollenberg 2013:241.

<sup>142</sup> Lesniewska and Pritchard 2011:5-6. A report by ClientEarth: Justice for the Planet entitled “Navigating Through Complex Legal Landscape: A Legal Compass for VPAs” is available online at <http://www.clientearth.org/reports/navigating-through-complex-legal-landscapes.pdf> (accessed 25 November 2015).

<sup>143</sup> Twining 2006:513.

<sup>144</sup> Juma 2002:502.

<sup>145</sup> Twining 2006:513.

<sup>146</sup> Perry 2011:74

<sup>147</sup> Twining 2006:513.

<sup>148</sup> Hoekema 2008:4.

<sup>149</sup> Hoekema 2008:5.

<sup>150</sup> Hoekema 2008:6. Emphasis in the original.

orders result in each legal order losing its “‘pure’, ‘autonomous’ identity and can only be defined in relation to the legal constellation of which it is a part”.<sup>151</sup> Sanders indicates that in Lesotho, “the indigenous law is already growing closer to the general law”.<sup>152</sup> The porosity of legal orders thus presents an opportunity for a critical judicial role in not only effectuating dialogue between the multifarious legal orders but also in the development and attainment of the “interlegality” that is consistent with the objective values of the Constitution.<sup>153</sup> As Paulus points out, the “multiplicity of legal orders requires not blindness, but dialogue”.<sup>154</sup> Such a dialogue facilitated by the courts is of critical importance in the context of Lesotho, as I shall indicate.

#### 4.3.2 The Constitution: recognition of customary law in Lesotho

Since coexisting legal orders within the same legal system usually do conflict, the important question is how to resolve this conflict in order to ensure a social order based on equality and justice. That question is usually resolved by reference to the manner in which a Constitution recognises or incorporates non-state legal orders such as customary law. As Onyango has rightly pointed out, “there is no other place in a legal system of a country in which we can tell the strength of the customary law other than the Constitution”.<sup>155</sup> The reason for this, according to the International Council on Human Rights Policy, is two-fold. Firstly, the Constitution outlines how far a recognised non-state legal order is subject to human rights norms. Secondly, the Constitution may “indicate how far the state has recognised the ‘laws’ or *outputs* of a non-state legal order, as well as the authority and autonomy of the *processes* by which the non-state legal order produces its laws”.<sup>156</sup> Thus, recognition or incorporation is a way through which a non-state legal order becomes part of the pluralised state legal system and involves questions as to normative content, jurisdiction, authority, adjudicative processes and enforcement of the decisions made within the non-state legal orders.<sup>157</sup> In recognising or incorporating the plurality of legal orders, the

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<sup>151</sup> Santos 2006:46.

<sup>152</sup> Sanders 1985:62.

<sup>153</sup> Ndulo 2011:92.

<sup>154</sup> Paulus 2010:136.

<sup>155</sup> Onyango 2013:73.

<sup>156</sup> International Council on Human Rights Policy (ICHRP) 2009:92. The report of the ICHRP entitled *When Legal Worlds Overlap: Human Rights, State and Non-State Law* is available online at <[http://www.ichrp.org/files/reports/50/135\\_report\\_en.pdf](http://www.ichrp.org/files/reports/50/135_report_en.pdf)> (accessed on 29 November 2015).

<sup>157</sup> ICHRP 2009:vii, 94-95.



Constitution attaches conditions as to the operation of such plurality.<sup>158</sup> It is in the operational detail of the recognition or incorporation that the coexisting legal orders may have negative or positive human rights outcomes.<sup>159</sup>

The Constitution recognises customary law as part of the law of Lesotho. The interpretation section of the Constitution defines “law” as including “the customary law of Lesotho”.<sup>160</sup> This means that any provision of the Constitution which prescribes certain conduct or conditions as being applicable to some law, applies equally to customary law. For instance, where in the Bill of Rights, certain human rights and freedom are limited by a provision of *law* and specific conditions are laid down for such a limitation, such conditions apply equally to customary law. Customary law is therefore subject to the Constitution and where it is inconsistent with the Constitution, it is void to the extent of that inconsistency.<sup>161</sup>

However, when it comes to the specific issue of discrimination, the Constitution does not only recognise the stronger autonomy of customary law but also lays down the evolutionary methodology on how such autonomy should ultimately be lost. While under the Constitution no law may make any provision that is discriminatory either in itself or in its effect,<sup>162</sup> the prohibition does not apply to a law that makes provision, among others, for “the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to it”.<sup>163</sup> For this reason, it has been argued that the Constitution “ring-fence customary law” so that customary law “is exempt from the scrutiny”.<sup>164</sup> Other commentators have concluded that section 18(4) of the Constitution excludes the application of customary law from non-discrimination clause<sup>165</sup> and therefore necessarily validates discriminatory laws that have some sort of customary law backing.<sup>166</sup> From a pluralist perspective, this is not strictly correct, as will be indicated below.

#### 4.3.3 Legal pluralism’s framework for attainment of equality in plural legal system of Lesotho: structured evolutionary methodology

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<sup>158</sup> ICHRP 2009:92.

<sup>159</sup> ICHRP 2009:93-97.

<sup>160</sup> The Constitution, 154(1).

<sup>161</sup> The Constitution, sec 2.

<sup>162</sup> The Constitution, sec 18(1).

<sup>163</sup> The Constitution, sec 18(4)(c).

<sup>164</sup> Banda 2006:17.

<sup>165</sup> Bond 2008:290.

<sup>166</sup> Juma 2013:177.

Courts play a central role in the resolution of the conflict between customary law and human rights norms and in the establishment of a functional relationship between plural legal orders.<sup>167</sup> On many occasions, the High Court and the Court of Appeal have interpreted non-discrimination and equality clauses of the Constitution. Resolving the issue of discrimination on the colonial model of legal pluralism, these Courts have treated section 18 of the Constitution in isolation.<sup>168</sup> They have showed their readiness to hold that discriminatory official customary law is constitutionally sanctioned by section 18(4) of the Constitution without discussing the critical question of the relationship, interaction and interpenetration of Lesotho's plural legal orders, especially that between customary law and the human rights norms (or the Constitution as a whole). On this approach, "all forms of discrimination, no matter how egregious, are protected once they are branded customary law".<sup>169</sup> The Court of Appeal has recently adopted that approach in the decision of *Senate v Senior Resident Magistrate*.<sup>170</sup>

Adopting a legal pluralist approach in succeeding paragraphs, I glean from the nature of the customary law and its recognition by the Constitution as well as other operational detail prescribed by the Constitution in dealing with the interaction and interpenetration of customary law and the Constitution, a framework that identifies "structuring elements of unity" between customary law and the Constitution. This is a functional and pragmatic methodology which does not only take into account important interlinkages between customary law and the Constitution but also an *evolutionary* one through which discriminatory aspects of customary law may be eliminated from customary normative order thus ensuring the establishment of gender equality and justice in Lesotho.

*Harmonious construction or interpretation of the Constitution.* The starting point is that the Constitution must be construed harmoniously in that all the relevant provisions bearing on the subject for interpretation must be considered together as a whole in order to reconcile them with one another and to give a coherent reading that promotes the central values, objectives and purpose of the Constitution.<sup>171</sup> As the German FCC rightly held, an individual

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<sup>167</sup> Lehnert 2005:242.

<sup>168</sup> See, however, *Attorney-General v Dow* 2001 AHRLR 99 (BwCA 1992):[33], [39], available online at <<http://www1.chr.up.ac.za/index.php/browse-by-country/botswana/1117-botswana-attorney-general-v-dow-2001-ahrlr-99-bwca-1992.html>> (accessed on 28 November 2015).

<sup>169</sup> Juma 2013:177-178.

<sup>170</sup> *Senate v Senior Resident Magistrate* 29/2013. This Court of Appeal decision is available online at <<http://www.lesotholii.org/ls/judgment/court-appeal/2014/22>> (accessed on 28 October 2015).

<sup>171</sup> *Dow* [25]. Also see *NM v Smith* 2007 5 SA 250 (CC):[203]-[204]; O'Connell 1999:51.

provision of the Constitution “cannot be considered as an isolated clause and interpreted alone. A [C]onstitution has an inner unity, and the meaning of any one part is linked to that of other provisions”.<sup>172</sup> Consequently, section 18(4) of the Constitution should not be interpreted in isolation but must be construed harmoniously with other relevant parts of the Constitution and should be given a meaning and application that does not lead to conflict with those other parts. The relevant parts of the Constitution include, among others, section 4(1) which guarantees rights and freedom on the basis of equality; section 18(8) which subordinate section 18 to the equality clause; the equality clause which provides for no public override limitations;<sup>173</sup> DPSP on equality and justice;<sup>174</sup> the constitutional definition of “customary law” in section 154(1) of the Constitution;<sup>175</sup> the fact that section 18(4) is excepted from entrenchment under section 85(3) of the Constitution; and the duty of the courts to construe customary law, as part of the existing laws, in conformity with the Constitution.<sup>176</sup>

*Evolutionary model for the elimination of discriminatory laws.* The Constitution does not entrench or ring-fence discrimination. On the contrary, the Constitution prescribes an *evolutionary* model for the elimination of discriminatory laws including discriminatory aspects of customary law and other personal status laws. The evolutionary model for the elimination of discriminatory laws is supported by historical accounts and the structure of the Constitution. Historically, the present section 18 of the Constitution appeared as section 17 of the 1966 Constitution. According to the Basutoland Council, the adoption of the 1966 Constitution would plainly affect the existing laws and *customs*, which, in many cases, would require modification and adaptation.<sup>177</sup> During the 1992 constitution-making process, the National Constitutional Commission adopted the 1966 Constitution as a working paper and considered constitutional reforms regarding section 17. The Commission, being of the opinion that “the objective to be pursued by Lesotho at the present moment is to build a society based on equality and which is free from discrimination”,<sup>178</sup> considered that

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<sup>172</sup> *Southwest State Case*, 1 BVerfGE 14, 32, (1951), cited in O’Connell 1999:51.

<sup>173</sup> The Constitution, sec 19. It has been argued that the absence of limitations on section 19 is based on “the desire to confer absolute equality of opportunity and treatment on all persons.” See Mosito 2014:1575.

<sup>174</sup> The Constitution, sec 26.

<sup>175</sup> See below.

<sup>176</sup> The Constitution, sec 156(1).

<sup>177</sup> Basutoland Council 1963:82.

<sup>178</sup> NCA 1992:32; also see Maope 2001-2004:399 (... there was agreement that discrimination must

discriminatory laws might be abolished by parliament and by permitting aggrieved persons to sue before the courts of law.<sup>179</sup> According to Maope, the Commission, which was faced with the “revolutionary”<sup>180</sup> and “evolutionary” models for the elimination of discriminatory laws, adopted the latter model.<sup>181</sup> The evolutionary model involves the identification, suppression and elimination of discriminatory laws by Parliament or by the judiciary on case-by-case basis.<sup>182</sup>

The evolutionary method for the elimination of discriminatory customary laws is also supported by the structure of the Constitution. Firstly, section 18(4) of the Constitution is specifically excepted from entrenchment in order to allow for the gradual removal of discriminatory laws by Parliament or the judiciary.<sup>183</sup> Secondly, Lesotho is obligated to adopt policies, which include judicial policies, aimed at promoting a society based on equality and justice for all citizens. These DPSPs are “markers of reasonableness” and “interpretive guides” for the courts in decision-making process.<sup>184</sup> The DPSP (in particular, section 26), together with section 156(1) of the Constitution, ground the judicial policy as part of public policy of Lesotho in eradicating discriminatory customary norms through modification, adaptation, qualification and development of customary law, in an effort to ensure gender equality.

Thirdly, section 18 of the Constitution is specifically subordinated to section 19 of the Constitution that guarantees equality and equal protection of the law.<sup>185</sup> Fourthly, section 18 of the Constitution is further subordinated to section 26 of the Constitution, which prescribes the taking of policies based on equality and justice.<sup>186</sup> Fifthly, by definition, customary law of Lesotho is “subject to any modification or other provision made in respect thereof by any Act

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be prohibited”.)

<sup>179</sup> NCA 1992:32-33.

<sup>180</sup> This involved the all-encompassing prohibition of discrimination without exception. See Maope 2001-2004:400.

<sup>181</sup> Maope 2001-2004:400.

<sup>182</sup> See Maope 2001-2004:400.

<sup>183</sup> See the Constitution, sec 85(3); Maope 2001-2004:401.

<sup>184</sup> See Bhatia’s unpublished article entitled “the directive principles of state policy: theory and practice” at <[https://www.academia.edu/8143348/Directive\\_Principles\\_of\\_State\\_Policy\\_Theory\\_and\\_Practice](https://www.academia.edu/8143348/Directive_Principles_of_State_Policy_Theory_and_Practice)> (accessed on 20 December 2015).

<sup>185</sup> See the Constitution, sec 18(8) (... the provision of [section 18] shall be without prejudice to the generality of section 19 of this Constitution.) Also see Acheampong 1993:103-104.

<sup>186</sup> The Constitution, sec 18(4), (the provision). Also see *Ts’epe*: [10].

of Parliament”.<sup>187</sup> By its nature, customary law is flexible and adaptable. It is subject to constant change, notwithstanding the “official” version of it.<sup>188</sup> It may also be modified by the judiciary or Parliament. Sixth, as part of the existing law, customary law should be construed by courts with such modifications, qualifications, adaptations and exceptions as to bring it into conformity with the Constitution.<sup>189</sup>

Finally, and most importantly, section 19 of the Constitution provides protection of equality in absolute terms.<sup>190</sup> Unlike other provisions that provide limitations to the protection of specified rights and freedoms, section 19 of the Constitution has no such limitations. The Constitution is clear that the specified limitations “as are contained in those [protective] provisions” are designed to ensure that no prejudice is occasioned on the rights of others or the public interest.<sup>191</sup> This means that the respective limitations are valid for the specific protective provisions under which they are subsumed. As the Botswana Court of Appeal stated concerning a Bill of Rights chapter similar to that of Lesotho, a close reading of the provisions of the Bill of Rights chapter discloses, “whenever a provision wishes to state an exception or limitation to a described right or freedom, it does so expressly in a form which is bold and clear”.<sup>192</sup> Just as a definition or a limitation that is only valid or is designed for a particular section of the Constitution may not be employed to limit another section,<sup>193</sup> a section 18(4) limitation of section 18(1) of the Constitution may not be employed to abridge section 19 of the Constitution. Therefore, a person approaching the courts because of section 19 of the Constitution should not be driven away empty handed with the answer that limitation or definition<sup>194</sup> that is only operative for section 18 of the Constitution allows that he or she should be treated unequally.<sup>195</sup>

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<sup>187</sup> The Constitution, sec 154(1).

<sup>188</sup> *Shilubana v Nwamitwa* 2008 2 SA 66 (CC):[54]; *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC):[52]-[53]. “Official” customary law is found in the “official” sources of that law such as *Laws of Lerotholi Code*, case law, textbooks and scholarly writings or government documents. See Grant 2006:13.

<sup>189</sup> The Constitution, sec 156(1).

<sup>190</sup> Mosito 2014:1575.

<sup>191</sup> The Constitution, sec 4(1).

<sup>192</sup> *Dow*:[68].

<sup>193</sup> See *Dow*:[66]. Barak<sub>1</sub> 2012:261; White and Ovey 2010:309.

<sup>194</sup> The definition of “discrimination” is valid only “in this section”, that is, section 18 of the Constitution. See the Constitution, sec 18(3).

<sup>195</sup> *Dow*:[67].

*The role of the courts in developing customary law based on equality and justice: the operational detail.* The evolutionary model provides a framework within which the courts, among others, play a critical role in eliminating discriminatory laws and creating a transformed society where equality and justice for the individuals are protected and promoted on a case-by-case basis. In fulfilling this duty, courts must adopt the following “operational” principles prescribed by the Constitution: Firstly, whenever the courts are faced with a constitutional challenge against customary law on the basis that it is discriminatory, the courts are constitutionally bound to modify and develop customary law in conformity with the equality clause of the Constitution.<sup>196</sup> Customary law, as part of existing law, is not excepted from this constitutional duty of the courts. Secondly, consistently with the whole scheme of the Constitution and the evolutionary model for the abolition of discriminatory law, the Constitution *only* prohibits the *direct* application of section 18(1) on customary law because direct application is disruptive and leaves the gap in private law.<sup>197</sup> This is the “legal chaos” the revolutionary technique was feared would create.<sup>198</sup> The courts must instead apply section 18(1) of the Constitution *indirectly* since this would allow them to develop customary law in conformity with the Constitution and to avoid the consequences, which are concomitant with direct application. As Amstutz rightly pointed out, the indirect application of the Bill of Rights does not only produce “*normative compatibilities*” but also triggers “*evolutionary formation of law*”.<sup>199</sup>

Thirdly, since section 18(4) of the Constitution which allows for the application of customary laws is a limitation to the non-discrimination clause,<sup>200</sup> such limitation must comply with section 4(1) of the Constitution. This section provides that limitations in the specific provisions of the Bill of Rights are “designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest”.<sup>201</sup> Both under the Constitution and customary law, no one has a right or

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<sup>196</sup> See the Constitution, sec 156(1).

<sup>197</sup> Du Bois 2012:112. Also see *Du Plessis v De Klerk* 1996 3 SA 850(CC):[53]. On the problems of direct horizontal application model, see chapter 2. However, there are opposing opinions on this issue. See Kumm 2006:352; also see *Barkhuizen v Napier* 2007 5 SA 323 (CC):[186].

<sup>198</sup> See Maope 2001-2004:400.

<sup>199</sup> Amstutz 2005:768-769. [Italics in the original].

<sup>200</sup> The Constitution, sec 18(1).

<sup>201</sup> See *Ramantele v Mmusi* CACGB-104-12 (BotwCA):[59]-[60], available online at <[http://www.africanlii.org/sites/default/files/Mmusi-Court-of-Appeal-Judgment\\_0.pdf](http://www.africanlii.org/sites/default/files/Mmusi-Court-of-Appeal-Judgment_0.pdf)> (accessed on 28 November 2015).

freedom which may be prejudiced by another's exercise of his [the latter's] freedom from discrimination or right to equality. The public interest that was protected by section 18(4) of the Constitution was never that gender inequality should continue to define and characterise the society. Allowing customary law limitation to section 18(1) of the Constitution was in stark realisation by the National Constitutional Commission that, while certain aspects of customs and laws were clearly discriminatory and unacceptable, a comprehensive or all-encompassing prohibition of discrimination (revolutionary method) was problematic as it would result in "legal chaos".<sup>202</sup> Thus, for a customary law rule to continue to have legal force notwithstanding its discriminatory normative content, it has to be established that its elimination from the legal order would still have the effect of creating the legal chaos that was apprehended in 1992.<sup>203</sup> Furthermore, it has to be established that such a rule is "reasonably justifiable in a democratic society".<sup>204</sup>

Fourthly, in order to achieve equality and justice, the courts must not compartmentalise Chapter II (fundamental human rights provisions) and Chapter III (DPSPs) into watertight compartments as they currently do.<sup>205</sup> Instead, they must establish a complementary and supplementary relationship between the Bill of Rights chapter and the DPSPs chapter. Notwithstanding the fact that they are non-justiciable,<sup>206</sup> the DPSPs are fundamental to the understanding and interpretation of the nature, content and ambit of the Bill of Rights provisions.<sup>207</sup> The Bill of Rights provisions under Chapter II of the Constitution are not an

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<sup>202</sup> Maope 2001-2004:399-400. Also see NCA 1992:31-33.

<sup>203</sup> However, a different view was taken by the Court of Appeal, which held that the issue of *prejudice to the public interest* is decided by the Constitution and not by construing the other law that is said to limit the concerned right or freedom. See *Senate*: [18]-[19]. This argument is clearly wrong. Suppose the issue that is involved is not prejudice to the public interest but *prejudice to the rights and freedoms of others*. Surely, that issue is not answered by the Constitution, but by the Court, taking into account the nature of the right, its legal pedigree, its limitation and the justification therefor. The Court would also have to balance the relevant competing rights.

<sup>204</sup> This test has been held to apply to all limitation provisions of the Bill of Rights. See *Mopa*: [33]. Also see Juma 2013:177-179.

<sup>205</sup> See *Khathang-Tema-Baitsökoli v Maseru City Council* LAC (2005-2005) 85: [15]-[28].

<sup>206</sup> See the Constitution, sec 25. Even if the DPSPs are not enforceable as such, an applicant should be allowed to rely on these directives, in particular section 26, to show that in a particular case he has been subjected to hostile discrimination. See *Daily Rated Casual Labour Employees v Union of India* 1988 (1) SCC 122: [7].

<sup>207</sup> *Mosito* 2014:1576-1577. Also see *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180:194.

end in themselves; they are a means to an end and that end has been specified in Chapter III (the DPSPs).<sup>208</sup> The DPSP on equality and justice enjoins Lesotho to adopt policies aimed at promoting a society based on equality and justice for all the citizens.<sup>209</sup> While this directive principle prescribes the goal of equality and justice for Lesotho, sections 18 and 19 of the Constitution set out an evolutionary technique for its attainment.<sup>210</sup> Thus, the courts must make DPSPs the integral part of their interpretation of sections 18 and 19 of the Constitution to ensure the implementation of DPSP prescribed under section 26 of the Constitution.<sup>211</sup> The mandate of the DPSPs is directed not only to Parliament and the Executive but also to the courts.<sup>212</sup> As Gangal correctly points out, “courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the [DPSPs]”.<sup>213</sup>

*Communalism is an unwritten constitutional principle of Lesotho.* The African customary concept of communalism is a fundamental underlying principle of the Constitution, which forms the very foundation and architecture of the Bill of Rights. Like underlying principles of the US,<sup>214</sup> Canadian<sup>215</sup> and Indian<sup>216</sup> Constitutions which play an essential role in balancing the constitutional text with the constitutional meaning,<sup>217</sup> the principle of communalism is central to the Bill of Rights and possesses a strong binding effect on the state organs including the courts in Lesotho. In a modern democratic constitutional order, unwritten constitutional principles “play an important function in fleshing out the spare, unadorned

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<sup>208</sup> See *Minerva Mills v Union of India* AIR 1980 SC 1789:1806-1807.

<sup>209</sup> The Constitution, sec 26.

<sup>210</sup> See *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461:[634].

<sup>211</sup> See Mosito 2014:1577; Gangal 2015:89.

<sup>212</sup> See the Constitution, sec 25. Also see *Ranjan Dwivedi v Union of India* AIR 1983 SC 624.

<sup>213</sup> Gangal 2015:91.

<sup>214</sup> The US unwritten constitutional principles are the separation of powers, the political question doctrine and the theory of judicial review. See Krishnamurthy 2009:232-233; Goldman 2003-2004:703; Davis 1978-1980:198. Also see *Marbury v Madison* 5 US (1 Cranch) 137 (1803):177.

<sup>215</sup> The Canadian unwritten constitutional principles are the rule of law, federalism, democracy, respect for minorities, judicial independence and the separation of powers. See Krishnamurthy 2009:208; Newman 2001:197; Mullan 2004:9; Mullan 2010:73; Leclair 2002:389; McLachlin 2006:147.

<sup>216</sup> The Indian unwritten constitutional principles are the rule of law, federalism, democracy, secularism and judicial independence. See Krishnamurthy 2009:208; Bulkan 2013:87-98.

<sup>217</sup> Newman 2001:215.



constitutional text”.<sup>218</sup> As the Canadian Supreme Court stated, the underlying constitutional principles “inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based”.<sup>219</sup> Secondly, constitutional principles are “invested with a powerful normative force”.<sup>220</sup> They infuse the Constitution and breathe life into it.<sup>221</sup> Thirdly, in constitutional adjudication, “courts must have regard to [these] unwritten fundamental postulates”<sup>222</sup> in not only “filling the gaps” but also in extending the “threads of existing fabric of the Constitution”.<sup>223</sup> Constitutional principles “assist in the interpretation of the text and the delineation ... of the scope of rights and obligations”.<sup>224</sup>

Since the observance of and respect for these principles is “essential to the ongoing process of constitutional development and evolution of [the] Constitution as a ‘living tree’”,<sup>225</sup> the employment by Lesotho courts of the principle of communalism in constitutional adjudication involving customary law would effectuate the evolutionary model’s elimination of discriminatory aspects of that law and the establishment of gender equality and justice in Lesotho. By its very nature, the concept of communalism excludes discrimination. As indicated above, communalism is a conglomerate of an array of values such as sharing of a common social life and social goods, commitment to the social or common good of the community, appreciation of mutual obligations, caring for others, interdependence, commonality, collective responsibility and solidarity.<sup>226</sup> These communal values, according to Igboin, are “the superintending ones in adjudication”.<sup>227</sup> The application of the constitutional principle of communalism provides judges “with a vital doctrinal resource with which to attack discriminatory and repressive customary practices, especially those that disadvantage or harm women or girls”.<sup>228</sup> Thus, a court’s decision based on this constitutional principle would, of necessity rearrange horizontal legal relationships, which exclude discriminatory treatment.

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<sup>218</sup> Krishnamurthy 2009:234.

<sup>219</sup> *Reference re Secession of Quebec* [1998] 2 SCR 217:[49].

<sup>220</sup> *Reference re Secession of Quebec*: [54].

<sup>221</sup> *Reference re Secession of Quebec*: [50].

<sup>222</sup> *Re Manitoba Language Rights* [1985] 1 SCR 721:752.

<sup>223</sup> Newman 2001:214.

<sup>224</sup> *Reference re Secession of Quebec*: [52].

<sup>225</sup> *Reference re Secession of Quebec*: [52].

<sup>226</sup> Gill 1993:49; Ambrose 1995:30-31,79; Juma 2011:98; Awoniyi 2015:8; Bá 1974:38-41; Cobbah 1987:320-324; Igboin 2011:98-101.

<sup>227</sup> Igboin 2011:100.

<sup>228</sup> Prempeh 2006:65.

## PART III

### 4.4 The role of constitutional jurisdiction in the constitutionalisation of private law

#### 4.4.1 Access to the constitutional jurisdiction: directly, indirectly, on referral or on appeal

It has been established, in chapter 3, that constitutional jurisdiction is not the preserve of the superior courts (the High Court and the Court of Appeal). It has been indicated that subordinate courts too have constitutional jurisdiction to determine any constitutional questions arising out of ordinary proceedings before them. However, it is important to note that before any court exercises its constitutional jurisdiction, that jurisdiction must be accessed, triggered or put in motion by the aggrieved party or parties to the dispute, and in some instances by the court of its own accord. Depending on the relevant court, access to the constitutional jurisdiction is either direct, indirect (incidental) or on appeal. Direct access to the constitutional jurisdiction of the High Court is facilitated by direct application in terms of sections 2 and 22 of the Constitution and the *Constitutional Litigation Rules 2000*.<sup>229</sup> Access to the constitutional jurisdiction of the Court of Appeal is through an appeal from the final decisions of the High Court.<sup>230</sup> Besides the direct access to the High Court and access to the Court of Appeal through the appeal process, access to the constitutional jurisdiction of the High Court and the subordinate courts may be indirect or incidental. This is the case where, in an ordinary case filed in the *ordinary jurisdiction* of the High Court or subordinate court, constitutional questions arise so that the case or part of it “assumes a constitutional dimension”.<sup>231</sup>

In view of the differences in points of entry into the constitutional jurisdiction through direct or indirect access, it is important to make the following points in relation to the discretion (or absence thereof) of the court which is sought to exercise such a jurisdiction. Firstly, no other court, except the High Court, may be accessed directly for the invalidation of any law that is considered inconsistent with the Constitution. The Constitution creates direct access only to the constitutional jurisdiction of High Court.<sup>232</sup> Secondly, once the constitutional jurisdiction of any court (including the High Court) has been accessed indirectly or incidentally, such a court has no discretion but is *obligated* to exercise such jurisdiction.

The obligation arises firstly, from the constitutional duty on those who perform public

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<sup>229</sup> See the Constitution, sec 22(1) and (2); *Constitutional Litigation Rules 194/2000*.

<sup>230</sup> The Constitution, sec 22(4), sec 128(2) and sec 129.

<sup>231</sup> *Mota v Director of Public Prosecutions* 473A/2013:[21].

<sup>232</sup> See the Constitution, sec 22(1) and (2).

functions (of which judges and judicial officers are) not to contravene the provisions of the Bill of Rights<sup>233</sup> and, secondly, by virtue of the constitutional duty and imperative to adapt, modify, qualify and develop the law in conformity with the Constitution.<sup>234</sup> As it was stated in *Carmichele v Minister of Safety and Security*, “where the common law deviates from the spirit, purport and objects of the Bill of Rights, the courts have *an obligation* to develop it by removing that deviation”.<sup>235</sup> Thirdly, once access to the constitutional jurisdiction of a court has been achieved, such court may apply the Bill of Rights directly (direct horizontal application) or indirectly (indirect horizontal application) to the impugned law (or conduct) in terms of section 4(2) of the Constitution.<sup>236</sup>

Finally, while direct access to the constitutional jurisdiction of the High Court (or access thereto on appeal in the case of the Court of Appeal) is guaranteed for anyone with the necessary *locus standi*,<sup>237</sup> the determination of the constitutional question by the High Court or Court of Appeal, as the case may be, is not mandatory”.<sup>238</sup> Consistent with the normative or adjudicative subsidiarity in terms of which a court is guided, within the context of normative pluralism of constitutional and non-constitutional norms, to prefer a choice and

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<sup>233</sup> See the Constitution, sec 4(2), sec 154(1) and sec 154(3). It is clear that once a party or parties to the proceedings raise constitutional questions and the person presiding does not determine and dispose of such a question, the rights of the party or parties raising that question will be infringed, in particular the right to a fair trial.

<sup>234</sup> See the Constitution, sec 156(1).

<sup>235</sup> *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC):[33]. Emphasis added. In *Thebus v S* 2003 6 SA 505 (CC):[32], it was held that a court “is obliged to adapt, or develop the common law in order to harmonise it with the constitutional norm”.

<sup>236</sup> Tushnet 2008:197. Indeed, section 4(2) of the Constitution does not discriminate between direct or indirect application of the Bill of Rights to the impugned law or conduct, but it has been stated that, because of the principle of avoidance (normative or adjudicative subsidiarity), indirect application, as “a default form of application”, is preferred to direct application. Currie and De Waal 2005:50-51; De Waal *et al* 1999:51. Direct application may be resorted to where indirect application is not able to provide the desired goals or remedies. See, for example, *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC):[69]-[70], [90]-[91].

<sup>237</sup> Not only section 22(1), but also sections 2 and 156(1) of the Constitution grant and regulate the issue of *locus standi*. See Linington 2012:68-71; Roach 1987:235-238; Roach 2013:490-493; Loots 1998:10-12; *Judicial Officers’ Association v Prime Minister* Constitutional Case 3/2005; *R v Big M Drug Mart* [1985] 1 SCR 295:312-316; *R v Ferguson* [2008] 1 SCR 96:[59]; *Hy & Zel v Antorio* [1993] 3 SCR 675:688-694; *Canada v Downtown Eastside Sex Workers United Against Violence Society* [2012] 2 SCR 524:[2]-[3], [18]-[51].

<sup>238</sup> Palmer and Poulter 1972:350.

application of the latter to the former, the Constitution confers on the High Court during direct constitutional review, to avoid deciding the case on constitutional basis. In making a preference, the High Court is guided by a number of considerations including what would be the result of the case when constitutional or non-constitutional norms are applied in that case.<sup>239</sup> Where the ordinary jurisdiction of the High Court<sup>240</sup> would bear a result or redress, which is consistent with the constitutional enforcement and protection of the human rights or freedom concerned, the High Court may avoid the constitutional question.<sup>241</sup> To this end, the Constitution provides that the High Court “may decline to exercise its powers” under section 22(2) of the Constitution “if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law”.<sup>242</sup> There are circumstances where the High Court will not avoid its constitutional jurisdiction. As Currie and De Waal point out:

Where the violation of the Constitution is clear and directly relevant to the matter, and there is no apparent alternative for ordinary relief, it is not necessary to waste time and effort by seeking a non-constitutional way of resolving a dispute. This will often be the case when the constitutionality of a statutory provision is placed in dispute because, apart from a reading down, there are no other remedies available to a litigant affected by the provision.<sup>243</sup>

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<sup>239</sup> *Sekoati v President, Court-Martial* LAC (1995-1999) 812:820-821; *Khalapa v Commissioner of Police* LAC (2000-2004) 151; *Sole v Cullinan* LAC (2000-2004) 572:594. In *S v Mhlungu* 1995 3 SA 867 (CC):[59], the South African Constitutional Court regarded it as a salutary principle that “where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed”. Also see *Kauesa v Minister of Home Affairs* 1995 1 SA 51 (NmS); *Zantsi v Council of State* 1995 4 SA 615 (CC); *Amod v Multilateral Motor vehicle Accidents Fund* 1998 4 SA 753 (CC); *Van Rooyen v S* 2002 5 SA 246 (CC); Currie 1999:138; Currie and De Waal 2005:75-78.

<sup>240</sup> This will also apply to the constitutional jurisdiction of subordinate courts.

<sup>241</sup> The Constitution, sec 22(2), the proviso.

<sup>242</sup> The Constitution, sec 22(2), the proviso. See Palmer and Poulter 1972:351-352. Currie and De Waal (2005:78, 93-94) opine, “when the interest of an applicant in the resolution of a constitutional issue is not clear, and where the issue is not ripe for decision or when it has become academic or moot”, the principle of avoiding constitutional issues becomes relevant. The court may refuse to determine a case which is too early (not ripe) or a matter which is too late (moot).

<sup>243</sup> Currie and De Waal 2005:78. Palmer and Poulter (1972:351) identify novelty of the constitutional question, clarity of the jurisprudence, the size of both dockets, fair distribution of labour within the courts, unfair delays to the other party, and perhaps most importantly, the High Court’s confidence in the *subordinate court’s capacity to make the correct constitutional judgment*, as factors that the High Court may consider in deciding to invoke its constitutional jurisdiction.

#### 4.4.2 Constitutional jurisdiction: determining the *legality* and *legitimacy* of laws and conduct

##### 4.4.2.1 Normative pluralism and hierarchy and the supremacy of the Constitution

Lesotho's legal order consists of a plurality or aggregate of norms consisting of customary rules and principles, administrative rules and regulations, judicial decisions, subsidiary legislation and primary legislation as well as constitutional norms. According to Kelsen, this plurality of norms becomes an order if the norms constitute a unity, "and they constitute a unity if they have the same basis of validity".<sup>244</sup> Kelsen continues to point out that the higher norm serves as the basis for the validity of all the lower norms that together form a normative hierarchy.<sup>245</sup> Thus, Kelsen concludes a legal order is not a plurality of valid norms on the same plane but rather a hierarchical structure of superior and subordinate norms, with the superior or higher norm regulating in varying degrees the content of the lower or subordinate norms.<sup>246</sup>

In a similar manner, all legal norms within Lesotho's legal order derive their substantive, procedural, spatial and temporal validity from the Constitution, which is the highest or supreme law and "if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, [is] void".<sup>247</sup> Thus, the *constitutional law-private law* relationship is that of a hierarchy in which private law occupies a lower level of the order. The Constitution is not only the validating norm, but also recognises pre-constitution existing laws and authorises their legal force and effect's continuity in the new legal order subject to their conformity with the Constitution.<sup>248</sup>

This applies to customary law as well.<sup>249</sup> While the colonial administration marginalised the customary law and left it as a self-sufficient legal system which was viewed through the repugnancy lenses only where it mattered to the colonisers,<sup>250</sup> the Constitution ushered in a paradigm shift and put the customary law and common law on equal footing and subjected both systems of law to the same constitutional standards. As Barak points out, "a sub-

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<sup>244</sup> Kelsen 1982:64.

<sup>245</sup> Kelsen 1982:65-66.

<sup>246</sup> Kelsen 1982:69-70.

<sup>247</sup> The Constitution, sec 2.

<sup>248</sup> The Constitution, sec 156(1); also see Saha 2010:45; *Thebus*:[24].

<sup>249</sup> *Thebus*:[31]-[32]; *Du Plessis*:[136]; *Sunday Times v United Kingdom* [1979] ECHR 1:[47]; Barak, 2012:118-127.

<sup>250</sup> See, for example, *Du Plessis*:[172]; *Gumede v President* 2009 3 BCLR 243 (CC):[20].

constitutional law” is constitutional only if it is proportional by constitutional standards.<sup>251</sup> The authority of private law (common law and customary) to limit constitutional rights as well as protect it should be found within the Constitution itself and such a limitation, like the statutory limitation, must be assessed on legality and proportionality (legitimacy) bases.<sup>252</sup> The Constitution is not only the primary source of customary law and the common law; it is the source of their validity and validation.<sup>253</sup> It recognises the customary law as a living system of law<sup>254</sup> and imposes obligations for its modification, adaptation and development.<sup>255</sup> Thus, the Constitution views customary law as an integral (or integrated) part of the constitutional order and system with which the customary law, like any other law, must comply.<sup>256</sup> Customary law must give way and allow to be influenced by the Bill of Rights<sup>257</sup> according to the evolutionary model prescribed by the Constitution.

What is stated here about *normative* pluralism does not detract in any way from the discussion of *legal* pluralism above. By integration, I do not mean uniformisation of customary law, common law, statutory law and constitutional law. Allott defines *integration* as “the making of a new legal system by the combining of separate legal systems into a self-consistent whole”.<sup>258</sup> According to him, “the legal systems thus combined may still retain a life of their own as sources of rules, but they cease to be self-sufficient autonomous systems”.<sup>259</sup> Typical of an integrated system, Allott concludes, “will be an outline law which regulates all transactions or relations of a specific type”.<sup>260</sup> Thus, legal integration requires the hierarchy of legal norms in which other norms are invalid if they conflict with the supreme

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<sup>251</sup> Barak<sub>1</sub> 2012:123-124. According to Alder (2002:419), “human rights disputes require the decision maker to decide the limits of a law in the sense of the extent to which a right should be sacrificed to some important public goal.” Also see *Sporrong v Sweden* 1982 5 EHRR 35:52; *Gough v Chief Constable* [2001] 4 All ER 289:320

<sup>252</sup> Barak<sub>1</sub> 2012:121-123.

<sup>253</sup> The Constitution, sec 2; sec 156(1). Also see *Bhe v Magistrate Khayelitsha* 2005 1 SA 580 (CC):[46].

<sup>254</sup> The Constitution, sec 154(1) (“customary law”).

<sup>255</sup> The Constitution, sec 156(1).

<sup>256</sup> *Bhe*:[139]; *Pharmaceutical Manufacturers Association: Ex Parte President of RSA* 2000 2 SA 674 (CC):[49].

<sup>257</sup> Bennett 2011:3; Bennett 2014:196.

<sup>258</sup> Allott 1965:377; Rautenbach 2008:6.

<sup>259</sup> Allott 1965:377.

<sup>260</sup> Allott 1965:377.

norm or law.<sup>261</sup>

In the final analysis, the whole array of the constitutional values and normative system apply to the customary law. Public safety and security, public order, public morality, the defence of the community, public health and the protection of individual rights and freedoms have been the concerns and are also regulated by customary law. To the extent that customary law is shown to regulate these interests, it is subject to the same constitutional standards as any other law where the rights and freedoms of private actors are allegedly contravened thereby.

#### 4.4.2.2 Determining the legality and legitimacy of laws and conduct

Since the Constitution may not supervise its own normative compliance, certain institutions are charged with the responsibility of ensuring compliance and conformity with the Constitution, thus upholding its supremacy or primacy. While there are various institutions in Lesotho with this kind of mandate,<sup>262</sup> in this study the focus is on the role of the courts in the determination of the constitutionality of private-law norms through the exercise of constitutional jurisdiction. It is the primary role of these courts to determine the substantive, procedural, temporal and spatial validity of the norms through an interpretative process of mediating and resolving normative conflicts.<sup>263</sup> However, what exactly *should*<sup>264</sup> the courts be scrutinizing when they determine the constitutional validity of legal norms?

What is clear is that, firstly, in a constitutional democracy, “a constitutional right cannot be limited unless such limitation is authorised by law”<sup>265</sup> which in turn derives its validity from the higher norm in the normative hierarchy, and ultimately from the Constitution.<sup>266</sup> Thus,

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<sup>261</sup> Cappelletti 1989:313.

<sup>262</sup> For example, the Ombudsman (see the Constitution, Chapter XII); the Human Rights Commission (see the Constitution, Chapter XIA, *Sixth Amendment to the Constitution Act 13/2011*); the Attorney General (see, the Constitution, sec 98(2)(c). See, however, *Attorney General v His Majesty the King 13/2015:[47]-[55]*).

<sup>263</sup> *Marbury*:177-178.

<sup>264</sup> The use of “should” is indicative of the background of this study where presently the subordinate courts do not exercise, or are excluded from exercising, any constitutional jurisdiction.

<sup>265</sup> Barak<sub>1</sub> 2012:107. *Oakes*:[62]; *Mopa*:439. According to Barak<sub>1</sub> (2012:109), all legal norms within the hierarchy, regardless of their “distance” from the Constitution, must ultimately be connected to the authorisation from the Constitution. Also see *Committee for the Commonwealth v Canada* [1991] 1 SCR 139 where internal government directives infringing a guaranteed freedom of speech were considered not to constitute “law”.

<sup>266</sup> *Pharmaceutical Manufacturers Association*:[43]-[49].

every measure (law or conduct) must have a constitutional legal pedigree in that its authority must be traceable back to a valid legal norm and ultimately to the Constitution. This is what Barak calls the *authorisation chain*.<sup>267</sup> If such a measure cannot be connected to the higher legal norm, or, as Barak states, if “a break in the authorisation chain” exists, the measure would not have the necessary legal authority and would be unconstitutional.<sup>268</sup> Secondly, constitutional review involves matching the constitutional norm against a non-constitutional norm with the view of finding out whether the latter fits the requirements of legality and legitimacy set out by former.<sup>269</sup> This is the content of constitutional review and is predicated, as Van der Schyff points out, on the fact that:

Norms of higher law govern the legality as well as the legitimacy of lower norms. This means that higher law dictates not only the formal coming about of legal norms, the aspect of legality, but also whether the content of such norms is legitimate when measured against fundamental rights.<sup>270</sup>

#### 4.4.2.2.1 The legality of laws

Legality relates to the question whether the impugned law is in fact law. According to Van der Schyff, the purpose of legality is to check whether a norm that purports to be law is in fact law in that, in the case of a legislative enactment, it was properly adopted following the established legislative processes, procedures and requirements.<sup>271</sup> According to Barak, non-compliance with the formal or procedural requirements causes a break in the authorisation chain, which leads to the invalidity of the law.<sup>272</sup> In Lesotho, “nothing contained in or done under the authority of any law” providing for public overrides “shall be held to be inconsistent with” the guaranteed right or freedom. Thus, any limitation of a guaranteed right or freedom requires the authority of law to be a constitutionally permissible limitation. The definition of “law” in the phrase “*authority of any law*” in all public override clauses of the Bill of Rights has received a narrow interpretation such that “only those limits on guaranteed rights which

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<sup>267</sup> Barak, 2012:107-108.

<sup>268</sup> Barak, 2012:107,111.

<sup>269</sup> Van de Schyff 2010:107.

<sup>270</sup> Van der Schyff 2010:6.

<sup>271</sup> Van der Schyff 2010:135; Van der Walt 2012:27; Matheson 1987:209-210; also see *Attorney General v Swissborough Diamond Mines* LAC (1995-1999) 214:228-231; *Mabetha v Mabetha* 40/2009:[31]-[33]; *Law Society v Minister of Defence and Internal Security* [1988] LRC 226 (Const):236-239; *Re Manitoba Language Rights*:746-747.

<sup>272</sup> Barak, 2012:111.



have survived the rigours of the law-making process are effective”.<sup>273</sup> The essential qualities of such “law”, to pass as law or a legal norm, include general applicability,<sup>274</sup> accessibility,<sup>275</sup> clarity and precision,<sup>276</sup> intelligibility and predictability (or foreseeability)<sup>277</sup> which qualities are based on the general principle of the rule of law.<sup>278</sup>

Although it is rare in the constitutional adjudication in Lesotho that the laws (or conduct) are attacked at the level of legality,<sup>279</sup> it is important, however, to note that, since Lesotho’s Bill of Rights substantive provisions are modelled after the ECHR,<sup>280</sup> the Strasbourg jurisprudence is of critical importance in the determination of the legality of laws based on the interpretation and meaning of “authority of any law”.<sup>281</sup> Defining an equivalent expression, the ECtHR stated that the phrase “prescribed by law” entails, firstly, that the law “must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case”.<sup>282</sup> Secondly, a norm cannot be regarded as a law “unless it is formulated with sufficient precision to enable the citizen to regulate his conduct”.<sup>283</sup> This means that a citizen “must be able – if need be

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<sup>273</sup> *McKinney v University of Guelph* (1991) 76 DLR (4th) 545:604; also see *Seeiso v Minister of Home Affairs* LAC (1990-1994) 665:681.

<sup>274</sup> A provision of the law, which does not apply generally, but singles out certain persons, may not pass a legality muster. See *Van der Walt* 2012:27-28; *Swissborough*:224; *United States v Lovett* 328 US 303 (1946):428; *President of Republic of South Africa v Hugo* 1997 4 SA 1 (CC):[102].

<sup>275</sup> *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC):[47]. The element of publication of the law “penetrates deep into the kingdom of the rule of law ... as steeped in the fundamental values of society and of the individual.” See *State of Israel v Klein* [1994] IsrSC 48(3) 485:515. Also see *Hugo*:[102]; *Committee for the Commonwealth v Canada* [1991] 1 SCR 139.

<sup>276</sup> *Swissborough*:204; *Hugo*:[102]; *Dawood*:[47]; *Sunday Times*:[49]; *Osborne v Canada* [1991] 2 SCR 69:94-95; *Barak*<sub>1</sub> 2012:116.

<sup>277</sup> *Sunday Times*:[49].

<sup>278</sup> *Swissborough*:224-225; *Re Manitoba Language Rights*:747-749; *Mohamed* 1989:2-3; *Barak*<sub>1</sub> 2012:108; *Van der Schyff* 2010:135-137; *Greer* 1997:10-13; *Keating* 1993:35-36; *Sales and Ekins* 2011:219.”

<sup>279</sup> See, for example, *Khathang-Tema-Baits’okoli*:[11]-[12].

<sup>280</sup> *Roberts-Wray* 1968:916; *Mopa*:435.

<sup>281</sup> The expressions “provision of law”, “prescribed by law”, “authorised by law”, “in accordance with law” and cognate expressions refer to a law whose *qualities* are “compatible with the rule of law”. See *Malone v United Kingdom* [1984] ECHR 10:[66]-[67]; *Huvig v France* (1990) 12 EHRR 528:[29].

<sup>282</sup> *Sunday Times*:[49].

<sup>283</sup> *Sunday Times*:[49].

with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.<sup>284</sup>

So, in order to pass the legality muster, any provision of “law” must first be able to go through the four-question threshold analysis: Does the legal system sanction the infraction?<sup>285</sup> Is the relevant legal provision accessible to the citizen? Is the legal provision sufficiently precise to enable the citizen reasonably to foresee the consequences a given action may entail? Does the law provide adequate safeguards against arbitrary interference with the respective substantive rights?<sup>286</sup> The High Court’s decision in *Moletsane v Attorney General* is a *locus classicus* not only of assuming constitutional jurisdiction during ordinary proceedings before the High Court, but also in testing the legality of a measure that purports to be “law” (*Selected Development Area Legal Notice*) on the basis of a law (*Land Act 1979*) which is higher in the normative hierarchy.<sup>287</sup> The case involved a declaration of applicants’ landed properties as Selected Development Area (SDA) by the Minister in terms of the *Land Act 1979*, the removal or demolition of applicants’ houses and consequential criminal charges being enforced against the applicants to force them out of the alleged SDA.<sup>288</sup> The High Court tested, correctly in my view, the legality of the *SDA Legal Notice* on the basis that “the purpose is not specified and the properties affected have not been identified at all” by the said *Legal Notice*.<sup>289</sup>

In the High Court’s view, for a Legal Notice to affect an individual in his property, “it has to specifically and individually mention the property affected in the legal instrument”<sup>290</sup> and should be preceded by the necessary notification, consultation and cooperation.<sup>291</sup> According to the High Court, the notification, consultation and cooperation are “the principles ... that are now part and parcel of the [SDA] schemes according to law”<sup>292</sup> and are “in full

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<sup>284</sup> *Sunday Times*: [49].

<sup>285</sup> See Greer 1997:10; also see *Seeiso*:679-681.

<sup>286</sup> See Greer 1997:10-13; *Huvig*: [29]; *Sunday Times*: [49].

<sup>287</sup> *Moletsane v Attorney General* 163/2001 (by Maqutu J on 18 October 2004) is available online at <<http://www.lesotholii.org/ls/judgment/high-court/2004/123>> (accessed on 20 July 2015).

<sup>288</sup> See *Land Act 17/1979*, sec 44.

<sup>289</sup> *Moletsane* (HC):19, 68.

<sup>290</sup> *Moletsane* (HC):20, 68.

<sup>291</sup> *Moletsane* (HC):68.

<sup>292</sup> *Moletsane* (HC):21; also see *Pages Stores v Lesotho Agricultural Development Bank LAC* (1990-1994) 51:62-69.

accord with Basotho custom and current practice”<sup>293</sup> which is underpinned by “fairness”.<sup>294</sup> Any SDA declarations by the Minister “must follow the procedure outlined in empowering legislation” and the power to make those declarations “must by law be used for the purpose and according to procedures laid down in the *Land Act 1979*”, the ministerial discretion granted under the law must be exercised “according to that law”, “should not be abused” and the “due process of law should be followed”.<sup>295</sup> In other words, the purpose of the declaration and the identification of the property to be declared as SDA are not only the preconditions and jurisdictional requirements of the exercise of discretion and, by extension, of any *SDA Legal Notice* but should also be specifically and clearly stated in the *SDA Legal Notice* so that the Court may “determine whether the *threshold requirements* for declaring it have been met”.<sup>296</sup>

By a resolute posture characteristic of a judiciary determined to defend and protect not only the rights and freedoms of the subjects and the rule of law but also “the liberal European democracy that Lesotho has inherited from Britain”,<sup>297</sup> the High Court found that the *SDA Legal Notice* and conduct of the Ministry from planning to declaration of the properties as SDA violated the applicants’ constitutional freedom from arbitrary seizure of property entrenched by the Constitution.<sup>298</sup> The High Court ultimately granted the interdict against the respondents “from removing or demolishing the houses of applicants” and declared the *SDA Legal Notice* “null and void for failure to comply with the ... requirements” stated above.<sup>299</sup> It is clear that according to the High Court, the *SDA Legal Notice* was not only lacking in its procedural aspects leading up to its adoption so that it can be said there was a break in the authorisation chain between it and the *Land Act 1979* but was also wanting in its substantive qualities of *clarity* and *intelligibility* with the result that the applicants’ constitutional property rights were left at the whim and caprice of the executive or administrative “flippant arbitrary interference and convenience”.<sup>300</sup>

It is crucial to note at this point that this case was lodged in the High Court in its ordinary civil jurisdiction. The importance of this decision lies, firstly, in the fact that when the

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<sup>293</sup> *Moletsane* (HC):21.

<sup>294</sup> *Moletsane* (HC):28-30.

<sup>295</sup> *Moletsane* (HC):37-38, 48, 52.

<sup>296</sup> *Moletsane* (HC):53, 55-56, 63.

<sup>297</sup> See *Moletsane* (HC):63. Also see *Swissborough*:214.

<sup>298</sup> *Moletsane* (HC):69. See the Constitution, sec 17.

<sup>299</sup> *Moletsane* (HC):72-73.

<sup>300</sup> *Moletsane* (HC):36.

constitutional question arose in the ordinary proceedings, the High Court invoked its constitutional jurisdiction to determine the legality of the *SDA Legal Notice* without the need for the amendment of the Notice of Motion,<sup>301</sup> and without the need of having to send the parties to another forum called “the Constitutional Court” for the determination of the very same constitutional question. Furthermore, it is clear that the very same constitutional question was fundamental and dispositive of the case and to have denied the applicants their constitutional right to raise it in those ordinary proceedings would have resulted in the High Court probably relying on otherwise unconstitutional *SDA Legal Notice* in upholding the executive infraction of applicants’ entrenched property rights.<sup>302</sup>

#### 4.4.2.2.2 The legitimacy of laws

In a constitutional democracy, the test of legality alone is not sufficient; constitutional democracy, Barak states, requires, in addition to legality, “a justification for the limitation on the constitutional right to be valid. In other words, the legitimacy component is required”.<sup>303</sup> According to Barak, this legitimacy review (the proportionality test) is made up of four components: *proper purpose*, *rational connection*, *necessity* and *balancing*.<sup>304</sup> By their very nature, these four components depict that the legitimacy review is concerned with the value system not limited to the impugned law itself.<sup>305</sup> These values are foundations of the entire legal order and to which the impugned law (or provision of the law) or conduct is subordinate.<sup>306</sup> In the context of Lesotho, the values that have been identified earlier as underlying the Fourth Kingdom Lesotho provide a backdrop against which the impugned law is measured. As Barak observes, “the purposes that justify limitations on human rights are

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<sup>301</sup> The High Court had rejected an application for amendment of the Notice of Motion to include the prayer for a declaration of the *SDA Legal Notice* as invalid, but that did not deter the Court in deciding the matter on constitutional grounds.

<sup>302</sup> Unfortunately, the Court of Appeal, following its segregationist approach where constitutional jurisdiction is separated from ordinary jurisdiction, reversed the High Court decision. See *Attorney General v Moletsane* LAC (2005-2006) 146:148-149,155.

<sup>303</sup> Barak<sub>1</sub> 2012:245.

<sup>304</sup> Barak<sub>1</sub> 2012:245,340.

<sup>305</sup> Van der Schyff 2010:137.

<sup>306</sup> According to Poole (2005:714), “what is often at issue in legitimacy disputes ... is whether the challenged rule or decision accords with some other rule or norm itself considered authoritative”. Fallon argues that legitimacy analysis invites an appeal to three kinds of interconnected criteria or standards that support the concept of legitimacy: legal, sociological and moral. See Fallon 2005:1794.

derived from the values on which society is founded”.<sup>307</sup>

The legitimacy assessment is carried out at the limitation/justification stage of constitutional adjudication.<sup>308</sup> It is at this stage that the law which has passed the legality muster should be subjected to a four-pronged legitimacy analysis (proportionality test), a process which involves “the weighing up of competing values and ultimately assessment based on proportionality ... which calls for the balancing of different interests”.<sup>309</sup> As indicated above, the first component of the proportionality test relates to the *proper purpose* of the impugned law. The focus of the enquiry here is the proper purpose of the impugned law and not its consequences, and the purpose will be proper if in the constitutional democracy such purpose is recognised as one of the legitimate grounds for limiting a constitutional right.<sup>310</sup> In the context of Lesotho, where each Bill of Rights provision expressly specifies what public interest or purposes may justify the limitation of the relevant right or freedom, it will be unconstitutional limitation if the law seeks to limit such a right or freedom for an interest or purpose not therein identified and specified. As Barak points out, “the list of express purposes therein is exhaustive, and no other implied purposes should be deduced or added to the list”.<sup>311</sup>

If the impugned law is “legitimate” in the sense that its *purpose* is proper, that is not the end of the matter, as the second component of legitimacy analysis is only then being triggered; whether the legitimate purpose of a law is achieved in a legitimate way. This is an enquiry into the *rational connection* between the legitimate purpose and the means adopted by that law in advancing or realising the stated proper purpose.<sup>312</sup> Here, the rational connection threshold test rules out instances where a law limits the constitutional right without advancing the purposes it is designed to achieve.<sup>313</sup>

The third component of the proportionality test of the legitimacy analysis is *necessity*. This involves the determination whether the proper purpose of the impugned law is not attainable

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<sup>307</sup> Barak<sub>1</sub> 2012:245.

<sup>308</sup> *Mota*:439-440.

<sup>309</sup> *S v Makwanyane* 1995 3 SA 391 (CC):[104]; *Ts’epe*:181-182.

<sup>310</sup> Barak<sub>1</sub> 2012:246-247; Barak<sub>2</sub> 2012:743; Van der Schyff 2010:138. A law will have a proper purpose if, for example, it is intended to protect other rights or freedoms or public interest. See the Constitution, sec 4(1) and public overrides clauses in the Bill of Rights. A law’s purpose could not be identified in *Minister of Labour and Employment v Ts’eua* LAC (2007-2008) 289:[12]-[15].

<sup>311</sup> Barak<sub>1</sub> 2012:261; also see White and Ovey 2010:309.

<sup>312</sup> Barak<sub>2</sub> 2012:743; Van der Schyff 2010:138.

<sup>313</sup> Barak<sub>1</sub> 2012:315.

by means less invasive or restrictive of the protected right or freedom.<sup>314</sup> Thus, if alternative means which are less restrictive of the protected right or freedom exist, the impugned law will be held to be unnecessary. According to Barak, “the necessity test requires that the means selected by the law be tailored to realizing the proper purpose”, so that “one ‘cannot shoot a sparrow with a canon’”.<sup>315</sup> The final component of the proportionality test of the legitimacy analysis relates to the proportionality *strict sensu* or balancing. This test requires a proper relationship between the social benefit of realizing the proper purpose of the impugned law and the social benefit of avoiding the limitation of the protected right or freedom, and involves the examination of the relationship between the law’s purpose and the protected right or freedom that is affected.<sup>316</sup>

#### 4.4.2.2.3 The legality and legitimacy of private law: an overview

The above principles apply equally to the common law (or private law, including customary law) as the common law’s authority to limit or to protect the constitutional right is found in the Constitution itself, in particular, the limitation clauses.<sup>317</sup> A limitation of a right or freedom must be by a *provision of “law”* which term includes common (or private) law.<sup>318</sup> In *Sunday Times v United Kingdom*, where the question was whether the common-law contempt of court infringed the freedom of expression under the ECHR, the ECtHR held that the word “law” in the expression “prescribed by law” “covers not only statute but also unwritten law”.<sup>319</sup> Accordingly, the ECtHR continued, “the Court does not attach importance here to the fact that contempt of court is a creature of the common law and not of legislation”.<sup>320</sup> Barak argues that since common law is a “state action” just as legislation is, and that both common law and legislation may affect the constitutional rights of individuals, their constitutionality therefore must be decided according to the limitation clauses.<sup>321</sup> Thus, both legislation and common law must pass the legality and legitimacy (proportionality) musters.<sup>322</sup>

In the final analysis, three conclusions can be made about the legality and legitimacy

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<sup>314</sup> Barak<sub>2</sub> 2012:744;

<sup>315</sup> Barak<sub>2</sub> 2012:744.

<sup>316</sup> Barak<sub>2</sub> 2012:744.

<sup>317</sup> Barak<sub>1</sub> 2012: 120-121.

<sup>318</sup> The Constitution, sec 154(1) (“law”).

<sup>319</sup> *Sunday Times*: [47].

<sup>320</sup> *Sunday Times* [47]; Also see the Constitution, sec 154(1); *British Columbia Government Employees’ Union v British Columbia* [1988] 2 SCR 214:243-249; *Du Plessis*: [136].

<sup>321</sup> Barak<sub>1</sub> 2012:123.

<sup>322</sup> Barak<sub>1</sub> 2012:123-124.

requirements. Firstly, a *provision of law* or thing done under the authority thereof (conduct), can only be said to be *necessary in a practical sense in a democratic society*, and therefore constitutes a justifiable limitation of an entrenched fundamental right or freedom, where such law or conduct has passed both the legality and legitimacy tests. If such law or conduct fails to pass any of these threshold tests (or any component thereof), it would fail to be law or to have the authority of law, or if law or have the authority of law because it would have passed legality threshold, it would fail to be legitimate and would therefore be unconstitutional.<sup>323</sup>

Secondly, and as a corollary to the first point, legality and legitimacy requirements are essential elements of the limitation/justification enquiry or analysis in constitutional adjudication. Legality analysis, as the starting point for any permissible limitation of a guaranteed right or freedom, precedes and is a pre-condition for a legitimacy analysis. Thus, the legitimacy analysis can only be embarked upon if the limitation of such a right or freedom has been “authorised” or is traceable back to a provision of *law*, that is, a *legal norm*.<sup>324</sup> Where, however, the measure fails the legality analysis, that would be the end of the case, and there would be no need to enquire into the legitimacy of the measure.<sup>325</sup> As Barak points out, “if the legality requirements are not satisfied, there is no need – and no reason – to examine the proportionality issue”<sup>326</sup> because “when no legal authority exists to limit a constitutional right, the proportionality of such a limitation is not at issue”.<sup>327</sup> Finally, legality and legitimacy requirements or determinations do not only reinforce observance of the normative hierarchy within a legal system, the rule of law and the upholding of the supremacy of the Constitution; the threshold analysis of legality and legitimacy embodies the methodologies for effectuating or realising the horizontal effect of constitutional values on private law as will be demonstrated below.

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<sup>323</sup> See for example, *Ts’euoa* LAC (2007-2008) 289:296.

<sup>324</sup> See, however, *R v Lucas* [1998] 1 SCR 439:[39], *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606:627 and *Hugo*:[104] for a suggestion that a legality analysis may be dealt with within the legitimacy enquiry. On a closer analysis of these Canadian Supreme Court decisions, however, it cannot be said the Canadian Court was lying as a principle and ruling out any legality analysis before the legitimacy enquiry. See *Committee for the Commonwealth v Canada* [1991] 1 SCR 139:215.

<sup>325</sup> See *iso*:269-281; *Swissborough*:224-231.

<sup>326</sup> Barak<sub>1</sub> 2012:107.

<sup>327</sup> Barak<sub>1</sub> 2012:110.

#### 4.4.3 Realising the horizontal effect: constitutionalisation of private law

##### 4.4.3.1 The constitutionalisation project

As noted repeatedly so far, the traditional liberal approach to human rights, based on the public-private distinction, was that human rights apply only in vertical relationships between a private actor and the state and a private actor may invoke human rights only as “shield” against the state.<sup>328</sup> As indicated, this liberal conception posed problems for the effective realisation of fundamental rights by private actors and led to the private law, which governs private legal relationships remaining unaffected or uninfluenced by the human rights principles and values.<sup>329</sup> In Lesotho, this problem was to be avoided. The 1996 and 1993 constitutional designs according to which a Bill of Rights applies in horizontal legal relationships were intended to have great influence and impact on the private law.<sup>330</sup> When in 1963 the constitutional designers proposed a Bill of Rights on which a private actor would rely against another private actor and that the courts would have the constitutional duty and authority to enforce the Bill of Rights provisions against private actors at the instance of another private actor, they were fully aware of the “profound [horizontal] effect ... a court-enforced Bill of Rights” would have on “both existing laws and future transactions”.<sup>331</sup> Alive to this reality, however, they proposed a postponement of the operation of the Bill of Rights on existing laws for a period of a year, during which time:

... a committee would be set up to advise the Government of Lesotho fully on the impact which the Bill of Rights on the existing laws and customs of Lesotho, and on the best means of adjusting, and where possible, reconciling such laws and custom. The committee should also advise the Government concerning the best means of ensuring that the operation of the Bill of Rights will be facilitated and made effective.... Existing laws and customs will plainly be affected by changes in the Constitution; in many cases they will require modification and adaptation, and in some cases repeal.<sup>332</sup>

In 1992, the NCA adopted a diametrically opposed position. The profound horizontal effect or impact of a horizontally applicable Bill of Rights, which would be “legally enforceable

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<sup>328</sup> Reid and Visser 2013:2; Smits 2006:19; Barnard-Naude 2013:38; Friedmann and Barak-Erez 2001:1.

<sup>329</sup> Pieterse 2003:2; Oliver and Fedtke 2007:22-23.

<sup>330</sup> See 1966 Constitution, sec 20(1), sec 4(2); the 1993 Constitution, sec 20(1), sec 4(2).

<sup>331</sup> Basutoland Council 1963:82.

<sup>332</sup> Basutoland Council 1963:82-87.



through the courts<sup>333</sup> was not postponed and would therefore have immediate operationalisation on the coming into operation of the 1993 Constitution. In an effort to effect transition from the old to the new constitutional order, the resultant 1993 Constitution directs *who* needs to do *what* in order to realise the horizontal effect of the Bill of Rights on private law. Pursuant to this constitutional commission, not only are pre-constitution existing laws denied any legal effect unless they are in conformity with the Constitution,<sup>334</sup> but also everyone with jurisdiction to construe the laws<sup>335</sup> or to make laws and regulations<sup>336</sup> including the King<sup>337</sup> is enlisted in the great constitutionalisation project. Although in compliance – to some extent – with this constitutional commission, the King did make regulations amending some existing laws as appeared to him to be necessary or expedient to bring them into conformity with the provisions of the Constitution,<sup>338</sup> it was clear that the bulk of the constitutionalisation agenda remained with the courts.<sup>339</sup>

As indicated earlier, it was therefore expected that all courts, in effectuating the horizontal effect of the Bill of Rights on the private law, would apply the Bill of Rights to legal proceedings between the private actors, and consequently infuse the private law with human rights and freedoms principles, values and norms. This horizontal effect could be realised by either directly (direct horizontal application) or indirectly (indirect horizontal application) applying the Bill of Rights on the impugned private-law doctrine, principle or rule. In the discussion that follows, I look into the specific methodologies of direct and indirect horizontal effect that the courts should employ in order to operationalise the horizontal effect of the Bill of Rights on the private law of Lesotho. These methodologies are discussed in relation to legislation, common law (including customary law) and private conduct.

#### 4.4.3.2 Direct horizontal effect on private law

##### 4.4.3.2.1 Direct horizontal effect on legislation

The Bill of Rights applies directly to the law if the law, upon the legality and legitimacy threshold analysis of the law as benchmarked directly on the requirements of the Bill of

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<sup>333</sup> NCA 1992:26.

<sup>334</sup> The Constitution, sec 156(2).

<sup>335</sup> The Constitution, sec 156(1).

<sup>336</sup> The Constitution, sec 156(4).

<sup>337</sup> The Constitution, sec 156(3).

<sup>338</sup> See *Amendment of Existing Laws Regulations 28/1994*.

<sup>339</sup> See the Constitution, sec 2 and 156(1).

Rights, is held to be inconsistent with the Bill of Rights and therefore void to the extent of the inconsistency.<sup>340</sup> The purpose of direct horizontal application is “to determine whether there is, on the proper interpretation of the law and the Bill of Rights, any inconsistency between the two”.<sup>341</sup> A lot of legislation, whether primary or subordinate, regulates private conduct and in the process imposes certain obligations or grants certain rights to private actors. The exercise or non-performance of such statutory rights or obligations may lead to disputes between private parties. In the circumstances, an aggrieved party has two choices: firstly, to pursue her ordinary remedies before a competent court (say, Ts’ifa-Li-Mali Local Court) and if the Bill of Rights provisions are implicated, seek to impugn the relevant provisions on constitutional grounds for being inconsistent with the Bill of Rights. Alternatively, he or she may launch a constitutional cause of action by applying to High Court under sections 2 and 22(1) of the Constitution for a declaration of invalidity of the relevant statutory provision.<sup>342</sup>

In the first scenario, the plaintiff would be instituting the case in the ordinary jurisdiction of Ts’ifa-Li-Mali Local Court. He or she would then demand the Court President of the Ts’ifa-Li-Mali Local Court (which will be constitutionally obliged<sup>343</sup>) to make a determination whether or not the relevant statutory provisions on which the defendant is relying as a defence is inconsistent with his or her fundamental right or freedom entrenched in the Bill of Rights. The Ts’ifa-Li-Mali Local Court, or in the second scenario, the High Court, would have to test the relevant impugned legislative provision on legality and legitimacy thresholds described above on the basis of the relevant Bill of Rights provision. If the impugned statutory provision fails to pass those threshold tests, the Ts’ifa-Li-Mali Local Court or the High Court would have to declare or invalidate the relevant legislative provision.

It is important to note that, in the case of direct horizontal application of the Bill of Rights to the legislation, when a court comes to the decision that the impugned legislative enactment is inconsistent with the Bill of Rights, its remedial powers – failing “reading down” and “reading in”<sup>344</sup> – are limited to declaration or invalidation of such a statute.<sup>345</sup> The reason is that these courts have no constitutional authority to “legislate” or to “develop” legislation.<sup>346</sup>

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<sup>340</sup> De Waal *et al* 1999:50. Also see Currie and De Waal 2005:32, 50.

<sup>341</sup> De Waal *et al* 1999:50. Also see Currie and De Waal 2005:32, 50, 73.

<sup>342</sup> Also see *Constitutional Litigation Rules* 194/2000.

<sup>343</sup> See the Constitution, sec 4(2), sec 154(1) and sec 154(3).

<sup>344</sup> On these terms, see below.

<sup>345</sup> Currie and De Waal 2005:67. Note, however, the quasi-legislative powers of a court concerning the existing laws under section 156(1) of the Constitution. See below.

<sup>346</sup> De Waal *et al* 1999:63.

As De Waal *et al* appositely put it, “it is the role of the legislature and not of the courts to remedy the defect in the legislation”.<sup>347</sup> Such authority is the preserve of Parliament. As it was stated in *Kauesa v Minister of Home Affairs*:

It must be remembered, however, that legislating is the constitutional domain of Parliament. The Court’s constitutional duty is to strike down legislation inconsistent with provisions of the Constitution and leave the legislature to amend or repeal where the Court has struck down the offending legislation. The less the judicial branch of government intrudes into the domain of Parliament the better for the functioning of democracy.<sup>348</sup>

It is clear that, if the applicant/plaintiff is successful in either the High Court or the Ts’ifa-Li-Mali Local Court, the Court would be applying the Bill of Rights provision directly on the statutory provisions in order to enforce the applicant/plaintiff’s fundamental right or freedom against the respondent/defendant who would be fully bound by such a right or freedom. In the circumstances, the Bill of Rights has a direct and immediate impact on the impugned statutory provision.<sup>349</sup> Although the matter did not involve all private actors and notwithstanding the fact that access to the constitutional jurisdiction of the High Court was indirect, *Moletsane v Attorney General* is an example of a direct horizontal application of the Bill of Rights to a statutory instrument.

#### 4.4.3.2.2 Direct horizontal effect on common law (private law)

Just as in the case of a legislative enactment, a court may directly apply the Bill of Rights to the common-law doctrine, principle or rule that is alleged to be inconsistent with the Bill of Rights. Currie and De Waal point out that the direct horizontal application in the context of the common law “is the testing of an allegation that an aspect of the common law is inconsistent with the Constitution”.<sup>350</sup> In testing the common law’s compatibility with the Constitution or Bill of Rights, the court applies the legality and legitimacy threshold tests against the impugned common-law doctrine, principle or rule based on the relevant Bill of Rights provision.

In *Khumalo v Holomisa*,<sup>351</sup> the respondent (a political figure) sued certain private actors (applicants) for the publication about him of a defamatory statement in a newspaper. The applicants excepted against the respondent’s claim on the grounds that the common-law

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<sup>347</sup> De Waal *et al* 1999:57.

<sup>348</sup> *Kauesa*:1558. Also see *S v Lawrence* 1997 4 SA 1176 (CC):[80]; *Thebus*:[30].

<sup>349</sup> Cherednychenko 2007:2.

<sup>350</sup> Currie and De Waal 2005:52.

<sup>351</sup> *Khumalo v Holomisa* 2002 5 SA 401 (CC).

defamation was inconsistent with the Bill of Rights (freedom of expression) provision to the extent that it allowed the respondent not to allege and prove the falsity of the published defamatory statement which was in the public interest and to allow him to recover damages without such allegation and proof of falsity of such statement. While the applicants argued that the Bill of Rights (freedom of expression) provision was directly applicable to the common law of defamation, the respondent's position was that the Bill of Rights provision was only indirectly applicable to the common law of defamation so that only the values and objects thereof could be employed to develop the common law of defamation. The Constitutional Court, rejecting the respondent's argument after it had found that the freedom of expression provision of the Bill of Rights applies not only in vertical but also in horizontal legal relationships, held:

In this case, the applicants are members of the media who are expressly identified as bearers of constitutional rights to freedom of expression. There can be no doubt that the law of defamation does affect the right to freedom of expression. Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by ... the Constitution. The first question we need then to determine is whether the common law of defamation unjustifiably limits that right.<sup>352</sup>

The Court, however, in answering the question whether the common law of defamation was inconsistent with the Constitution, found that the common law of defamation had previously just been developed<sup>353</sup> to be in tune with the Bill of Rights, and held, therefore, that it was not inconsistent with the Constitution. Unlike in instances of legislative incompatibility where the court's powers are limited, where the court finds the common law inconsistent with the Bill of Rights, its remedial power, or, to be precise, constitutional obligation,<sup>354</sup> is first to modify, adapt, qualify and develop the common law so that it grows in harmony with the constitutional norm and the objective normative value system forming the basis of the Bill of Rights so as to give effect to the constitutional right involved.<sup>355</sup> This is because the courts have the authority, under both common law and the Constitution, to reformulate and develop

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<sup>352</sup> *Khumalo*: [33].

<sup>353</sup> See *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).

<sup>354</sup> See the Constitution, sec 156(1); *Thebus*: [32]. According to Currie and De Waal (2005:68), the constitutional duty to adapt, modify and develop the common law (whether civil or criminal) applies "whether or not the parties have requested the court to develop the common law".

<sup>355</sup> *Thebus*: [28].

the common law.<sup>356</sup> As it was stated in *Thebus*,

A different approach is required when a Court deals with a constitutional challenge to a rule of the common law. *The common law is its law*. Superior Courts are protectors and expounders of the common law. The Superior Courts have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society. *That power is now constitutionally authorised and must be exercised within the precepts and ethos of the Constitution*.<sup>357</sup>

Secondly, the court may invalidate the common law that is incompatible with the Bill of Rights. This will be the case where a common-law principle or rule does not have to be adapted or developed, but it is desirable that it must be rooted out of the legal system completely. For example, in *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Bill of Rights was applied directly to the common-law crime of sodomy. Instead of “developing” such a crime, the court invalidated the crime in its entirety.<sup>358</sup> In *Shabala*, the court invalidated the common-law “docket privilege”, since it was incompatible with the right to fair trial.<sup>359</sup> Thus, as Currie and De Waal point out, when the common law is declared incompatible with the Bill of Rights without developing it, “it can no longer form part of the law”.<sup>360</sup>

The above cases are instances of direct horizontal application of the Bill of Rights to common law. In South Africa, the same methodology applies equally to the customary law. In Lesotho, however, the horizontal application of the Bill of Rights, whether direct or indirect, has not been an easy task taking into account the complex structure of the Bill of Rights in dealing with the relationship between the fundamental rights and freedom and customary law. This is further complicated by the Court of Appeal’s approach to the issue of discrimination under customary law. According to the Court, section 18(4) of the Constitution authorises discriminatory customary laws to limit the entrenched freedom from discrimination and the right to equality and equal protection of the law.<sup>361</sup> Next, I shall deal with this complex area of the law, which merits elaborate discussion.

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<sup>356</sup> See the Constitution, sec 156(1).

<sup>357</sup> *Thebus*: [31]. Emphasis supplied.

<sup>358</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999): [72]-[73].

<sup>359</sup> *S v Shabalala* 1996 1 SA 725 (CC).

<sup>360</sup> Currie and De Waal 2005:74.

<sup>361</sup> On this approach of the Court, see below.

#### 4.4.3.2.3 Direct horizontal effect to customary law

##### 4.4.3.2.3.1 The meaning and the changing nature of “customary law”

To start with, to refer to traditional Basotho’s legal normative system and legal order as “customary law” is to invoke the colonial racial discriminatory attitude and approach towards not only Basotho whom the colonial administration viewed as “sub-humans” but also towards that traditional system and order which, according to the administration, could not serve the interests of the European “humans”. As Juma appositely points out, “from the very beginning the term ‘customary law’ [has] a racial connotation”.<sup>362</sup> In the second place, reference to “customary law” is an unconscious perpetuation of colonial racial connotations and attitudes towards the traditional legal normative system and legal order. It is therefore assumed that the employment of this phrase in the Constitution was – and continues to be – for the purpose of *mere differentiation* between received law and statutory law, on the one hand, and, on the other, the traditional legal normative system. It is in this latter sense that the phrase “customary law” is used in this study.

There is no single comprehensive definition or interpretation of the concept “customary law”.<sup>363</sup> In dealing with the meaning of customary law, the common approach, as Juma points out, “has been to identify its norms based on some common characteristics, such as proximity to culture, informality, simplicity, fluidity, and susceptibility to change”.<sup>364</sup> Juma goes further to indicate, however, “custom was the nexus that ran through all of these”.<sup>365</sup> Social practices, customs and traditions are pre-legal normative material that forms the basis of legal customary norms.<sup>366</sup> Customary law’s susceptibility to change is grounded on three factors. Firstly, customary law is always in the state of flux as a necessary incident of ever-evolving societal practices, customs and traditions.<sup>367</sup> Secondly, customary law may be modified by judicial decisions because of the interpretative process, which necessarily takes into account a variety of socio-legal factors and practices as well as constitutional demands. Thirdly, Parliament may, by statute, amend or repeal customary law principles and norms.<sup>368</sup> The constitutional designers were fully cognisant of the customary law’s susceptibility to change when they interpreted “customary law” to mean “the *customary law* of Lesotho for

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<sup>362</sup> Juma 2013:180.

<sup>363</sup> Juma 2013:179.

<sup>364</sup> Juma 2013:180

<sup>365</sup> Juma 2013:180.

<sup>366</sup> Perreau-Saussine and Murphy 2007:6.

<sup>367</sup> Bennett 2009:30.

<sup>368</sup> See the Constitution, 18(4) proviso; sec 154(1) interpretation of “customary law”.

*the time being in force subject to any modification* or other provision made in respect thereof by any Act of Parliament”.<sup>369</sup>

The importance of section 154(1) of the Constitution lies, firstly, in the very absence of the precise definition of what amounts to customary law – customary law means *the customary law* of Lesotho. The Constitution does not bond or tie customary law’s normative content and contours to any specific period in the historical or social development of Lesotho nor does it decree that such law shall thereafter not be amended, modified, changed or repealed. However, it proclaims in no uncertain terms and without any equivocation, the constant mutability of customary law by prescribing that it would be the customary law of Lesotho “*for the time being in force*”.<sup>370</sup> Thus, customary law has never been cast in the proverbial primitive stone bearing indelible inscriptions and incantations known and understood only by the society of a particular period in the nation’s historical and social development and only to be dug up, unearthed and presented in real-time during judicial proceedings before the courts for, so to speak, mechanical application, at the time and period in the social development of the nation when the society has grown not only to understand and appreciate the said inscriptions and incantations but has also developed its own new practices, customs and traditions. The customary law evolves and it is always in the state of flux, informed as it is by the contemporary societal morality, values, practices, customs and traditions. As Bennett points out, “the creation of customary law ... [is] a dialectic process involving the communities from which the law springs”.<sup>371</sup> Thus, *custom as social practice* and *custom as law* are inseparable concomitants at any given stage in the historical and social development of any nation<sup>372</sup> but must be distinguished.

The second importance of section 154(1) of the Constitution lies in the constitutional proclamation or recognition of what has been noted above: customary law, as the customary law of Lesotho for the time being in force, is “*subject to any modification*”.<sup>373</sup> The word “any” is of general import and is, therefore, not limited to modification because of statutory impact. The closer look at the phrase “subject to any modification or other provisions made in respect [of the customary law] by any Act of Parliament” reveals three important points. Firstly, it expresses the intention of the constitutional designers of a disjunctive reading of the word “or” so that by “any modifications” reference is made to modifications as effected on

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<sup>369</sup> The Constitution, sec 154(1).

<sup>370</sup> The Constitution, sec 154(1).

<sup>371</sup> Bennett 2009:30.

<sup>372</sup> Mokgoro 1997:1281.

<sup>373</sup> The Constitution, sec 154(1).

the customary law of Lesotho otherwise than by legislative means, while “other provisions... by any Act of Parliament” refers to those amendments or repeal of the customary law through legislative intervention. Secondly, apart from Parliament, the customary law of Lesotho is, as section 154(1) of the Constitution states, subject to modification by the judiciary. On this score, the Basutoland Council was, in 1963 (and I argue, the NCA in 1992), fully aware of the “profound effect” of the “court-enforced Bill of Rights” both on “the existing law and custom”.<sup>374</sup> Furthermore, customary law of Lesotho, to the extent that it is “existing law”,<sup>375</sup> is, like any other law, subject to modification, adaptation, qualification and development by the courts.<sup>376</sup> The courts have an onerous constitutional duty and responsibility to construe customary law of Lesotho in conformity with the Constitution. It is a duty and responsibility that must be executed whenever a development in the custom as social practice has outpaced custom as law, in the light of the fundamental values, norms and principles underlying Lesotho’s constitutional order.

Subject to the evolutionary model prescribed by the Constitution for the elimination of discriminatory laws, customary law in the post-democratisation era should, on a case-by-case basis, succumb to constitutional morality and justice and to the extent of its inconsistency with the Constitution, it is void.<sup>377</sup> Perreau-Saussine and Murphy state that customary law is subject to “change and development through interpretation”.<sup>378</sup> Thus, the Constitution has never insulated customary law from the Bill of Rights and constitutional principles. If this constitutional conception of the customary law was appreciated and adopted into the judicial policy of Lesotho, the supposedly problematic section 18(4) of the Constitution would not have become a hurdle and an impediment it has become in the agenda of constitutionalisation of customary law.

Although “law” must necessarily be *distinguished* from “custom” for purposes of full understanding of the place customary law “ought to occupy in the legal system”,<sup>379</sup> it will be indicated in the next chapter that the courts in Lesotho have adopted a separatist attitude and approach in terms of which custom as social practice and custom as law have been kept

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<sup>374</sup> Basutoland Council 1963:82. Also see NCA 1992:26.

<sup>375</sup> The Constitution, sec 156(5).

<sup>376</sup> The Constitution, sec 156(1). This reading of sections 154(1) and 156(1) of the Constitution is consistent with the purposive or teleological interpretation that should be given to constitutional documents.

<sup>377</sup> See Rautenbach 2003:113.

<sup>378</sup> Perreau-Saussine and Murphy 2007:5-6.

<sup>379</sup> Juma 2007:92. Also see Bennett 2009:21.



in water-tight compartments, allowing one to outpace the other, with consequential serious problems and hardships on the vast majority of Basotho community to which customary law applies, in particular, women. This attitude and approach has, as described by Mokgoro J, “lamentably marginalised, and allowed [customary law] to degenerate into a vitrified set of norms alienated from its roots in the community”.<sup>380</sup> It is indeed amazing that in more than two decades of constitutional democracy and constitutionalism, Lesotho courts have not attempted to salvage the customary law from the inhibitions of the past, where its norms “were frozen in the texts and contexts of days gone by, and thereby, denied the opportunity for growth, regeneration, and development”.<sup>381</sup> The courts have largely failed to distinguish between what the people *did* then or *do* now as a matter of practice, and what they *ought* to do to as a matter of law. Moreover, what they ought to do is dictated, not so much by what they do constantly and consistently over a long period than by the all-pervasive constitutional norms.

Finally, and besides legislative and judicial modifications, the phrase “subject to *any* modification” under section 154(1) of the Constitution interpretation of “customary law”, admits of the most important institution that has the *original* jurisdiction, so to speak, to “legislate” and effect modifications on the customary law in an idiosyncratic manner: the Basotho society itself. To legal anthropologists and legal pluralists, the traditions, practices and customs of the indigenous people are “the customary mode of the production of law”.<sup>382</sup> Customary law in the first place emerges and is crystallised from the long, constant and consistent general practices, customs and traditions of any given society, and it is through societal changes into these practices, customs and traditions that the customary law necessarily suffers change. Customary law, in this sense, is the living law of the society,<sup>383</sup> and not a hollow shibboleth whose sole purpose is to serve as a mere relic and vestige of the antiquarians’ ossified past. Because of its dynamism, fluidity, flexibility and adaptability, customary law constantly adapts to societal changing conditions.<sup>384</sup>

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<sup>380</sup> *Du Plessis* [172].

<sup>381</sup> Juma 2013:181.

<sup>382</sup> See Perry 2011:77.

<sup>383</sup> According to Juma (2007:109), living law is “a concept which reflects the understanding of African law as an evolving phenomenon” and which often is used to distinguish the “official customary law” with the “law actually lived by the people.” Ndulo (2011:102) refers to the living law as the law that is “being practised” by the community. *Mabena v Letsoalo* 1998 2 SA 1068 (T):1074 (it is “the law actually observed by African communities”). Also see Banda 2006:14; Grant 2006:13.

<sup>384</sup> Juma 2007:94; *Pilane v Pilane* 2013 4 BCLR 431 (CC):[34]-[35].

In the final analysis, therefore, the *customary law of Lesotho* can be understood as the legal sub-order of normative principles and rules based on long-standing, constant and consistent practices, customs and traditions of Basotho society at any given stage in its social development and as interpreted and modified by judicial decisions and/or as amended or repealed by Parliament. It is, to use Mokgoro's elucidation, the cumulative of all legal normative practices, customs and traditions of Basotho, legislative enactments and judicial pronouncements on those practices, customs and traditions of Basotho.<sup>385</sup> It is the law, in metaphorical terms, whose house (order) is built on the foundations of contemporary societal practices, customs and traditions beneath which lies the *past*, with the building material and the utility services (values, norms and principles) supplied by the *contemporary*.<sup>386</sup> With the passage of time, there comes a period in the history and social development of Basotho nation when what was considered contemporary recedes and ebbs into the shades of the past to make way for the new and contemporary foundation and utility services. It is the law that, if not legislated upon or judicially modified, should:

... continuously respond to society's contemporary values, needs and practices. If it is sufficiently responsive to social reality, its contemporary value would be measured in terms of its compatibility with the contemporary values, needs and practices (sic) of its jural communities.<sup>387</sup>

#### 4.4.3.2.3.2 The interface between the Bill of Rights and customary law

That *the application of the customary law* has been *constitutionalised* such that when customary law is applied to persons who are subject to it may not constitute discrimination,<sup>388</sup> is not entirely correct regard being had to the evolutionary model prescribed by the Constitution for the elimination of discriminatory laws as will be demonstrated below. The Constitution does not sanction or ring-fence discrimination through section 18(4) as many including the Court of Appeal believe.<sup>389</sup> On the contrary, the Constitution prescribes an evolutionary elimination of discriminatory laws from Lesotho's legal system. Before customary law finds application in any proceedings, three fundamental anterior requirements or thresholds must be established. Firstly, its substantive normative content must be determined. Secondly, whether, as determined, such customary norm

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<sup>385</sup> Mokgoro 1997:1281.

<sup>386</sup> The past values, norms and principles become part of the customary law's present order to the extent that they conform to the contemporary normative system.

<sup>387</sup> Mokgoro 1997:1281.

<sup>388</sup> See Juma 2013:177,182.

<sup>389</sup> See Maope 2001-2004:395-396; *Senate*: [29].

*applies* to the particular person. According to Bennett, this “implies a determination by the courts, in accordance with statutory and judge-made choice of law rules governing conflicts of personal law, that it is appropriate in the circumstances of the case”.<sup>390</sup> Thirdly, the final question becomes whether there is a need to modify and develop such a norm in view of the constitutional duty on the courts under section 156(1) of the Constitution and the constitutional precept to eliminate discriminatory laws on evolutionary basis.

The judicial determination of the legality and legitimacy of customary norms involves the determination or ascertainment, respectively, of the existence of the substantive normative content of customary law and the justifiable limitation of a right or freedom involved.<sup>391</sup> The general criteria and factors to be considered in identifying the existence of a customary norm as well as the pitfalls in the interpretation of customary law have been discussed elsewhere.<sup>392</sup> If the customary norm in relation to a specific matter (for, example, whether women may be Regent in their own right during the minority of a substantive holder of the office of the King) is not clear taking into account the practices, customs and traditions of the society, then that would mean that the customary norm relied on failed the legality threshold in that it lacked the necessary attribute of the law – clarity. What is tested here, it should be pointed out, is not the customary practice, custom or tradition; it is the customary norm (or law). It is the determination of the “living” customary law rather than just the official version thereof. In addition, here lies the importance of distinguishing custom as social practice and custom as law. Even if the custom as practice is clear, that does not necessarily translate it into a customary law: the clear customary practice will be customary law if not only the said practice fulfils the necessary *essentialia* of a customary norm existence, but also when the people ought to comply with such customary practice, taking into account the constitutional normative imperatives. This is the legality assessment or threshold of constitutional

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<sup>390</sup> Bennett 2011:3, a report submitted to the Venice Commission Conference held at Santa Cruz, Bolivia, July 2011, available online at <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU\(2011\)014-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2011)014-e)> (accessed on 29 July 2015). Also see Bennett 2014:196.

<sup>391</sup> See, for example, Bennett 2009:19-20.

<sup>392</sup> Bennett 2009:14-29 (criteria: (a) the Constitution; (b) textual authority; (c) social practice; and (d) culture and tradition); *Shilubana*: [44]-[49] (factors: (a) the traditions of the community concerned; (b) the possible distortion of records due to the colonial experience; (c) the need to allow communities to develop customary norms; and (d) the fact that customary law, like any other law, regulates the lives of people). Also see *Van Breda v Jacobs* 1921 AD 330 for the determination of custom under common law. The criteria in *Van Breda* are also used to determine the existence or validity of a customary legal norm. On the pitfalls of the interpretation of customary law, see Schauer 2007:13.

adjudication.

If the customary norm is clear and thus passes the legality threshold, it should be tested on legitimacy threshold. This is because even if the customary practice satisfies the *essentialia* of the customary norm existence, it will be invalid if it is in conflict with the Constitution<sup>393</sup> or it will have to be modified to conform to it. It is at this level of assessment of the legitimacy of customary norm that the process becomes intricate. If the claim or the defence of the party is based on discrimination, the court does not mechanically reach out to the magic wand of section 18(4) of the Constitution that, once waved, the claim or defence should be thrown out of the court. The legal area and processes between the finding that a customary norm exists (the establishment of the legality of such a norm) and the final disposition of the case is wide and it is at this area that the evolutionary model plays an important role.

There are two alternatives here. Firstly, the person raising the claim or defence of discrimination may happen to be a person who is not “subject to that [customary] law and the differential treatment against him or her on the basis of the customary norm which does not apply to him or her may therefore constitute discrimination. As Palmer and Poulter rightly point out, a law (including customary law) “that subjects a citizen to customary law may be unconstitutional if the custom in question is discriminatory”.<sup>394</sup> This is how the courts enforce constitutionalism and the rule of law by keeping the customary norm within its prescribed area of application so that any excesses thereof should be declared null and void.

Secondly, the courts have a clear constitutional duty to develop any existing law, including customary law, to be in conformity with the Constitution.<sup>395</sup> They are also enjoined to achieve gender equality and justice progressively in the performance of the duties as public authorities.<sup>396</sup> This means that the court would have to answer the following questions concerning the relevant customary norm: what is the proper purpose of the impugned customary norm? Is there a rational connection between the legitimate purpose and the means adopted by that norm in advancing or realising the stated proper purpose? Can the proper purpose of the norm be attained by means less restrictive or invasive of the protected right or freedom, for example, equality before the law? Does the social benefit of realising the proper purpose of the relevant customary norm outweigh the social benefit of avoiding the limitation of the protected right or freedom, or vice versa? A proper legitimacy

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<sup>393</sup> The Constitution, sec 2.

<sup>394</sup> Palmer and Poulter 1972:410 (footnote 442).

<sup>395</sup> See the Constitution, sec 156(1) and (5).

<sup>396</sup> See the Constitution, sec 25 and 26.

assessment of the impugned customary norm would finally assist the court in making the determination whether to retain the norm or whether the time has come that such a norm should be altered and the practices underlying it suppressed.<sup>397</sup> Following an evolutionary model for the elimination of discrimination and the attainment of gender equality in customary justice system, the courts should, in the context of plural legal orders, be “*building* rights” and not merely “*balancing*” them.<sup>398</sup>

The following example will serve to illustrate generally the points that I am making. Suppose a woman whose husband has passed away and buried is required by the head of the husband’s family to stay at home – with limited mobility – for a period of at least three months mourning for her deceased husband, wearing black cloth and without having to return to her work. Usually, the woman goes to work and retires to her home in the evening. Suppose she launches a constitutional cause of action with the High Court on the basis of the said custom being inconsistent with her right to equality (section 19), freedom from discrimination (section 18(1)) and freedom of movement (section 17(1)). Suppose the head of the family raises the defence that the bereft woman’s right to freedom of movement has not been infringed (section 7(6)) and the application of customary law on her may not in law constitute discrimination (section 18(4)(c)) in violation of her right to equality. The High Court finds that the custom of mourning for more than a three-month period by women whose husbands have passed away is a well-established and clear customary norm (that is, it has passed legality threshold). As indicated, to dismiss a case at this point based on section 18(4) of the Constitution would be a terrible mistake on the part of the court and would be inconsistent with the evolutionary model prescribed by the Constitution.

In the first place, the court may find that the “matter in the case” of the relevant woman is not one that is susceptible to “the application of customary law of Lesotho” because she is not a person who is “subject to that law”.<sup>399</sup> In this instance, the relevant woman would have been discriminated based on sex by requiring her to mourn for her late husband for the mentioned period while she is not subject to such customary law. In this way, a customary norm, which was sought by the heads of the family to go beyond its constitutionally set limits, which is its application to persons who are subject to it only, would have been kept within its constitutionally prescribed area of application. In the expression of section 18(4)(c) of the Constitution, the customary norm would constitute discrimination since the only norm that may not constitute discrimination is one which makes application of the customary law with

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<sup>397</sup> Maope 2001-2004:400.

<sup>398</sup> Perry 2011:106. Emphasis in the original.

<sup>399</sup> The Constitution, sec 18(4)(c).

respect to a matter in the case of a person who, under that law, is subject to that law. Thus, to make provision for the application of customary law to persons who are not subject to it, which law then treats differently men and women whose spouses have passed away constitutes discrimination in terms of section 18(1) of the Constitution.

But even assuming that the relevant woman is a person to whom the relevant custom is applied is a person who is “subject to that law”, that would not have been the end of the matter, since in the circumstances of the case, the court would still have to test the customary norm on other provisions of the Bill of Rights, in this instance, sections 7 and 19 of the Constitution or to ensure that the goal of gender equality and justice prescribed by a section 26 DPSP is fulfilled. This would be the case where the reliance on this provision was either expressly made or is sufficiently foreclosed or foreshadowed by evidential material on the papers before court.<sup>400</sup> When tested against section 7(6) of the Constitution, the court may find that the impugned customary norm constitutes an unjustified limitation of the relevant woman’s right to freedom of movement because the imposed restrictions on her were not restrictions upon her “freedom to reside in any part of Lesotho”. The restrictions imposed by the relevant norm upon her did not relate to her freedom to reside elsewhere as she is admittedly resident at the late husband’s home. Thus, her right to freedom of movement has been unjustifiably limited by the customary norm in question.

As it is constitutionally enjoined under sections 26 and 156(1) of the Constitution, the court may also have to develop the customary norm so that it is in conformity with section 19 of the Constitution, the right to equal treatment and equality before the law. The Court may find that to condemn a bereft woman to a restricted space simply because her husband has passed away, resulting in her failure to continue with her work, does not serve any proper or legitimate purpose. Neither is there a social benefit in avoiding the limitation of bereft women’s protected rights to movement and equality. Pursuant to the “evolutionary” paradigm of the constitutional designers in the eradication of discriminatory customary laws,<sup>401</sup> the present case may be a proper case to modify customary law to achieve gender equality and justice. To achieve this, the Court may have to direct that in the case where a woman’s husband has died, it should not be necessary for the family to force her to mourn or to mourn for any period, but that the woman should be allowed to go to work and to pursue all such activities which were part of her life before the death of her husband, perhaps subject to

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<sup>400</sup> The legal arguments may be made, and the Court is entitled to rely, on issues that are sufficiently foreshadowed by evidence on the papers. See *CUSA v Tao Ying Metal Industries* 2009 2 SA 204 (CC):[68]; *Nedbank v Mendelow* 2013 6 SA 130 (SCA):[18]-[19].

<sup>401</sup> NCA 1992:29-34; Maope 2001-2004:399-401.

discussions with the husband's family. Perhaps this is how customary law treats men in similar circumstances. In this way, the Court would not only have reconciled the customary norm with the entrenched right to freedom of movement and equal treatment but would have also progressively realised these rights as mandated by section 25 of the Constitution. The Bill of Rights would have influenced the relevant customary norm and the courts would have developed the customary norm that falls below the constitutional standards to be in conformity with the Constitution. The court would have "built" new rights – equality and freedom of movement – were unknown under customary justice system.

#### 4.4.3.2.3.3 The Bill of Rights and the customary law: an overview through the *Ramootsi* approach

The instances where the courts have attempted to salvage customary law from the clutches of the vitrified past are – not surprisingly – few, regard being had to the shirking of their constitutional function to develop the customary law and the lack of judicial policy on this score.<sup>402</sup> Although it was not a case involving constitutional questions, *Ramootsi v Ramootsi*<sup>403</sup> is a *locus classicus* not only on the recognition by courts of their constitutional duty and mandate to develop customary law but also on how to effectuate horizontal effect of the Bill of Rights on that law. In 2009, the High Court was called upon in *Ramootsi* to determine whether there was a customary marriage between the deceased and the applicant (respondent on appeal) to the case. According to the 1903 *Laws of Lerotholi Code*, the customary law marriage "shall be deemed to be complete" when, among others, "there is payment of part or all of the *bohali*".<sup>404</sup> No such payment had been made in the case *in casu*. The contention of the respondents was that since there had not been payment of *bohali* no customary-law marriage ever came into existence. Having heard evidence, the High Court concluded that a valid customary marriage had come into existence. On appeal, the Court of Appeal had to grapple with the vexed question whether the payment of *bohali* was an indispensable requirement for the validity of a customary law marriage.

The Court of Appeal, firstly, recognised that section 34 of the *Laws of Lerotholi Code* was not "a codification of the customary law of Lesotho as such" nor "a comprehensive statement of all the Sesotho customary law of marriage".<sup>405</sup> This, in my view, was correct. While the customary law can be identified with respect to a particular period in the social development of a nation by identifying the social practices, customs and traditions of the society, the

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<sup>402</sup> *Ramootsi v Ramootsi* LAC (2009-2010) 233; *Ramaisa v Mphulenyana* 1977 LLR 138 (LesHC).

<sup>403</sup> *Ramootsi*:233.

<sup>404</sup> *Laws of Lerotholi Code*, sec 34(1)(c).

<sup>405</sup> *Ramootsi*:237.

whole body of that law may not practically be stated under a single code. Besides this, codification itself is at variance with the very nature of customary law. As has been stated, customary law, of necessity, depends not much on the code but the constantly changing social practices, customs and traditions as the nation develops the judicial pronouncements thereon and legislative amendment thereof. Furthermore, the code freezes the “customary law” in the clutches of the period of the code (1903) while on the other hand the living customary law on the same aspects develops and prescribes the application of materially different precepts and norms. Thus, the official version of the customary law should always be considered with circumspect. This is because the official version of the customary law, in view of colonial infiltration, is an “invented tradition”<sup>406</sup> which is “corrupted, inauthentic and lacking authority ... a foreign imposition, a stranger” to the society<sup>407</sup> and which is mainly disposed to serving the interests of the state rather than of the community living under it.<sup>408</sup> The official version of customary law may be correct, and therefore valid, to the extent that it still corresponds with the living customary law mirrored by the social practices, customs and traditions of the society at a given point in its social development.

Secondly, the Court of Appeal considered the social development of Basotho (their practices, customs and traditions) in relation to the aspect of “the payment of bohali” requirement of the *Laws of Lerotholi Code*. The Court found that “crucially, the Basotho have always recognised the reality that some people may lack the means to pay bohali when they coined the expression ‘*monyala-ka-peli-o nyala oa hae*’.”<sup>409</sup> The Court took into account the fact that “in a poor country like Lesotho it is indeed not hard to imagine that a great many people do not have the means to pay *bohali*” and it would be “a sad day if they were denied marriage merely because of their failure to raise *bohali* as such”.<sup>410</sup> Taking into account these considerations, which in my view informed the changes of the social attitude and outlook towards the *Laws of Lerotholi Code* section 34 requirement for the “payment of bohali”, the Court finally held that “in this day and age ... *bohali* is not a *sine qua non* of the

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<sup>406</sup> Roberts 1984:1-5. Also see Juma 2013:160.

<sup>407</sup> Costa 1998:534; also see Ndima 2007:81-82; Allott 1965:369-370.

<sup>408</sup> For instance, it was through the interpretative of repugnancy that the colonial administration enforced the its policies and as a result, customary law of Lesotho had to bent forward to respect the colonial morality and justice. To say that the present customary law of Lesotho embodies the colonial distortions in terms of which African characteristics were removed from the law would be to perpetuate the colonial injustices and racial domination. See Ndima 2007:81-82.

<sup>409</sup> *Ramootsi*:238.

<sup>410</sup> *Ramootsi*:238.



validity of a customary law marriage in all cases”.<sup>411</sup> Of fundamental importance in this respect, the Court concluded, “... is the agreement by the respective parties to create a validly binding customary law marriage regardless of *bohali*”.<sup>412</sup>

In *Ramootsi*, the Court of Appeal successfully wrestled the usual difficulty facing judicial determination of the living customary law. This difficulty, the South African Constitutional Court once observed, “lies not so much in the acceptance of the notion of ‘living’ customary law, as distinct from official customary law, but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights”.<sup>413</sup> Notwithstanding the clear requirement of the *Laws of Lerotholi Code* that to constitute a valid customary marriage there should be “payment of full or part of *bohali*”, the Court of Appeal answered the constitutional call by determining what the South African Constitutional Court referred to as “the true content of customary law as it is today”.<sup>414</sup> In this way, the Court of Appeal developed the customary law of marriage by wrangling it out of the hard grip of the *Code* in order to reflect the current social traditions of the Basotho society. In my considered view, it is this *Ramootsi* approach and attitude that takes into account the general social development which the courts should generally adopt towards the customary law, in particular the official version thereof. The *Ramootsi* approach is not only constitutionally mandated by the constitutional requirement to develop the existing law including customary law in conformity with the Constitution;<sup>415</sup> it is an approach which is unavoidable in the process of testing the constitutionality of any aspect of customary law on the basis of the Constitution on which, like any other law, it derives its source and validity,<sup>416</sup> and in the process injecting the customary law with the constitutional principles of dignity, equality, freedom and communalism embedded in the Bill of Rights. Whereas section 156(1) of the Constitution is the constitutional foundation for the development of the customary law of Lesotho, the *Ramootsi* approach is the searchlight in the discovery of customary law norms and principles that are otherwise inconsistent with the Bill of Rights and the “birth certificate” of the living customary law recognition in Lesotho. In the next chapter, I shall indicate that the judiciary in Lesotho has not only shirked its general constitutional responsibility to develop customary law but has also effectively played a major role in the ossification of the

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<sup>411</sup> *Ramootsi*:238. [Underlining supplied].

<sup>412</sup> *Ramootsi*:238.

<sup>413</sup> *Bhe*:[109].

<sup>414</sup> *Bhe*:[109].

<sup>415</sup> The Constitution, sec 156(1) and (5).

<sup>416</sup> See *Alexkor*:[51]; *Bhe*:[43]; *Thebus*:[24] *Pharmaceutical Manufacturers Association*:[44].

1903 *Laws of Lerotholi Code* by mechanical application of this Code – which is often inaccurate and misleading<sup>417</sup> – as the present customary law of Lesotho, thus emasculating the living customary law of its important normative substantive qualities: fluidity, adaptability, flexibility and susceptibility to change.<sup>418</sup>

#### 4.4.3.2.4 Direct horizontal effect on private conduct

The Bill of Rights is directly applicable to private conduct.<sup>419</sup> Both sections 22(1) and 4(2) of the Constitution are intended to extend the application of the Bill of Rights to the conduct of private actors. According to De Waal *et al*, when it comes to conduct, “the task of the court is simply to ascertain whether the challenged conduct amounts to a direct infringement of the Bill of Rights”.<sup>420</sup> In my view, this is an oversimplification of the issues and processes involved in the determination of the constitutionality of private conduct. What is clear is that “it is the basic requirement in every constitutional democracy ... that every limitation of a constitutional right be traced back to a valid legal norm ... a norm that is a part of the hierarchical structure”.<sup>421</sup> Without such legal authority, the conduct would be unconstitutional. On the other hand, the legal authority upon which the conduct is based, or is sought to be justified, may be challenged on legality and legitimacy thresholds as indicated above. Any constitutional attack to the legal pedigree of the relevant conduct is an attack against the conduct itself.

*Radeby v National Executive Committee*<sup>422</sup> is an example of direct application of the Bill of Rights to private conduct. In that case, the first respondent had, contrary to the constitution of a party, appointed and submitted as a representative of the party the name of the fourth respondent to the Independent Electoral Commission (IEC) for the national general election. The applicant, aggrieved with the conduct of the first respondent, applied to the High Court to have such appointment and submission of the name of the fourth respondent to the IEC declared null and void as being inconsistent with her right to participate in government entrenched under section 20 of the Constitution. The issue before the High Court was the

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<sup>417</sup> See Sanders 1987:405.

<sup>418</sup> *Bhe*: [43].

<sup>419</sup> See the Constitution, sec 4(2).

<sup>420</sup> De Waal *et al* 1999:51.

<sup>421</sup> Barak<sub>1</sub> 2012:108.

<sup>422</sup> *Radeby v National Executive Committee*, BCP 159/98. Also see *Ramakatsa v Magashule* 2013 2 BCLR 202 (CC).

legality of the conduct of the first respondent in terms of its own constitution.<sup>423</sup>

Having found the conduct of the first respondent to be not only unauthorised by the party constitution but also inconsistent with the Constitution of Lesotho, the High Court declared the appointment and submission of the fourth respondent by the first respondent as unconstitutional and therefore invalid.<sup>424</sup> Thus, the High Court tested the legality of the first respondent's conduct by going behind it to determine its legal pedigree. It is clear that where such conduct could not be traced back to any legal authorisation, whether by the party constitution or any other law, it could not pass the legality threshold. If there had been such a law, then the law would have to be tested on the normal legitimacy threshold with the result that if the law fails the legitimacy analysis, then the impugned conduct would be unconstitutional.

#### 4.4.3.3 Indirect horizontal effect on private law

##### 4.4.3.3.1 Indirect horizontal effect on legislation

###### 4.4.3.3.1.1 "Reading down" and "reading in" the statute

Whereas direct horizontal application of the Bill of Rights is intended to *test* the inconsistencies between legislation and the Bill of Rights with the consequence of invalidation of the former if such inconsistency exists, indirect horizontal application of the Bill of Rights involves the interpretation of legislation in such a way that, if possible, the inconsistency with the Bill of Rights is *avoided*.<sup>425</sup> The "inconsistency" can be defined as what the statute improperly excludes or includes in its verbal formula and purpose (substantive material) when measured against the verbal formula, purpose and values of the constitutional provision.<sup>426</sup> In applying the Bill of Rights indirectly to legislation, the process entails, firstly, the attempt to interpret the legislation so that its verbal formula conforms to the purpose and values of the Bill of Rights, and if that cannot be achieved so that there exists incompatibility with the Bill of Rights, then, secondly, the court will invalidate the relevant provision of the statute.<sup>427</sup> Thus, the purpose of indirect horizontal application of the Bill of Rights to legislation "is to determine whether it is possible to avoid any inconsistency

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<sup>423</sup> *Radeby*:9.

<sup>424</sup> *Radeby*:12.

<sup>425</sup> De Waal *et al* 1999:50; Currie and De Waal 2005:32.

<sup>426</sup> See *Schachter v Canada* [1992] 2 SCR 679:699.

<sup>427</sup> Currie and De Waal 2005:64.

between the [legislation] and the Bill of Rights by a proper interpretation of the two".<sup>428</sup> In other words, the purpose is to give the statutory provision a constitutionally valid meaning. This is normally achieved by "reading down" (severance)<sup>429</sup> or "reading in" the relevant statute.

There is a general presumption that a statute is constitutionally valid.<sup>430</sup> The statute is treated as valid until its constitutional validity is challenged. Where a litigant challenges the validity of a statute that applies in a case in which he is a party, a court will employ the whole repertoire of interpretive tools, including "reading down" and "reading in" the impugned statute. "Reading down" and "reading in" operate to ensure, where possible, that the statute is in conformity with the Constitution.<sup>431</sup> The interpretative counterparts of "reading down" and "reading in" the statute involve the interpretation that promotes the fundamental values underlying the Constitution to avoid any inconsistency between it and the Constitution.<sup>432</sup> It is important to note that, when through the process of interpretation a litigant establishes or demonstrates that his constitutional right or freedom is infringed by a particular statute or provision thereof, the inconsistency between the statute or the provision thereof with the Constitution may be avoided by the employment of the techniques of "reading down" or "reading in". In those circumstances, the language or the manner in which the statute or the provision thereof is drafted or stated is irrelevant for the purpose of the constitutional

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<sup>428</sup> De Waal *et al* 1999:50.

<sup>429</sup> Although "reading down" and "severance" are technically different in that "reading down" is a "narrower remedy than severance" (see *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC):[76]), they involve practically the same process and both end up in the invalidation of overbroad statutory terms. As Rogerson (1987:248) appositely pointed out, "while the courts continue to describe reading down as a technique of interpretation rather than of invalidation, as a practical matter reading down is difficult to distinguish from a remedy which would operate to declare particular applications of law unconstitutional. Reading down does require an initial determination by the court that particular applications of the statute would be unconstitutional." In this study I will use "reading down and "severance" interchangeably, but it is important to bear the technical distinctions between the two in mind. This is because, according to Duclos (1992:23, 27 fn 13), the difference between "severance and reading down" is "largely semantic".

<sup>430</sup> See *Sekoati*:820; *Sechele v Public Officers' Defined Contribution Pension Fund* 43B/2010:[11], [16]; *Judicial Officers' Association*:[51]. See, however, *Osborne*:104 and Prempeh (2006:74-75) for the criticism of this presumption.

<sup>431</sup> See *UKHRA* 1998, sec 3(1), which provides that "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

<sup>432</sup> Currie and De Waal 2005:64-65; De Waal *et al* 1999:51-52.

remedy.<sup>433</sup>

“Reading down” refers to the interpretative process<sup>434</sup> and a remedy<sup>435</sup> where a court gives an *over-inclusive* statute or provision a sufficiently narrow interpretation to bring it into line with the demands of the Constitution.<sup>436</sup> An “over-inclusive” statute or provision is one whose terms are cast too widely or broadly and which, if applied literally, infringe entrenched rights and freedoms in some situations.<sup>437</sup> The statutory overhangs or offshoots (the overbreadth) – those matters improperly included in the statute and which go beyond the constitutionally determined confines and limits – are excised, pencilled out or severed from the rest of the statute.<sup>438</sup> For, example, in *Brockett v Spokane Arcades*, the Washington statute proscribed the display of any obscene matter, which an average person would find to appeal to “prurient interest”. Prurient interest was defined in the statute to mean “that which incites lasciviousness or lust”. The Court of Appeal invalidated the whole statute on the basis that the inclusion of the word “lust” contravened constitutionally protected rights. Reversing that decision, the US Supreme Court held that the Washington statute should have been invalidated only insofar as the word “lust” was to be understood as reaching protected materials over and above obscene matter. The Court went to state further that even if the Court of Appeal had understood the word “lust” to refer only to normal sexual appetites, “it could have excised the word from the statute entirely”.<sup>439</sup> Courts sever statutory overbreadths so that they (courts) interfere with the legislative scheme adopted by Parliament as little as possible and, most importantly, to ensure that the statute conforms to the Constitution.<sup>440</sup> To achieve this severance, the court would have to:

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<sup>433</sup> *Knodel v British Columbia* (1991) 58 BSLR (2d) 356 (BCSC):388.

<sup>434</sup> Roach 2013:494; *Osborne*:78 (“‘reading down’ is a process of interpretation so as to restrict the scope of [the statute’s] application ... [and] is held as a matter of interpretation not to apply to X.”)

<sup>435</sup> This remedy “in cases where it is ... appropriate ... to fulfil the purposes of the [Constitution] and at the same time minimize the interference [by] the court with the parts of the legislation which do not themselves violate the [Constitution]. See *Andrews v Law Society* [1989] 1 SCR 143:695-702; also see *Osborne*:104; Roach 2013:492-496.

<sup>436</sup> Narrain and Thiruvengadam 2013:536.

<sup>437</sup> See, for example, *Brockett v Spokane Arcades* 472 US 491 (1985):501-506.

<sup>438</sup> *Schachter*:698. Also see *McKay v The Queen* [1965] SCR 798; *Bernstein v Bester* 1996 2 SA 751 (CC); *Nel v Le Roux* 1996 3 562 (CC); *Harksen v Lane* 1998 1 SA 33 (CC); *Case*:[70]-[80]; In *R v Lambert* [2001] 3 All ER 577 a statute which imposed a *legal* burden of proof on the accused was “read down” to impose only an *evidential* onus of proof.

<sup>439</sup> *Brockett*:504-505.

<sup>440</sup> *Schachter*:696.

... define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.<sup>441</sup>

On the other hand, “reading in” refers to the interpretative process and a remedy where a court gives an *under-inclusive* statute or provision a sufficiently broader interpretation so as to extend its reach to those who have a constitutional claim to its protection.<sup>442</sup> An “under-inclusive” statute or provision is one whose terms is cast narrowly and therefore exclude from its protection, the constitutional claims of those who are excluded. As it was stated in *Schachter v Canada*, in the case of “reading in”, the inconsistency is defined “as what the statute wrongly excludes rather than what it wrongly includes”.<sup>443</sup> When so defined, the Court went on, “the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme”.<sup>444</sup> This, the Court concluded, “has the effect of extending the reach of the statute by way of reading in”.<sup>445</sup>

The nullification of an under-inclusive statute or provision is an unsatisfactory constitutional remedy, since those who had already been left out of its reach remain without its protection as before, but also the included group are denied the protection they already enjoyed under the statute or provision. In these circumstances, the only satisfactory remedy would be for the court to “read in” the statute or provision with the result that those whose constitutional claims were excluded, are added to the protective mould of the statute or provision. In *Andrews v Law Society* where section 42 of the *Barristers and Solicitors Act* which regulated the admission of “a Canadian citizen” as a solicitor, the court, finding that the non-citizens had been excluded in violation of the right to equality under the *Charter*, and instead of striking down the section as invalid with the consequence that everyone (citizen and non-citizen) would be prevented from becoming a solicitor, the Court “read in” “non-citizen” into section 42 so that a non-Canadian could be admitted as a solicitor in Canada as well.

#### 4.4.3.3.1.2 The limits of “reading down” and “reading in”

The interpretative techniques and remedies of “reading down” and “reading in” must, however, be kept within the acceptable and permissible limits so that a word used in the

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<sup>441</sup> *Schachter*:697.

<sup>442</sup> Currie and De Waal 2005:204-206.

<sup>443</sup> *Schachter*:698. [Underlining in the original].

<sup>444</sup> *Schachter*:698.

<sup>445</sup> *Schachter*:698.

statute cannot be given an unduly strained meaning.<sup>446</sup> A court will “read down” legislation where it (legislation) is reasonably capable of a restricted interpretation.<sup>447</sup> It is therefore appropriate “only where the language of the provision will fairly bear the restricted reading”.<sup>448</sup> As it was stated in *Andrews v Law Society*, the purposes of “reading down” and “reading in” statutes are founded on the respect not only for the role of Parliament<sup>449</sup> but also for respect for the purposes of the Constitution.<sup>450</sup> The text, structure, statutory purpose and the whole repertoire of statutory interpretation or construction tools set the limits within which reading down is permissible.<sup>451</sup> Beyond these limits, the process would amount to judicial legislation.<sup>452</sup> In the circumstances, the appropriate remedy would be the nullification of the statute.<sup>453</sup> On “reading down” within permissible limits, which equally applies to “reading in”, Hume states:

The identification of the permissible limits on the court’s power to ascribe a constitutionally valid meaning to statutory text is intimately intertwined with the court’s application of the ordinary rules of statutory construction.... [T]he text necessarily constrains the process of reading down. A provision can only be read down so far as its language permits or is apt to include the valid meaning. Similarly, a provision cannot be read down if the text is ‘intractably inconsistent’ with being read in conformity with the *Constitution* or Parliament has, with irresistible clearness, given a provision an invalid meaning. Several statements of the presumption suggest that statutory text is the *only* means by which the presumption of valid meaning can be refuted.<sup>454</sup>

A distinction, however, must be made concerning the power of courts under section 156(1) of the Constitution in relation to the modification of existing laws to bring them into conformity

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<sup>446</sup> *Ts’eoua*:31]; *Investigating Directorate v Hyundai Motor Distributors* 2001 1 SA 545 (CC):[24]; *Mateis v Ngwathe Plaaslike Munisipaliteit* 2003 4 SA 361 (SCA); *Fourie v Minister of Home Affairs* 2005 3 BCLR 241 (SCA):[31]. If “reading down” cannot be achieved without the court “legislating”, the last resort is to declare the relevant provision as unconstitutional.

<sup>447</sup> *S v Bhulwana* 1996 1 SA 388 (CC):[25]-[29].

<sup>448</sup> *Case*:76].

<sup>449</sup> The purpose here is “to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature.” See *Andrews*:700.

<sup>450</sup> “Reading down” and “reading in” are also required “in order to respect the purposes of the Charter.” See *Andrews*:701.

<sup>451</sup> Hume 2014:636.

<sup>452</sup> *Donoghue v Poplar Housing* [2001] 4 All ER 604:[75]-[77]; *Case* [76]; *Lawrence*:80].

<sup>453</sup> *Kauesa*:1558.

<sup>454</sup> Hume 2014:635; also see *Osborne*:104; *Schachter*:708-709.

with the Constitution. Under section 156(1) of the Constitution, the court is not restricted by the above considerations. Its constitutional power under that provision has been said to go far beyond what is normally meant by ‘construing’. It may involve the substantial amendment of laws, by either deleting parts of them or making additions to them or substituting new provisions for the old ones.<sup>455</sup> It is thus a wide quasi-legislative power. Clarifying the courts’ constitutional powers under similar provisions in former colonial territories’ Constitutions as Lesotho’s section 156(1), the House of Lords in *Ghaidan v Godin-Mendoza* had this to say:

Such provisions commonly authorise the court to construe such laws ‘with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the constitution’. This is a quasi-legislative power, not a purely interpretative one; for the court is not constrained by the language of the statute in question, which it may modify (ie amend) in order to bring it into conformity with the constitution.<sup>456</sup>

#### 4.4.3.3.2 Indirect horizontal effect on common law (private law, including customary law)

##### 4.4.3.3.2.1 Bill of Rights as “interpretative constructs” for radiation through private law

The Bill of Rights provisions are not only instructions for respect for fundamental rights and freedoms; they “present themselves to the judiciary as guiding principles in interpreting and applying private law”.<sup>457</sup> They are “interpretative constructs”<sup>458</sup> in terms of which any court in fulfilling its constitutional mandate under section 156(1) of the Constitution, *must* take into account and employ in its decision-making process.<sup>459</sup> Section 156(1) of the Constitution directs in mandatory terms that the Bill of Rights, as interpretative constructs, must be internalised by all courts and be given effect – vindicated – interpretatively in any proceedings that involve constitutional questions.<sup>460</sup> As it was stated in *Holomisa v Argus*

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<sup>455</sup> *Commissioner of Police v Maduro* HCVAP 2009/016:[17]-[20]. This is the Virgin Islands’ Court of Appeal decision. The decision is available online at <[http://www.eccourts.org/wp-content/files\\_mf/2011.07.02\\_commissioner\\_of\\_police\\_et\\_al\\_v\\_maduro.pdf](http://www.eccourts.org/wp-content/files_mf/2011.07.02_commissioner_of_police_et_al_v_maduro.pdf)> (accessed on 25 August 2015).

<sup>456</sup> *Ghaidan v Godin-Mendoza* [2004] 3 ALL ER 411:[63]-[64].

<sup>457</sup> Voermans 2006:36-37.

<sup>458</sup> According to Elliott (2000:272), section 3(1) of *UKHRA* 1998 instructs an interpretation-based approach to a rights-review process. Like section 156(1) of the Constitution, section 3 of *UKHRA* 1998 prescribes that all law shall be construed in conformity with the ECHR.

<sup>459</sup> See Elliott 2000:278. According to Jacobsohn (2012:779), the deployment of these values by judges deciding cases “is an inevitable and necessary component of the judicial task.” Moran (2009:21) confirms this, and states, “constitutional values not only should be but *must* be respected in the application and development of private law”. Emphasis in the original.

<sup>460</sup> See Elliott 2000 272; *Donoghue*:[75].



*Newspaper*, this constitutional duty to construe all law in conformity with the Constitution and the Bill of Rights is a force that informs all legal institutions and decisions with the new power of constitutional values.<sup>461</sup>

Thus, employing the Bill of Rights as interpretative constructs means that a court which finds a rule of private law to be inconsistent with the Bill of Rights or falling short of the values underlying the Bill of Rights may not necessarily invalidate it. Instead, the court may use the fundamental principles and values underlying the Bill of Rights to interpret and develop the private law to be in conformity with the Constitution.<sup>462</sup> Thus, section 156(1) of the Constitution must be employed by all courts “as an interpretative tool” so that all private law is interpreted “as being inherently limited by reference to [the Bill of Rights] norms”<sup>463</sup> which influences all areas of the law without exception.<sup>464</sup> This is precisely because the Bill of Rights provisions are not freestanding rules that have nothing to do with the substantive content of private law.<sup>465</sup>

As indicated earlier, the Bill of Rights embodies a value system, an objective system or order of fundamental values which underlie the constitutional order and which constitute a yardstick for assessment of constitutional compliance.<sup>466</sup> According to the FCC decision in *Lüth*, no rule of private law may conflict with the objective value system], and all such rules must be construed in accordance with its spirit.<sup>467</sup> On the other hand, private law, to some degree and according to its own standards, not only encompasses the protection of certain aspects of human rights by defining the standards and values of a just society among private actors,<sup>468</sup> but also embodies open-ended legal standards and abstract concepts and notions (value terms). These value terms include reasonableness, autonomy and freedom of the individual, wrongfulness and moral convictions of the society, fairness, justice and equity, good faith, due care, legality and public policy.<sup>469</sup> They are facilitative tools and the gateway

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<sup>461</sup> *Holomisa v Argus Newspaper* 1996 2 SA 588 (W):597-598; also see Currie and De Waal 2005:65 (footnote 131).

<sup>462</sup> *Thebus*: [28]; Currie and De Waal 2005:67.

<sup>463</sup> See Elliott 2000:278; Voermans 2006:37.

<sup>464</sup> See Brüggemeier 2006:70.

<sup>465</sup> The Constitution, sec 2.

<sup>466</sup> See BVerfGE 7, 198 (*Lüth* case); *Thebus*: [27]; Jacobsohn 2012:785.

<sup>467</sup> *Lüth*.

<sup>468</sup> Smits 2006:16; Voermans 2006:33; Banakas 2006:85.

<sup>469</sup> Barkhuysen and Van Emmerik 2006:46; Lindenbergh 2006:110; Webster 2013:297; Brand 2009:73,84; MacQueen 2004:376-377; Barak 2001:23; Laing and Visser 2013:334; Barak-Erez

of the Bill of Rights' transference into private law<sup>470</sup> and through which the Bill of Rights and the private law find mediated interaction.<sup>471</sup>

According to Brügge-meier, the indirect horizontal application of the Bill of Rights to the private law does not change these private-law value terms.<sup>472</sup> According to him, these value terms provide a basis for the recasting, rearranging or reshaping of private actors' legal relationships and private-law rights through the Bill of Rights.<sup>473</sup> In the words of Barak, the indirect horizontal application of the Bill of Rights model "works within the old private-law system, imbuing old tools with new contents or creating new tools with traditional private-law techniques".<sup>474</sup> It is because of these value terms that the Bill of Rights "radiates" through private law by the process of constitutional adjudication.<sup>475</sup> The effect of this is that private rights are reconceptualised, reconfigured and delimited by the employment of the Bill of Rights values and standards.<sup>476</sup> As Gardbaum points out, the indirect horizontal application of the Bill of Rights "limits what private actors may lawfully be empowered to do and which of their interests, preferences and actions can be protected by law".<sup>477</sup> Thus, while having the internal justice and morality of their own, the private law and private law value terms should be understood instrumentally, among others, as serving the external justice and moral ends

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and Gilead 2007:256; Heldrich and Helm 2001:115. Also see *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA):[17]; *South African Forestry v York Timbers* 2005 3 SA 323 (SCA):339; *Barkhuizen*:[82]. *Kadisha v Kastenbaum* [1992] IsrSC 46(2) 464:[20]-[21]. English translation is available at <<https://law.utexas.edu/transnational/foreign-law-translations/israeli/case.php?id=1391>> (accessed on 30 June 2015); *Regis v Trabelsi* 2009 IsrLR 1 (IsrSC):[32] ("The principle of good faith is, as we know, a foundational principle of our legal system. It functions as 'a binding principle guiding conduct and legal policy with respect to legal actions and obligations throughout the entire Israeli legal system.'")

<sup>470</sup> Barak 2001:14; Brügge-meier 2006:71.

<sup>471</sup> Brügge-meier 2006:80. They are the "pipeline" or "conduit" through which the objective values of the constitutional order flow or are transferred into the private sphere. See *Roker v Salomon* [1999] IsrSC 55(1) 199:279; Sutherland 2008:401.

<sup>472</sup> Their scope may, however, be expanded to meet the standard of the Bill of Rights.

<sup>473</sup> Brügge-meier 2006:71; Moran 2009:21-22.

<sup>474</sup> Barak 2001:22.

<sup>475</sup> Kumm 2006:350.

<sup>476</sup> Brügge-meier 2006:80; Molan 2009:25; Barnard-Naudé (2013:37-38) refers to this change that happens "when human rights meet private law" "a dialectical notion of transformation".

<sup>477</sup> Gardbaum 2012:180.

grounded in the Bill of Rights.<sup>478</sup> As Du Bois points out:

The indirect horizontal application of constitutional human rights provides an apt normative framework for private law reasoning, relating claims of interpersonal justice to the wider context of a society's moral commitments. It directs attention to which array of interpersonal rights and duties is best calculated to enable the sorts of lives a given polity is committed to enabling people to live. The content of that commitment may vary significantly from country to country; but where it is enshrined in a constitutional charter of human rights, such a social ideal always represents a conception of human rights being as ends valuable in their own right rather than means available for the purpose of others. For that reason, recourse to such rights serves to "humanize" private law, ensuring that interpersonal justice not merely makes everyone count, but makes everyone count as a human, a normative agent with concrete needs and aspirations.<sup>479</sup>

#### 4.4.3.3.2.2 The Bill of Rights values' reach into private law: examples from the leading cases

In the discussion that follows, a few examples of leading cases are provided in which the courts, through indirect horizontal application of the Bill of Rights, ensured the reach of the Bill of Rights into the heartlands of private law, and thus developed the private law. The usual starting point is the German decision in *Lüth*<sup>480</sup> whose factual matrix has been narrated in chapter 2. Briefly, in that case, the producer and the distributor of the film had successfully applied for the injunction (interdict) of the boycott triggered by one Lüth who considered the film to be anti-Semitic propaganda. The injunction remedy was issued under German civil law. On an application to the FCC, the question was whether the civil law injunction violated Lüth's guaranteed right to free speech under article 5(1) of GG. The FCC refused to apply the provisions of article 5(1) of the GG directly to the impugned civil law, but considered that the fundamental rights under the GG constituted "an objective system of values" in terms of which all decisions, legislative, administrative or judicial, must be consistent with its spirit. The FCC held that not only the civil law injunction but also the decision of the lower court was inconsistent with that objective system of values, constituted a limitation of Lüth's guaranteed right to free speech and was therefore unconstitutional. Commenting on this decision, Barak states that the impact of article 5(1) of the GG values on the injunction of German civil law was "effected by the doctrinal means of private law

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<sup>478</sup> See Robertson 2009:6-7; Moran 2009:26. According to Moran, the relationship between the Bill of Rights values and private law is not "uni-directional" as the private-law rights "fill out the content of constitutional guarantees" so that their (constitutional guarantees') scope is fully understood. Also see Barnard-Naudé 2013:38.

<sup>479</sup> Du Bois 2013:36.

<sup>480</sup> *BVerfGE 7*, (1958).

itself”<sup>481</sup>.

In effectuating the radiating effect of fundamental rights into the area of contract law, the Israeli Supreme Court has recognised the significant role of fundamental rights values during two phases: pre-contractual and contractual phases.<sup>482</sup> The Israeli Supreme Court’s jurisprudence is that the Court will intervene in pre-contractual or contractual arrangements and enforce compliance with the objective system of values based on the Israeli Basic Laws where the pre-contractual arrangement is discriminatory<sup>483</sup> or the contractual configurations constitute unjustifiable limitations on access to justice,<sup>484</sup> freedom of occupation<sup>485</sup> and freedom to organise, or offend against human dignity or constitute discrimination in collective bargaining.<sup>486</sup>

In *Kadisha v Kastenbaum*,<sup>487</sup> the parties had signed the “burial registration and ordering form” in respect of the death of the respondent’s wife. The form contained the stipulation that the inscription on the tombstone of the respondent’s wife should be in Hebrew letters, without numerals, pictures or illustrations. For reasons that were clearly legitimate,<sup>488</sup> the respondent approached the funeral service provider, the appellant, for permission to have the names of his wife inscribed in Latin letters and Arabic numbers instead. The request was refused but later granted on condition that the engravings in Latin and Arabic should be at the back of the tombstone. The respondent approached the District Court for a declarator that he had a right to have the tombstone engraved in the languages of his choice – Latin and Arabic. He was successful.

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<sup>481</sup> Barak 2001:23.

<sup>482</sup> Barak-Erez and Gilead 2007:257.

<sup>483</sup> Barak-Erez and Gilead 2007:261-263.

<sup>484</sup> See *Levin v Levin* (1994) 48(2) PD 862. *Barkhuizen*:[31]-[36]; *Bafana Finance Mabopane v Makwakwa* 2006 4 SA 581 (SCA):[21].

<sup>485</sup> *Egged Cooperative Society for Transportation v Mashiach* (1994) IsrSC 48(2) 66, English translation available at <<https://law.utexas.edu/transnational/foreign-law-translations/israeli/case.php?id=1390>> (accessed on 30 June 2015).

<sup>486</sup> See Barak-Erez and Gilead 2007:257-264.

<sup>487</sup> *Kadisha*:464.

<sup>488</sup> It was suggested that the deceased had spent most of her life in the US. She was known by her English name. Her life was lived in accordance with the Gregorian calendar. The request was in accordance with her wishes and honour. Engraving the tombstone as requested would assist many of her relatives, acquaintances and loved ones from abroad in uniting with her memory at the cemetery.

The Israeli Supreme Court dismissed the appeal by the appellant and declared the exclusivity of Hebrew writings on the tombstone null and void. Treating the case as one of “indirect attack” which avoided “a frontal confrontation”,<sup>489</sup> the Court stated that in order for the Israeli fundamental values of human dignity and liberty, freedom of thought, expression and conscience to “flow into the confines” of the law of contract and the behaviour of private individuals in their interactions with others, the Court would normally use as “conduits”, “various rules of interpretation” – interpretative conduit – and “a number of doctrines that function as vessels through which the basic principles of the system in general, and basic human rights in particular, can flow into private law”.<sup>490</sup> Central to these vessels, the Court stated, “are the principles of good faith ... public policy ... negligence ... and breach of duty”.<sup>491</sup>

The Court stated that the contract between the parties should take into account not only the importance of the language but also the beliefs and feelings of individuals as well as human dignity and liberty, freedom of thought, expression and conscience not only of the deceased during her lifetime but also of her family, the basic rights which were guaranteed in Israel.<sup>492</sup> The values of human dignity and liberty, according to the Court, were not matters of rhetoric or simple metaphor: they translated into positive rights and obligations and affected the interpretation of every law.<sup>493</sup> These values were “a normative reality, which warrant[ed] operative conclusions”.<sup>494</sup> According to the Court, the engraving of the tombstone in the language that the deceased and his family spoke was an expression of these rights.<sup>495</sup>

Besides these values, the Court found that the principle of mutual tolerance, which allowed an individual to express himself, underpinned the Israeli pluralistic society and served not only an end unto itself but as a balancing tool when social interests conflict.<sup>496</sup> It further found that the principle of “reasonableness” required “a proper balancing between competing values”<sup>497</sup> and that the insistence on the exclusivity of the Hebrew language was

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<sup>489</sup> *Kadisha*: [18]. In other words, the case involved the indirect horizontal application of the fundamental rights on the Israeli law of contract.

<sup>490</sup> *Kadisha*: [20]-[21].

<sup>491</sup> *Kadisha*: [20]-[21]. Also see Webster 2013:300.

<sup>492</sup> *Kadisha*: [6].

<sup>493</sup> *Kadisha*: [11].

<sup>494</sup> *Kadisha*: [11].

<sup>495</sup> *Kadisha*: [6].

<sup>496</sup> *Kadisha*: [7].

<sup>497</sup> *Kadisha*: [12].

“unreasonable”.<sup>498</sup> The Court took into account the above factors and, in particular, the rule of law of contract which nullifies all contract that are contrary to public policy,<sup>499</sup> and balanced the freedom of contract and the autonomy of will, on one hand, and, on the other, the above constitutional values. The Court concluded that the contractual term which required exclusive use of Hebrew language on the tombstones was inconsistent with the entrenched basic values, was unreasonable and contrary to public policy, and was therefore null and void.<sup>500</sup>

According to Barak, the flowing or transfer of the Bill of Rights values into the law of contract and the consequential shaping of private contractual rights content “need not create any conceptual difficulty” because courts have always in the past, before the positivisation of rights into written constitutions, addressed this issue as a matter of routine.<sup>501</sup> According to him, courts in the past had always dealt with the freedom of contract<sup>502</sup> and the freedom of occupation or trade as well as shaping the content of the contract in view of the freedom of expression,<sup>503</sup> equality<sup>504</sup> or dignity.<sup>505</sup> In all these cases, Barak concludes:

In the past, this was done with regard to human rights that ‘were not inscribed in a book’. Today, this is done with respect to ‘rights inscribed in a book’ entitled to constitutional protection. To be more precise, just as the rights of property and freedom of occupation were elevated in normative level from a “common law” right to a “constitutional” right, so too was the freedom to shape the contents of a contract. This right is an expression of human dignity and liberty, and it too enjoys constitutional status.... Just as courts dealt in the past, before the constitutionalisation of human rights, with the appropriate balance between the freedom to shape the contents of a contract and other human rights, so too ... will they deal with the appropriate balance between this freedom and other constitutional human rights.<sup>506</sup>

In the circumstances, courts in Lesotho should without any problem be in a position to test the legality and legitimacy of *any* pre-contractual or contractual relationships on the basis of

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<sup>498</sup> *Kadisha*: [12].

<sup>499</sup> According to the Court, by this rule, “the legal system ensures that a minimal level of proper conduct is maintained in the realm of private law ... [and the] society determines the appropriate behavior of individuals in contractual relations”. See *Kadisha*: [22]. Also see *Barkhuizen*: [29]-[36].

<sup>500</sup> *Kadisha*: [22]-[29].

<sup>501</sup> Barak 2001:37.

<sup>502</sup> See, for example, *Printing and Numerical Registering v Sampson* (1879) LR 19 Eq 462:465.

<sup>503</sup> See, for example, *Neville v Dominion of Canada News* [1915] 3 KB 556.

<sup>504</sup> See, for example, *Nevo v National Labour Court* (1990) 44(4) PD 749.

<sup>505</sup> See, for example, *Horwood v Millar’s Timber and Trading* [1917] KB 305.

<sup>506</sup> Barak 2001:37-38. Also see *Brownsword* 2001:187; *Bull v Hall* [2014] 1 All ER 919.

the Bill of Rights values, notwithstanding the dominant principle of individual's autonomy or freedom of contract<sup>507</sup> and without the need of hiding behind common-law doctrines.<sup>508</sup> The above principles should not be limited to the law of contract: they should find equal application to all aspects of private law – family law and children's rights,<sup>509</sup> delict,<sup>510</sup> property law,<sup>511</sup> employment law,<sup>512</sup> customary law<sup>513</sup> and company law.<sup>514</sup> Every aspect of private law should be situated within the constitutional framework. Section 156(1) of the Constitution founds this interpretative indirect horizontal effect of the private law by requiring and authorising all courts to transfer the Bill of Rights values into the private law through the conduit of value terms of the private law.<sup>515</sup>

#### 4.4.3.3 Indirect horizontal effect on private conduct?

The Bill of Rights provisions may not indirectly be applied to private conduct. The reason is simply that indirect horizontal application requires the interpretation and development of the material, which is the object of enquiry or analysis based on the Bill of Rights values. Unlike law, conduct does not lend itself to either interpretation or development. As De Waal *et al* correctly points out, "the Bill of Rights can only be indirectly applied to law and not to conduct. This is because conduct, whether it is state or private conduct, cannot be 'interpreted' to avoid any inconsistency with the Bill of Rights".<sup>516</sup>

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<sup>507</sup> See *Barkhuizen*: [82]-[83]; *Bredenkamp v Standard Bank* 2010 4 SA 468 (SCA): [47]; *Brisley v Drotzky* 2002 4 SA 1 (SCA): [88]-[95].

<sup>508</sup> See *Ramots'abe v Rector, Lerotholi Polytechnic* 412/2013, the High Court decision (24 October 2013 by Makara AJ) available at <<http://www.lesotholii.org/ls/judgment/high-court/2013/94>> (accessed on 30 June 2015).

<sup>509</sup> Pieterse 2003:1.

<sup>510</sup> See Nolan and Robertson 2012:1; Mostert 2013:256; MacQueen 2004:359; Van Aswegen 1995:50; Grosskopf 2001:357; *Deshapriya v Municipal Council, Nuwara Elye* [1995] 1 SriLR 362:371 ("Compensation must therefore be measured by the yardstick of liberty, and not weighed in the scales of commerce").

<sup>511</sup> See Van der Walt 2012:1; Miller 2013:465.

<sup>512</sup> See Carbrelli 2013:391; Palmer 2000:168; Mundlak 2001:297.

<sup>513</sup> Rautenbach 2003:107; Grant 2006:2; Ndulo 2011:87.

<sup>514</sup> See Smit 2011:354; Anderson 2013:361; Weissbrodt 2005:279; Paust 2002:801; Bilchitz 2008:754; Bilchitz 2010:1; Bilchitz 2013:580; Timmerman 2006:23; *Mankayi v AngloGold Ashanti* 2011 3 SA 237 (CC).

<sup>515</sup> See Oliver 2007:70-71.

<sup>516</sup> De Waal *et al* 1999:51.

#### 4.4.3.3.4 Horizontal effect on private law: from corrective to distributive justice

##### 4.4.3.3.4.1 Horizontal effect: an overview

It is clear from chapter 2 and from the above analysis that there are distinctions in both the purpose and the methodology of direct and indirect horizontal application of the Bill of Rights.<sup>517</sup> While direct horizontal application of the Bill of Rights – the application of the Bill of Rights provisions *as such* – is aimed at the determination of any inconsistency between the Bill of Rights and the law or conduct with the result that where such incompatibility exists the law or conduct will be invalidated, the purpose of indirect application of the Bill of Rights to law – the application of the *principles and values* underlying the Bill of Rights – is to avoid such incompatibility. If there is such incompatibility or the law falls short of the standards imposed by the objective value system of the Bill of Rights, the court has the constitutional duty and responsibility to “read down” or “read in” the statute, or develop the common law or customary law.

Because the Constitution does not separate constitutional jurisdiction from ordinary jurisdiction,<sup>518</sup> and in view of the constitutional duty to modify and develop the law, the indirect horizontal application of the Bill of Rights is a “default form” of horizontality and must be resorted to before direct horizontal application.<sup>519</sup> Thus, before a court resorts to declaring the impugned law invalid, it must consider interpreting the statute or developing the common law or customary law to be compatible with the Bill of Rights.<sup>520</sup> The process between indirect and direct application of the Bill of Rights is however not a compartmentalised one. The decision of *Govender v Minister of Safety and Security* directs how this process should be carried out:

This method of interpreting statutory provisions under the Constitution requires a court to negotiate the shoals between the Scylla of the old-style literalism and the Charybdis of judicial law-making. This requires magistrates and judges (a) to examine the objects and purport of the Act or the section under consideration; (b) to examine the ambit and meaning of the rights protected by the Constitution; (c) to ascertain whether it is reasonably possible to interpret the Act or section under consideration in such a manner that it conforms with the Constitution, *i.e.* by protecting the rights therein protected; (d) if such interpretation is possible, to give effect to it, and (e) if it is not possible, to initiate steps leading to a declaration of constitutional

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<sup>517</sup> Also see Sutherland 2008:405.

<sup>518</sup> See Kokott and Kaspar 2012:810.

<sup>519</sup> Currie and De Waal 2005:51.

<sup>520</sup> Currie and De Waal 2005:51.



invalidity.<sup>521</sup>

The proportionality or legitimacy assessment of private law constitutes a paradigm shift in the methodology and the social ends of private law disputes adjudication.<sup>522</sup> Whereas the attainment of corrective justice is the primary goal of private law, where the constitutional right of one or both private parties to the dispute is an aspect of such dispute adjudication, not only a shift from the “Scylla of the old-style literalism” to the “Charybdis of judicial law-making” interpretative methodologies is prescribed but also a shift in the kind of justice which is sought to be promoted. Constitutional adjudication in private sphere is predicated on and seeks to attain distributive justice rather than corrective justice, the latter being the primary concern of private law.<sup>523</sup>

#### 4.4.3.3.4.2 Constitutional values into private law through distributive justice

In chapter 2, it was indicated that because of traditional liberal conceptions according to which law was dichotomised into public and private, fundamental rights, understood as part of public law, were conceived as shields against the might of the state and had no relationship with private law. The implication of this liberal approach is that under private law, the private actors as legal subjects are autonomous. They determine for themselves whether, and if so, on what conditions, they enter into legal relationships with each other. They are not influenced by human rights considerations. Furthermore, while, on the one side, a breach of public law is a matter of common interest of all members of the society, a breach of a private-law rule, on the other is left to the elective choice of the private actors involved in the legal relationship, with the role of the state being to provide the enforcement machinery for the resolution of the dispute. When a private matter ultimately comes before courts for resolution, the role of the courts is to “restore the pre-existing balance between the two parties, one or both of whom have had their rights disturbed in some way”.<sup>524</sup> Corrective

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<sup>521</sup> *Govender v Minister of Safety and Security* 2001 4 SA 273 (SCA):[11]. Also see Alder 2002:445; *Bhulwana*:[28]. This threshold analysis is applicable to common law and customary law. See *Thebus*:[31]-[32]; *Du Plessis*:[136]; *Sunday Times*:[47]; Barak<sub>1</sub> 2012:118-127.

<sup>522</sup> First, the Constitution requires a special justification of proportionality for a law to override an entrenched right or freedom. Secondly, common-law assessment of rights is multi-factorial in its approach. It “depends on accumulating factors pointing to or against a particular conclusion, without necessarily organising these within a formal hierarchy of principles. These factors include precedent, logical coherence, social policy and morality.” However, some factors may be given more weight than others may. See Alder 2002:426.

<sup>523</sup> Reichman 2001:247.

<sup>524</sup> Laing and Visser 2013:333.

justice has always been the normative structure that underlay private law as a normative framework for claims and liability arising out of human interaction.<sup>525</sup> Corrective justice does not relate to the sharing of wealth, income, property, rights and duties (social goods) but involves the claims that one person has against another and the obligation of reparation or a reversal of the transaction in the event of injury or loss.<sup>526</sup> In its treatment of private parties, corrective justice has three distinctive features.

Firstly, the focus of corrective justice is the distinctive character of the injury – who sustained it and who caused it – and is not concerned with the characters of the parties involved.<sup>527</sup> Corrective justice excludes as irrelevant the personal features of the parties to the legal relationship: comparative wealth, social rank, needs, moral character, and whether a party is a private actor or government authority. Comparative assessments of the parties are completely excluded from the determination not only because they are considered irrelevant to the consideration of the rights and liability of the parties but also because the courts are “obligated to strive for coherence and consistency among the common-law principles derived from reason” and not political or other considerations.<sup>528</sup>

Secondly, corrective justice treats parties to a legal relationship as formally equal. This formal equality consists in individuals’ having what lawfully belongs to them in the light of the period when they entered into the transaction.<sup>529</sup> The law assumes private actors as equal autonomous legal subjects who are not only equal in their legal relationship but also who are entitled to decide, in the first place, whether or not to enter into such legal relationship including the determination of the substantive content of that relationship.<sup>530</sup> According to this formal equality, a right bearer remains “a right bearer equal to other right bearers from the perspective of Right, regardless of his or her particular and indeed, sometimes peculiar, circumstances”.<sup>531</sup> Corrective justice thus requires the maintenance and restoration of the formal equality with which the legal subjects first entered the transaction and is limited in

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<sup>525</sup> Barnard-Naudé 2013:38. According to Weinrib (2002:354), corrective justice “is the organising principle for private-law liability generally”.

<sup>526</sup> Keating 2012:370; Gardener 2011:9-10; Mbazira 2009:103-109.

<sup>527</sup> Mbazira 2009:107.

<sup>528</sup> Reichman 2001:247.

<sup>529</sup> Weinrib 2002:349.

<sup>530</sup> Mbazira 2009:106. In contradistinction to private law, public law imposes the will of the state on private actors and this imposition is the basis for inequality between private actors and the state.

<sup>531</sup> See Barnard-Naudé 2013:40.

terms of remedies available to address the formal inequality.<sup>532</sup> As Laing and Visser put it, “corrective justice assumes that a state of equality or balance pre-existed the disturbance ... and seeks to restore the parties to the positions they were in before the disturbance occurred”.<sup>533</sup> Where the formal equality is disturbed in that one person loses or gains what he or she in the first place was not supposed to lose or gain, injustice occurs and it is the duty of the courts to correct that injustice and to restore the balance by depriving one person of the gain and restoring it to the other.<sup>534</sup>

Finally, corrective justice is concerned with and therefore focuses on the immediate relationships of the parties as opposed to their relationship within the wider context of the society and treats them through the lens of the harm or the imbalance, which is the subject of the dispute.<sup>535</sup> Thus, according to corrective justice, parties to the dispute occupy a bipolar position and are linked or correlated *only* by the harm or imbalance of their legal relationship and factors pertaining to that relationship.<sup>536</sup> In the end, corrective justice restores the pre-existing and value-neutral balance in the legal relationship without factoring into the determination any independent external determinants or considerations.<sup>537</sup> Weinrib points out that “the only considerations that conform to corrective justice are those that apply (or figure with in a larger ensemble of considerations that applies) correlatively to both parties”.<sup>538</sup> “Such considerations”, Weinrib continues, “set terms for the two parties’ interaction that take account of their mutual relationship and are consequently fair to both of them”.<sup>539</sup> In this way, corrective justice is the justice of the particular parties contextualised within their specific legal relationship and without consideration of external society-wide values. It is the requirements of formal equality of legal subjects, the organisation of private-law rules and principles around the idea of reason (rationality) and *correlativity* – situating

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<sup>532</sup> Weinrib 2002:349; Mbazira 2009:106,109-111. Thus, when the parties have recourse to the courts, “what the judge does is to restore equality”. Aristotle 1955:148-149.

<sup>533</sup> Laing and Visser 2013:333.

<sup>534</sup> Weinrib 2002:349.

<sup>535</sup> Nolan and Robertson 2012:23-24. Cane states that, private law, according to corrective justice, is concerned with the protection and promotion of the value of human autonomy rather than other human values such as community and solidarity. See Cane 2012:56.

<sup>536</sup> Nolan and Robertson 2012:25; Weinrib 2002:351.

<sup>537</sup> Laing and Visser 2013:333. Since the role of judges is to administer corrective justice, social and political considerations are said to be beyond the province of the courts and into the domain of Parliament. See Cane 2012:56.

<sup>538</sup> Weinrib 2002:355.

<sup>539</sup> Weinrib 2002:355.

the parties to the dispute in a bipolar position and the determination of liability and restoration of the balance by consideration and ascription of appropriate factors underlying the parties' legal relationship only<sup>540</sup> – which insulate private law from any external factors such as fairness, political considerations and other societal values.<sup>541</sup>

Distributive justice, on the other hand, involves the assessment of the apportionment or distribution of social goods among the participants in the political community in accordance with the demands of the Constitution.<sup>542</sup> Distributive justice considers all the necessary comparative factors of the parties to the dispute who are not treated on formal equality basis but are secured a fair share in the distribution of the social goods or burdens by taking into account as relevant considerations their different particulars or merits.<sup>543</sup> Instead of positioning the parties in a correlative bipolar position as corrective justice does, distributive justice links all the parties including the wider community to the benefit or burden that they jointly share.<sup>544</sup> The parties are not correlated by the harm or imbalance in the relationship but are situated within the adjudication process by the proportion of the share based on their different particulars and independent external determinants such as policy, social interests and values, fairness and substantive equality (political considerations).<sup>545</sup> While corrective justice is about restoring pre-existing and value-neutral balance, distributive justice determines “how rights and duties are to be apportioned” through the personal particulars of the parties to the dispute and the application of external criteria.<sup>546</sup> It is the kind of justice “which seeks to bring about equitable distribution of the social material and political resources of the community”,<sup>547</sup> and which avails a wide range of equitable remedial powers to the decision-maker, who is not limited by the causation of harm and restoration of formal equality but by the needs of the community as a whole.<sup>548</sup> On the distinction between distributive and corrective justice, Gardner states:

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<sup>540</sup> See Weinrib 2002:350-352,354.

<sup>541</sup> Barnard-Naudé 2013:40; Reichman 2001:247.

<sup>542</sup> Laing and Visser 2013:333; Keating 2012:370; Weinrib 2002:349; Mbazira 2009:111.

<sup>543</sup> Weinrib 2002:349. Thus, the conduct of the Hotelier in cancelling the contract for the occupation of the hotel by homosexual partners based on their sexual orientation is void. See *Bull v Hall* [2014] 1 All ER 919.

<sup>544</sup> Weinrib 2002:351; Mbazira 2009:114-122.

<sup>545</sup> Laing and Visser 2013:333.

<sup>546</sup> Laing and Visser 2013:333.

<sup>547</sup> Bhaguati 1988:26.

<sup>548</sup> Mbazira 2009:114-115

Norms of distributive justice are to be understood on the 'geometric' model of division. There are several potential holders of certain goods or ills and the question is how to divide the goods or ills up among them. Norms of corrective justice, on the other hand, are to be understood on the 'arithmetic' model of addition and subtraction. Only two potential holders are in play at a time. One of them has gained a certain goods or ills from, or lost certain goods or ills to, the other. The question is whether and how the transaction is to be reversed, undone, counteracted. Should we add what has been subtracted, subtract what has been added or leave things as they are?<sup>549</sup>

*Macfarlane v Tayside Health Board*<sup>550</sup> is a classic example demonstrative not only of the different results emanating from the application of corrective justice and distributive justice on the same set of facts but also of how constitutional values are utilised in the promotion of distributive goals in private law and the constitutionalisation of private law.<sup>551</sup> *Macfarlane* involved the problem of "wrongful birth" and the claim by the parents against the doctor or health authority for the birth of an otherwise healthy but unwanted child (Catherine) flowing from the doctor's negligence during the sterilisation of one of the parents of the child as a result of which she conceived. The issue was whether special damages in the form of the *unwanted but healthy child* and the *costs* of the raising and upbringing thereof were recoverable in law.

The possibility of conceptualising the child as a form of damage or harm depended on the corrective or distributive aspects of the matter. Corrective justice would require the assessment of the matter by the Court in relation to the immediate interaction of the parents and the doctor in their legal relationship through the correlativity of the doctor's negligent conduct and the resultant event (birth) on the parents which when they entered into relationship with the doctor they sought to evade. The Court would then have to correct or rectify the injustice of wrongful birth on the part of the parents and restore or maintain the formal equality that existed at the time the parties entered into the sterilisation agreement. Absence of a child and costs of raising and upbringing a child would be what lawfully belongs to the parents and considerations as to morality or fairness would be irrelevant in the structure of justification and the determination of liability in the matter.

Thus, linking the doctor and the parents on the corrective justice's correlative baseline of the

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<sup>549</sup> Gardner 2011:9.

<sup>550</sup> *Macfarlane*:963.

<sup>551</sup> It is important to note that *Macfarlane* is used for demonstrative purposes and not as a statement of law of Lesotho on "wrongful birth" incidents. Perhaps the law on this issue is as stated in *Administrator of Natal v Edouard* 1990 3 SA 581 (A).

doer and the sufferer, the parents, as the sufferers of the injustice, would be entitled to succeed and be restored to the balance that would have obtained had the sterilisation been successfully performed. As Lord Steyn stated, “it is possible to view the case simply from the perspective of corrective justice. It requires somebody who has harmed another without justification, to indemnify the other”.<sup>552</sup> “On this approach”, Lord Steyn continued, “the parents’ claim for the costs of bringing up Catherine must succeed”.<sup>553</sup> In the circumstances, to adopt Weinrib’s expression, correlativity would have fulfilled its rectificatory function by eliminating the *damage* on the part of the parents, without considering the morality of labelling Catherine as damage.

Approaching the matter from the vantage point of distributive justice would produce different results. This is precisely so since from the distributive justice vantage point, as Lord Steyn indicated, “it requires a focus on the just distribution of burdens and losses among members of a society”.<sup>554</sup> Here, the enquiry is broad and is not limited to the correlative bipolar position and circumstances of the parties, the parents and the doctor or health authority in *Macfarlane*. In *Macfarlane*, the enquiry turned on whether it was just for the parents of a healthy child to recover damages from the doctor or health authority for the costs of the upbringing of that child. Answering this question, Lord Steyn linked not only the parties (parents and the health authority), but also the common travellers (commuters) of the London Underground in the criteria (societal morality in this case) for the distribution of the burden created by the circumstances of the case:

I am firmly of the view that an overwhelming number of ordinary men and women would answer the question with an emphatic ‘No’. And the reason for such a response would be an inarticulate premise as to what is morally acceptable and what is not.... Instinctively, the traveler on the Underground would consider that the law of torts has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing.... Relying on principles of distributive justice I am persuaded that our tort law does not permit parents of a healthy unwanted child to claim the cost of bringing up the child from a health authority or a doctor. If it were necessary to do so, I would say that the claim does not satisfy the requirement of being fair, just and reasonable.<sup>555</sup>

*Macfarlane* is demonstrative of how private law should be injected with distributive considerations by factoring in the assessment and determination of liability of the parties the

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<sup>552</sup> *Macfarlane*. Lord Steyn’s opinion.

<sup>553</sup> *Macfarlane*. Lord Steyn’s opinion.

<sup>554</sup> *Macfarlane*. Lord Steyn’s opinion.

<sup>555</sup> *Macfarlane*. Lord Steyn’s opinion.

constitutional values that underlie the constitutional order. It is clear that corrective justice-based approach to litigation is inimical to private law absorbing external demands of the Constitution. Prempeh was correct to observe that “the common law, in its method, substance, and philosophical underpinnings, carries with it elements and tendencies that do not accord with the transformative vision reflected in modern bills of rights”.<sup>556</sup> According to Prempeh, “much of the problem stems from the basic constitutional and jurisprudential paradigm upon which English common law is built, namely Austinian positivism and Diceyan parliamentary sovereignty”, the ideas which can, in the age of constitutional review and constitutional supremacy, be problematic and “present significant difficulty for rights”.<sup>557</sup> Echoing the same sentiments, Michelman has more than four decades ago decried:

For it can hardly be doubted that the mainstream of our legal tradition has largely bypassed the outcome-appraising sort of distributional concern. Lawyers and jurists, like economists and political scientists, seem to have instinctively placed distributive-share questions beyond the province of their specialized analysis, ‘science,’ and technique. They work under a paradigm of legal order which is noticeably lacking in norms, principles, and categories of analysis directly applicable to the evaluation of distributional outcomes. The notion of justice inhabiting that paradigm has been essentially corrective and regulative, stabilizing and preservative – if not of any extant distributional configuration, then of an extant framework of procedures and practices within which distributions are secreted.<sup>558</sup>

Section 4(2) of the Constitution which collapses and disintegrates the traditional liberal wall of public-private distinction is a cradle for a paradigm shift from corrective justice approach to distributive justice-based private-law dispute adjudication through a horizontally applicable Bill of Rights.<sup>559</sup> Section 4(2) and section 156(1) of the Constitution ground and mandates a shift from the legal order and legal traditions, which focus on the correctness of the legal processes and the purity and rationality of their application to the appraisal and evaluation of distributional outcomes of each private-law relationships and disputes.<sup>560</sup> Based as it is on

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<sup>556</sup> Prempeh 2006:72.

<sup>557</sup> Prempeh 2006:72-73; Leigh 1999:62.

<sup>558</sup> Michelman 1973:963.

<sup>559</sup> According to section 4(2) of the Constitution, the Bill of Rights provisions should be applied in horizontal legal relationships as well. That, however, should not necessarily result in the complete elimination of corrective justice aspects of private law. As Lord Steyn correctly pointed out in *Macfarlane*, “the truth is that tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven. *Macfarlane*, Lord Steyn’s opinion. Also see Mbazira 2009:130.

<sup>560</sup> See, for example, *LIC of India v Consumer Education and Research* 1995 SCC (5) 482 where the Indian Supreme Court held that an insurance policy must ensure a “public element” of “reasonable,

fundamental constitutional values of communalism, the new constitutional order dictates the notion of distributive justice, which “places an individual as part of his community and whose welfare is dependent on the welfare of everybody else”.<sup>561</sup>

In the new constitutional order, and in the exercise of constitutional jurisdiction in private-law disputes where the legality and legitimacy of law or conduct is involved, all courts are not merely neutral arbiters restoring the balance. They are co-architects in the social engineering through taking of “political” decisions about how to apportion rights and duties in accordance with the demands of the Constitution.<sup>562</sup> When the Constitution ushered a new legal order in Lesotho, the courts were thus confronted with “a rapid oscillation” from the old traditions to the new approach that involves the recognition and application of constitutional values in private-law litigation.<sup>563</sup> Speaking of this rapid oscillation in the context of section 35 of the Interim Constitution of South Africa, the equivalent of section 156(1) of the Constitution of Lesotho, Friedman JP observed:

The Courts in South Africa are now confronted by a rapid oscillation from the positivist jurisprudence founded on the sovereignty of Parliament to a jurisprudence based on the sovereignty of the law contained in a Constitution with a justiciable bill of rights. Having regard also to the provisions of s 35, the Courts are now directed to a different form of interpretation, founded on value judgments.... In dealing with a legal system, due cognisance must also be taken of the underlying ideals, principles and concepts. These factors implicitly influence those who operate within the said system. In terms of s 35 the Courts ... are cast in the additional role of social engineers, social and legal philosophers in order to 'promote the values which underlie an open and democratic society based on freedom and equality'.<sup>564</sup>

The objective values underpinning the Bill of Rights constitute the source of distributive justice and the proportionality or legitimacy test is “a means by which to pursue the ideal of distributive justice: [...] a fair allocation of benefits and burdens across society”.<sup>565</sup> This is

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just and fair” eligibility conditions, thus being “conformable to the Preamble, fundamental rights and the directive principles of the Constitution”. The insurer limited eligibility to salaried Government and reputed commercial firms’ employees.

<sup>561</sup> Mbazira 2009:130.

<sup>562</sup> Laing and Visser 2013:333; Hatchard *et al* 2004:177.

<sup>563</sup> According to Cappelletti (1989:236), “the old, formalistic bodies and techniques” which are “frequently unsuitable for the new role” are forced to change, and the decision-makers “must contribute to mould the law to society’s novel needs and aspirations.” Also see *Sekoati*:821.

<sup>564</sup> *Baloro v University of Bophuthatswana* 1995 4 SA 197 (B):243-245. Also see *National Coalition for Gay and Lesbian Equality v Minister of Justice* 2000 2 SA 1 (CC):[82].

<sup>565</sup> Alder 2002:508.



particularly so because under proportionality test, it is the law that has the “proper purpose” that may justifiably limit the entrenched human rights and “the purposes that justify limitations on human rights are derived from the values on which society is founded”.<sup>566</sup> Unfortunately, and notwithstanding sections 4(2) and 156(1) of the Constitution, the legal traditions of the old order are embedded and run too deep in the new legal order’s adjudicative processes and continue to predicate private-law disputes adjudication on the hallmarks of corrective rather than distributive paradigm. The problem is further exacerbated by the unconstitutional separation of constitutional jurisdiction from ordinary jurisdiction concretised by the trilogy of *Morienyane*,<sup>567</sup> *Chief Justice*<sup>568</sup> and *Mota*.<sup>569</sup>

While Lesotho’s legal traditions clearly require calibration to be compatible with the Constitutional order and framework, it is important to point out that the role of constitutional jurisdiction in private-law disputes is to balance private-law corrective values with the distributive requisites of the Constitution in the promotion and apportionment or distribution of public goods such as constitutional justice.<sup>570</sup> Just as minimum wage laws are intended to ensure a fair distribution of wealth between the employer and the employee by compulsory alteration of the parties’ contractual capacity in relation to what may lawfully be offered and accepted as to the minimum wage and the declaration of anything below the threshold as unlawful,<sup>571</sup> so the Bill of Rights dictates that the normative content and contours of private law must reflect the distributive features of the Constitution, the objective value system embodied in the Bill of Rights: human dignity, liberty, equality, freedom, justice and communalism. As Zucker observes, the principles of distributive justice “regulate basic freedoms, so one cannot readily eliminate them from the constitutional essentials” of a constitutional democratic state.<sup>572</sup> Anything below this threshold, Lesotho’s Constitution has declared, should be void.<sup>573</sup>

In the final analysis, it is clear that, firstly, the distributive justice-based private-law dispute adjudication is intended to optimise constitutional distributive ends in the private law resulting

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<sup>566</sup> Barak1 2012:245.

<sup>567</sup> *Morienyane v Morienyane* 204/2003.

<sup>568</sup> *Chief Justice v Law Society* 59/2013.

<sup>569</sup> *Mota v Director of Public Prosecutions* 473A/2013.

<sup>570</sup> This is particularly so when considered in the light that distributive justice “is intrinsic to ... democracy.” See Zucker 2003:273.

<sup>571</sup> Kronman 1980:499.

<sup>572</sup> Zucker 2003:291.

<sup>573</sup> The Constitution, sec 2.

in the constitutionalisation – or, as Mundlak calls it, “juridification”<sup>574</sup> – of private law. Secondly, it is the task of the courts, armed with the powers conferred on them by section 2, 22 and 156(1) of the Constitution, to blend the Bill of Rights and the objective values underlying the constitutional order into private law, “modifying the latter whenever necessary so as to achieve a harmonious amalgam”.<sup>575</sup> Finally, the Constitution, and therefore constitutional law, “provides new lenses through which the traditional branches of the law have to be critically viewed. Lawyers and judges working in any area of the law have to play the constitutional game now”<sup>576</sup> and “abandon the individualistic, essentially *laissez-faire*, nineteenth-century concept of litigation”.<sup>577</sup>

## PART IV

### 4.5 Constitutional jurisdiction and constitutional remedies: recreating a Bill-of-Rights-compliant private-law world

#### 4.5.1 Introduction

Writing to Thomas Jefferson in 1788 about the proposed alterations to the then new US Constitution to include provisions about the Bill of Rights, James Madison, referring to the Bill of Rights provisions, had decried the efficacy of “these parchment barriers” which had repeatedly been violated.<sup>578</sup> In the years that immediately followed, the US Supreme Court proved to be one of America’s effective institutions for the upholding of constitutional supremacy and integrity and later the translation, to some degree, of the Bill of Rights’ paper guarantees into meaningful human rights protections through the granting of appropriate constitutional remedies.<sup>579</sup>

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<sup>574</sup> According to Mundlak (2001:298-300), “juridification” refers to the diffusion of fundamental rights into private law by formation of norms that rest on public values.

<sup>575</sup> *Motala v University of Natal* 1995 3 BCLR 374 (D):382.

<sup>576</sup> Comella 2011:266.

<sup>577</sup> Cappelletti 1989:271-272.

<sup>578</sup> Madison 1904:169. The PDF format of this book is available online at <[http://lf-oll.s3.amazonaws.com/titles/1937/Madison\\_1356-05\\_EBk\\_v6.0.pdf](http://lf-oll.s3.amazonaws.com/titles/1937/Madison_1356-05_EBk_v6.0.pdf)> (accessed on 5 July 2015).

<sup>579</sup> See *Marbury*. Also see Strossen 1994:50. Though the US Constitution had been ratified in 1787 and the Bill of Rights since 1791, it was not until 1857 that the US Supreme Court first exercised its judicial review power to nullify a statute on the basis of its inconsistency with the private actor’s Bill of Rights in its decision of *Dred Scott v Sandford* 60 US 393 (1857).

Indeed, remedies are the central monolith and mainstay for the translation of the parchment barriers into social reality.<sup>580</sup> As the Indian Chief Justice stated, “it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated. A right without a remedy is a legal conundrum of a most grotesque kind”.<sup>581</sup> It is for this reason that the concept of remedies has been said to be closely and inextricably interwoven with that of right, so that where there is a right, there is a remedy – *ubi jus ibi remedium*.<sup>582</sup> Remedies refer to a range of measures that may be taken in response to a threatened or actual human rights violation and are therefore both procedural and substantive.<sup>583</sup> Procedurally, remedies are guaranteed avenues, processes and mechanisms for the ventilation and vindication of rights violations and claims such as courts, tribunals or administrative bodies.<sup>584</sup> Thus, the existence of remedial institutions, procedures of access thereto and the constitutional review itself are procedural remedies for the fair determination of private actors’ rights claims without which it is impossible to speak of the right itself. As Zupačič opined in *Roche v United Kingdom*,

... a right without a remedy is a simple recommendation (‘natural obligation’). It follows that a right is doubly dependent on its concomitant remedy. If the remedy does not exist a right is not a right; if the remedy is not procedurally pursued the right will not be vindicated. The right and its remedy are not only interdependent. They are consubstantial. To speak of rights as if they existed apart from their procedural context is to separate artificially – say for pedagogical, theoretical or nomotechnical reasons – what in practical terms is inseparable. A substantive right is not a mirror image of its procedural remedy. A substantive right is its remedy.<sup>585</sup>

In its substantive sense, remedies refer to the outcome of those processes geared towards the protection and enforcement of the human rights violations and claims.<sup>586</sup> In this chapter,

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<sup>580</sup> Tortell 2006:1.

<sup>581</sup> *Fertiliser Corporation Kamgar Union v Union of India* (1981) 1 SCC 568:574.

<sup>582</sup> Dada 2013:2; *Minister of Interior v Harris* 1952 4 SA 769 (A):780-781. *Ashby v White* (1703) 92 ER 126:136, Holt CJ stated that “if the plaintiff has a right, he must of necessity have means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for ... want of a right and want of remedy are reciprocal.” Also see *Marbury*:163.

<sup>583</sup> Musila 2006:446.

<sup>584</sup> Shelton 2005:7.

<sup>585</sup> Dissenting opinion of Zupačič in *Roche v United Kingdom* (2006) 42 EHRR 30 available online at <<http://hudoc.echr.coe.int/eng?i=001-70662>> (accessed on 30 July 2015).

<sup>586</sup> Shelton 2005:7.

remedies are used in this latter sense. While the right to effective remedies is well entrenched by global and regional human rights instruments,<sup>587</sup> remedies, both procedural and substantive, are the essential hallmarks of the rule of law and constitutionalism at national level.<sup>588</sup> They have been at the epicentre of the protection and enforcement of the private actor's fundamental rights and liberties by controlling state and private activity which is, or has the potential of being, injurious to private interests. The horizontal application of the Bill of Rights is a mainstay for the innovative fashioning of new remedies in the private sphere for the effective protection and enforcement of fundamental rights and freedoms resulting in the constitutionalisation of private law.

In strict legal sense, it is the constitutional remedies which the courts grant to private actors which impact on private law by not only reconfiguring the horizontal legal relationships of private actors, but also the normative content and structure of private law,<sup>589</sup> thus actualising the statement of rights and freedoms into a reality.<sup>590</sup> Without the effective remedies, the fundamental rights of private actors would remain parchment barriers without any meaningful effect and the private law would maintain its blockade against external demands of the Constitution. Dada was correct in observing, "the efficacy of any remedy is dependent not only on its availability but its sufficiency and adequacy".<sup>591</sup> According to the African Commission, a remedy must be available, effective and sufficient. It is considered available "if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint".<sup>592</sup>

This means that the courts must give appropriate remedies that are effective and sufficient for the protection and enforcement of the threatened right or freedom. Whether a remedy is effective and sufficient will always be informed by the nature of the right that has been

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<sup>587</sup> See, for example, *Universal Declaration of Human Rights*, Art 8; *International Covenant on Civil and Political Rights*, Art 2(3), 9(5) and 14(6); *Convention on the Elimination of Racial Discrimination*, Art 6; *Convention on the Elimination of All Forms of Discrimination against Women*, Art 2(c); *United Nations Convention against Torture*, Art 14; *ECHR*, Art 13; *American Declaration of the Rights and Duties of Man*, Art 17; *American Convention of Human Rights*, Art 25; *ACHPR*, Art 7, 21, 26.

<sup>588</sup> Shelton 2005:114; Van der Schyff 2010:2.

<sup>589</sup> Dada 2013:3.

<sup>590</sup> Fiss 1979:51-52; Mbazira 2009:122-123.

<sup>591</sup> Dada 2013:11.

<sup>592</sup> *Jawara v The Gambia* (2000) AHRLR 107:[32]; also see Dada 2013:11.

infringed and the nature of the infringement.<sup>593</sup> According to the Supreme Court, remedies should firstly, provide compensation for the pecuniary and non-pecuniary harms of *Charter* violations. Secondly, remedies should vindicate the values of the *Charter*. Thirdly, they should deter *Charter* violations and ensure compliance with the *Charter* in the future. Fourthly, they should be effective, meaningful and responsive to the *Charter* violation and the situation of the claimant and may require that remedial discretion be exercised in a novel manner. Fifthly, remedies should be fair to all parties and balance the affected interests including concerns about good governance. Finally, they should be appropriate for a court to devise and they should respect the role of the executive and the legislature.<sup>594</sup> In *Fose v Minister of Safety and Security*, the Constitutional Court of South Africa stated that “an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced” and the courts, which have a particular responsibility in this regard, are obliged to “forge new tools” and shape innovative remedies, if needs be, to achieve this goal.<sup>595</sup>

While constitutional review and the associated constitutional remedies of invalidation of incompatible laws were the ingenious machination developed by the Supreme Court in the US without an express constitutional grant to that effect,<sup>596</sup> comparative constitutional theory demonstrates that the structure and architecture of constitutional review and its remedies are a conscious choice that every constitutional democracy makes in the light of each society’s specific political, historical and social heritage including the political power struggles of that society.<sup>597</sup> Comparative constitutional theory indicates that such a choice of constitutional review is made on the continuum of “strong” and “weak” review. The importance of determining whether a constitutional review is strong or weak lies in the fact that strong and weak reviews determine the kind, extent and finality of remedies available in the event of infringement of guaranteed rights and freedoms.

#### 4.5.2 Strong and weak review: characterising the consequences of constitutional review

When citizens in a constitutional democracy disagree about whether a right has been

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<sup>593</sup> *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC):[106]. Also see the Constitution, sec 22(2).

<sup>594</sup> See Roach 2013:477-479. Also see Currie and De Waal 2005:196-198.

<sup>595</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC):[69].

<sup>596</sup> Strossen 1994:52, 59.

<sup>597</sup> Barak, 2012:382.

contravened, whether the contravention constitutes a justifiable limitation of the rights and what remedies should be available for the contravention, which institution – the judiciary or Parliament – should have a final say in the dispute. Moreover, what are the consequences of the inconsistency of a law with the Constitution? Does Parliament (or the Executive) have a role to play beyond the finding by the courts of the incompatibility between a law and the Constitution? While these questions may raise issues concerning the counter-majoritarian difficulty or the doctrine of the separation of powers, the central issue with which this study is concerned is whether the judiciary or Parliament has the final authority or say in interpretation of the Constitution and in the consequences of its finding of incompatibility of a law with the Constitution. The answer to this question depends very much on the choice each constitutional democracy makes as expressed in the Constitution on the continuum of strong and weak review.<sup>598</sup> Waldron defines strong review as follows:

In a system of strong judicial review, courts have the authority to decline to apply a statute in a particular case (even though the statute on its own terms plainly applies in that case) or to modify the effect of a statute to make its application conform with individual rights (in ways that the statute itself does not envisage). Moreover, courts in this system have the authority to establish as a matter of law that a given statute or legislative provision will not be applied, so that as a result of *stare decisis* and issue preclusion a law that they have refused to apply becomes in effect a dead letter. A form of even stronger judicial review would empower the courts to actually strike a piece of legislation out of the statute-book altogether.<sup>599</sup>

Van der Schyff points out that “strong-form review amounts to leaving the legislature no room to respond to a court that strikes down legislation on account of it violating higher law, bar an amendment of such higher law”.<sup>600</sup> The courts’ ruling is final and binding and must be accepted without any qualification by Parliament.<sup>601</sup> In a system of weak judicial review, by contrast, “courts may scrutinize legislation for its conformity to individual rights but they may not decline to apply it (or moderate its application) simply because rights would otherwise be violated”.<sup>602</sup> The judiciary does not have the last word in the interpretation of the Constitution

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<sup>598</sup> Van der Schyff 2010:181. Also see Tushnet 2008:3-43; Tushnet 2006:3-11; Tushnet 2003:2782-2787; Sinnott-Armstrong 2003:381.

<sup>599</sup> Waldron 2006:1354-1355.

<sup>600</sup> Van der Schyff 2010:181.

<sup>601</sup> Van der Schyff 2010:182; Tushnet 2006:3-3; Tushnet 2008:33 (“Strong-form review is a system in which judicial interpretations of the Constitution are final and unrevisable by ordinary legislative majorities.”)

<sup>602</sup> Waldron 2006:1354-1355; Tushnet 2008:24; Tushnet 2006:4-5; Tushnet 2013:2251 (weak review is “dialogic in design”).

and the resultant consequences of incompatibility between a law and the Constitution, but it has a shared responsibility with Parliament or the Executive on the issue.<sup>603</sup> Between the two extremes of strong and weak review, there are intermediate positions.<sup>604</sup> For example, while the Canadian Courts may declare any law incompatible with the Charter null and void,<sup>605</sup> the Canadian Parliament may override the ruling of the Courts.<sup>606</sup>

In the context of Lesotho, the decisions of the judiciary in relation to the interpretation and the remedies awarded thereby are final and non-reversible by Parliament except through the amendment of the Constitution. In *Law Society v Prime Minister*,<sup>607</sup> the Government of Lesotho issued a Cabinet directive in 2004 barring the use of lawyers in Local Courts contrary to the Court of Appeal decision in *Mopa*<sup>608</sup> declaring the exclusion of the legal representatives from these courts unconstitutional. The cabinet directive was an immediate direct reaction intended to reverse, in effect, the *Mopa* decision. The High Court in *Law Society v Prime Minister* declared the Cabinet directive unconstitutional, null and void holding that since “only a Constitutional amendment would be required” to reverse the Court of Appeal decision in *Mopa* “the problem of forbidding legal practitioners from appearing in the Local Court will therefore not be that simple”.<sup>609</sup> It is therefore clear that Lesotho’s

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<sup>603</sup> Van der Schyff 2010:182; Poole 2005:710. For example, under section 4(4) of the *UKHRA* 1998, the English Courts may declare a statute incompatible with the ECHR, but such declaration of incompatibility does not result in the nullification or invalidity of such statute and is not binding on the parties (sec 4(6)). The incompatibility is then left to the political structures to take care of it. The power to take remedial action lies with the minister who may initiate “fast-track” procedures for the amendment of the statute to remove the incompatibility (sec 10(2)). A similar framework with express legislative override obtains with State of Victoria’s *Charter of Human Rights and Responsibilities Act* 2006 (*CHRR* 2006, sec 36(2), 37 and 31). *New Zealand Bill of Rights Act* 1990 (*NZBORA*) prevents the courts from declaring any statute incompatible with the *NZBORA* and from refusing to apply a law they consider inconsistent with the *NZBORA* (sec 4). However, New Zealand Courts may apply a meaning of the statute that is consistent with the *NZBORA* (sec 6).

<sup>604</sup> Waldron 2006:1356.

<sup>605</sup> See the *Charter*, sec 24(1); *Constitution Act* 1982, sec 52(1).

<sup>606</sup> See the *Charter*, sec 33 (the “notwithstanding clause”). Also see Gardbaum 2001:724; Tushnet 2008:32-33.

<sup>607</sup> *Law Society v Prime Minister* Constitutional 2/2004. This High Court decision is available online at <<http://www.lesotholii.org/ls/judgment/high-court/2004/82>> (accessed on 20 June 2015).

<sup>608</sup> *Mopa*:427.

<sup>609</sup> *Law Society v Prime Minister*:7, 10-11.

constitutional review can be classified as a strong and not a weak one.<sup>610</sup> The next question is what are the consequences of strong review and their effect on private law and whether subordinate courts have constitutional remedial power to bring this effect on private law in Lesotho.

#### 4.5.3 Consequences (remedies) of strong review and their effect on private law

Milchelman describes constitutional jurisdiction as “the power of a court (or similar body) to pronounce on the compatibility of questioned laws and acts with constitutional requirements, *with some measure of decisive effect on legal outcomes*”.<sup>611</sup> The consequences of a finding by a court that a rule or principle of private law is inconsistent with the Constitution may result in a number of legal outcomes and options. It is important to note that three main sources of constitutional remedies under the Constitution where the Bill of Rights provisions are involved: the supremacy clause,<sup>612</sup> the Bill of Rights chapter<sup>613</sup> and the modification of existing laws clause.<sup>614</sup> Comparative constitutional jurisprudence<sup>615</sup> indicates that the supremacy clause provides *defensive* remedies against unconstitutional *laws* such as “reading down” or severance, “reading in”, invalidity or disapplication (or non-application)<sup>616</sup> and suspended declarations of invalidity.

On the other hand, the Bill of Rights chapter provides for a range of remedies covering not only defensive remedies indicated above, but also personalised *affirmative* remedies of declaration of rights, declaration of general invalidity, damages, interdicts (including structural interdicts) and monetary compensation.<sup>617</sup> The remedies are available against the

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<sup>610</sup> The Constitution has ushered into Lesotho constitutional supremacy with the judiciary responsible to determine the infractions into the Constitution and the Bill of Rights. The weak review is predicated on traditions and organising principles of parliamentary supremacy which are not applicable to Lesotho. See the Constitution, sec 2, sec 22, sec 24(1) “court”, sec 118, sec 119(1).

<sup>611</sup> Michelman 2011:287. Emphasis supplied.

<sup>612</sup> The Constitution, sec 2.

<sup>613</sup> The Constitution, sec 22.

<sup>614</sup> The Constitution, sec 156(1).

<sup>615</sup> *Big M Drug Mart*:312-316; *Schachter*:700-702; *Osborne*:77-78,103; Roach 2013:474,490-509; McAllister 2004:2-63; Roach 1987:233-249; Hogg 2007:177-178; Klaaren 1998:1-32; Currie and De Waal 2005:190-227; De Waal *et al* 1999:164-186; Devenish 1999:572-575; Linington 2012:68-72.

<sup>616</sup> The court declares the law as invalid to the extent of inconsistency or disregards it because it is invalid. See *Marbury*:178.

<sup>617</sup> The remedies are available, and threshold issue of *locus standi* is limited, to a private actor who



*law or conduct* (state or private) which threatens the guaranteed rights and freedoms.<sup>618</sup> Finally, the modification of existing laws clause provides remedies of modification/adaptation and development of common law and customary law as well as all defensive and affirmative remedies available, respectively, under the supremacy clause and Bill of Rights chapter.<sup>619</sup>

Since the horizontal application of the Bill of Rights does not displace remedies available under common law and customary law, such remedies will continue to be applicable under constitutional jurisdiction or be developed to give effect to the Bill of Rights.<sup>620</sup> Courts may also fashion new remedies to vindicate both the fundamental rights and the Constitution and to deter further contraventions.<sup>621</sup> With the whole array and panoply of constitutional remedies being applied in horizontal legal relationships, it is clear what impact this may bring in reconfiguring private legal relationships and the constitutionalisation of private law. Currie and De Waal point out that constitutional remedies are “forward-looking, community-oriented and structural rather than backward-looking, individualistic and retributive” and their object is “to make the real world more consistent with the Bill of Rights”.<sup>622</sup> As it was stated in *Fose*, when courts award remedies in private-law disputes involving constitutional questions, they attempt to synchronise the real world of private law with the ideal construct of a constitutional world created in the image of the supremacy clause.<sup>623</sup> Without effective remedies, the declared constitutional values underlying the Bill of Rights may not find actualisation in private law. On this score, Fiss was correct to point out that “a remedy is an effort by the

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alleges actual or potential contravention of guaranteed rights and freedoms “in relation to him” or “in relation to a detained person”. See the Constitution, sec 22(1); also see McAllister 2004:63-73; Roach 2013:509-525; Klaaren 1998; *Ferguson*:[49].

<sup>618</sup> See the Constitution, sec 4(2), sec 22(1), sec 24(1) (“contravention”).

<sup>619</sup> On comparative jurisprudence concerning the relationship between section 2 and section 156(1) of the Constitution, see *Tan Eng Hong v Attorney General* [2012] SGCA 45:[57]-[64], a Singaporean Supreme Court decision available online at <<http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/court-of-appeal-judgments/14979-tan-eng-hong-v-attorney-general-2012-sgca-45>> (accessed on 18 June 2015).

<sup>620</sup> Currie and De Waal 2005:194, 226; *Fose* [19].

<sup>621</sup> See UN Human Rights Committee (UNHRC), Art 16, 17 and 19 of *General Comment 31*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available online at: <<http://www.refworld.org/docid/478b26ae2.html>> (accessed on 1 August 2015). Also see Hettiarachi 2007:67; *Fose*:[19].

<sup>622</sup> Currie and De Waal 2005:196. Contrast constitutional remedies with private law remedies which “tend to be retrospective, seeking to remedy loss caused rather than to prevent loss in the future ...” See *Rail Commuters’ Action Group v Transnet* 2005 2 SA 359 (CC):[80].

<sup>623</sup> *Fose*:[94].

court to give meaning to a public value in practice” and constitutes “the actualization of the right”.<sup>624</sup>

#### 4.5.4 Subordinate courts’ power of declaration and invalidation in effectuating horizontal effect on private law

The horizontal effect of constitutional remedies on private law is clear, but the fundamental anterior question is whether, notwithstanding constitutional jurisdiction they have, subordinate courts have the necessary power to grant these remedies, in particular, declaratory remedies. The issue becomes one of great importance in the light of orthodox understanding that subordinate courts, being creatures of statutes, have no declaratory power. The answer to this query is in the affirmative and is based on the diffused or decentralised constitutional review framework of Lesotho, the horizontal application of the Bill of Rights, the constitutional authority and duty to modify and develop existing law and theoretical bases.

As indicated in chapter 3, Lesotho’s constitutional review framework, unlike the European model where the power to supervise the constitutionality of laws and to give a constitutional remedy is exercised by a single specialised Constitutional Court to the exclusion of all ordinary courts, is diffused or decentralised. According to the American model of constitutional review which Lesotho has adopted, constitutional jurisdiction is not separated from ordinary jurisdiction. Thus, every court in the legal system has the power to test the legality and legitimacy of laws on constitutional grounds and to award appropriate remedies (which include declaratory and invalidation of impugned laws) in the event the ordinary laws are inconsistent with the Constitution.<sup>625</sup> Speaking of the attributes of the decentralised model, Medécigo stated:

In the American Model the ability to review the constitutionality of legislative action – and directly provide a remedy for a breach – represent a significant judicial power regardless of whether the courts involved are federal or local. Constitutional review is thus carried out directly within ordinary judicial procedures and only insofar as it is necessary to resolve the legal dispute brought before the court.<sup>626</sup>

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<sup>624</sup> Fiss 1979:52.

<sup>625</sup> *Marbury*:178; Cappelletti 1989:135; Finck 1997:126; Kokott and Kaspar 2012:810. Of course, the effect of the declaratory order is *inter partes* and not *erga omnes*. See, Medécigo 2013:11; De Tocqueville 2010:173-174; De Andrade 2001:979; Kokott and Kaspar 2012:814.

<sup>626</sup> Medécigo 2013:11.

Secondly, the application of the Bill of Rights in private law<sup>627</sup> and the corresponding constitutional authority and duty of the subordinate courts to modify and develop existing laws in the event of incompatibility with the Constitution,<sup>628</sup> necessarily involve the analysis of the law in terms of the constitutional thresholds of legality and legitimacy. When the law is found wanting or inconsistent, then it has to be modified and developed. To construe the law in conformity with the Constitution involves “reading down” and “reading in” the statute and the development of common law and customary law, the processes or remedies equivalent to a remedy of declaring the relevant portion of statute, common law or customary law incompatible with the Constitution unconstitutional. This is so, since these remedies require an initial determination by the subordinate courts that the particular application of the statute, common law or customary law would be unconstitutional.<sup>629</sup> Thus, subordinate courts have first to determine the inconsistency of the law and the extent thereof with the Constitution. This by itself brings the self-executing invalidation sting of the supremacy clause, as will be indicated below. The subordinate courts would then give an appropriate remedy by either severing or excising the defect, “reading down” the statute or “reading in” the necessary material into the statute or develop the common law or customary rule, in order to cure the defect.<sup>630</sup> It is clear that the purpose of these remedies is to render an otherwise unconstitutional law compliant with the Constitution by the subordinate courts’ framing of appropriate order that remedies the constitutional defect of law. It is also clear that where such a law cannot be brought into conformity with the Constitution through the employment of these remedies, subordinate courts would have to declare it unconstitutional.<sup>631</sup>

Thirdly, the power of subordinate courts to issue declarative orders in order to effectuate the horizontal effect into private law can be founded on theoretical bases. The availability of constitutional remedies is a matter of jurisdiction<sup>632</sup> and in Chapter 3 it was indicated that subordinate courts have constitutional jurisdiction to determine the validity of the law they are called upon to apply. The subordinate courts may only decide cases and proceedings

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<sup>627</sup> See, the Constitution, sec 4(2).

<sup>628</sup> See, the Constitution, sec 156(1).

<sup>629</sup> See, *Mkhize v Umvoti Municipality* 2012 1 SA 1 (SCA):[19]; *Osborne*:102-103.

<sup>630</sup> *Osborne*:94-103; *Ferguson*:[49].

<sup>631</sup> This should be the case where, for example, after severance the remainder would no longer serve the main objective of the statute (*Coetzee v Government of RSA* 1995 4 SA 631 (CC):[16]; *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC):[14]; *Attorney General for Alberta v Attorney General for Canada* [1947] AC 503:518) or in partial invalidation of common law (*National Coalition for Gay and Lesbian Equality* (1999):[68]-[73]).

<sup>632</sup> Currie and De Waal 2005:191.

according to law and may apply the law which is valid.<sup>633</sup> The Canadian Supreme Court stated, “courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state”.<sup>634</sup> Any law that is superior to the other in the normative hierarchical layers determines the validity of a norm lower to it on the hierarchy.<sup>635</sup> Whenever in the determination of the validity of a law, the subordinate courts establish through an interpretative process any inconsistency between the law and the Constitution, the self-executing invalidity sting of the supremacy clause is visited on the law to the extent of inconsistency.<sup>636</sup> That inconsistency may consist in what the law improperly *includes* or improperly *excludes*<sup>637</sup> or in the purpose of the law not being one that is constitutionally recognised as one that may legitimately limit the guaranteed rights and freedoms.<sup>638</sup>

The law that is inconsistent with the Constitution is rendered invalid by the Constitution to the extent of the inconsistency. As stated in *Ferreira v Levin*, “laws are objectively valid or invalid depending on whether they are or are not inconsistent with the Constitution”.<sup>639</sup> According to the Constitutional Court, “a pre-existing law which was inconsistent with the provisions of the Constitution became invalid the moment the relevant provisions of the Constitution came into effect”.<sup>640</sup> This means that it is not the courts that invalidate the law that is inconsistent with the Constitution; it is the Constitution itself.<sup>641</sup> This much was put beyond any doubt in *Fose* where the South African Constitutional Court stated that the constitutional supremacy clause “makes unconstitutional conduct a nullity, even before courts have pronounced it so”.<sup>642</sup>

What then is left for the subordinate courts is to provide an appropriate remedy in the circumstances to protect those who are adversely affected by that law. The appropriate or effective remedy would involve the subordinate courts refusing to apply (disapplying or

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<sup>633</sup> Hamburger 2003:9-12.

<sup>634</sup> *Nova Scotia v Martin* [2003] 2 SCR 504:528.

<sup>635</sup> For example, any subsidiary legislation inconsistent with the enabling Act is void. See *Interpretation Act* 19/1977, sec 23(b).

<sup>636</sup> The Constitution sec 2; *Monyau v R* LAC (2005-2006) 44:52.

<sup>637</sup> See, for example, *Schachter*:698.

<sup>638</sup> Barak<sub>1</sub> 2012:245-302.

<sup>639</sup> *Ferreira v Levin* 1996 (1) SA 984 (CC):[27].

<sup>640</sup> *Ferreira*:[28].

<sup>641</sup> See *Martin*:528 (“The invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of [the supremacy clause]”).

<sup>642</sup> *Fose*:[94]; *Martin*:528.

disregarding)<sup>643</sup> the invalid law in favour of the Constitution. The subordinate courts would then, to use the expression in *Fose*, have to “synchronise the real world with the ideal construct of a constitutional world created in the image of [the supremacy clause]”<sup>644</sup> as prescribed in mandatory terms of sections 2 and 156(1) of the Constitution. To do this, the subordinate courts would have to formulate the declaration of invalidity, sever or excise the defect or “read in” the statute or develop the common law or customary law.<sup>645</sup> In practical terms, disapplication of the impugned law leads to the same result as invalidation or annulment.<sup>646</sup> As Cappelletti points out, the disapplication or non-application of unconstitutional law “becomes a true annulment of the law”.<sup>647</sup> Thus, invalidity is an automatic legal effect triggered by a normative condition of inconsistency between the law and the Constitution, while the declaration is merely descriptive of that status.<sup>648</sup>

Unlike the South African Constitution,<sup>649</sup> the *UKHRA*<sup>650</sup> and the *NZBORA*,<sup>651</sup> for example, Lesotho’s Constitution does not limit subject matter and remedial competence of any court including the subordinate courts.<sup>652</sup> It is therefore clear that when exercising constitutional

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<sup>643</sup> *Marbury*:176-178; *Mothobi v R* LAC (2009-2010) 465:473; Finck 1997:126.

<sup>644</sup> *Fose*:[94].

<sup>645</sup> The Canadian Supreme Court stated, “a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects”. See *Martin*:528. The expression “to the extent of its inconsistency” permits the Court “greater latitude in formulating its declaration of invalidity”. See *Ferreira*:[131].

<sup>646</sup> Claes 2006:455; Cappelletti 1989:139.

<sup>647</sup> Cappelletti 1989:139-140.

<sup>648</sup> Currie and De Waal 2005:206; *Ferreira*:[29]-[30]

<sup>649</sup> For example, in terms of section 170 of South African Constitution, Magistrates’ Courts have no constitutional jurisdiction to enquire into the validity of legislation or conduct of the President; section 167 limits the jurisdiction of the Constitutional Court to constitutional matters and granting exclusive jurisdiction in certain matters; and in terms of sections 167(5) and 172(2), the High Court and the Supreme Court of Appeal may invalidate an Act of Parliament, the provincial Act or conduct of the President, but such invalidation requires confirmation by the Constitutional Court to have legal force and effect.

<sup>650</sup> In terms of section 4(5) of the *UKHRA* 1998, only specified superior courts in the UK may issue a declaration of incompatibility of law with the ECHR.

<sup>651</sup> Section 4 of the *NZBORA* 1990 prevents New Zealand courts from granting any declaration of inconsistency between a law and the *NZBORA*.

<sup>652</sup> Even in the case of questions of contravention or interpretation of the Constitution arising in proceedings before the subordinate courts, the subordinate courts are not denied jurisdiction to decide those constitutional questions. See the Constitution sec 22(3) and sec 128(1).

jurisdiction, the subordinate courts have the power to state (that is, declare) whether what they are called upon to apply is or is not law.<sup>653</sup> Such a declaration may be formal<sup>654</sup> or informal.<sup>655</sup> If part of the law is invalid because of its inconsistency with the Constitution, the subordinate courts may “read down” or “read in” the statute the appropriate material, or modify or develop common law or customary law in compliance with the remedial authority of section 2 and section 156(1) of the Constitution. Where it is not reasonably possible to do either, the only remedy that the subordinate courts are obligated to grant is to strike down (nullify) the statute or common law or customary law.<sup>656</sup> Thus, the constitutional jurisdiction of the subordinate courts, in particular the “judicial power” of the subordinate courts, includes the power of declaration and nullification, unless such power is expressly excluded.<sup>657</sup>

Finally, Geiringer points out that in the debate whether a court has declaratory power is buried two distinct but related questions. Firstly, the *substantive question* is whether the court is empowered to enter into the question of the validity of a law that contravenes the rights and freedoms guaranteed under the Constitution and to pronounce on the justifiability of the impugned law. Secondly, there is a *remedial question* whether the courts are empowered to issue a declaration to that effect.<sup>658</sup> That the subordinate courts have constitutional jurisdiction to determine the validity of laws has already been established. It is also clear from the above analysis, and the Constitution has empowered the subordinate courts to provide constitutional remedies in the exercise of the constitutional jurisdiction.

Contrary to the orthodox view and in the absence of any express provision limiting the

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<sup>653</sup> Declaratory order, in this sense, is “a legal statement of the legal relationship between the parties”. See Mbazira 2009:155-156.

<sup>654</sup> This is where the court formally or expressly declares the law invalid for being inconsistent with the Constitution. It may include the declaration as part of its order. See *Moletsane*:72, available at <<http://www.lesotholii.org/ls/judgment/high-court/2004/123>> (accessed on 20 July 2015).

<sup>655</sup> This is where the court does not formally or expressly declares the law invalid, but it is clear from its reasoning and decision that the impugned law has been rejected as invalid based on its inconsistency with the Constitution. It is clear in *Moletsane* above that even if the Court had not expressly declared the *SDA Legal Notice* unconstitutional it would have rejected it on the grounds of its unconstitutionality.

<sup>656</sup> In this sense, the declaratory order has a nullifying effect. See *Ferguson*:[65]; *Coetzee*:[16]; *South African National Defence Union*:[14]; *Attorney General for Alberta*:518; *National Coalition for Gay and Lesbian Equality* (1999)[68]-[73]. Also see Van der Walt 2012:23-24; *Schachter*:710-711; *Van Rooyen v S* 2002 5 SA 246 (CC):[88].

<sup>657</sup> *Marbury*:177-180; *Muskrat v United States* 219 US 346 (1911):361; Sarubbi 2011:47, 51-52.

<sup>658</sup> Geiringer 2009:618.

constitutional remedial power of the subordinate courts, it can be concluded that the subordinate courts have declaratory and invalidation powers. It can be said, therefore, to use Fiss' expression, that in granting constitutional jurisdiction to all courts, the constitutional designers did not only enlist all courts in actualising constitutional values' impact and influence in private law but also gave them the whole array of constitutional remedial means and power as integral part of that process.<sup>659</sup>

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<sup>659</sup> Fiss 1979:53.

**CHAPTER 5:**  
**QUO VADIS LESOTHO'S JUDICIARY?**  
**CONSTITUTIONAL REVIEW PRACTICE:**  
**TRAJECTORIES, PATHOLOGY AND CONSEQUENCES**

Courts are empowered by constitutional designers and given tools to protect the constitutional bargain. But the subsequent choices courts make as they play their games can supplement or deplete their arsenals.

- Tom Ginsburg<sup>1</sup>

### 5.1 Introduction

The introduction of a horizontally applicable court-enforced Bill of Rights in Lesotho both in 1966 and 1993 was precipitated by the stark realisation by Basotho that, firstly, in matters of government, it was “essential not to trust in human nature” and to “minimise, as far as possible, the risks involved in national growth”.<sup>2</sup> Secondly, Basotho had intended to establish in Lesotho a polity in which “the rights and obligations of individual citizens, on to the other, and the rights and obligations of the community to which they belong, are reconciled in stable social order and preserved from the abuse of power in any of its forms”.<sup>3</sup> Thirdly, they desired to give “legal efficacy” to “essential characteristics of political and social justice ... in the Constitution itself”.<sup>4</sup> However, of greater importance was the Basotho’s awareness that those charged with the responsibility of ensuring the constitutional bargain and compact and who were predominantly foreigners at the time, were likely to be “unsympathetic or unresponsive to local aspirations”<sup>5</sup> and as a result would carelessly import “foreign ideas which were unsuited to [Lesotho]”.<sup>6</sup> However, Cowen records the ardent hope of Basotho in 1963 and, the author argues, in 1993 when the same 1966 constitutional structure, substance and underlying objective values were maintained:

Of course there is some risk of these evils. But the first is surely only temporary; it will disappear as Basotho judges are increasingly appointed to the bench. And the second will disappear as the legal profession and the judiciary become more efficient, more

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<sup>1</sup> Ginsburg 2003:247.

<sup>2</sup> Basutoland Council 1963:83; NCA 1992:34.

<sup>3</sup> Basutoland Council 1963:83.

<sup>4</sup> Basutoland Council 1963:83.

<sup>5</sup> Cowen 1964:10.

<sup>6</sup> Cowen 1964:13.



sophisticated, and more learned. What we need is sound and liberal legal education as an essential corollary to the introduction of a Bill of Rights. Indeed, unless our people and our lawyers are educated in the use of a Bill of Rights, and in the values which they are meant to preserve, the whole exercise may become a farce.<sup>7</sup>

Perhaps Basotho had pitched their hopes too high or the problem lay deeply buried in the very processes they thought would be remedial. I say this because the very risks most feared by Basotho visited their legal shores and landscape notwithstanding the developments that had been hoped would address the problems.<sup>8</sup> After a period of more than two decades since the adoption of the Constitution in 1993, the twin transformative techniques and tools of horizontality and decentralised constitutional review, the cradles for the constitutionalisation project and maintenance of a stable society preserved from the abuse of power, in particular private power, remain laudable exhortations, which have not yet been operationalised. As will be indicated, Lesotho's constitutional system bears all the hallmarks of most of the African constitutional systems, which, according to Harutyunyan and Mavcic, are characterised by the "disparity between the constitutional text and actual legal and constitutional practice".<sup>9</sup> What is clear is that, although constitutional designers expressly provided for the above constitutional tools with a view to ensure that Lesotho's private law does not escape the influence of the Bill of Rights and the objective value system underlying the Bill of Rights,<sup>10</sup> Lesotho's judiciary, in going about its constitutional mandate of shepherding the contours of the Constitution, chose not to supplement, but rather to deplete these important arsenals in the constitutionalisation project, maintenance of the rule of law and constitutionalism. As a result, the gap between the rich promise by the Constitution of a balanced stable society bound together by the principles and values of

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<sup>7</sup> Cowen 1964:13.

<sup>8</sup> While in 1964 all the judges in the High Court and Court of Appeal as well as judicial officers in the Magistrates Courts were from United Kingdom or South Africa, by 2006, Magistrates Courts were manned by Basotho locals in all the ten districts of Lesotho, and the High Court, by 1995, was staffed entirely by Basotho locals. The Court of Appeal continues to be dominated by foreign appointments with the first Mosotho, Justice Ramodibedi, being appointed to the Court as President thereof in 2008. See Maqutu 2006:12-15. The unpublished document by Maqutu is available online at <<http://unpan1.un.org/intradoc/groups/public/documents/aapam/unpan025651.pdf>> (accessed on 25 August 2015).

<sup>9</sup> Harutyunyan and Mavcic 1999: Chapter 1. The authors' unpaginated electronic monograph is available online at <<http://concourt.am/Books/harutyunyan/monogr3/book.htm>> (accessed on 26 June 2015).

<sup>10</sup> The Constitution sec 4(2); sec 22 and sec 156(1). Also see chapter 2 and 3 of this study.

communalism, on the one hand and, on the other, the harsh reality of exclusion and banishing of the masses of the people of Lesotho to the margins of constitutional justice keeps increasingly widening.

What is the nature and the extent of the hiatus between the constitutional promise of constitutionalisation of private law and the reality of human rights protection, enforcement and realisation presaged in the constitutional review practice? How has the judiciary pushed the frontiers between the constitutional promise and the lived reality of the vast majority of Basotho resulting in the gap between constitutional principles and the social reality? What factors account for the trajectories the constitutional review practice has taken and the resultant gap between the constitutional design and the social reality? Moreover, what are the consequences and implications thereof on the rights and lives of the masses of the people of Lesotho and the administration of justice?

These questions are brought into focus in this chapter as the gap between the rhetoric of constitutional promise and commitment based on horizontality and decentralised constitutional review, on the one hand and, on the other, the lived reality of Basotho flowing from the constitutional review practice are dissected. I focus on the constitutional review practice of Lesotho's judiciary from the Mahomed Court,<sup>11</sup> through the Steyn Court<sup>12</sup> to the Ramodibedi Court<sup>13</sup> – a period of more than two decades from 1993 to 2014 – and indicate how the judiciary has sailed out of the constitutional design and framework in two material respects – the centralisation of constitutional review and the verticalisation of the Bill of Rights: the trajectories of the Courts' constitutional review practice.

Firstly, notwithstanding the diffused or decentralised constitutional review framework in terms of which all courts have a constitutional mandate to review the constitutionality of private law and to effectuate constitutionalisation thereof, the constitutional review practice

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<sup>11</sup> Justice Ishmael Mahomed was the President of the Lesotho Court of Appeal since 1991 when Justice William Peter Schutz retired as President (1979-1991), until 1997 when Justice Jan Hendrik Steyn took over the reins. All of them were South African citizens. I refer to the judiciary from 1993 to 1997 as the Mahomed Court. Where a distinction is necessary to differentiate superior courts from lower courts, they will be referred to as upper and lower echelons, respectively, or by their respective names.

<sup>12</sup> Justice JH Steyn became President of the Court of Appeal in 1997 until 2008 when he resigned, at which time Justice Michael Mathealira Ramodibedi became the first Mosotho citizen at the helm of judicial hierarchy in Lesotho. I refer to the judiciary from 1998 to 2008 as the Steyn Court.

<sup>13</sup> Justice MM Ramodibedi became the President of the Court of Appeal from 2008 to April 2014 when he resigned. I refer to the judiciary during this period as the Ramodibedi Court.

trajectory in the centralisation direction began with dormant subordinate courts and ends with the total exclusion of these courts and the High Court from the incidental constitutional review. From the initial stages, the trajectory developed from the dormancy of subordinate courts to the point where even the High Court was not spared the incapacitation, as its constitutional jurisdiction was excised and emasculated from its civil ordinary jurisdiction so that incidental constitutional review by the High Court in terms of sections 2 and 156(1) of the Constitution became impossible. The final destination of centralised constitutional review was reached when the remaining constitutional review powers of the High Court were removed in incidental constitutional review of criminal laws. In effect, the trajectory depicts an unconstitutional move from the prescribed decentralised constitutional review model to the European centralised constitutional review prototype.

The second trajectory concerns the application of the Bill of Rights and the resuscitation of the public-private distinction of classical liberalism. Whereas the Constitution has collapsed and disintegrated the liberal wall of separation between the public and private spheres in order to ensure that private law is not shielded from the influence of the Bill of Rights and the objective value system underlying our constitutional order,<sup>14</sup> the constitutional review practice indicates a constant reconstruction of the liberal wall behind which private law hides from the Bill of Rights' influence. The trajectory began with the failure, firstly by the Mahomed Court in the twilight of the new constitutional order, and then later, the Steyn and Ramodibedi Courts, to shirk the corrective justice approach and to adopt, instead, distributive justice form of private law disputes adjudication. Blinded by the common law's corrective approach to litigation, the Mahomed Court, in the very early days of the new constitutional dispensation, laid down pedantic requirements for establishing standing (*locus standi in judicio*) by those who sought to enforce the Constitution. The Mahomed Court's common-law approach to constitutional standing ensured that not only very few people have the capacity to enforce the Constitution but that even when they have such capacity they are ruled out of the enforcement of the Constitution by procedural hurdles and impediments.

The second trajectory developed to the point of failure by the Mahomed, Steyn and Ramodibedi Courts to discover the living version of the customary law and the undue reliance thereby on the official version thereof. With the unconstitutional separation of constitutional jurisdiction from ordinary jurisdiction by the Steyn and Ramodibedi Courts and the resultant deprivation of the High Court and the subordinate courts from controlling the constitutionality of private law in ordinary proceedings, the Steyn and Ramodibedi Courts, in

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<sup>14</sup> The Constitution, sec 4(2), sec 22 and sec 156(1). See chapter 2.

their horizontality-verticality trajectory, reconstructed the classical liberal wall of public-private dichotomy. The “wall” has reached such heights that the majority of the people of Lesotho, except those who had the capacity and the means to access the High Court’s constitutional jurisdiction through direct constitutional review, could not rely on the Bill of Rights in private-law dispute adjudication. The trajectory ended with the effective placing of the Court of Appeal by the Ramodibedi Court beyond constitutional reproach and accountability for the violation of the Bill of Rights. In effect, the trajectory represents an unconstitutional move away from the horizontal application of the Bill of Rights as prescribed by the Constitution to the vertical application of the Bill of Rights.

The consequences of these trajectories are clear. Firstly, the majority of the people of Lesotho suffer constitutional injustice because the frontline actors in the constitutionalisation project – the lower echelons of the judiciary – have been side-lined and forced to apply otherwise unconstitutional laws. The constitutionalisation agenda and the hope to see established for Lesotho a polity in which the rights of individuals and the community reconciled in a stable order and preserved from the abuse of power, in particular private power, have been dealt a fatal blow and rendered illusory. Secondly, the decisions of the courts, as a result, suffer substantive legal and sociological illegitimacy and Basotho are subjected to these decisions. Thirdly, the general administration of justice has suffered greatly because of the constitutional review practice. A number of factors which I shall identify account for the constitutional review practice trajectories towards the Continental model of constitutional review and the verticalisation of the Bill of Rights.

The discussion of how the judiciary has moved out of the constitutional review framework into verticalisation of the Bill of Rights with constitutional review concentrated only in the High Court is made in four Parts. In Part I, the decentralised-centralised trajectory of the constitutional review practice is considered. In this trajectory, I discuss the dormancy of the lower echelons of the judiciary and the legal pegs – the specific legal principles foreign to the new constitutional order – established by the upper echelons of the judiciary while negotiating their way out of the clearly chartered area of constitutional review. I indicate that it is on these legal pegs where not only the subordinate courts, but also ultimately the High Court was forced to hang their constitutional review sails. As a result, and with the exception of the High Court through direct constitutional review only, the High Court and the subordinate courts are excluded from the constitutionalisation agenda.

In Part II, I discuss specific issues and points which the Mahomed, Steyn and Ramodibedi Courts have established in their reconstruction of the public-private distinction and its move away from horizontality to verticality in the application of the Bill of Rights, thus making it

largely impossible for constitutionalisation of private law. Part III identifies and critically discusses the pathology and specific factors that, among other causes, paved a way or made it easy for the constitutional review practice to have taken the trajectories it did contrary to the constitutional design and architecture. Under this Part, the consequences of these trajectories are also chronicled. The last part, Part IV, is an overview and summary of the chapter.

## PART I

### 5.2 Constitutional review practice: decentralised-centralised constitutional review trajectory

#### 5.2.1 The foundation for centralisation laid

Beginning with the period during the authoritarian rule in Lesotho, the High Court and the Court of Appeal were on the lookout and demonstrated a militant posture in the protection and enforcement of the rights and freedoms of the people.<sup>15</sup> This judicial militancy against human rights violations attained its height immediately after the adoption of the Constitution in 1993 when the upper echelons of the Mahomed Court adopted a resolute stance, exhibiting that nothing less than the strict compliance with the constitutional mandate and requirements, the rule of law and constitutionalism would be tolerated. In *Seeiso v Minister of Home Affairs*,<sup>16</sup> the Court of Appeal declared the ministerial letter preventing the Chiefs from assembling at Matsieng to discuss issues surrounding the office of the King null and void. Being of the view that the *Chieftainship Act* 1968 under whose authority the letter was authored was not the relevant law which “[made] provision in the interests of public safety or public order”, the Court held that the respondent Minister neither had any authority in law entitling him to limit the applicant’s right to freedom of assembly guaranteed under section 15 of the Constitution, nor established that it was necessary in a practical sense in the interest of public safety or public order for him to prevent the holding of the said meeting.<sup>17</sup>

A few years after the adoption of the Constitution, the Court of Appeal sounded a clarion call on the respect for the rule of law and the effectuation of the ethos and values underpinning the Constitution by all those involved in the administration of justice in its decisions of

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<sup>15</sup> See, for example, *Sello v Commissioner of Police* 1980 LLR 159; *Mohatla v Commissioner of Police* [1985] LSCA 18; *Law Society v Minister of Defence and Internal Security* [1988] LRC 226 (Const); *Phiri v Commander* LAC (1990-1994) 233; *Maseko v Attorney General* LAC (1990-1994) 13.

<sup>16</sup> *Seeiso v Minister of Home Affairs* LAC (1990-1994) 665.

<sup>17</sup> *Seeiso*:679-682.

*Swissborough*<sup>18</sup> and *Bolofa*.<sup>19</sup> In *Swissborough*, the military government had revoked the mining leases of the applicant by enacting the *Revocation of Specified Mining Leases Order* 1992 (the *Revocation Order*) contrary to the *Human Rights Act* 1983, which stipulated conditions for the appropriation of one's right to property. Situating his decision within the rule of law discourse, Mahomed P stated that the victims of the law transgressions were entitled to the full and unreserved protection by the courts, which should fiercely guard against the invasion of the citizens' fundamental rights and freedom.<sup>20</sup>

Finding that the *Revocation Order* not only invaded all the propositions of the rule of law but also failed to follow the conditions laid down by the *Human Rights Act* 1983, an Act which, according to the Court, was "fundamental to the discipline of law-making in the Kingdom",<sup>21</sup> Mahomed P held that the mining leases could only have been revoked if the government had confined itself "to the grounds and all the procedures established by law" for the taking away of private-property rights.<sup>22</sup> The fierce attitude of the Mahomed Court in protecting fundamental rights was adopted by the Steyn Court, which showed its resolve to effectuate the constitutional promise in *Bolofa*. *Bolofa* involved long-drawn bail application proceedings where the applicants sought to be released by the High Court, pending their trial on high treason charges. Steyn P indicated that the Constitution, which provided for the right to personal liberty and the right to fair trial within the reasonable time<sup>23</sup> had not been enacted merely for purposes of promoting Lesotho as a country that expresses a commitment to acceptable international norms and standards of behaviour but it was a solemn and effective covenant regulating the relationship between the Crown and its citizens.<sup>24</sup>

According to Steyn P, the rights to personal liberty and to fair trial entrenched by the Constitution could only be meaningful if all those involved in the administration of justice performed their duties in a manner consistent with the ethos and the values that underpin them.<sup>25</sup> This obligation, Steyn P sounded a stern warning, "rests on those who are part of the cohesive unit" that administers criminal justice: the police officers, the judicial officer, the prosecutor, the High Court, the Court of Appeal, the correctional institution authorities and

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<sup>18</sup> *Attorney General v Swissborough Diamond Mines* LAC (1995-1999) 214.

<sup>19</sup> *Bolofa v Director of Public Prosecutions* LAC (1995-1999) 231.

<sup>20</sup> *Swissborough*:224.

<sup>21</sup> *Swissborough*:228.

<sup>22</sup> *Swissborough*:230.

<sup>23</sup> See the Constitution, sec 6(1), (5) and sec 12.

<sup>24</sup> *Bolofa*:247.

<sup>25</sup> *Bolofa*:248.

the Social Service.<sup>26</sup> The learned President of the Court of Appeal found that the continued detention without a speedy trial was an arbitrary form of punishment unacceptable in a civilized state and that there had been “an inadequate sensitivity both to the provisions of the common law, of the Criminal Procedure and Evidence Act and of the Constitution”<sup>27</sup> on the part of the prosecution and the High Court in conducting the bail application of the appellants which, according to him, was done “in a manner that failed to demonstrate the vigilance required by the constitutional safeguards [of personal liberty and fair trial]”.<sup>28</sup> In the circumstances of the case,<sup>29</sup> however, the matter was ultimately dismissed.

*Seeiso*, *Swissborough* and *Bolofa* presented a trilogy of cases in which the Mahomed and Steyn Courts adopted a judicial posture and attitude in terms of which the courts expected nothing less than strict compliance with the constitutional standards and imperatives. It was the attitude and posture, which signalled that everyone in the administration of justice, including the lower echelons of the judiciary, among others, must be involved in ensuring the rule of law, constitutionalism and the protection of fundamental rights and freedoms of private actors. This was a constitutional duty, which, according to the trilogy, must be discharged by the vigorous application of the law and the fierce defence and protection of the citizens’ entrenched fundamental rights in the light of the objective value system of the Constitution.<sup>30</sup>

Notwithstanding the resolute judicial militancy of the Mahomed and Steyn Courts to address human rights violations and to protect and enforce the Bill of Rights, the control of constitutionality of laws and conduct based on the Constitution was practically the exclusive engagement of the High Court and the Court of Appeal. Since 1993 to date, the subordinate courts as the frontline actors in the constitutionalisation project remained dormant and never exercised any constitutional jurisdiction in compliance with the constitutional review framework. Whereas a number of factors, such as a lack of legal training of subordinate courts’ magistrates and judicial officers, may have accounted for this state of affairs, no administrative or legislative policy or intervention was put in place to conscientise, capacitate and encourage the magistrates and judicial officers in exercising constitutional jurisdiction. Nor was there practice directives emanating from the Chief Justice’s office or from the Court of Appeal through judicial decisions specifically inciting and stirring up the operationalisation

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<sup>26</sup> *Bolofa*:249.

<sup>27</sup> *Bolofa*:250.

<sup>28</sup> *Bolofa*:250.

<sup>29</sup> See *Bolofa*:257.

<sup>30</sup> *Swissborough*:224.

of constitutional jurisdiction by the lower echelons of the judiciary.<sup>31</sup> In my view, this dormancy of the subordinate courts or their failure to exercise constitutional jurisdiction was the launch pad from which the Mahomed Court initiated the first steps in its trajectory towards centralised Continental model of constitutional review.

### 5.2.2 *Constitutional Litigation Rules*: the springboard and tool for centralisation

Notwithstanding the fact that the Constitution came into effect in April 1993 and that it empowered the Chief Justice to make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under section 22 of the Constitution including rules with respect to the time within which applications may be brought and references shall be made to the High Court, only seven years later the Chief Justice<sup>32</sup> enacted the *Constitutional Litigation Rules*.<sup>33</sup> As will shortly be indicated, the *Constitutional Litigation Rules* became the springboard for centralisation of constitutional review because of their conception and focus as well as the interpretative gloss attached to them by the three major decisions of the upper echelons of the Steyn and Ramodibedi Courts.

The *Constitutional Litigation Rules* regulate the conduct of constitutional litigation.<sup>34</sup> The Rules prescribe the procedure that the applicants must follow in enforcing protective provisions of the Bill of Rights under sections 22 of the Constitution<sup>35</sup> and constitutional questions involving membership of Parliament in terms of section 69 of the Constitution.<sup>36</sup> According to the Rules, “Court” means “the High Court established by section 119 of the Constitution and exercising its jurisdiction under section 22 of the Constitution”.<sup>37</sup> The Rules are completely silent or give no guidance whatsoever on the procedures and practice in relation to referrals of constitutional questions by subordinate courts under sections 22(3)<sup>38</sup>

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<sup>31</sup> As Maqutu (2006:6) rightly points out, the Local and Central Courts have since been neglected by colonial administration as well as post-independence government.

<sup>32</sup> In 2000, Justice Kheola was the Chief Justice of Lesotho.

<sup>33</sup> *Constitutional Litigation Rules* LN 194/2000 came into force on 14 December 2000 when they were published in the *Gazette*. See *Constitutional Litigation Rules*, Rule 1.

<sup>34</sup> For example, the duties of the Registrar (Rule 5); the service of process by the Sheriff (Rules 6 and 7); representation of the parties including *amicus curiae* (Rules 8-10).

<sup>35</sup> See *Constitutional Litigation Rules*, Rules 11 and 12.

<sup>36</sup> See *Constitutional Litigation Rules*, Rules 14.

<sup>37</sup> See *Constitutional Litigation Rules*, Rule 1 (“Court”).

<sup>38</sup> This deals with constitutional questions involving allegations of contravention of the Bill of Rights provisions of the Constitution.



and 128(1)<sup>39</sup> of the Constitution.<sup>40</sup> Nor do they address the issue of what procedure should be followed where in ordinary proceedings, whether criminal or civil, constitutional questions arise.

It is clear that both the conception and the focus of the *Constitutional Litigation Rules* were the exercise of constitutional jurisdiction by the High Court only to the exclusion of any other courts. This is so, notwithstanding the fact that subordinate courts also exercise constitutional jurisdiction under the Constitution as indicated in Chapter 3. While the name of the Rules seems to suggest that they would govern and regulate *constitutional litigation* as a whole,<sup>41</sup> the content and substance of the Rules establish that the Chief Justice fell into a conceptual error. This error was perhaps precipitated by the fact of the dormancy of the subordinate courts as indicated earlier, by supposing that it was only the High Court which could deal with constitutional litigation. Another conceptual error was the inability on the part of the Chief Justice to appreciate that access to the constitutional jurisdiction of the High Court is either direct, indirect or on referral, and that section 22(1) of the Constitution created the procedure only for direct access to the constitutional jurisdiction of the High Court. The appreciation of the modalities of access to the constitutional jurisdiction of a court or of the difference between direct and indirect constitutional review would have caused the law-maker of the *Constitutional Litigation Rules* not only to cover a broader area for the operation and application of the Rules<sup>42</sup> but also to avoid glossing the Rules with misleading and inappropriate name.<sup>43</sup>

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<sup>39</sup> This involves constitutional questions involving the interpretation of the Constitution.

<sup>40</sup> The only mention of the issue relating to referral is in relation to the duties of the Registrar who “shall number ... an order of court referring any matter to the Court by another court.” See *Constitutional Litigation Rules*, Rule 5(1)(b).

<sup>41</sup> Compare the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013* which, as their name correctly suggests, are limited only to the enforcement of the Bill of Rights provisions of the Constitution of Kenya 2010 in terms of section 22 of that Constitution, whereas section 258 thereof provides for the enforcement of the entire Constitution.

<sup>42</sup> For example, section 2 of the Constitution (constitutional jurisdiction based on supremacy clause); section 45(5) of the Constitution (constitutional jurisdiction in relation to succession to the throne); section 119(1) of the Constitution (constitutional jurisdiction in relation to exercise of review of inferior courts and public functionaries exercising judicial, quasi-judicial or administrative functions on constitutional grounds); and section 156(1) of the Constitution (constitutional jurisdiction in relation to modification and development of existing laws).

<sup>43</sup> The name of the Rules is misleading and inappropriate because while the Rules have been

Perhaps the greatest conceptual error has been the lack of full appreciation that in the context of the Lesotho there cannot be “acoustic separation” between ordinary and constitutional litigation. In terms of section 156(1) and section 2 of the Constitution, all laws predating and postdating the Constitution must be in conformity with the Constitution and the courts are constitutionally obligated to ensure their compatibility with the Constitution. Thus, every adjudicative process where any law finds application before any adjudicative body is susceptible and subject to constitutional jurisdiction such that whereas it may have begun as ordinary law litigation it may metamorphose into constitutional litigation.

As Michelman rightly observes, where the application of any law is not exempt from inspection for compatibility with the Constitution, “then no adjudicative issues lie securely beyond reach of a nominally contained, ‘constitutional’ jurisdiction”.<sup>44</sup> Comella points out that in the context of a horizontally applicable Bill of Rights, the Constitution or the constitutional law “is not a new legal field to be added to the traditional ones. Rather, it provides new lenses through which the traditional branches of the law have to be critically viewed”.<sup>45</sup> According to him, all lawyers, judges and judicial officers “working in any area of the law have to play the constitutional game ...”<sup>46</sup> “An ‘acoustic separation’ between constitutional law and ordinary law”, Comella concludes, “can only be maintained in a stable manner if the Constitution has a more limited scope – if it is merely a charter for the government”.<sup>47</sup>

It is clear that in the context of Lesotho’s horizontal application of the Bill of Rights and the

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expressly promulgated under sections 22 and 69 of the Constitution dealing specifically with the enforcement of the Bill of Rights and questions as to membership to Parliament provisions of the Constitution, respectively, it erroneously suggests that it covers all litigation involving constitutional questions under sections 2, 45(5), 119(1) and 156(1) of the Constitution. In some jurisdictions, the Rules made under the equivalent of section 22 of Lesotho’s Constitution have been given the appropriate names. See, for example, (Nigerian) *Fundamental Rights (Enforcement Procedure) Rules* 2009 (available online at <<http://www.refworld.org/pdfid/54f97e064.pdf>> (accessed on 28 August 2015)); (Ugandan) *Judicature (Fundamental Rights and Freedoms)(Enforcement Procedure) Rules* 2008 (available at <<http://www.ulii.org/ug/legislation/statutory-instrument/55-1>> (accessed on 28 August 2015)); (Kenyan) *Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules* 2013 (available at <<http://www.icj-kenya.org/index.php/media-centre/news/549-kenya-chief-justice-has-published-practice-and-procedure-rules>> (accessed on 28 August 2015)).

<sup>44</sup> Michelman 2011:279.

<sup>45</sup> Comella 2011:266.

<sup>46</sup> Comella 2011:266.

<sup>47</sup> Comella 2011:266.

decentralised constitutional review, the deceptive glossing of the Rules as “*Constitutional Litigation*” Rules – which gives the impression that they were intended to regulate all constitutional litigation – coupled with their actual limited scope of application and focus in that they regulate only direct constitutional review by the High Court (leaving the incidental constitutional review by the High Court and the subordinate courts unregulated), became the springboard for a centralised constitutional review practice. Promising the decentralising character only by name, the Rules became a “Trojan Horse” which brought about and accelerated the centralisation and concentration of constitutional power and authority in the High Court. It is this illusion that the upper echelons of the Steyn and Ramodibedi Courts fell victim to as will be indicated below. The Rules further became the ‘surgical tools’ for the unconstitutional excision and removal by the Steyn Court and later Ramodibedi Court of constitutional jurisdiction from the High Court and the subordinate courts in incidental constitutional review. The *Constitutional Litigation Rules* thus constitute an anchor and the effective tool in the decentralised-centralised constitutional review practice trajectory.

### 5.2.3 Excising indirect constitutional review from the High Court and subordinate courts: the trilogy of *Morienyane*, *Chief Justice* and *Mota*

#### 5.2.3.1 Introduction

It is the Steyn Court that did not only fall victim to the hidden danger of the *Constitutional Litigation Rules* but also made the first incisions and operation, to use the surgical metaphor, in excising constitutional jurisdiction of the High Court from its ordinary jurisdiction in incidental or indirect constitutional review. The operation, to continue the metaphor, was conducted in the theatre of *Morienyane v Morienyane*<sup>48</sup> in 2004. Almost seven years after *Morienyane*, the Ramodibedi Court in *Chief Justice v Law Society*<sup>49</sup> effectively removed constitutional jurisdiction from the High Court and the subordinate courts in ordinary civil matters (incidental constitutional review). From 2004 up to 2012, the High Court could only exercise such jurisdiction directly and on reference, and indirectly in criminal matters. In 2014, the remnant of the incidental constitutional review power of the High Court in criminal proceedings was finally expurgated by the Ramodibedi Court in *Mota v Director of Public*

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<sup>48</sup> *Morienyane v Morienyane* 204/2003. This is the unreported High Court decision available online at <<http://www.lesotholii.org/ls/judgment/high-court/2004/83>> (accessed on 28 August 2015).

<sup>49</sup> *Chief Justice v Law Society* 59/2011. This is the unreported decision of the Court of Appeal, which is available online at <<http://www.lesotholii.org/ls/judgment/court-appeal/2012/3>> (accessed on 28 August 2015).

*Prosecutions*<sup>50</sup> because of which no constitutional jurisdiction thereof could be exercised in ordinary proceedings before the High Court, whether civil or criminal.

While *Morienyane* and *Chief Justice* provided the third and fourth stepping stones in the Steyn Court's trajectory towards centralisation of constitutional review, *Mota* was the final peg, not only closing the main door of decentralised constitutional review, but also serving as an indicator that the "judicial ship" of Lesotho's judiciary has anchored on the centralised constitutional review's "high seas" and will not return home any sooner. In this part of the study, I discuss *Morienyane*, *Chief Justice* and *Mota* and identify otherwise foreign and unconstitutional principles laid down by this trilogy and indicate how this trilogy first made moves out of the decentralised constitutional review framework by concentrating and only allowing direct constitutional review in the High Court, as the so-called Constitutional Court, in the manner of centralised European constitutional review model.

#### 5.2.3.2 Facts and principles of the trilogy

##### 5.2.3.2.1 *Morienyane*: first incisions in excising constitutional jurisdiction from the High Court

###### 5.2.3.2.1.1 Factual matrix and principles of *Morienyane*

The factual matrix of *Morienyane* is very brief. *Morienyane* involved a family dispute over the estate of the late Morienyane. The applicant, the wife of the deceased, approached the High Court for a number of reliefs including an interdict against the respondents from dealing further with the estate; a declarator that the purported will executed by the deceased and the appointments as executors, legatees and beneficiaries of some of the respondents were null and void and that the applicant had full ownership over the joint estate of her and her late husband; and a declarator that section 3(b) of the *Administration of Estates Proclamation* 1935 was unconstitutional and therefore null and void for being inconsistent with the Constitution on the ground that it was discriminatory.

The applicant had approached the High Court in its ordinary jurisdiction and as it turned out, she had sought constitutional relief as well as the declaration of unconstitutionality of section 3(b) of the Proclamation 1935. The matter came before Nomngongo J who, having faulted the applicant for failing to establish the constitutional essential and imperative of alleging a Bill of Rights provision contravention in relation to herself (applicant) as required by section

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<sup>50</sup> *Mota v Director of Public Prosecutions* 473A/2013. This decision of the High Court is available online at <<http://www.lesotholii.org/ls/judgment/high-court/2014/42>> (accessed on 28 August 2015).

22(1) of the Constitution, “advert[ed]” to “another aspect which was not specifically raised nor ... argued before [the Honourable Judge] and that [was] the procedure adopted in making ... constitutional challenge to the law”.<sup>51</sup> In dealing with the important procedural issue, Nomngongo J stated that the High Court, in dealing with the protection and enforcement of fundamental rights and freedoms under Chapter II of the Constitution, exercises original jurisdiction under section 22(2) of the Constitution in terms of the *Constitutional Litigation Rules*.<sup>52</sup> Thus, observed Nomngongo J, as he ultimately dismissed the application:

the court sitting in its constitutional jurisdiction should be distinguished from the court sitting in its ordinary civil or criminal jurisdiction. In that jurisdiction its procedure and practice is governed by separate rules. It is therefore not proper in my view to lump together in one application constitutional as well as ordinary redress. It may well be that it would be convenient to argue the two together where for instance one relief depends on the other, but that is a matter of the direction of the court hearing the matter in its proper jurisdiction under the relevant rules. It would seem therefore that the constitutional challenge is not properly before me – this court sitting as it is, in its ordinary civil jurisdiction.<sup>53</sup>

It is important to identify the new principles laid down by *Morienyane*. Firstly, constitutional, civil and criminal cases are dealt with by the High Court exercising separate constitutional, civil and criminal jurisdiction, respectively.<sup>54</sup> Secondly, a distinction should be made between the High Court when it is sitting in its constitutional jurisdiction, on the one hand, and on the other, when sitting in its ordinary (civil or criminal) jurisdiction under the relevant law governing practice and procedure.<sup>55</sup> Thirdly, the High Court can *only* exercise its constitutional jurisdiction when a matter has been brought to it under the *Constitutional Litigation Rules*.<sup>56</sup> Fourthly, and as a result, it is improper for the litigants to lump together in one proceeding (application or trial) constitutional and ordinary (civil or criminal) relief or redress and, by extension, ordinary and constitutional causes of action or defences.<sup>57</sup> Fifthly, when the matter has been brought before the High Court in its constitutional jurisdiction in

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<sup>51</sup> *Morienyane*:9.

<sup>52</sup> *Morienyane*:9.

<sup>53</sup> *Morienyane*:10.

<sup>54</sup> See, for example, *Chief Justice*:[1]-[2].

<sup>55</sup> The *High Court Rules* 9/1980 and *Criminal Procedure and Evidence Act* 9/1981 regulate the procedure and practice in the High Court in respect of civil and criminal matters, respectively. Also see *Mota*:[23].

<sup>56</sup> See *Mota*:[21], [23]. Also see *Chief Justice*:[4], [13]-[15].

<sup>57</sup> See *Mota*:[21]-[23].

terms of the relevant Rules, the High Court has the discretion to direct, for consideration of convenience and, where constitutional and ordinary redress are interwoven, whether the constitutional and ordinary causes or redresses may be heard or granted together. Finally, the constitutional challenge against any law or conduct cannot be brought when the High Court is dealing with ordinary (civil or criminal) proceedings.<sup>58</sup>

#### 5.2.3.2.1.2 Critiquing *Morienyane*

Since independence<sup>59</sup> and in particular under the 1993 constitutional order, the High Court has been exercising constitutional jurisdiction in civil and criminal proceedings, whether in direct or incidental constitutional review under the *High Court Rules*<sup>60</sup> and *Criminal Procedure and Evidence Act* 1981.<sup>61</sup> This has been so to ensure that the High Court tests or controls the constitutionality of any laws that were sought to be applied before the High Court. Consistent with the decentralised constitutional review prescribed by the Constitution, not only the High Court and the Court of Appeal, but also the subordinate courts have constitutional jurisdiction to ensure that all laws and conduct are compatible with the Constitution. To be able to fulfil this onerous constitutional mandate, the High Court and the subordinate courts' constitutional jurisdiction have been integrated with their respective ordinary jurisdictions so that whenever necessary the constitutional jurisdiction can be utilised to control the constitutionality of laws and conduct. While conceptually constitutional and ordinary jurisdictions are separable, the "acoustic separation" cannot legally be maintained under Lesotho's Constitution that prescribes a horizontally applicable Bill of Rights and the decentralised constitutional review framework. Such a separation is competent in concentrated constitutional review framework of the Continental model where a particular specialised institution – the Constitutional Court – is the only organ charged with the control of the constitutionality of laws and the rest of the judiciary is expressly denied such competence.

It is clear that, contrary to the decentralised constitutional review framework, *Morienyane* has established or introduced new and foreign principles to Lesotho's constitutional order, which not only depleted the potency of the constitutional tools of horizontality and decentralised constitutional review but also had a debilitating effect. Firstly, contrary to the established procedural principle, *Nomngcongong J* laid down these foreign principles *sua sponte*.<sup>62</sup> The

<sup>58</sup> See *Mota*: [21], [27]. Also see *Chief Justice*: [13].

<sup>59</sup> See, for example, *Law Society v Minister of Defence and Internal Security*: 238.

<sup>60</sup> *High Court Rules* 9/1980.

<sup>61</sup> *Criminal Procedure and Evidence Act* 9/1981.

<sup>62</sup> This is a Latin phrase which means "of its own accord". See *Black's Law Dictionary*, edited by

issue relating to the procedure to be followed when making a constitutional challenge to a law resulting in Nomngongo J laying down these principles was admittedly “not specifically raised nor was argued before [the Honourable Judge]”.<sup>63</sup> The practice of the courts and litigants relying on issues not raised or pleaded has been deprecated by the Court of Appeal,<sup>64</sup> which stressed that in motion proceedings – as was the case in *Morienyane* – “the court is confined to resolving the dispute on the issues raised in the founding affidavit”.<sup>65</sup>

Secondly, the separation and segregation of the High Court’s constitutional jurisdiction from ordinary jurisdiction means that ordinary cases where the High Court exercises its ordinary jurisdiction should run parallel to cases that have improperly been referred to as “constitutional cases” in which the High Court may exercise its constitutional jurisdiction. This parallelism between ordinary cases and constitutional cases denies the High Court or any judicial officer for that matter, to decide constitutional questions that arise during ordinary proceedings and necessitates that where such questions arise, litigants be referred to a court that may exercise constitutional jurisdiction. Section 156(1) of the Constitution, however, empowers all courts to exercise constitutional jurisdiction and to modify and develop existing laws without the need for a parallel action before “the Constitutional Court”, thereby expediting the dispensation of justice.<sup>66</sup>

Thirdly, and as a result, the segregationist approach of *Morienyane* has a profound effect on the power of the High Court in incidental constitutional review. On this score, *Morienyane* withered the incidental constitutional review power of the High Court. It incapacitated or rendered it impossible for the High Court to control the constitutionality of laws in ordinary proceedings and to modify and develop them compatibly with the Constitution through the use of the Bill of Rights or the objective value system underlying the Bill of Rights in terms of sections 2 and 156(1) of the Constitution. The net effect of this is that the High Court is bound to apply the law as it is in any ordinary proceedings, notwithstanding its view or that of the litigants that such a law is or might be inconsistent with the Constitution. This is in direct conflict and militates against the supremacy and integrity of the Constitution, legality as well as the express constitutional mandate for the High Court to ensure that all laws predating the

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Garner (2004:4465).

<sup>63</sup> *Morienyane*:9.

<sup>64</sup> *Theko v Morojele* LAC (2000-2004) 302:313; *Sekhonyana v Standard Lesotho Bank* LAC (2000-2004) 197:201; *Frazers v Hata-Butle* LAC (1995-1999) 698:702; *Attorney General v Tekateka* LAC (2000-2004) 367:373.

<sup>65</sup> *Mota v Motokoa* LAC (2000-2004) 418:424.

<sup>66</sup> *Attorney General v Osotraco* 32/2002:6; *Pyarali v Sibo* 9/1997.

Constitution are brought into conformity with the Constitution.

Fourthly, in excising the High Court's constitutional jurisdiction from its ordinary jurisdiction, *Morienyane*, catapulted forward by the springboard facilitated through the *Constitutional Litigation Rules*, took a giant step in the constitutional review practice trajectory towards concentration of constitutional review in the High Court. This meant that the High Court's constitutional jurisdiction would only be accessed directly through the procedures of the *Constitution Litigation Rules*. The problem here is that these Rules were meant to guide the procedure and practice in the enforcement of the Bill of Rights provisions (Chapter II of the Constitution) and constitutional questions relating to membership of Parliament<sup>67</sup> and not for the enforcement of the Constitution as a whole.<sup>68</sup> Under a decentralised constitutional review model, constitutional jurisdiction under sections 2 and 156(1) of the Constitution is invariably exercisable in incidental constitutional review. This necessarily arises in or during ordinary concrete cases before all courts as a result of the reliance by one, some or all the parties on the Constitution or where the constitutional issue is raised by the court of its own motion. The unconstitutional excising of constitutional jurisdiction of the High Court from its ordinary jurisdiction has profound ramifications and implication on constitutional justice, the administration of justice and the rights of the people of Lesotho, as will be indicated below.

5.2.3.2.2 *Chief Justice*: excising incidental constitutional review power from the High Court and the subordinate courts

5.2.3.2.2.1 Factual matrix and principles of *Chief Justice*

While the Steyn Court through *Morienyane* made first incisions into the constitutional jurisdiction of the High Court in 2004 and shrivelled its (High Court) incidental constitutional review power, the Ramodibedi Court received the baton in 2008 and completed the "surgical operation" not only on the constitutional jurisdiction of the High Court but also that of the subordinate courts in incidental constitutional review within a period of eight years. In its direction towards concentration of constitutional review in the High Court in the manner of the European prototype, the Ramodibedi Court in its 2012 decision of *Chief Justice* completely removed constitutional jurisdiction in all incidental constitutional review proceedings. *Chief Justice* involved a constitutional attack on the *High Court (Amendment)*

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<sup>67</sup> See, for example, the Constitution sec 22(6), 69(5). The *Constitutional Litigation Rules* were promulgated by the Chief Justice "in exercise of the powers conferred on [him] by sections 22 (6) and 69 (5) of the Constitution.

<sup>68</sup> For example, in the exercise of constitutional jurisdiction under sections 2 and 156(1) of the Constitution.



*Rules 2009* that had been promulgated by the Chief Justice, with the result that the Registrars of the High Court would be entitled to hear and give judgment in uncontested matters instituted in the High Court. The Law Society had sought a number of prayers involving a declarator and an interdict before the High Court.

To the extent that it is relevant to this study, it is important to indicate that the Law Society had sought the High Court to declare the purported granting of adjudicative powers to the Registrars null and void, to declare the relevant rules as inoperative for being *ultra vires* the Chief Justice's power under the Constitution and the *High Court Act 1978* and to interdict the Registrars from exercising such adjudicative functions as empowered by the rules because that would be inconsistent with the litigants' right entrenched under subsections 12(1) and (8) of the Constitution as well as the independence of the judiciary in terms of section 118(2) of the Constitution.<sup>69</sup> As it shall become clearer below, and looking at the prayers sought by the Law Society, one is immediately aware that this was a matter completely within the ordinary jurisdiction of the High Court although constitutional questions would have arisen as far as the constitutional powers of the Chief Justice in terms of the Constitution and the *High Court Act 1978* as well as the effect thereof on the litigants' rights were concerned.

The High Court (Monapathi J) finally granted the orders as prayed having assumed constitutional jurisdiction to test the legality and the constitutionality of the relevant rules.<sup>70</sup> According to Monapathi J, the High Court was entitled to assume constitutional jurisdiction in the proceedings in terms of sections 119(1) and 2 (supremacy clause) of the Constitution, which granted to the High Court unlimited jurisdiction to review public authorities exercising judicial, quasi-judicial or public administrative functions under *any* law (which included the Constitution) and the power to control the constitutionality of laws, respectively.<sup>71</sup> It is important to state Monapathi J's view on the matter:

The ***High Court Rule 2009*** as alluded are also subject to attack from another angle. Under the doctrine of legality, the exercise of judicial powers must be in accordance with the law under the constitution. This is an aspect of the Rule of law. Any resolution which has adverse effect on the rights, freedom and interests of the citizen must be determined according to law and not otherwise. Finally, since 1993 the ***constitution*** is the supreme law in Lesotho, every

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<sup>69</sup> For a complete set of prayers sought by the Law Society in its Notice of Motion, see the High Court decision (per Monapathi J) in *Law Society v Chief Justice* 149/2010 available online at <<http://www.lesotholii.org/ls/judgment/high-court/2012/6>> (accessed on 29 August 2015) (Hereinafter, *Chief Justice* High Court decision).

<sup>70</sup> *Chief Justice* High Court decision:[32]-[34].

<sup>71</sup> *Chief Justice* High Court decision:[28.3].

public law or act or decision must pass the constitutional muster. Constitutionalism implies constitutionality of exercise of executive legislative and judicial power and authority.<sup>72</sup>

Consistent with the supremacy clause and the incidental constitutional review powers, Monapathi J was entitled to test the constitutionality of the relevant rules, notwithstanding that the proceedings before him were ordinary proceedings. However, when the matter came before the Court of Appeal, the Court of Appeal reversed the decision of the High Court because Monapathi J did not have constitutional jurisdiction to nullify the relevant rules. In coming to this decision, the Court of Appeal stated that whereas section 119(1) of the Constitution granted ordinary jurisdiction to the High Court, section 22(2) of the Constitution conferred constitutional jurisdiction to the High Court.<sup>73</sup> The Court of Appeal stated that it was generally accepted that when the High Court exercised its constitutional jurisdiction, “it [sat] as a Constitution Court”. According to the Court of Appeal, “the Constitution therefore envisage[d] the High Court sitting as such in the exercise of its ordinary jurisdiction, and as a Constitutional Court in the exercise of its constitutional jurisdiction”.<sup>74</sup> In its exercise of ordinary jurisdiction, the Court of Appeal went on, the High Court’s practice and procedure is regulated by the *High Court Rules* while the exercise of constitutional jurisdiction is regulated by the *Constitutional Litigation Rules*, and the respective Rules must be followed in ordinary and constitutional causes of actions, respectively.<sup>75</sup>

The Court of Appeal was quite aware of “a lacuna” not covered by the Rules: the problem of constitutional questions arising in ordinary proceedings. This is a matter of great constitutional significance as far as the power of the High Court to control constitutionality of laws in incidental constitutional review proceedings. The Court, however, considered it “a matter which need not concern us in the present appeal”.<sup>76</sup> The Court of Appeal further pointed out to a practice in the High Court where, in every case where the High Court exercised its constitutional jurisdiction under the *Constitutional Litigation Rules*, the matter was heard by a Bench comprised of three judges, resulting in the legitimate expectation by the litigants that their matters would be heard by three judges.<sup>77</sup> The Court pointed out that

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<sup>72</sup> *Chief Justice* High Court decision:[38].

<sup>73</sup> *Chief Justice*:[1].

<sup>74</sup> *Chief Justice*:[1].

<sup>75</sup> *Chief Justice*:[2].

<sup>76</sup> *Chief Justice*:[2].

<sup>77</sup> *Chief Justice*:[4].

whereas the matter had been brought in the ordinary jurisdiction of the High Court,<sup>78</sup> it was clear on the papers that the Law Society also challenged the constitutionality of the relevant rules.<sup>79</sup> The respondents raised the issue that Monapathi J had had no jurisdiction to determine the matter, and the Law Society argued that there was no “Constitutional Court” and therefore the High Court had the necessary jurisdiction to deal with the matter under the Constitution.<sup>80</sup> Having referred to *Morienyane*, the Court of Appeal continued:

By invoking section 12(1) and (8) of the Constitution the provisions of section 22(1) of the Constitution are brought into play ... [T]he Law Society, in bringing its application, was obliged to comply with the Constitutional Litigation Rules ... Instead, it followed the Rules of Court applicable to the High Court exercising its ordinary jurisdiction ... [A] constitutional challenge cannot properly be brought before a judge exercising his ordinary jurisdiction ... Where different rules regulate different procedures it is incumbent upon a litigant to follow the correct procedure ... If the proper route had been followed in the present instance then, given the importance of the issues raised in the application and the fact that it involved a challenge to the constitutionality of subordinate legislation involving the determination of matters in the High Court, it is a matter of high probability that the hearing of the application would have been set down before a three-judge panel ... Consequently the appellants have been denied a hearing before three judges in the High Court exercising its constitutional jurisdiction to which they were entitled.<sup>81</sup>

It is clear that *Chief Justice*, besides confirming the *Morienyane* principles, has covered more ground than *Morienyane* did. *Chief Justice* has developed the trajectory towards concentration of constitutional review in the High Court by taking further giant steps through laying down the following foreign principles. Firstly, whenever one invokes the Bill of Rights provisions, section 22(1) of the Constitution is brought into operation and one has to follow the *Constitutional Litigation Rules*. Secondly, whenever there is a constitutional challenge of any law or conduct before the High Court, the matter must be heard by a Bench of three judges. Thirdly, failure to have a constitutional question being heard by a Bench of three judges results in the denial of the hearing to the litigants and therefore is irregular. Fourthly, a constitutional challenge cannot be brought before a single judge exercising his ordinary jurisdiction under ordinary rules in view of the importance of constitutional matters. Fifthly, and by implication flowing from the fourth principle, no constitutional challenge may be brought before subordinate courts in the exercise of their ordinary jurisdiction in terms of the

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<sup>78</sup> *Chief Justice*: [7].

<sup>79</sup> *Chief Justice*: [7].

<sup>80</sup> *Chief Justice*: [8].

<sup>81</sup> *Chief Justice*: [13]-[15].

ordinary rules governing procedure and practice before them. Finally, constitutional jurisdiction is available and exercisable only under section 22 of the Constitution.

#### 5.2.3.2.2.2 The critique of *Chief Justice*

The critique against *Moriényane* is equally applicable against *Chief Justice* and to the extent that *Chief Justice* covers new ground further than *Moriényane*, the constitutional review practice has moved farther from the constitutional framework. In relation to what was identified as the first and the last principles of *Chief Justice* above, namely that constitutional jurisdiction under the constitution is only available under section 22 of the Constitution, it is important to note that section 22 is not the only source of constitutional jurisdiction under the Constitution. Section 22 of the Constitution relates exclusively to the enforcement and protection of the Bill of Rights provisions (section 4 to section 21 of the Constitution) and nothing more.<sup>82</sup> The constitutional jurisdiction is invoked by a person who alleges contravention of the Bill of Rights provisions in relation to himself or to some other person who is detained.<sup>83</sup>

However, the Constitution is not all about the enforcement and protection of the Bill of Rights only for personal relief. The public interest litigants including the Law Society have approached the courts for a declarator of some law or conduct as unconstitutional for contravening constitutional principles such as the separation of powers, the independence of the judiciary, or irregular and unconstitutional appointments to or removal from office. All of those cases have nothing to do with the enforcement and protection of rights and freedoms under the Bill of Rights provisions. It cannot be argued, therefore, that in determining and disposing of these matters, the courts would be exercising constitutional jurisdiction under section 22 of the Constitution. Clearly, this constitutional jurisdiction must be sourced elsewhere in the Constitution than under section 22. Thus, the supremacy clause,<sup>84</sup> the Bill of Rights enforcement and protection provision,<sup>85</sup> the High Court general review clause,<sup>86</sup> the

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<sup>82</sup> See the Constitution, sec 22(1), 22(2), 22(3). As Hogg (2007:177, 199) observes in relation to the enforcement provision of the Canadian *Charter* (section 24(1)) which is similar to our section 22(1) of the Constitution, “section 24(1) is applicable only to breaches of the Charter of Rights ... [and] is available only to a person whose rights have been infringed... [It] provides for the granting of a remedy to enforce the rights or freedoms guaranteed by the Charter”.

<sup>83</sup> See Hogg 2007:201.

<sup>84</sup> The Constitution, sec 2.

<sup>85</sup> The Constitution, sec 22.

<sup>86</sup> The Constitution, sec 119(1). The power of the High Court to review public authorities exercising public functions “under *any law*” in terms of section 119(1) of the Constitution includes the power to

modification and development of existing laws provision<sup>87</sup> and other provisions under the Constitution,<sup>88</sup> all embody constitutional jurisdiction. Based on any of these clauses, the constitutional jurisdiction of a court may be invoked.

As far as constitutional jurisdiction under the supremacy clause is concerned, section 2 of the Constitution confers on the bodies that have “judicial power” under section 118(1) of the Constitution, among other bodies,<sup>89</sup> an explicit power and basis for constitutional review.<sup>90</sup> This is so since it falls invariably on these bodies to determine whether a law or conduct is consistent or inconsistent with the Constitution.<sup>91</sup> Unlike section 22 of the Constitution, which applies only to Chapter II of the Constitution,<sup>92</sup> constitutional jurisdiction under sections 2 and 156(1) of the Constitution is applicable to the entire Constitution,<sup>93</sup> with the latter section operative only against laws predating the Constitution.<sup>94</sup> As Hogg points out, whenever the validity of any law or act under the supremacy clause is relevant to the outcome of any dispute, “the court that is seized of the dispute has the power and the duty to determine whether or not” such law or act is valid.<sup>95</sup> Accordingly, Hogg continues, such power or jurisdiction under the supremacy clause “is possessed by any court or tribunal (with the power to decide questions of law) before which the validity of the law is brought into

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review such public authorities exercising powers in terms of the Constitution as part of the *law*, such as the Chief Justice’s enactment of High Court Rules under 131(a) of the Constitutions, for example. The review of powers exercised in terms of the Constitution, necessarily involves the invocation of constitutional jurisdiction by the High Court.

<sup>87</sup> The Constitution, sec 156(1).

<sup>88</sup> See, for example, the Constitution, sec 17(2); sec 45(5); sec 46(3); sec 69(5); 118(1) (Unless otherwise expressly excluded, “judicial power” includes the power of nullification and therefore a constitutional jurisdiction to nullify laws on the basis of the Constitution.)

<sup>89</sup> Section 2 of the Constitution grants constitutional review to any other tribunal or administrative body, which has jurisdiction or power to decide questions of law. See Hogg 2007:176, 214-219.

<sup>90</sup> See Hogg 2007:176; Roach 2013:491-492; Linington 2012:74. As Hogg (2007:221) points out, the enforcement of the Constitution is the function of the courts by virtue of the supremacy clause.

<sup>91</sup> See Hogg 2007:176.

<sup>92</sup> See the Constitution, sec 22(1) and (3); also see *Khathang-Tema-Baits’okoli v Maseru City Council* LAC (2005-2006) 85:[19]-[20], [28].

<sup>93</sup> See Hogg 2007:177. Compare, for example, section 22 of Kenyan Constitution 2010 intended for the enforcement of the Bill of Rights only and section 258 thereof for the enforcement of the entire Constitution.

<sup>94</sup> Section 156(1) of the Constitution is concerned only with “existing law”. Also see the Constitution, sec 156(5).

<sup>95</sup> Hogg 2007:199.

contention”.<sup>96</sup>

Constitutional challenge of any law directly under the *Constitutional Litigation Rules* does not make the constitutional question arising there any more important than when such an issue arises incidentally during ordinary proceedings so that a Bench comprised of three judges is necessary. It is not the numerical strength of the Bench but the consequential constitutional justice dispensed thereby and the constitutionalisation of the Lesotho’s private law that is more important. Nor should a practice of a triple-judge Bench in direct constitutional review translate into unconstitutional expurgation of constitutional jurisdiction of a single High Court judge in incidental constitutional review. To gloss the hearing of constitutional questions by a single judge or judicial officer as an irregularity denying litigants of a hearing before a Bench of three judges is incorrect. The litigants who are actually denied a hearing are those who have absolutely been deprived an opportunity to raise a constitutional question in ordinary proceedings before the High Court and the subordinate courts. The three-judge Bench requirement in all circumstances has also sacrificed constitutional supremacy and integrity on the altar of procedural convenience and practice.

That a constitutional challenge cannot be brought before a judge exercising ordinary jurisdiction simply because in order to do so a litigant must follow the *Constitutional Litigation Rules*, otherwise constitutional jurisdiction is not available or exercisable under any other rules, is not only contrary to sections 2 and 156(1) of the Constitution but is also unfortunate. It is unfortunate because, firstly, the constitutionality of law or conduct as a substantive matter may be raised whether the matter is governed by the *Constitutional Litigation Rules* or any other rules in terms of sections 2 and 156(1) of the Constitution in order to vindicate the Constitution and to attain constitutional justice. As the Tanzanian Court stated, all rules of procedure are the handmaidens of justice and may not be used to defeat substantive justice.<sup>97</sup> Failure to invoke the correct rules of the court cannot defeat the course of justice, particularly when human rights are at stake.<sup>98</sup> Thus, where constitutional questions have been raised in ordinary proceedings, the primary concern of the court should not be whether the correct rules of the court have been invoked, but rather to redress the wrong as speedily as possible.<sup>99</sup>

Furthermore, the impact of the *Chief Justice* principle is not limited to the High Court only but

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<sup>96</sup> Hogg 2007:203. Also see Roach 2013:492.

<sup>97</sup> *General Marketing Co Ltd v Shariff* [1980] TLR 61:65.

<sup>98</sup> *Ephrahim v Pastory* (2001) AHRLR 236 (TzHC):[14].

<sup>99</sup> *Ephrahim*:[16].

also applies with equal force to all other subordinate courts. The principle in effect means that not only the High Court, but also the subordinate courts cannot exercise constitutional jurisdiction when a matter is before them under their respective ordinary rules. In the case where the *Constitutional Litigation Rules* are applicable only before the High Court, the subordinate courts can in no way assume constitutional jurisdiction to test the constitutionality of laws or conduct before them. *Chief Justice* thus declared that the Constitution and constitutional justice have become the “holy grain which only the initiates of the superior courts may handle”.

Until the time of *Mota*, the *Morienyane* and *Chief Justice* principles did not, surprisingly, apply in criminal proceedings before the High Court.<sup>100</sup> The Court of Appeal had deprecated the bifurcation of proceedings into constitutional and ordinary issues in criminal matters. The Court of Appeal had constantly warned that constitutional questions arising incidentally out of ordinary criminal matters must be heard by the presiding judge of the High Court at an appropriate stage of the proceedings, except where exceptional circumstances or factors warranted the hearing of constitutional questions first in separate proceedings.<sup>101</sup> There is no reason, either in principle or policy, that the same approach, which in my view is the correct one, should not be applicable in civil ordinary proceedings where constitutional questions arise incidentally.

That it is generally accepted that when the High Court sits under section 22(2) of the Constitution, it does so as “a Constitutional Court”, is a judicial imprimatur for the improper importation of foreign legal ideas and constructs. That the High Court is a “Constitutional Court” is an irregular acceptance by the apex court in Lesotho of a legal transplant, which is not only inimical to the constitutional framework of Lesotho, but also fails to sit comfortably with the general principles of the constitutional order. Reference to the High Court as the Constitutional Court as well as the emasculation of the High Court’s constitutional jurisdiction in incidental constitutional review are indeed matters of great constitutional importance by

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<sup>100</sup> In *Director of Public Prosecutions v Lesupi* LAC (2007-2008) 403 [18], [23] where the constitutional application was brought during the course of the main criminal trial, the Court of Appeal stated the said application “all of the matters raised in the application could, and should, have been dealt with at an appropriate stage of the trial”. The application “in essence ... formed part of those proceedings. It was considered by the judge who had heard the evidence and who was seized with the matter. Whether the judge wore black or red robes when he listened to argument is irrelevant. In its substance the application was an integral component of the criminal proceedings....”

<sup>101</sup> See, for example, *Fath v Minister of Justice* LAC (2005-2006) 436:[37]-[39]; *Lesupi*: [18]; *Ntaote v Director of Public Prosecutions* LAC (2007-2008) 414:[9].

their invariance with the constitutional framework. Unfortunately, the Ramodibedi Court regarded these issues as matters that “need not concern” the ultimate custodian of the Constitution, the Court of Appeal.<sup>102</sup> Thus, Ramodibedi Court failed in its constitutional duty to protect and enhance the constitutional principles and tools. If *Morienyane* and *Chief Justice* were to be followed to their logical conclusion, then there would be more than five Constitutional Courts in Lesotho exercising constitutional jurisdictions under various rules that the Constitution prescribes the Chief Justice to make.<sup>103</sup>

#### 5.2.3.2.3 *Mota*: anchoring in the high seas of concentrated constitutional review

##### 5.2.3.2.3.1 The factual matrix of *Mota*

The Ramodibedi Court was swift in its sail towards concentrated constitutional review. From *Chief Justice*, it took the Ramodibedi Court only two years to adopt the concentrated constitutional review model entirely. While the Ramodibedi Court had already gone out of the decentralised constitutional review framework’s chartered area, only one aspect remained – incidental constitutional review in criminal matters. It is this last aspect that the Ramodibedi Court had to deal with and to excise from its judicial armoury before a European model is fully applicable in Lesotho. *Mota* was instrumental in achieving this goal of the Ramodibedi Court. *Mota* concerned a member of the Lesotho Defence Force who, because of criminal charges of murder against him and arraignment before the High Court, had been suspended from the LDF since 2005 on half pay.<sup>104</sup> For over a period of eight years, his case had not been prosecuted. He brought a criminal application before the High Court (Makara J) for a permanent stay of criminal charges against him on the ground that the unreasonable delay in prosecuting the matter had resulted in contravening his constitutional right to fair trial guaranteed under section 12 of the Constitution.<sup>105</sup> According to the High Court, the criminal

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<sup>102</sup> *Chief Justice*: [2].

<sup>103</sup> We would have (a) *Human Rights Enforcement and Protection Constitutional Court*, exercising constitutional jurisdiction in terms of section 22(2) of the Constitution in terms of the Rules made by the Chief Justice under section 22(6); (b) *Property Constitutional Court* in terms of section 17(2), in respect of rules made under section 17(3); (c) *Succession to Throne Constitutional Court* under section 45(5), in respect of rules made under section 47(3); (d) *Designation of Regent Constitutional Court* in terms of section 46(3) and 47(1)-(2), in respect of rules made under section 47(3); (e) *Members of Parliament Questions Constitutional Court* in terms of section 69(1), in respect of rules made under section 69(5); and (f) *Review of Public Functionaries Constitutional Court* in terms of section 119(1), in respect of rules under section 131(a).

<sup>104</sup> *Mota*: [3].

<sup>105</sup> *Mota*: [4]-[5], [15].



application:

effectively introduced a constitutional question within the otherwise normal criminal proceedings which the Court has in the main been seized with. It is precisely this sudden turn of the situation, which calls upon it to detail a direction to be followed.<sup>106</sup>

Drawing from the *Constitutional Litigation Rules, Morienyane* and *Chief Justice, Makara J* was of the opinion that where a constitutional question suddenly arises in ordinary criminal proceedings so that the proceedings assume a constitutional dimension, “a litigant who introduces it must be directed to follow the appropriate Rules. The end result would *inter alia* be that the Chief Justice would schedule the matter for hearing by 3 judges”.<sup>107</sup> According to Makara J, this was the conceptualisation of the Rules, taking into account the importance of constitutional issues, that such issues should be introduced following the *Constitutional Litigation Rules* regardless of whether litigation is in the main or incidental.<sup>108</sup> As a result, Makara J concluded, the constitutional challenge was not properly before the Court.<sup>109</sup> Makara J ultimately held:

In the final analysis, the Court holds that the Applicant should introduce the constitutional dimension through the Constitutional Court Rules. This would procedurally facilitate for that case to come to the attention of the Chief Justice for its allocation to a panel of 3 judges. The Applicant is, however, exempted from paying for extra duty stamps in an endeavour to make the access constitutional route and the relief he is seeking for.<sup>110</sup>

#### 5.2.3.2.3.2 The principles and the critique of *Mota*

*Mota* simply regurgitated the principles of *Morienyane* and *Chief Justice*. However, it has been through its instrumentalism that the constitutional jurisdiction of the High Court in incidental constitutional review of ordinary criminal cases, which had hitherto been exercised by the High Court notwithstanding *Morienyane*, was finally excised from the jurisdiction of the High Court. To challenge the constitutionality of any law or conduct in ordinary criminal proceedings before the High Court and by extension, before the subordinate courts with criminal jurisdiction, one would have to access the constitutional jurisdiction of the High Court through the only constitutional route created for that purpose: the *Constitutional Litigation Rules*. The Continental model of constitutional review was thus fully incorporated

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<sup>106</sup> *Mota*: [16].

<sup>107</sup> *Mota*: [21], [23].

<sup>108</sup> *Mota*: [21].

<sup>109</sup> *Mota*: [22].

<sup>110</sup> *Mota*: [27].

into Lesotho.

The combined forces of *Morinyane*, *Chief Justice* and *Mota* have beaten hard on the constitutional jurisdiction of the subordinate courts and the High Court in ordinary proceedings. The combined effect of the trilogy transplanted the European model of constitutional review into Lesotho's constitutional review space. Consequently, the subordinate courts and the High Court will not, contrary to the Constitution<sup>111</sup> be involved in incidental constitutional review. Following the Continental model of constitutional review, the High Court has become the specialised Constitutional Court in constitutional matters. In this new status, the High Court's constitutional jurisdiction can only be accessed through direct access procedures created by the *Constitutional Litigation Rules* and on referral of constitutional questions from the subordinate courts. The trilogy's unconstitutional exclusion of the frontline actors from the constitutionalisation of private-law agenda prescribed by the Constitution carries with it serious consequences on the rights and the lives of the masses of the people as will be indicated below.

### 5.3 Constitutional review practice: horizontality-verticality trajectory

#### 5.3.1 Introduction

The gap between the constitutional review framework and the constitutional review practice, and therefore between the constitutional promise and the lived reality of Basotho, was extended on another front: the application of the Bill of Rights. Notwithstanding the constitutional framework of horizontality, the constitutional review practice of the Mahomed, Steyn and Ramodibedi Courts reconstructs the liberal wall of separation between the Bill of Rights and private law. I follow the steps of, and measure the gap between the constitutional promise and the lived reality of Basotho occasioned by, the Mahomed, Steyn and Ramodibedi Courts in their horizontality-verticality trajectory. He identifies the "building blocks" used by these Courts as they reconstruct, contrary to the Constitution, the liberal wall of public-private distinction behind which private law, is largely shielded from constitutionalisation process and the private actors are absolved from their constitutional obligations one to another.

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<sup>111</sup> See, for example, the Constitution, sec 2; sec 4(2); sec 22(3); sec 118(1); sec 128(1); and sec 156(1).

### 5.3.2 Adherence to traditions of corrective justice: the foundation of the public-private division

The judicial inclination towards either corrective or distributive justice greatly influences the impact (or lack thereof) of the Constitution, in particular the Bill of Rights, on horizontal legal relationships and consequently on private law, as a result of different methodologies and approaches to private-law disputes adjudication and the granting of remedies under the two notions or forms of justice.<sup>112</sup> While the legal culture of corrective justice will be discussed below, it is important at this stage to indicate that corrective justice, based as it is on the ideology of libertarianism,<sup>113</sup> has been the cradle for common-law dispute adjudication and resolution. Under corrective justice paradigm, the autonomy, liberty and the sovereignty of the individuals are respected and, in the event of injury or injustice by one to another, the formal equality with which the parties first entered the legal relationship is restored without considering extraneous factors to that relationship. As will be indicated in full below, the legal culture underpinned by corrective justice has thus been considered inimical to distribute constitutional demands and imperatives of the particular society for the common good of its members.

Distributive justice, on the other hand, based as it is on utilitarianism – the political philosophy not only based on the belief in an individual's wellbeing, but which also emphasises the common good of society and the wellbeing of all its members – is concerned with the distribution of benefits and burdens among members of the group or society.<sup>114</sup> Under distributive justice, the role of courts is not limited to finding liability between the parties before them, but to realise the constitutional bargain and to promote the common good by reconciling conflicting values and accommodating and resolving competing conceptions of good.<sup>115</sup> It is thus through the distributive approach to adjudication of private-law disputes that constitutional values get transferred into private law through rearrangement of legal relationships on the basis of those values.

Emerging from a century-long colonial administration and the two decades-long authoritarian

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<sup>112</sup> See Mbazira 2009:131; *Ferreira v Levin* 1996 1 SA 984 (CC):[229].

<sup>113</sup> This is a political philosophy in terms of which individual members of the community are considered sovereign, self-ruling or self-governing agents whose sovereignty any just system of law must accommodate. See Machan 2005:3; Mbazira 2009:105; Kronman 1980:485-486.

<sup>114</sup> Mbazira 2009:111-112.

<sup>115</sup> Mbazira 2009:112.

rule, the Mahomed Court was caught up by the dawn of the new constitutional order in April 1993 heavy-laden with the conception and traditions of litigation based predominantly on corrective justice paradigm.<sup>116</sup> Without shirking the corrective approach to law and litigation, the Mahomed Court embarked upon its judicial functions and, in the light of the then recent experiences of the Court during the authoritarian rule, set its face against government's intrusion into personal space meant for autonomy and sovereignty of individuals, and in the process losing sight of the fact that the very personal space should be subjected to constitutional regulation and monitoring. Thus, the Mahomed Court, consistent with libertarianism that underpins corrective justice, placed emphasis of the protection of individual autonomy and approached litigation or adjudication as an instrument of restoring such autonomy for the individuals whose rights have been infringed by the state. To adopt Michelman's expression, the Mahomed Court was concerned with the correctness of the pre-Constitution processes and the purity of their application whereas the Constitution mandated the outcome-oriented appraisal of such processes in the light of the distributive demands of the Constitution.<sup>117</sup> The ideology and methodologies of this legal culture were inherited by Steyn and Ramodibedi Courts.<sup>118</sup>

These Courts maintained the correctness of pre-Constitution processes and the purity of their application in three principal ways. Firstly, the upper echelons of the Mahomed, Steyn and Ramodibedi Courts perceived the Constitution as a tool to correct the wrongs occasioned on individuals' rights and freedoms by the state and did not apply the Constitution in horizontal legal relationships. Steyn P's perception of the Constitution as a covenant "regulating the relationship *between the Crown and its citizens*"<sup>119</sup> confirms the Courts' indifference towards the regulation and protection of the horizontal constitutional space. The effect is that the horizontal space of legal relationships largely maintained its pre-Constitution architecture and contours. Secondly, and notwithstanding the supremacy of the

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<sup>116</sup> Once the Court of Appeal in *Human Rights Alert Group v Minister of Justice* LAC (1990-1994) 652 had correlated the prison authorities and the prisoners on the corrective justice's wrongdoer-victim baseline and established that there was no wrong committed on the latter, the questions of causation and liability were equally absent and the application to declare the prison authorities' refusal to bring prisoners to Court resulting in the contravention of the prisoners' constitutional right to fair trial within reasonable time was bound to fail.

<sup>117</sup> Michelman 1973:962-963. According to Kronman (1980:476-477), in litigating contractual issues on the corrective justice paradigm, "it is only the process leading up to an agreement, and not its distributive effects, that matter".

<sup>118</sup> See *Letsielo v Khobethi* LAC (2009-2010) 376:[16]-[17].

<sup>119</sup> *Bolofa*:247. Emphasis added.

Constitution and the constitutional duty on all courts to modify and develop the existing laws compatibly with the Constitution, the Mahomed Court continued to apply pre-constitution laws without subjecting them to constitutional scrutiny, except where, in the case of the upper echelons of the Court, the constitutionality of such laws was specifically raised by the litigants either in direct or incidental constitutional review proceedings. In effect, Mahomed Court not only respected the formal equality with which private actors came into legal relationships but also, in the event that such equality was disturbed by a breach or injury, restored same to the position before the breach or injury without considering the distributive outcomes of such a dispute as mandated by the Constitution.

Thirdly, the Mahomed Court was constrained by the limitations of corrective justice in terms of which the remedies available for the breach or injury are defined in terms of the correlativity of the parties as the wrongdoer and the victim and the need to restore the parties to their position before the breach or injury.<sup>120</sup> Once the breach or injury has been proved, as Mbazima puts it, the role of the adjudicative body under corrective justice is to correct the imbalance without the need either to balance the conflicting or affected interests or to change the behaviour for the future.<sup>121</sup> Because of this narrow focus, the discretion of the adjudicative body and remedies available to address the legal problem are limited by the scope of the harm or breach and the requirement of restoration to the pre-wrong position.<sup>122</sup> Consequently, all such remedies look back to the parties' position before the destabilisation of their formal equality. Thus, unlike the Indian Supreme Court<sup>123</sup> and the South African Constitutional Court,<sup>124</sup> which have fashioned innovative remedies based on distributive justice approach to adjudication, the Mahomed Court's constitutional powers to grant

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<sup>120</sup> Sniderman (2014:174) correctly points out that "corrective justice looks to a pre-wrong past for remedial guidance".

<sup>121</sup> See Mbazima 2009:106.

<sup>122</sup> Sniderman 2014:174.

<sup>123</sup> See *Morcha v Union of India* 1984 2 SCR 67:[110] where the Indian Supreme Court stated: "We have therefore to abandon the *laissez faire* approach in the judicial process particularly where it involves a question of enforcement of fundamental rights and forge new tools, devise new methods and adopt new strategies for the purpose of making fundamental rights meaningful for the large masses of people." Also see Bhagwati and Dias 2012:176,180.

<sup>124</sup> See *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC):[69] where the Court stated: "... I have no doubt that that this Court has a particular duty to ensure that ... effective relief is granted for the infringement of any of the rights entrenched in it ... The courts have a particular responsibility in this regard and are obliged to 'forge new tools and shape innovative remedies, if need be, to achieve this goal.'"

appropriate effective relief have been severely circumscribed by its inclination to the traditions of corrective justice.<sup>125</sup> It is not surprising therefore that it was only after a period of a decade that the High Court was prodded to “give careful consideration” to its remedial powers under section 22(2) of the Constitution “in any future invocation” of that provision.<sup>126</sup>

The Steyn and Ramodibedi Courts continued the inclination towards corrective justice and this legal culture continues to regulate the legal methods and methodologies of adjudication today.<sup>127</sup> The corrective justice’s strict adherence to causation requirement in the determination of whether rights have been contravened<sup>128</sup> and the wrongdoer-victim correlativity in liability assessment greatly imperilled the Mahomed, Steyn and Ramodibedi Courts’ constitutional remedial powers and discretion. Thus, the corrective justice paradigm on which private-law litigation has largely been conducted by these Courts provided a foundation on which the liberal wall of public-private distinction was reconstructed because of the bipolar orientation of the system and its disregard of distributive concerns of the constitutional order.<sup>129</sup> Dealing with the limits of corrective justice in fashioning appropriate constitutional remedies, Roach correctly points out:

Corrective justice is too strong in its conceptual inability to accommodate interests other than those of the plaintiff or defendant. On the other hand, corrective justice is too weak because it cannot comprehend that some injustices can never be corrected and it cannot justify practical remedies which respond to the needs of those who have suffered irreparable harm.<sup>130</sup>

### 5.3.3 Classical judicial position on *locus standi*: immunising the law from constitutional scrutiny

Standing, or *locus standi*, is a procedural rule, which determines a proper person who may bring an action before a court for adjudication and redress.<sup>131</sup> According to the traditional rule of *locus standi*, only persons who have suffered actual or potential violation of their own

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<sup>125</sup> See, for example, *Lesotho Human Rights Alert Group*, discussed below.

<sup>126</sup> *Sole v Cullinan* LAC (2000-2004) 572:[38].

<sup>127</sup> This research is a critique of the law as at 2015.

<sup>128</sup> See Roach 1991:875.

<sup>129</sup> Corrective justice “has trouble justifying remedies that are not designed to restore those who have suffered constitutional wrongs to the position they occupied before the wrong.” See Roach 1991:877.

<sup>130</sup> Roach 1991:886-887.

<sup>131</sup> *Wood v Ondangwa Tribal Authority* 1975 2 SA 294 (A):305-306. Also see Bhagwati and Dias 2012:177. Also see Loots 1998:2-3.

rights are entitled to access the court for a remedy.<sup>132</sup> No one may institute a case before a court on behalf of another or in the interest of the public except in limited circumstances.<sup>133</sup> The philosophy and focus of the rules of standing under the common law and the Constitution differ. Whereas under the common law, the enquiry in relation to standing focuses on the person and his interests<sup>134</sup> in the subject matter of litigation rather than the issues to be adjudicated or their impact,<sup>135</sup> rules of standing under the Constitution govern which party may raise public law issues in litigation.<sup>136</sup> Rules of standing are closely linked with the conceptualisation of the judicial role in litigation. As Barak J pointed out in *Ressler v Minister of Defence*:

... the judge whose judicial philosophy is based merely on the view that the role of the judge is to decide a dispute between persons with existing rights is very different from a judge whose judicial philosophy is enshrined in the recognition that his role is to create rights and enforce the rule of law.<sup>137</sup>

Writing in an extra-judicial context, Barak J emphasized, “how a judge applies the rules of standing is a litmus test for determining his approach to his judicial role” and observed that “a judge who regards his role as deciding a dispute between persons with rights – and no more – will tend to emphasize the need for an injury in fact”.<sup>138</sup> By contrast, Barak J indicated, “a judge who regards his judicial role as bridging the gap between law and society and protecting (formal and substantive) democracy will tend to expand the rules of standing”,<sup>139</sup> In *Ressler*, Barak J concluded that a judge “cannot formulate the rules of standing if [he does] not formulate for [himself] an outlook on the role of these rules in public law”.<sup>140</sup> In order to formulate an outlook about the nature and role of the rules of standing,

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<sup>132</sup> *Wood*:305-306.

<sup>133</sup> For example, in the case of a detained person, another person may bring institute judicial proceedings on his behalf for a relief. *Wood*:305-306; *Trustco Insurance v Deed Registries Regulation Board* 2011 2 NR 726 (SC):[16].

<sup>134</sup> Consistent with corrective justice, the *interest* here is the loss or gain out of the proceedings. See Abebe 2010:410.

<sup>135</sup> *Loots* 1998:3.

<sup>136</sup> *Reitz* 2012:120.

<sup>137</sup> *Ressler v Minister of Defence* HCJ 910/86. This Israeli Supreme Court decision is available online at <[http://elyon1.court.gov.il/files\\_eng/86/100/009/Z01/86009100.z01.pdf](http://elyon1.court.gov.il/files_eng/86/100/009/Z01/86009100.z01.pdf)> (accessed on 28 September 2015).

<sup>138</sup> *Barak* 2002:107.

<sup>139</sup> *Barak* 2002:107.

<sup>140</sup> *Ressler* 23.

Barak J added, a judge “must adopt a position on the role of judicial review in the field of public law”.<sup>141</sup> In other words, a judge must consider the distributive concerns laid down by the Constitution, among others, in his decision on standing.

That the Mahomed Court, followed by the Steyn and Ramodibedi Courts, have greatly been influenced by the philosophy and traditions of corrective justice is exemplified by these Courts’ laying down of pedantic requirements for the establishment of standing under the Constitution and their failure or inability to exploit or discover other existing access routes through which a public interest litigant, for example, may attain access to constitutional jurisdiction of the High court in particular. Benumbed by corrective justice-based common-law principles of standing, the Mahomed Court started in the dawn of the new constitutional order announcing its restrictive reception policy at the judicial footsteps. In terms of the Constitution, it is sufficient for the applicant to have direct access to the constitutional jurisdiction of the High Court making the necessary allegations in his or her pleadings.<sup>142</sup> However, the Mahomed Court in *Lesotho Human Rights Alert Group v Minister of Justice and Human Rights*<sup>143</sup> adopted a classical common-law position and took a pedantic view of the constitutional standing. It therefore laid on the constitutional space the principle that the right of a private person or association of persons is limited to prosecuting actions in his or its own interests and that he or it has no title to institute them in the interest of the public.<sup>144</sup>

*Lesotho Human Rights Alert Group* concerned an application by a human rights organisation on behalf of prison inmates who were awaiting trial and whom the prison officers who were on strike had failed to bring to court and in some instances their visitors were denied access to the prison, as a result of which, it was alleged in affidavits, the inmates’ constitutional rights were being violated. The organisation invoked the constitutional jurisdiction of the High Court and sought for a declarator that the refusal of the prison officers to bring the prisoners

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<sup>141</sup> *Ressler*:23.

<sup>142</sup> See, for example, *Attorney General v Dow* (2001) AHRLR 99 (BwCA 1992):[116] (“The section shows that the applicant must ‘allege’ that one of the named sections of the Constitution has been, is being or is likely to be infringed in respect of him. He must therefore sue only for acts or threats to himself. *But the section does not say that the applicant must establish as a matter of proof that any of these things has or is likely to happen to him.*”) Emphasis added. This decision of Botswana Court of Appeal is available at <http://www1.chr.up.ac.za/index.php/browse-by-country/botswana/1117-botswana-attorney-general-v-dow-2001-ahrlr-99-bwca-1992.html> (accessed on 20 October 2015).

<sup>143</sup> *Lesotho Human Rights Alert Group*:652.

<sup>144</sup> *Lesotho Human Rights Alert Group*:657.



to court was in violation of their right to a fair trial within a reasonable time.<sup>145</sup> The High Court dismissed the application for lack of *locus standi* on the part of the organisation.<sup>146</sup> On appeal, the Court of Appeal, accepting that the prisoners' rights were being violated, however, went on to state that the organisation would only have the necessary standing to sue on their behalf if the latter were proved not able to make the application themselves and that even so, it would have been in exceptional circumstances where an applicant with no direct and substantial interest in the matter would be allowed to sue.<sup>147</sup> The Court held that, as the prisoners were not unlawfully detained and the organisation had no link or relationship with them, it would amount to unwarranted relaxation of the common-law rule beyond what it was intended for and consequently reviving the Roman *actio popularis*.

It is clear that the applicant organisation had done all that the Constitution required for a private actor to be entitled to raise public law issues: the allegation of the contravention of the Bill of Rights provision (fair trial) and that the contravention was in relation to the detained person. This was sufficient under section 22(1) of the Constitution to clothe the applicant organisation with the necessary *locus standi* since under that section "the question which has to be asked in order that the courts might listen to the merits of [the applicant's] case is whether he makes the required allegation with reasonable foundation" and if that is shown, "the courts ought to hear him".<sup>148</sup> Beyond this hurdle, what remained would have been the testing of the conduct of the prison authorities on legality and legitimacy thresholds. However, blinded by corrective justice ideology, the Court of Appeal had to find a common-law cliché to characterise the proceedings before it and in the process classified them as an application *de libero homine exhibendo*. Glossing the proceedings as such, the corrective justice-based common law required that the detained person should be illegally detained.<sup>149</sup> In the end, the Court whittled down the Applicants' constitutional rights by principles derived from the common law.<sup>150</sup>

Through what Bhagwati and Dias have labelled "strict constructionism",<sup>151</sup> the Mahomed Court in *Lesotho Human Rights Alert Group* not only failed to liberate both itself and the law from the hard grip and manacles of the corrective justice-based common-law principles

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<sup>145</sup> *Lesotho Human Rights Alert Group*:655.

<sup>146</sup> *Lesotho Human Rights Alert Group*:656-657.

<sup>147</sup> *Lesotho Human Rights Alert Group*:658.

<sup>148</sup> *Dow*:[117].

<sup>149</sup> See *Wood*:310-312.

<sup>150</sup> See *Dow*:[117].

<sup>151</sup> Bhagwati and Dias 2012:173.

which were engineered to deal with “mechanical, slot machine-type justice”.<sup>152</sup> The Court also introduced the restrictive common-law standing rules which do not sit well in the new constitutional space and framework as it shall be indicated below. The Court further immunised the alleged unlawful governmental conduct from constitutional scrutiny through constitutional review.<sup>153</sup> Unlike the Namibian Courts which were able to liberate themselves and the law from the shackles of the narrow common-law standing in constitutional litigation after a period of nineteen years of constitutional dispensation,<sup>154</sup> the Mahomed, Steyn and Ramodibedi Courts as well as the current Mosito Court<sup>155</sup> are continuously influenced, for upwards of two decades now, by the corrective justice paradigm of private-law dispute resolution and there is no indication of ever following in the footsteps of their Namibian counterparts. Inspired by *Ferreira v Levin*<sup>156</sup> to reject the narrow approach to the issue of standing in constitutional litigation, the Namibian High Court stated:

These common law principles and the measure of flexibility they allow the Court is an important reference, but not the true criteria, for deciding standing when litigants claim that their fundamental rights and freedoms protected under the Constitution have been infringed, derogated from or diminished ... But, it is especially within the context of the protection and promotion of human rights values after the new constitutional dispensation created on Independence, that a more purposive approach must be adopted to accord individuals and classes of individuals standing to enjoy the full benefit of their entrenched rights and to effectively maintain and enhance the values expressed therein.<sup>157</sup>

The Mahomed, Steyn and Ramodibedi Courts have not only laid narrow requirements for the

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<sup>152</sup> Bhagwati and Dias 2012:175.

<sup>153</sup> According to Kaufman (2013:107), restrictive standing rules immunise unlawful governmental activity from judicial review as in many cases there will be no one (or one with means) who will challenge the governmental action.

<sup>154</sup> Since 1990 when the Namibian Constitution was adopted, the Namibian courts had applied the common law rule of standing (see *Kerry McNamara Architects v Minister of Works, Transport and Communication* 2000 NR 1 (HC)) and it was only in 2009 (see *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC)) that the courts adopted a more liberal approach to standing in constitutional litigation. Also see Hinson and Hubbard 2012:i-ii (Report on Access to Justice in Namibia available online at [http://www.lac.org.na/projects/grap/Pdf/access2justice2\\_locus\\_standi.pdf](http://www.lac.org.na/projects/grap/Pdf/access2justice2_locus_standi.pdf) (accessed on 2 September 2015)).

<sup>155</sup> The current President of the Court of Appeal is Justice KE Mosito, who was appointed as such in January 2015.

<sup>156</sup> See *Ferreira*: [165], [229].

<sup>157</sup> *Uffindell*: [13].

establishment of standing under section 22(1) of the Constitution, but have also failed to unlock the *locus standi* rules buried elsewhere<sup>158</sup> in the Constitution, thereby failing to create further access routes to constitutional jurisdiction for the masses of the people whose rights and interests have been violated. Section 22(1) of the Constitution lays down standing requirements for “any person” whose fundamental rights and freedoms have been contravened actually or potentially and such standing is granted for the enforcement and protection of the applicant’s own rights and freedoms or of the person who is in detention.<sup>159</sup> Thus, standing under section 22(1) of the Constitution is exclusively for the Bill of Rights enforcement and protection by or on behalf of “the victim” who is *affected personally and directly* by the impugned law or conduct in issue.<sup>160</sup> The theoretical postulates for such restriction have adequately been identified elsewhere.<sup>161</sup> However, the private actor is allowed merely to allege the contravention of his rights or those of the detained person in order to be granted personal standing to raise constitutional issues in litigation.<sup>162</sup>

However, what of cases where a contravention of the Constitution has nothing to do with any of the applicant’s rights and freedoms?<sup>163</sup> Does the Constitution allow or permit its vindication by the public interest litigant before the courts? Should the courts turn their back against a person who seeks to vindicate the Constitution simply because he or she cannot point out a provision under the Bill of Rights? Should unconstitutional laws and conduct be effectuated or go unchallenged simply because it is difficult, if not impossible, for an individual to establish that his personal rights or freedoms have been contravened or affected? What nature of right or interest should a public interest litigant have in order to vindicate the constitutional provisions that have been violated or to enforce constitutional duties, which have been disregarded or breached?

These and other questions are answered by sections 2 and 156(1) of the Constitution but, owing to their inclination to corrective justice, among others causes, the Mahomed, Steyn and Ramodibedi Courts have failed to unlock rules of standing buried under these provisions. Apart from being jurisdictional and remedial, sections 2 and 156(1) of the

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<sup>158</sup> For example, sections 2 and 156(1) of the Constitution also grant standing.

<sup>159</sup> See Hogg 2007:201.

<sup>160</sup> See *Ferreira*:[38]; *Schachter v Canada* [1992] 2 SCR 679:719-720; Loots 1998:6.

<sup>161</sup> See Hogg 2007:773; Kay 2005:24; Woolf *et al* 2007:70-71; Bailey and Chaisson 2012:134; *Canada v Downtown Eastside Sex Workers Against Violence Society* [2012] 2 SCR 524:[22]-[30].

<sup>162</sup> See *Dow*:[116]; *Ferreira*:[38]. However, compare with *Ferreira*:[167]-[168] as to the South African position under the Interim Constitution.

<sup>163</sup> See *Ferreira*:[167].

Constitution provide for liberal rules of standing for those who seek to challenge any law or conduct on constitutional grounds in the interest not only of themselves but also where they have an interest in the infringement or threatened infringement of the rights of other persons or public interest.<sup>164</sup> As Linington points out, “the concept of constitutional supremacy necessarily implies the existence of a right to challenge the constitutionality of laws before the courts”.<sup>165</sup> This is so in view of the fact that the Constitution is not only about rights and freedoms; it is about the maintenance of its supremacy over any other law and the curbing of the misuse of public and private power. While *locus standi* under section 22(1) of the Constitution is restricted to claims for personal reliefs, sections 2 and 156(1) of the Constitution lays down liberal rules of standing for a private or other litigants to raise constitutional questions of incompatibility of any law or conduct with the Constitution, for either private or public reasons.<sup>166</sup> Thus, in principle, a party, whether a private actor, statutory body or government authority, has the necessary standing to challenge the constitutionality of any law or conduct on the basis of its inconsistency with the Constitution even in circumstances where none of his or its rights and freedoms have been violated, whether the proceedings are launched directly for that purpose<sup>167</sup> or the constitutional issue arises in the course of the ordinary litigation.<sup>168</sup> On this score, Linington correctly states that:

... constitutional challenges framed on the basis of [the supremacy clause] of the Constitution need not allege that the [Bill] of Rights has been infringed. Such an allegation need only be made where the challenge is made in terms of the [Bill of Rights enforcement clause]. That provision is concerned exclusively with the jurisdiction of the courts in respect of the enforcement of the [Bill of Rights]. [The supremacy clause] is broader in that it justifies challenging the constitutionality of any law, regardless of whether or not it is alleged that the impugned law has violated a provision in the [Bill of Rights].<sup>169</sup>

In the circumstances, the existence of a right before an application to the High Court is made

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<sup>164</sup> See *Ferreira*: [167], [227], [229].

<sup>165</sup> Linington 2012:71.

<sup>166</sup> See Hogg 2007:773-774; Roach 2013:491-492.

<sup>167</sup> See, for example, *Chief Justice*. Also see *Judicial Officers' Association v Prime Minister* 3/2005 where an association of judicial officers successfully challenged the *Judicial Service Commission Rules* and the Government directive effectively placing the judicial officers under public service regulation and the control of the District Administrators on the basis that such measures were inconsistent with constitutional separation of powers and the independence of the judiciary (section 118 of the Constitution); *Thulo v Government Secretary* LAC (2000-2004) 551.

<sup>168</sup> *Motanyane v Ramainoane* LAC (1995-1999) 466.

<sup>169</sup> Linington 2012:73.

is not a basic condition of judicial action since section 22 of the Constitution is not the only recourse in the face of unconstitutionality and illegality.<sup>170</sup> As Barak J rightly pointed out in *Ressler*, there is nothing in the nature of the judicial role, which necessitates that only persons whose rights have been violated are entitled to plead their case.<sup>171</sup> According to Barak J, “frequently the court creates, by its very ruling, the right itself. Judging is not merely declarative; it also involves creativity”.<sup>172</sup> It is this judicial creative role that the Mahomed, Steyn and Ramodibedi Courts failed to discharge as far as liberal standing rules under section 2 and 156(1) of the Constitution are concerned.

In view of the fact that it would be a cause for alarm if the Canadian legal system provided no route by which a question concerning the constitutionality of a law could be determined by the courts, the Canadian Supreme Court has granted standing to a private party who seeks to vindicate a public interest and who is not exceptionally prejudiced.<sup>173</sup> Such a public interest litigant is allowed to challenge the constitutionality of a law or conduct based on standing granted under the supremacy clause of the Canadian Constitution.<sup>174</sup> The prime purpose of public interest standing under the supremacy clause, it was stated in *Canadian Council of Churches*, is to ensure that the Constitution and other applicable laws are adhered to and to prevent the immunisation of law and conduct from any constitutional challenge, thereby enforcing the rule of law and constitutionalism.<sup>175</sup> On this score, the Indian Supreme Court stated that public interest standing ensures the “effective policing of

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<sup>170</sup> See *R v Big M Drug Mart* [1985] 1 SCR 295:313; *Osborne v Canada* [1991] 2 SCR 69:77.

<sup>171</sup> The Israeli Supreme Court held that “it is not the right which creates the dispute, but rather the dispute which creates the right. If a right is a desire or interest that is protected by law, then a judicial determination, which affords the protection of the law creates the right itself. Accordingly, the judicial nature of the function is not determined by the content of the dispute, but by its very existence”. See *Ressler*:33.

<sup>172</sup> *Ressler*:31.

<sup>173</sup> Hogg 2007:776-777; Linington 2012:70.

<sup>174</sup> See *Thorson v Attorney General* [1975] 1 SCR 138; *Nova Scotia Board of Censors v McNeil* [1976] 2 SCR 265; *Minister of Justice v Boroski* [1981] 2 SCR 575; *Finlay v Minister of Finance* [1986] 2 SCR 607; *Hy and Zel v Antorio* [1993] 3 SCR 675. For a similar position in South Africa, see *Ferreira*:166].

<sup>175</sup> *Canadian Council of Churches v Canada* [1992] 1 SCR 236:252-253; *Downtown Eastside Sex Workers Against Violence Society*:31]-[34]. Also see Hogg 2007:780, 781. The same rationale underpinned the liberalisation of rules of standing in the UK. See *Re ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617:630, 644; *Re ex parte The World Development Movement Ltd* [1995] 1 All ER 611.

the corridors of power” by courts.<sup>176</sup> Furthermore, public-interest standing “serve[s] to enhance the principle of legality with respect to serious issues of direct concern to some of the most marginalized members of society”.<sup>177</sup> It therefore facilitates access to justice to the marginalised and disadvantaged who cannot afford to approach the courts.<sup>178</sup>

According to the Canadian Supreme Court, this liberal public interest standing under the supremacy clause is granted to the party who establishes the three public interest litigant standing requirements. These are, firstly, that the matter raises a serious legal question. Secondly, the applicant must establish that he has a genuine interest in the resolution of the question. Thirdly, the applicant must establish that there is no other reasonable and effective manner in which that question may be brought to court.<sup>179</sup> The third requirement or factor in the public interest standing analysis has recently been recast to be more flexible as follows: “whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court”.<sup>180</sup>

Contrary to common-law standing, which requires personal interest (loss or gain) before one may be entitled to sue, rules of standing under the Constitution (sections 2, 22(1) and 156(1)) are liberal since they are outcome-oriented and issue-focused.<sup>181</sup> Rather than being concerned with the relationship between the applicant and the subject-matter of litigation in determining standing under common law, the primary focus in the determination of constitutional standing in constitutional litigation is on the importance of the public law issue or constitutional issue raised, the nature of the breach for which the relief is sought and the need to vindicate the rule of law and the Constitution.<sup>182</sup> Consistent with the distributive justice paradigm, constitutional standing is therefore both a legal and factual inquiry taking into account all the relevant factors of the whole case.<sup>183</sup> It is for this reason that Kay has

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<sup>176</sup> *Fertilizer Corporation Kamgar Union v Union of India* (1981) 2 SCR 52:70.

<sup>177</sup> *Downtown Eastside Sex Workers United Against Violence Society*: [76].

<sup>178</sup> *Downtown Eastside Sex Workers United Against Violence Society*: [22].

<sup>179</sup> Roach 2013:491; Hogg 2007:779; *Hy and Zel*:690. For a similar position under the South African Interim Constitution, see *Port Elizabeth Municipality v Prut* 1996 4 SA 318 (ECD):324-325.

<sup>180</sup> See *Downtown Eastside Sex Workers United Against Violence Society*: [21].

<sup>181</sup> See Linington 2012:72. It is clear that under section 22(1) of the Constitution, all the applicant needs do is to allege those issues to establish standing. See *Mda v Minister of Home Affairs* 4/2014:[34]-[35] available online at <<http://www.lesotholii.org/ls/judgment/high-court/2014/30>> (accessed on 2 September 2015).

<sup>182</sup> See *Ferreira*: [165], [229]-[230].

<sup>183</sup> See *Re ex parte The World Development Movement Ltd*:620; *Uffindell*: [12].

come to refer to it as “inquiry-standing” because, he explains, its main purpose is “to clarify the meaning of constitutional rules so as to facilitate their observance”.<sup>184</sup> According to Kay, the use of the inquiry standing is “designed not so much to benefit any particular person or group as to help perfect the operation of the constitutional order as a whole”.<sup>185</sup>

While section 22(1) of the Constitution establishes personal standing, sections 2 and 156(1) of the Constitution are the foundation of public interest standing. Thus, under sections 2 and 156(1) of the Constitution, recourse to the enforcement clause (section 22(1) of the Constitution) to establish standing is unnecessary and the particular effect on the challenging party is irrelevant<sup>186</sup> since no civil or criminal liability may be imposed on a party based on unconstitutional law.<sup>187</sup> In *Big M Drug Mart*, a company was criminally charged for selling goods on a Sunday contrary to the *Lord's Day Act*. When the corporation raised the defence of the unconstitutionality of the Act on the basis that it violated the entrenched right to freedom of religion, it was argued that a corporation was incapable of holding religious beliefs and therefore incapable of claiming such a right in its defence. The Canadian Supreme Court, rejecting this argument stated:

A law which itself infringes religious freedom is, by that reason alone, inconsistent with ... the *Charter* and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue.... In my view there can be no question that the respondent is entitled to challenge the validity of the *Lord's Day Act* on the basis that it violates the *Charter* guarantee of freedom of conscience and religion.<sup>188</sup>

Courts carry a great constitutional role to ensure that the rule of law and constitutionalism are vindicated and the rights of individuals are protected. As it was stated in *Ferreira*, this role requires that “access to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated”.<sup>189</sup> Thus, the South African Constitutional Court continued, “it is important that it is not only those with vested interests who should be

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<sup>184</sup> Kay 2005:2.

<sup>185</sup> Kay 2005:2, 15.

<sup>186</sup> See *Big M Drug Mart*:313.

<sup>187</sup> *Big M Drug Mart*:313; *R v Hess* [1990] 2 SCR 906:945.

<sup>188</sup> *Big M Drug Mart*:314, 315. Also see *S v Morgentaler* [1988] 1 SCR 30, where a male doctor successfully defended criminal charges brought against him under abortion provisions of the Criminal Code on the ground that such provisions violated the Charter rights of pregnant women.

<sup>189</sup> *Ferreira*: [230].

afforded standing in constitutional challenges, where remedies may have a wide impact”.<sup>190</sup> By laying traditional standing requirements under section 22(1) of the Constitution and failing to discover or conceptualise liberal rules of public interest standing under sections 2 and 156(1) of the Constitution as a result of their inclination to corrective justice, the Mahomed, Steyn and Ramodibedi Courts not only narrowed the access route to constitutional jurisdiction and its benefits, but also excluded the majority of poor and downtrodden Basotho and incapacitated public interest litigants such as non-governmental organisations (NGOs) from being involved in vindicating the Constitution and the maintenance of the rule of law. The personal right or interest requirement as a precondition for standing “does harm the rule of law”<sup>191</sup> as a result of the creation of “dead areas” in which a legal norm exists but the private actor or public body “is free to violate it without the possibility of judicial review”, leading to “a violation of the legal norm, undermining the rule of law and undermining democracy”.<sup>192</sup> The result, in the final analysis, is that the law, in particular private law, is largely immunised from the constitutional challenge and scrutiny.

#### 5.3.4 The ossified official version of customary law and the failure by courts to ascertain the living version

It would not come as a surprise for those lawyers who had occasion to practise their trade before the Local, Central and Judicial Commissioners’ Courts to hear a startling statement that any law in Lesotho, including the Constitution, which is inconsistent with customary law is invalid to the extent of its inconsistency; precisely so because the codified or official version of the customary law has over a period of a century ossified to the extent that constitutional principles deflect upon contact with it. The majority, if not all, of the judicial officers in the above-mentioned Courts religiously or mechanically apply the official customary law version that one may be forgiven to think that they have never heard of the “Constitution of Lesotho”, let alone the legal relationship between the Constitution and other laws.

The absence of interlinkages and interaction between the official customary law and the Bill of Rights notwithstanding the constitutional recognition of customary law and the evolutionary model for the elimination of discriminatory laws is startling. The undue reliance on the official version of customary law, the failure by the Mohamed, Steyn and Ramodibedi Courts to set standards for the ascertainment and application of the “living” version of

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<sup>190</sup> *Ferreira*:230].

<sup>191</sup> *Ressler*:33.

<sup>192</sup> Barak 2002:109.



customary law as well as the colonial paradigm of legal dualism which denies hybridisation of customary law and the Bill of Rights through interaction and interpenetration increase the divide between the constitutional promise and the lived reality of the people of Lesotho to whom customary law applies. The stark reality is that these people have been marginalised from the mainstream of the constitutional system and constitutional justice.

The *Laws of Lerotholi Code* is a statement of the customary law that was codified in 1903.<sup>193</sup> Together with textbooks, statutory enactments, judicial pronouncements and commentaries, this Code constitutes the official customary law of Lesotho. It reflects the customs, practices and traditions of Basotho during a period of over a century ago. No doubt new and different practices, customs and traditions responding to the challenges and values of the contemporary Lesotho have evolved replacing the old ones.<sup>194</sup> As Juma correctly points out “the gap between the applicable law and the prevailing customary practices seems to be widening”.<sup>195</sup> According to him, the *Laws of Lerotholi Code* has been “outpaced by the changes in the Basuto social life”.<sup>196</sup> These new practices, customs and traditions constitute the “living” version of customary law, the norms that actually govern daily life in the community.<sup>197</sup> They have been adapted to fit in with changed circumstances.<sup>198</sup> Because of their inherent dynamism and adaptability, living customary law norms differ considerably from the official customary law norms in the majority of cases,<sup>199</sup> and the challenge lies with the ascertainment by courts of what constitutes the body and corpus of living customary law norms at the relevant stage in the development of a nation or community.<sup>200</sup> This is particularly so when the official version of customary law has largely been corrupted and distorted by colonial imperialism.

Official customary law was not only the area where various forces competed for hegemony but was also more of an enforcement tool for power configurations than as a normative framework of legal relationships between indigenous peoples.<sup>201</sup> The South African Law

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<sup>193</sup> Juma 2011:110-118.

<sup>194</sup> Palmer and Poulter 1972:195-196.

<sup>195</sup> Juma 2011:121.

<sup>196</sup> Juma 2011:121.

<sup>197</sup> Juma 2007:109; Ndulo 2011:102; Ubink and Van Rooij 2011:10.

<sup>198</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC):[87].

<sup>199</sup> Ubink and Van Rooij 2011:10.

<sup>200</sup> Ubink and Van Rooij 2011:11.

<sup>201</sup> Juma 2011:101; Clarke 2011:50; Mamdani 1996:22,125; *Bhe*:[86]. For example, a Mosotho leading a customary way of life is still today not “competent to make a will” because of the colonial

Commission (SALC) correctly observes that unlike the living version, the official customary law served the interests of the colonial state rather than the interests of the communities living under it as it “described less what people previously did (or were actually doing) and more what the government and its chiefly rulers thought they ought to be doing”.<sup>202</sup> The SALC concludes that the official version of customary law is an ‘invented tradition’.<sup>203</sup> It is clear therefore that the official customary law is often inaccurate and misleading<sup>204</sup> as it depends on alien values for validity.<sup>205</sup> As an invented tradition, official customary law is “corrupted, inauthentic and lacking authority ... a foreign imposition, a stranger” to the society.<sup>206</sup>

This distortion of the official version of customary law was achieved largely by what Mamdani has referred to as “decentralized despots”<sup>207</sup> – the local authorities (chiefs) who stood to benefit immensely from the indirect rule of the colonial administration. As Mamdani puts it, the official customary law “was an administratively driven affair” defined by those “who enforced it”.<sup>208</sup> According to Mamdani, the official customary law “was not about guaranteeing rights; it was about enforcing custom. Its point was not to limit power but to enable it”.<sup>209</sup>

The official customary law harbours these colonial impurities in its normative framework and has over a century ossified as a tool of power enforcement. As stated in *Ramaisa v Mphulenyane*, the official customary law has “assumed a quality of rigidity out of all proportion to their true meaning or significance”.<sup>210</sup> Notwithstanding this, the official customary law continues to find mechanical application by the Mahomed, Steyn and Ramodibedi Courts to resolve current pressing life issues among Basotho society even in

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legislation. See *Law of Inheritance Act 26/1873*; *Administration of Estates Proclamation 19/1935*; *Mokatsanyane v Thekiso* LAC (2005-2006) 117.

<sup>202</sup> South African Law Commission 1997:37. The unpublished report of SALC is available online at [http://www.justice.gov.za/salrc/dpapers/dp74\\_prij90\\_cstmar\\_1998.pdf](http://www.justice.gov.za/salrc/dpapers/dp74_prij90_cstmar_1998.pdf) (accessed on 5 September 2015).

<sup>203</sup> South African Law Commission 1997:37. Also see Roberts 1984:1-5.

<sup>204</sup> See Sanders 1987:405.

<sup>205</sup> Ndima 2007:82.

<sup>206</sup> Costa 1998:534; also see Ndima 2007:81-82; Allott 1965:369-370.

<sup>207</sup> Mamdani 1996:17-19.

<sup>208</sup> Mamdani 1996:110.

<sup>209</sup> Mamdani 1996:110.

<sup>210</sup> *Ramaisa v Mphulenyane* 1977 LLR 138:149.

the constitutional dispensation.<sup>211</sup> Notwithstanding the fact that the Constitution creates a single legal system in which all laws derive their validity from one source and reposes in courts the power and obligation to ensure compatibility between it and customary law through adjudication,<sup>212</sup> the Mahomed, Steyn and Ramodibedi Courts have crystallised the colonial legacy of centralised and decentralised despotism.<sup>213</sup> In terms of this legacy, the privileged minority in urban and peri-urban areas enjoy the rights and liberties granted under the general law while the underprivileged majority living in local communities under customary law enjoy few or no rights and liberties. Because the official customary law is essentially an instrument of control in the hands of the dominant rather than “a rights-conferring and -reinforcing system of law that fosters democracy and citizen participation”,<sup>214</sup> the reliance by the Mahomed, Steyn and Ramodibedi Courts on this version of customary law had great impact.

Firstly, the Mahomed, Steyn and Ramodibedi Courts effectively confirmed the fossilisation and marginalisation of customary law and denied that law of its inherent adaptable nature and development.<sup>215</sup> The Courts failed to salvage the customary law from the inhibitions of the past where its norms “were frozen in the texts and contexts of days gone by, and thereby, denied the opportunity for growth, regeneration, and development”.<sup>216</sup> The South African Constitutional Court was correct to point out that customary law “is not a fixed body of formally classified and easily ascertainable rules”.<sup>217</sup> According to the Constitutional Court, customary law, by its very nature, “evolves as the people who live by its norms change their

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<sup>211</sup> It is important further to note that the official customary law, like common law, is strongly inclined towards protecting those who control the system’s underlying socio-economic, legal and political relationships. See Fanana 2004:120.

<sup>212</sup> See the Constitution, sec 2; sec 22; sec 156(1).

<sup>213</sup> According to Mamdani, the colonial state was bifurcated into central polity of European settlers and natives who had abandoned tribal custom and who were Europeanised. This group, which was ruled directly by an appointed official or authority, lived in towns and enjoyed rights and privileges. On the other, there was a decentralised state of indigenous people who lived in rural communities and enjoyed few or no rights and privileges under the authority of chiefs appointed by the colonial administration. Mamdani refers to the first state and the second state, respectively as “centralised despotism” and “decentralised despotism”. See Mamdani 1996:16-18,109-110; Sibanda 2010:32-33.

<sup>214</sup> Sibanda 2010:33.

<sup>215</sup> See *Bhe*: [43], [82].

<sup>216</sup> Juma 2013:181.

<sup>217</sup> *Alexkor v Richtersveld Community* 2004 5 SA 460 (CC):[52].

patterns of life ... And it will continue to evolve within the context of its values and norms consistently with the Constitution".<sup>218</sup> The Constitutional Court concluded in *Shilubana* that:

The legal status of customary law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail. Development implies some departure from past practices. A rule that requires absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow, and would stifle the recognition of the new rules adopted by the communities in response to the changing face of ... society.<sup>219</sup>

Secondly, the colonial stratification of the society into humans and sub-humans continues to define the socio-economic space facilitated, consciously or unconsciously, by the judiciary in the new constitutional era. Thirdly, the official customary law, which has been alienated from its roots and is out of step with the customs, practices and traditions as actually lived by Basotho,<sup>220</sup> and consequently, as Mokgoro puts it, fails "to respond to society's contemporary values, needs and practices".<sup>221</sup> This separatist approach has kept custom as law and custom as practice in watertight compartments, thus allowing the former to vitrify and ossify while the latter continued to develop and change. Fourthly, all the people living the customary way of life and to whom customary law is applicable have literally been removed from the constitutional protection and the enjoyment of constitutional guarantees. Their lives are entangled between the ossified official version of customary law and the reality of the changed circumstances in the practices, customs and traditions of the society (the living version of customary law.) The ascertainment of this living version of customary law,<sup>222</sup> coupled with the constitutional duty to develop customary law where it falls short of constitutional standards, has been neglected entirely by the Mahomed, Steyn and Ramodibedi Courts as a result of undue reliance on the official version of customary law in customary law disputes adjudication.

It is clear that the approach of the Mahomed, Steyn and Ramodibedi Courts to customary law disputes adjudication provided an impetus for the shielding of customary law from the influence of the Bill of Rights. This approach therefore widened the divide between the

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<sup>218</sup> *Alexkor*: [52], [53].

<sup>219</sup> *Shilubana v Nwamitwa* 2008 2 SA 66 (CC): [55].

<sup>220</sup> Juma 2011:121. See *Du Plessis v De Klerk* 1996 3 SA 850 (CC): [172].

<sup>221</sup> Mokgoro 1997:1281; also see *Bhe*: [82].

<sup>222</sup> On ascertainment of customary law, see Hinz 2012:89; *Shilubana*: [44]-[49]; *Bhe*: [150]-[152].

constitutional promise of horizontal application of the Bill of Rights and stark reality of condemnation and banishment of all people to whom customary law norms apply to the margins of constitutional system and justice. Juma has made it clear however that, today the tenets of customary law “cannot be defined through regimes of a codified law”,<sup>223</sup> but through the Constitution. The ossified official customary law has been and continues to be one of the major factors in the reconstruction of the public-private distinction in Lesotho.

### 5.3.5 Excising constitutional jurisdiction from ordinary jurisdiction: giant strides towards verticalisation of the Bill of Rights

It was indicated in previous chapters that, in order for the Bill of Rights to interact and influence private law, constitutional jurisdiction necessarily has to be integrated with ordinary jurisdiction. Therefore, the excising of constitutional jurisdiction from the High Court and the subordinate courts means that private law is shielded from the influence of the Constitution, in particular, the Bill of Rights. The net effect of this is the *verticalisation* of the Bill of Rights. To the majority of the people of Lesotho this means that the Bill of Rights is not enforceable in horizontal legal relationships contrary to sections 4(2) and 22(1) of the Constitution. Except for those private actors who have resources to approach the High Court directly to enforce their rights against other private actors, the Bill of Rights has become the notional shield against the state only. The trilogy’s excising of constitutional jurisdiction of courts from their respective ordinary jurisdiction has forged great strides in horizontality-verticality trajectory of the Mahomed, Steyn and Ramodibedi Courts’ constitutional review practice.

### 5.3.6 Placing Court of Appeal beyond constitutional reproach for Bill of Rights contraventions

One of the variants of the doctrine of horizontal application of the Bill of Rights is “the application to the judiciary model”. As indicated in Chapter 2, under this model, the judiciary is regarded as the “state” or public authority.<sup>224</sup> The model puts constitutional restraints and duties on the judiciary in the performance of the judicial function. Section 4(2) of the Constitution puts this beyond any doubt. Consequently, the judiciary not only has the constitutional obligation not to contravene the guaranteed rights and freedoms of litigants appearing before it,<sup>225</sup> but also to develop the law to be in conformity with the Constitution to

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<sup>223</sup> Juma 2011:123.

<sup>224</sup> See the Constitution, sec 4(2). Also see Phillipson 1999:827.

<sup>225</sup> Rautenbach and Malherbe 2004:309; Oliver and Fedtke 2007:5. See, for example, *Shelley v. Kraemer* 334 US 1 (1948); *Magano v District Magistrate* 1994 4 SA 172 (W):176; *Davids v Van Straaten* 2005 4 SA 468 (C):486.

avoid any possible contravention of such litigants' rights and freedoms. Thus, horizontality implies that the Bill of Rights is enforceable against the judiciary and a private actor has a constitutional cause of action against judges and judicial officers in circumstances where their decisions or judgments violate any of the private actor's entrenched Bill of Rights' provisions. Notwithstanding this, the Ramodibedi Court's decision of *Lepule v Lepule*<sup>226</sup> has effectively placed the Court of Appeal beyond any constitutional reproach for Bill of Rights contravention.

*Lepule* concerned an application brought under section 22 of the Constitution in terms of which the applicant sought from the High Court a declarator that a previous judgment of the Court of Appeal be set aside as unconstitutional in that, it was alleged, it violated the applicant's entrenched right of fair determination of his (applicant's) civil rights and obligations and equal protection of the law entrenched under sections 4(1)(h), 12(8), 4(1)(o) and 19 of the Constitution.<sup>227</sup> The Court of Appeal decision involved a dispute over the estate and the Court had upheld the appeal against the High Court's decision, which had granted interdict and other prayers in favour of the applicant. The applicant's cross-appeal had also been dismissed by the Court of Appeal.<sup>228</sup> While this study is not concerned with the correctness or otherwise of the decision but the constitutional principle of "application of the Bill of Rights to the judiciary" that was involved in the matter, it is clear that *Lepule* is in direct violation of the express constitutional imperative subjecting the judiciary to constitutional control as will be indicated.

The issue before the Court was whether the High Court had the power to set aside the Court of Appeal's judgment on constitutional grounds in circumstances where it was alleged that such judgment contravened the entrenched Bill of Rights of an individual.<sup>229</sup> While accepting as trite that "every Court of the land, the Court of Appeal included is bound by the Constitution and to exercise its powers in accordance with the provisions thereof",<sup>230</sup> the Court surprisingly went on to state that to challenge the decision of the Court of Appeal, as the highest court in Lesotho, was "not permissible in law".<sup>231</sup> According to the Court, this is because "the Court of Appeal decisions are not challengeable and or appealable and or

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<sup>226</sup> *Lepule v Lepule* 4/2013. This High Court's decision is available online at <<http://www.lesotholii.org/ls/judgment/high-court/2014/72>> (accessed on 4 September 2015).

<sup>227</sup> *Lepule*: [1].

<sup>228</sup> *Lepule*: [6]-[7].

<sup>229</sup> *Lepule*: [15], [38]-[39].

<sup>230</sup> *Lepule*: [37].

<sup>231</sup> *Lepule*: [40].

reviewable per the statutory provision of the Court of Appeal Act, *to wit*, section 20 thereof as well as in terms of the Constitution”.<sup>232</sup> In the Court’s view, the flow of judicial proceedings is upward from the lower courts to the Court of Appeal. This means that to bring the constitutional attack of the decision of the Court of Appeal before the High Court would not only “undermine the fundamental principles of juridical hierarchy”<sup>233</sup> but would also “fly in the face of the unassailable, fundamental and deep rooted principle of judicial precedence and *stare decisis*”.<sup>234</sup> The Court further considered finality of judicial proceedings as an important factor and that it was only through constitutional amendment that the applicant could obtain the remedy and not to ask the High Court “to review the constitutionality of a judgment of the Court of Appeal”.<sup>235</sup> The application was dismissed, the Court holding that it was misconceived and flew “in the face of the very pillars of constitutional jurisprudence and the structural hierarchy of the Courts” .<sup>236</sup>

*Lepule* is in direct contravention of the Constitution, which in no uncertain terms prescribes that the Bill of Rights provisions apply “in relation to things done or omitted to be done ... by any person acting in the performance of functions of any public office”.<sup>237</sup> Judges of the Court of Appeal are “public officers” within the meaning of the Constitution. Private actors whose rights and freedoms have been contravened by any decision or judgment of the Court of Appeal may bring a constitutional cause of action to the High Court in terms of section 22(1) of the Constitution to the High Court for the violation of such rights and freedoms.<sup>238</sup>

The High Court in *Lepule* failed to appreciate that the decision of the Court of Appeal constituted a new cause of action separate from the merits of the matter, which were the subject of the appeal. The final judicial act in the form of the judgment or decision of the highest judicial body, and not the factual context from which it arises, is the subject of direct constitutional (review) jurisdiction of the High Court under the Constitution.<sup>239</sup> The role of the High Court in constitutional review under section 22 of the Constitution is not to determine

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<sup>232</sup> *Lepule*: [40].

<sup>233</sup> *Lepule*: [46].

<sup>234</sup> *Lepule*: [47].

<sup>235</sup> *Lepule*: [47].

<sup>236</sup> *Lepule*: [71].

<sup>237</sup> See the Constitution, sec 4(2).

<sup>238</sup> See the Constitution, sec 154(1) (interpretation of “public office”, “public officer”); sec 154(3)(“... office in the public service shall be construed as including references to the office of a judge of Court of Appeal ...”

<sup>239</sup> See the Constitution, sec 22(1)-(2).

whether the Court of Appeal was correct or wrong on a point of substantive law or procedure in deciding the matter as it did (which point would have finally been settled by the Court of Appeal and the rest of the courts would be bound thereby on the basis of the judicial structure and *stare decisis*). The question is really whether or not the decision of the Court of Appeal, constituting a *final judicial act performed by the public officer in the person of the Judge of the Court of Appeal* contravenes in one way or another the protected provision of the Bill of Rights.<sup>240</sup> If it does, then section 22(1) of the Constitution has provided a means to deal with the divergence and for the enforcement of that right which has been contravened by the final judicial act that deviated from the limits set by the Constitution.<sup>241</sup>

Thus role of the High Court in constitutional review, to use Harutyunyan and Mavcic's expression, is to examine, uncover, state and remove any law, act or conduct that diverges from the regulatory framework of the Constitution, in particular, the Bill of Rights.<sup>242</sup> In this way, the constitutional review of the Court of Appeal's decision by the High Court, to adopt Woolf *et al's* expression, answers "the age old question of 'who guards the guards?'" by ensuring that the Court of Appeal as a "public authorit[y] responsible for ensuring accountability of government" does so within the constitutional boundaries of its own lawful powers.<sup>243</sup>

Further, the fact that in terms of the Constitution the Court of Appeal is the highest court whose decision is final and binding on all other courts has nothing to do, both in logic and law, with the constitutionality of the decision itself. That the decision of the Court of Appeal as an apex court in Lesotho is binding on all other courts lower in the hierarchical structure on the basis of the common-law doctrine of *stare decisis, res judicata* and the need for finality in litigation has little to do with the question whether in making that decision the Court of Appeal contravened the protected rights of the person who is or is not a party to that

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<sup>240</sup> See Feldman 2000:265.

<sup>241</sup> Constitutionally, there should be no difference between the *final executive act* (for example, a declaration of an individual's property as a selected development area; the *final legislative act* (for example, where an Act of Parliament an individual's right to equality before the law (see *Minister of Labour and Employment v Ts'euo* LAC (2007-2008) 289); and the *final judicial act* (for example, where a decision of the Court of Appeal – or final decision of any court for that matter – in any manner violates an individual's protected right). On what rational normative grounds, therefore, should the *final judicial act* be excluded from the constitutional review?

<sup>242</sup> Harutyunyan and Mavcic 1999, Chapter 1.

<sup>243</sup> Woolf *et al* 2007:6-7.



litigation. The doctrine of *stare decisis* is not an “inexorable command”<sup>244</sup> and there is no room for its rigid application in the present context.<sup>245</sup> While the decision of the Court of Appeal provides the factual context within which the contravention of the rights or freedoms took place (the constitutional fact), the constitutionality of that decision under section 22(1) of the Constitution involves not only different parties,<sup>246</sup> but also different causes of action and issues.<sup>247</sup>

Contrary to section 4(2) of the Constitution, *Lepule* effectively absolved the Court of Appeal from accountability and subjugated the constitutional primacy and the doctrine of horizontal application of the Bill of Rights espoused by the Constitution to a common-law doctrinal subservience and thus placed the Court of Appeal beyond constitutional reproach for contravening private actors’ entrenched rights and freedoms. *Lepule* was obviously gladly accepted by the Court of Appeal in its recent decision in terms of which the Court confirmed, “as the apex court, no other court has constitutional authority to set aside the decision of the Court of Appeal”.<sup>248</sup>

### PART III

#### 5.4 The pathology and consequences of the constitutional review practice trajectories

##### 5.4.1 The pathology of the constitutional review practice trajectories

###### 5.4.1.1 The legal culture: ideology, methods and methodologies of corrective justice

A number of factors account for the trajectories the constitutional review practice has taken away from constitutional review framework since 1993. Some have already been presaged above. Firstly, the pre-constitutional traditions – the legal culture – of corrective justice conditioned the Mahomed, Steyn and Ramodibedi Courts as well as legal practitioners, to the extent that it was largely difficult to approach private-law disputes adjudication on the

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<sup>244</sup> *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 (1992):854.

<sup>245</sup> *Aguda* 1974:158.

<sup>246</sup> The aggrieved party would be bringing a constitutional cause of action against the judge or judges of the Court of Appeal who handed down the decision.

<sup>247</sup> The issues involved would no longer be those issues concerning which the parties finally reached the Court of Appeal, but the rights or freedoms of the party that alleged contravention and how the decision is said to contravene those rights or freedoms.

<sup>248</sup> See *Lepule v Lepule* 34/2015:46-50. This Court of Appeal Judgment is available online at <<http://www.lesotholii.org/ls/judgment/court-appeal/2015/29>> (accessed on 28 November 2015).

baseline required or prescribed by the new constitutional order and to consider distributive outcomes of such disputes adjudication. This is because of the jurisprudential conservatism underlying the corrective justice ideology, legal methods and methodologies. It is this legal culture in which the Courts and legal practitioners are steeped which Sanders lamentably dubbed as the “hermit’s life in the land of legal positivism”.<sup>249</sup> Three decades ago, Sanders lamented this attitude, which not only resulted in “mechanical application of legal rules” by the colonial courts, but also incapacitated such courts from steering “the general law in a direction responsive to national values”.<sup>250</sup> The Mahomed, Steyn and Ramodibedi Courts are not to be spared Sanders’ lamentations. It is clear that the legal culture of corrective justice constrains legal outcomes irrespective of the constitutional mandate and imperatives.<sup>251</sup> In his account of South African transformative constitutionalism, Klare defines “legal culture” in rhetorical intonation as follows:

By legal culture, I mean professional sensibilities, habits of mind, and intellectual reflexes: What are the characteristic rhetorical strategies deployed by participants in a given legal setting? What is their repertoire of recurring argumentative moves? What counts as a persuasive legal argument? What types of arguments, possibly valid in other discursive contexts (e.g., in political philosophy), are deemed outside the professional discourse of lawyers? What during political and ethical commitments influence professional discourse? What understandings of and assumptions about politics, social life and justice? What ‘inarticulate premises [are] culturally and historically ingrained’ in the professional discourse and outlook?<sup>252</sup>

According to Klare, the legal culture orients judges and legal professionals’ perceptions, thoughts and feelings, and shape their imagination and beliefs,<sup>253</sup> sets limits to the kind of answers that can be generated<sup>254</sup> and exercises “a drag on constitutional interpretation, weighing it down and limiting its ambition and achievements in democratic transformation”.<sup>255</sup> Prempeh was correct to observe that the common law, steeped as it is in the ideology, legal methods and methodologies of corrective justice, “carries with it elements and tendencies that do not accord with the transformative vision reflected in modern bills of rights”.<sup>256</sup> The

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<sup>249</sup> Sanders 1985:63.

<sup>250</sup> Sanders 1985:63.

<sup>251</sup> Klare 1998:151.

<sup>252</sup> Klare 1998:166-167.

<sup>253</sup> Klare 1998:167.

<sup>254</sup> Klare 1998:168.

<sup>255</sup> Klare 1998:168.

<sup>256</sup> Prempeh 2006:72.

elements, tendencies, habits of mind and patterns of thought yielded by the present legal culture on the part of judges and legal professionals and which may hinder the development of the type of human rights culture envisaged by the Constitution include, among others, the following: the judicial deference to individuals' arrangement of their private affairs based on *laissez faire* ideology – the acceptance of the primacy of private ordering; the firm distinction between public and private spheres; the adversarial nature of the proceedings characterised by the bipolarity of disputing parties about the extent of their legal rights and obligations and the judge playing a role of a neutral umpire who decide the matter on the basis of evidential material placed before him; formalistic traditional methods of legal interpretation and analysis; and that the role of judges is not to make law but merely to discover it.<sup>257</sup>

Having all-pervasive influence on courts and lawyers,<sup>258</sup> these unarticulated cultural premises have resulted in “highly structured, technician, literal and rule bound”<sup>259</sup> legal methods and methodologies which shackled judges in the Anglo-Saxon jurisprudence and traditions which require every legal proceeding “to be cast in a rigid or definitive mould and insist on observance of certain well settled rules of procedure”.<sup>260</sup> Thus, the Mohamed, Steyn and Ramodibedi Courts worked, and Mosito Court continues to be immersed, “under a paradigm of legal order which is noticeably lacking in norms, principles, and categories of analysis directly applicable to the evaluation of distributional outcomes”.<sup>261</sup>

Sanders' admonition to the judiciary of the colonial Lesotho that “if ever there was a reason for this type of judicial attitude, there is certainly none today” is still valid even to this present day.<sup>262</sup> The reason, as Du Bois rightly points out, is that the horizontal application of the Bill of Rights grounded in distributive justice as prescribed by the Constitution provides “an apt normative framework for private-law reasoning, relating claims of interpersonal justice to the wider context of a society's moral commitments”.<sup>263</sup> Regard being had to the inherent limitations of corrective justice as a paradigm of disputes adjudication<sup>264</sup> especially in relation to the court's capability to consider the objective values underlying the constitutional order in order to reach a decision and to forge innovative remedies geared towards protecting and

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<sup>257</sup> Hunt 1999:92-96.

<sup>258</sup> Hunt 1999:92.

<sup>259</sup> Klare 1998:168.

<sup>260</sup> *Morcha*:109.

<sup>261</sup> Michelman 1973:963.

<sup>262</sup> Sanders 1985:63.

<sup>263</sup> Du Bois 2013:36.

<sup>264</sup> See Roach 1991:864-879; Mbazira 2009:105-111.

enforcing the private actors' entrenched fundamental rights and freedoms, the writing was and continues to be on the wall about the difficulty if not the impossibility of effectuating the Bill of Rights in horizontal legal relationships. As Klare correctly warned, the defining feature of a legal culture is that its participants (judges and legal professionals) often do not perceive or are unaware of the cultural specificity of their ideas about legal argument or legal problems.<sup>265</sup> Wrestling the Indian justice system out of the corrective justice traditions and embracing the "non-traditional" distributive justice as a new paradigm of disputes adjudication where the Supreme Court would play a major role, the Indian Supreme Court had stated in 1983:

It is true that the adoption of this non-traditional approach is not likely to find easy acceptance from the generality of lawyers because their minds are conditioned by constant association with the existing system of administration of justice which has become ingrained in them as a result of long years of familiarity and experience and become part of their mental make up and habit and they would therefore always have an unconscious predilection for the prevailing system of administration of justice. But if we want the fundamental rights to become a living reality and the Supreme Court to become a real sentinel on the *quivive*, we must free ourselves from the shackles of outdated and outmoded assumptions and bring to bear on the subject fresh outlook and original unconventional thinking.<sup>266</sup>

#### 5.4.1.2 The dormancy of subordinate courts' constitutional jurisdiction and the alienation of the customary justice system

The dormancy of the subordinate courts in the exercise of constitutional jurisdiction to control the constitutionality of laws and conduct has played a major role in the constitutional review practice taking the trajectories it has. When these frontline players in the constitutionalisation agenda were not actively involved therein, the practical reality which ultimately evolved into principle as a result of the trilogy of *Moriyane*, *Chief Justice* and *Mota* was that the High Court and the Court of Appeal were the only institutional role players shepherding the constitutional space and the limits of exercise of public or private power.

The alienation of the customary law justice system with the result of that no interlinkages are established or built between that system and the fundamental human rights system played out in the trajectories that the constitutional review practice has taken. Notwithstanding the efforts in 1963 to integrate the Central and Local Courts into the single system of

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<sup>265</sup> Klare 1998:167.

<sup>266</sup> *Morcha*: [13].

subordinate courts<sup>267</sup> and the adoption in 1992 of that unified system of subordinate courts,<sup>268</sup> no legislative or administrative policy was put in place to ensure the intended integration and the legal training of the Central and Local Courts' judicial officers. The judicial officers continue not to be legally trained and the Central and Local Courts are equipped "with no laws or books ... to aid [them] to dispense justice".<sup>269</sup> It is not surprising therefore that to them the law is the ossified *Laws of Lerotholi Code* and not the Constitution.

#### 5.4.1.3 The declining levels of judicial vigilance and sensitivity against constitutional infractions

The level of vigilance and sensitivity originally adopted by the Mohamed and Steyn Court against constitutional infractions subsided dramatically with the passage of time. In the years immediately before and after the coming into effect of the Constitution in 1993, the Court of Appeal was sensitive and vigilant not to sustain any invocation by state or public authority of public override defences such as "interests of defence", "public safety", "public order", "public morality" or "public health" where the conduct of the state or public authority curtailed or infringed fundamental rights and freedoms entrenched in the Constitution, and usually required the state or public authority to discharge the *onus* with the necessary clarity and particularity –both in the making of necessary allegations in the pleadings and in providing evidential material therefor – in order to ward off the constitutional challenge leveled against the state or public authority.<sup>270</sup> In *Bolofo*, the Court of Appeal warned against "inadequate sensitivity" to the Constitution and directed courts to adopt demonstrable "vigilance required by the constitutional safeguards" during the process of adjudication.<sup>271</sup>

Lately, the Court of Appeal's levels of sensitivity and vigilance against constitutional

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<sup>267</sup> See Basutoland Council 1963:76; also see the 1966 Constitution, sec 120, 123.

<sup>268</sup> The 1966 judicial structure was adopted as it is by the 1993 Constitution. See sec 118, sec 127, sec 130. It could not have been that the drafters of the 1966 and 1993 Constitutions had run out of ink so as not to be able to mention Central and Local Courts or Judicial Commissioners Court expressly. Their absence from the two Constitutions is indicative of the intention to integrate Central and Local Courts into a single system of subordinate courts and the abolishment of the Judicial Commissioners Court as Basutoland Council Report clearly indicates. See Basutoland Council 1963:76.

<sup>269</sup> Maqutu 2006:7-8.

<sup>270</sup> See, for example, *Maseko v Attorney General* LAC (1990-1994) 13; *Sopeng v Minister of Interior* LAC (1990-1994) 507; *Seeiso*:665.

<sup>271</sup> *Bolofo*:250.

infractions has demonstrably lowered. This is exemplified in the Court of Appeal's finding that the justificatory onus on those against whom rights contraventions are alleged has been discharged even in the absence of clear evidence to that effect and contrary to the constitutional imperative and requirement that a party "shall not to be permitted to rely in any judicial proceedings upon ... a provision" of any public overrides law "except to the extent to which he satisfies the court" that such provision satisfies the *Oakes* test.<sup>272</sup> Notwithstanding these non-reliance clauses, the Court of Appeal has held that justification does not always require evidence, as according to the Court there are cases where justification is self-evident.<sup>273</sup> Furthermore, the Court of Appeal has held that even in the face of a clear allegation of the contravention of the private actor's entrenched rights or freedoms, the High Court has no power to grant the order which was intended to protect or uphold such private actor's rights or freedoms<sup>274</sup> or to develop the law to be in conformity with the constitutional values.<sup>275</sup>

In *Attorney General v Moletsane*, the applicants before the High Court had alleged contravention of their entrenched freedom from arbitrary seizure of property by the ministerial declaration of such property as SDA pursuant to a *SDA Legal Notice*. The High Court had refused the amendment by the applicants to introduce a prayer relating to the declaration of the *SDA Legal Notice* as unconstitutional. Notwithstanding such refusal, the High Court found the *SDA Legal Notice* contravening the applicants' entrenched rights and ordered a declarator to that effect. On appeal by the Attorney General, the Court of Appeal held that the High Court did not have such power especially where the amendment had been withdrawn. By this decision, the Court of Appeal was effectively communicating the fact that the High Court must cast a blind eye to the contravention of a private actor's rights or freedoms. This is not the attitude of being sensitive and vigilant to constitutional safeguards. The fact that the High Court had refused the amendment did not emasculate by itself the

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<sup>272</sup> For non-reliance clauses, see the Constitution, sec 7(3) proviso; sec 10(3); sec 11(3); sec 13(6); sec 14(3); sec 15(3); sec 16(3). The *Oakes* test has been held to apply to all provisions of the Bill of Rights. See *Attorney General v Mopa* LAC (2000-2004) 427:[33].

<sup>273</sup> See *Ts'epe v Independent Electoral Commission* LAC (2005-2006) 169:182.

<sup>274</sup> See *Attorney General v Moletsane* LAC (2005-2006)146:153.

<sup>275</sup> See *Matekane v Matekane* LAC (2009-2010) 536:539 where the Court of Appeal held that the High Court had no power to create a new ground for divorce, the function which, it was said, was reserved for the Legislature. In the context of a serious violation of the wife's privacy rights by her husband and the High Court's constitutional duty to protect and to protect and enforce constitutional rights, one fails to understand why the Court of Appeal denied the High Court the power to develop the common law of divorce and to shape new and appropriate remedies.

constitutional jurisdiction of the High Court to ensure that any law that is sought to be applied or is relied on in proceedings before it, is consistent to the Constitution. The High Court had incidental constitutional review powers, especially where the pleadings admittedly covered the constitutional question arising in ordinary proceedings, and to make a finding or a declaratory order formally or informally to that effect. Thus, the absence of the appropriate vigilance and sensitivity against constitutional infractions resulted in “a slippery and inevitable slide”<sup>276</sup> from the constitutional framework to verticality and centralised constitutional review.

#### 5.4.1.4 Low levels or lack of legal literacy

Notwithstanding a high literacy rate in Lesotho,<sup>277</sup> the masses of the people of Lesotho lack awareness and knowledge of their legal or constitutional rights, the ability to assert those rights and the capacity to mobilise for change.<sup>278</sup> Knowledge is necessary to enable a person to satisfy his personal needs and to participate in public affairs and for effective functioning of a democracy.<sup>279</sup> According to Loukaidēs, those who lack knowledge “are doomed to be always victims of those who know; victims of deceit and distortion of facts; victims of irrationality”.<sup>280</sup> Without information and knowledge, it is difficult to prevent wrong reasoning or interference with one’s rights.

Legal literacy does not only make people aware of their constitutional rights but also empowers them to articulate and assert them.<sup>281</sup> A lack or low level of legal literacy is a critical barrier to the citizen’s meaningful constitutional engagement with the legal system generally and the relevant specific issues in the particular proceedings in particular. It is only when the citizens, in particular, the marginalised and disadvantaged, know or are aware of what the law or the Constitution offers to them and the processes open or available to them

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<sup>276</sup> Yacoob 2013:610.

<sup>277</sup> Lesotho has one of the highest literacy rates in Africa (87.4% by 2011 and 89.6% by 2014). See Lesotho Bureau of Statistics at <<http://www.bos.gov.ls>> (accessed on 25 September 2015). Also see <[http://www.indexmundi.com/lesotho/demographics\\_profile.html](http://www.indexmundi.com/lesotho/demographics_profile.html)> (accessed on 25 September 2015).

<sup>278</sup> Pholo 2013:7, 114. See the Report by Pholo titled “Lesotho: Justice Sector and the Rule of Law” available online at <[http://www.osisa.org/sites/default/files/afriamap\\_lesotho\\_justice.pdf](http://www.osisa.org/sites/default/files/afriamap_lesotho_justice.pdf)> (accessed on 20 May 2015).

<sup>279</sup> Loukaidēs 1995:3.

<sup>280</sup> Loukaidēs 1995:3.

<sup>281</sup> Duni *et al* 2009:54.

that they may be able to identify and challenge the injustices which confront them. The non-implementation or wrong implementation of laws is largely attributable to the beneficiaries' lack of awareness or knowledge of their rights and processes geared towards remedying the defect.<sup>282</sup> According to Pholo, low or lack of legal literacy "disempowers citizens from demanding accountability for the violations".<sup>283</sup>

#### 5.4.1.5 The culture of legal transplantation from South Africa

The culture of legal transplantation and borrowing from South Africa has created a window for incorporation into Lesotho's legal space jural postulates and attitudes that are out of step with the present constitutional order.<sup>284</sup> Since 1993 to 2014, all judges of the Court of Appeal, with the exception of Justice Ramodibedi, were retired foreigners from South Africa.<sup>285</sup> Taking the cue from *Proclamation 2B* of 1884 which prescribed the common law of the Cape of Good Hope (South Africa) to be applicable in Lesotho, the judiciary, in particular the Court of Appeal has justifiably freely applied the South African courts' decisions in Lesotho. While not taking issue with Lesotho's judiciary relying on comparative jurisprudence, the problem lies with the culture of free importation of concepts and attitudes from South Africa<sup>286</sup> even in the face of the new Constitution in Lesotho. While in 1993 the Constitution prescribed a horizontally applicable Bill of Rights, decentralised constitutional review and the constitutional mandate to all courts to modify and develop pre-existing laws in conformity with the Constitution, that did not prod judges of the superior courts, in particular

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<sup>282</sup> Pholo 2013:7.

<sup>283</sup> Pholo 2013:7.

<sup>284</sup> Forere (2012:119) states that Lesotho courts rely heavily on South African jurisprudence and that "one hardly finds any case where a judge in Lesotho has not relied on South African materials". Although not entirely correct, Forere goes on to point out that, "the Lesotho High Court library contains only South African law reports, legislation and literature". She discusses a case decided by the High Court where the Court, relying on an old South African common law, ruled that an unmarried father has no rights to his child born out of wedlock because that was not in the best interests of the child to keep contact with his father who was not living with the child's mother. The High Court had given this ruling despite legal developments of South African law on that issue, the relevant International Conventions and the Constitution of Lesotho. The topic under which she discusses the case is telling of the effects of untrammelled overreliance by Lesotho Courts on South African law: "*A judge in Lesotho digs into South African archives to take children's rights back to the stone age ...*"

<sup>285</sup> Maqutu 2006:12-18.

<sup>286</sup> Letsika 2010:76.



judges of the Court of Appeal, to ensure that all private actors were enabled to rely on the Bill of Rights or that the subordinate courts fulfilled their constitutional mandate to enforce the Bill of Rights in proceedings before them. Nor did they adopt the radical restructuring of pre-constitutional law as prescribed by section 156(1) of the Constitution,<sup>287</sup> opting for the minimalism<sup>288</sup> and incrementalism<sup>289</sup> that has defined the South African theory of common-law development.

The problem is attributable mainly to three factors, apart from the traditions of common law. The first factor is that in South Africa, the horizontal application of the Bill of Rights has evolved through three generations of South African Constitutional Court's thinking and decisions with the first generation initially out-rightly rejecting horizontal application in *Du Plessis v De Klerk*,<sup>290</sup> holding, essentially, that the South African Bill of Rights "applied only vertically".<sup>291</sup> The application debate continued to dominate the Bill of Rights enforcement discourse in South Africa even beyond the adoption of the final Constitution.<sup>292</sup> The second factor is that both the South African Supreme Court of Appeal and Constitutional Court have opted for incremental rather than radical development of common law. According to the Constitutional Court, "radical amelioration of the common law [is] a function of Parliament".<sup>293</sup> Moseneke observes that these Courts "have shown remarkable slowness or perhaps reticence in allowing the fundamental rights or values of our Constitution to influence" the

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<sup>287</sup> The adjudicative body's power of modification under section 156(1) of the Constitution "extremely wide" and radical, and it is in "exceptional case[s] where the necessary modifications cannot be effected to bring an unconstitutional law into line with the Constitution." Such power is "quasi-legislative." See *Tan Eng Hong v Attorney General* [2012] SGCA 45:[49]-[50],[58], a Singaporean Supreme Court decision available online at <<http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/court-of-appeal-judgments/14979-tan-eng-hong-v-attorney-general-2012-sgca-45>> (accessed on 18 June 2015). Also see *Ghaidan v Godin-Mendoza* [2004] 3 All ER 411:[63]-[64]; *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433:[21]; *Kanda v Government of the Federation of Malaya* (1962) MLJ 169; *Director of Public Prosecutions (Jamaica) v Mollison* [2003] 2 AC 411:[16]-[17].

<sup>288</sup> According to Moseneke, the Constitutional Court of South Africa has been "stoutly minimalist and very reluctant to constitutionalise the common law" in its early years. Moseneke 2009:7.

<sup>289</sup> See *Du Plessis*:[58], [189].

<sup>290</sup> See *Du Plessis*:[62]. For a view of second and third generations on application debate, see, respectively, *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) and *Ramakatsa v Magashule* 2013 2 BCLR 202 (CC). Also see Dafel 2015:56.

<sup>291</sup> Moseneke 2009:6.

<sup>292</sup> See Tanzer 2010:457; Fedtke 2007:351; Moseneke 2009:8.

<sup>293</sup> *Du Plessis*:[53].

South African private law “through direct or indirect horizontality” as a result of “entrenched legal culture and ideology of liberal legalism”.<sup>294</sup> The third factor is that the South African Constitution expressly excludes Magistrates’ Courts from exercising constitutional jurisdiction.<sup>295</sup>

#### 5.4.1.6 Legal education and the legal professionals as technocratic aristocrats

Members of the legal profession – the Law Society of Lesotho – and of the upper echelons of the judiciary are drawn from the upper crust of the Basotho society and, as Weeramantry correctly observes of the propensities of such pool, “tend naturally to reflect the values and interests of that class”.<sup>296</sup> According to Weeramantry, such lawyers are traditionally self-centred and chase “the phantom of professional success”, removing themselves progressively “from the socially oriented issues” which ought to engage their attention as leaders of their community. Weeramantry concludes that at the peak of their power and influence, such lawyers are “often phenomenally removed from the real causes and concerns” of their people.<sup>297</sup> Rasekoai, the former President of the Law Society, aptly observes that, “in Lesotho, the demographic distribution of lawyers puts them at a great distance – both geographic and social – from impoverished, excluded rural people”.<sup>298</sup>

The legal education that the legal professionals have attained, to use De Tocqueville’s expression, has assured them “a separate rank in society” – the aristocracy.<sup>299</sup> The Lesotho’s legal education in terms of which “law students pursue long courses based on classical law curricula that do not refer” to the social and constitutional context in Lesotho and in which such students minimally participate in public interest legal services to poor and

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<sup>294</sup> Moseneke 2009:10.

<sup>295</sup> See section 170 of the South African Constitution 1996.

<sup>296</sup> Weeramantry 1997:56.

<sup>297</sup> Weeramantry 1997:57.

<sup>298</sup> Rasekoai 2014:7. Lesotho Times newspaper article entitled “Declining Standards in the Legal Fraternity” available online at <<http://lestimes.com/declining-standards-in-the-legal-fraternity>> (accessed on 26 September 2015). According to Pholo’s report, about 90% of admitted legal practitioners have established their offices in Maseru. Although they occasionally handle cases in the districts, there is serious shortage of lawyers in the districts. See Pholo 2013:84.

<sup>299</sup> De Tocqueville 2010:432,433. (“Like the aristocracy, they have an instinctive propensity for order, a natural love of forms; like the aristocracy, they conceive a great distaste for the actions of the multitude ...”)

marginalised communities is a fertile breeding ground for this malady.<sup>300</sup> Lawyers produced by the present legal education system “are trained to become legal technicians”<sup>301</sup> because of scientific legal methods, methodologies and pedagogies.<sup>302</sup> Lacking “experiential legal education”,<sup>303</sup> they are encouraged to have little or no interest or comprehension of the policy issues inherent in the law. They are generally unable or reluctant to “shift the analytical baseline” of the law<sup>304</sup> – criticising the current law by not only challenging its proposition but also exposing and scrutinising the underling tacit policy assumptions which support the persuasive power of the legal proposition. Even as technicians, however, these lawyers “have limits”.<sup>305</sup> Speaking of African legal education systems out of which these lawyers are groomed, which speaks volumes about the capacity or limits of African lawyers, Jessup correctly pointed out that:

Notwithstanding, post-colonial African nations have not consciously and systematically undertaken a redesign of their legal education systems to more appropriately meet the needs of their societies. The current systems, as left by the colonial rulers, or as they have evolved over the years, have outlived their utility... The law courses of early curricular design did not reflect the needs of the society, and the training of lawyers was based on doctrinaire teaching geared to an adversary setting catering to litigation for the fortunate few at the cost of social injustice to the deprived many. As a result, the *status quo* was maintained and the majority of the people continued to suffer the indignities which are the legacy of colonial rule ...<sup>306</sup>

The Law Society is constituted of the pool of lawyers not only trained within a system

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<sup>300</sup> United Nations Office on Drug and Crime 2011:41. This is a survey report on *Access to Legal Aid in Criminal Justice Systems in Africa*. The report of the UNODC dated April 2011 is available online at <[https://www.unodc.org/pdf/criminal\\_justice/Survey\\_Report\\_on\\_Access\\_to\\_Legal\\_Aid\\_in\\_Africa.pdf](https://www.unodc.org/pdf/criminal_justice/Survey_Report_on_Access_to_Legal_Aid_in_Africa.pdf)> (accessed on 24 September 2015).

<sup>301</sup> Ndulo 1985:451.

<sup>302</sup> Moliterno 2015:32.

<sup>303</sup> Moliterno 2015:38.

<sup>304</sup> Spann 2005:722-723.

<sup>305</sup> Ndulo 1985:451. Ndulo was speaking of Zambian legal education, but the sentiments apply equally to Lesotho. According to Lesotho’s legal education system, a student who barely has a secondary education with no broad-based knowledge of the society and the problems bedevilling it qualifies for entry into the school of law. With the narrow-based knowledge, the student enters a system which is too “academic” in its approach to the study of law, which emphasizes legal methods that impart knowledge about the content of legal doctrines rather than their practical application and which treats the study of law as self-contained and independent discipline ignoring its socio-economic and political contexts and policy assumptions.

<sup>306</sup> Jessup 2002:387.

entrenching culturally and historically irrelevant teaching methodologies<sup>307</sup> but who are also unleashed onto legal practice ill-equipped with “an awareness of human society, its history and working”,<sup>308</sup> and lacking the necessary practical legal skills. Without the necessary training of its members to deal with local realities and consequently insensitive and unresponsive to local needs and aspirations,<sup>309</sup> the Law Society, notwithstanding its statutory role as the central defender of the liberties of the poor and marginalised masses of the people of Lesotho and the body which should ensure that the law, in particular the Constitution, is correctly applied “to lead the country to its predetermined goals”,<sup>310</sup> has not taken proactive measures in the form of legislative enactments geared towards, among others, ensuring the integration of the Central and Local Courts into the single subordinate courts system as envisaged by the Constitution, the prodding of subordinate courts in the exercise of constitutional jurisdiction in horizontal legal relationships, the clarification or elaboration of standing rules under the supremacy clause so as to allow public interest litigation and the establishment of rules for the ascertainment of the living customary law by the judiciary. In terms of the *Law Society Act*, the Law Society’s primary objective is “to consider, originate and promote reforms and improvements in law ... to assist in the administration of justice and to effect improvements in administration or practice of law”.<sup>311</sup> It is through the Law Society and its members’ “diversified portfolio of capital (including legal, political, relational and academic) that they can constantly renegotiate the changing and porous boundary between social relations and legitimate legal processes”.<sup>312</sup>

The Law Society and its members’ apathy towards the poor and marginalised people’s legal interests is evidenced by the Society’s failure for a period of more than three decades to introduce a single statutory measure geared towards ensuring any of the above constitutional objectives and goals, among others. Instead, the Law Society, catapulted by its reactive attitude, has been on a crusade predominantly to protect the interests of its members or of the privileged class from which its members are largely drawn,<sup>313</sup> and to prevent the admission or appointment of some individuals or officers where the Society felt

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<sup>307</sup> On teaching methods and methodologies suitable for African legal education, see Manteaw 2008:950-952; Ndulo 1985:449-454.

<sup>308</sup> Ndulo 1985:448.

<sup>309</sup> Manteaw 2008:936.

<sup>310</sup> His Majesty King Moshoeshoe II 1985:21.

<sup>311</sup> *Law Society Act* 13/1983, sec 4(a).

<sup>312</sup> Dezalay and Garth 2011:3.

<sup>313</sup> See, for example, *Law Society v Minister of Defence and Internal Security*:226; *Ralekoala v Minister of Justice* 16/2012.

that it did not favour such an admission or appointment.<sup>314</sup>

Further, the Law Society together with its members has failed to fulfil their professional responsibility to provide free legal services (*pro bono*) to the poor and marginalised by championing their causes before the courts of law. The absence of a theoretical legal framework, in particular, mandatory requirements for *pro bono* legal services by legal professionals in favour of the poor and the marginalised, means that the majority of the poor and marginalised approach litigation based on their own sense of justice and the little knowledge of the law. This means that it is in rare instances where a law or conduct would be challenged on constitutional grounds. The Law Society and its members' fixation with private practice has undermined their role as "brokers" who should constantly renegotiate the interchange between social legal relations and the Constitution<sup>315</sup> and to employ the law, in particular the Constitution, in social engineering.

#### 5.4.1.7 Improper pleading: the case is essentially in the pleadings

Even where they represent the parties, lawyers have generally failed, in their pleadings at the initial stages of the proceedings, to test the law or conduct on the legality and legitimacy threshold based on the Constitution. Whereas this failure to plead the constitutionality of laws or conduct may be attributable to a number of factors, it is clear that several reasons account for the lack of proper pleading on the part of legal practitioners. Moseneke correctly states that because "those who plead cases before court are themselves steeped in a tradition that seeks to preserve rather than innovate legal reasoning and rules, particularly within the sphere of the common law", the reliance on constitutional provisions "is often half-hearted and an afterthought".<sup>316</sup> He continues to point out, "sometimes the constitutional points taken are not borne out by the factual matrix".<sup>317</sup> He concludes that because "it is trite that courts cannot fabricate points for parties; they have to do with the case materials at hand."<sup>318</sup>

The result of this half-hearted and afterthought reliance on the Constitution to test the constitutionality of laws and conduct is that once the pleading stage has been passed and

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<sup>314</sup> See, for example, *Law Society v Ramodibedi* 1/2003; *Mosuo v Law Society* LAC (2009-2010) 254; *Law Society v Thetsane* LAC (2009-2010) 479; *Chief Justice*.

<sup>315</sup> See Dezalay and Garth 2011:1.

<sup>316</sup> Moseneke 2009:13.

<sup>317</sup> Moseneke 2009:13.

<sup>318</sup> Moseneke 2009:13.

the trial judge or judicial office has also failed to *mero motu* raise the constitutional issue, the problem is difficult to repair as the appellate court will not be in a position to correct the situation. This is precisely because in principle the trial and the appellate court may not make a case for the litigants or grant a relief, which had not been sought by litigants.<sup>319</sup> As Moseneke pointed out:

In our system, judges do not make cases for litigants; they have to make do with what is before them. Everything being equal, procedural justice requires that parties be held to their pleadings. As is required in relation to any cause of action, a party seeking to rely on the horizontal application of a fundamental right or on the development of the common law has to plead its cause unequivocally.<sup>320</sup>

#### 5.4.1.8 The passivity of (the office of) the Attorney General in defending the Constitution

Perhaps of all factors that play out for the constitutional review practice trajectories is the inactiveness of the Attorney General who, according to our constitutional democracy, has to play multifarious functions relatively different from the English prototype who traditionally was “at the junction between law and politics”.<sup>321</sup> The Attorney General is the first defender and guardian of the Constitution, constitutionalism, and administration of justice as well as the rule of law.<sup>322</sup> Although the office of the Attorney General is in the public service and exercises executive and legislative functions, the Attorney General is independent and separate from any arm of Government.<sup>323</sup> In the performance of his functions, the Attorney General is not subject to the direction or control of any other person or authority.<sup>324</sup> While the

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<sup>319</sup> See *Phori v Durow* LAC (1995-1999) 391:399; *Lesotho National Olympic Committee v Morolong* LAC (1995-1999) 449:456; *Mbangamthi v Sesing-Mbangamthi* LAC (20005-2006) 295:[9].

<sup>320</sup> Moseneke 2009:11.

<sup>321</sup> See House of Commons Constitutional Affairs Committee 2007:5. The Fifth Report of Session 2006-7 of this Committee titled “Constitutional Role of the Attorney General” is available online at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/306/306.pdf> (accessed on 28 September 2015).

<sup>322</sup> The Constitution, sec 98(2).

<sup>323</sup> The Constitution, sec 98(4); *Motanyane v Ramainoane* LAC (1995-1999) 466:472.

<sup>324</sup> Rosenberg and Weisfelder 2013:222. The independence and immunisation of the Attorney General from political control is necessary in the light of public interest functions, powers and discretion that the Attorney General possesses and which should not be exercised on the influence of partisan political considerations. See Carney 1997:3. Also see *Attorney-General v Times Newspapers Ltd* [1974] AC 273:311; *Krieger v Law Society of Alberta* 2002 SCC 65:[30]-[32].

Attorney General is the principal legal advisor of the Government of Lesotho,<sup>325</sup> his unique primary function and role is the protection and upholding of the Constitution and other laws of Lesotho.<sup>326</sup> In this leading role as the guardian of the public interest, the Attorney General is obliged to take legal measures to ensure that the constitutional space is not invaded by both private and public power; constitutionalism and the rule of law are respected and upheld;<sup>327</sup> and that the administration of justice is not hampered. To attain these objectives, the Attorney General may perform the public interest role personally or through officers subordinate to him<sup>328</sup> through relator suits or *ex rel*<sup>329</sup> where a private actor, mostly an NGO involved in public interest litigation, is authorised to sue in the *name* and by the *consent* of the Attorney General.<sup>330</sup> As Ray points out, it is through his public interest role that the Attorney General upholds the rule of law and constitutionalism in a democracy.<sup>331</sup>

Notwithstanding these onerous duties and noble objectives of his office, the Attorney General has failed to take the necessary legal measures focused on the protection of public interest. While the Attorney General may not be expected to act in all instances where the Constitution allegedly violated, there are the public interest issues bedevilling this Kingdom that merit his intervention.<sup>332</sup> The total exclusion of the subordinate courts and the High Court from incidental constitutional review and the emasculation of the private actors' constitutional right to rely on the Bill of Rights in horizontal legal relationships are clearly

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<sup>325</sup> *Office of the Attorney General Act* 6/1994, sec 2; the Constitution, sec 98(2)(a).

<sup>326</sup> The Constitution, sec 98(2)(c). Also see *Attorney General v His Majesty The King* 13/2013:[51]-[55] available online at <<http://www.lesotholii.org/ls/judgment/court-appeal/2015/1>> (accessed on 28 September 2015).

<sup>327</sup> The Court of Appeal, while accepting the public interest role of the Attorney General to uphold the Constitution and the rule of law, left open the issue of the exact parameters of such responsibility. See *Attorney General v His Majesty the King*:[51], [54]-[55].

<sup>328</sup> The Constitution, sec 98(3).

<sup>329</sup> According to *Black's Law Dictionary* edited by Garner, "a suit *ex rel.* [*ex relatione*, a Latin which means by or on the relation of] is typically brought by the government upon the application of a private party (called a relator) who is interested in the matter." "Relator" means "the real party in interest in whose name a state or an attorney general brings a lawsuit". See Garner 2004:1753, 4030.

<sup>330</sup> See Ray 2008:5. Ross Ray's report entitled "The Role of the Attorney-General: An Australian Perspective" is available online at <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/20081013TheRoleoftheAttorney.pdf>> (accessed on 28 September 2015).

<sup>331</sup> Ray 2008:5.

<sup>332</sup> *Motanyane*:472.

some of such matters deserving of the Attorney General's intervention regard being had to their constitutional importance. These matters not only derogate from the constitutional design and framework which the Attorney General is obliged to uphold, but also have a serious effect on constitutionalism, the rule of law and the administration of justice in Lesotho. These are matters involving great public interest, but which the office of the Attorney General is in deep slumber to engage with and interrogate.

A number of factors account for the Attorney General's inertia and lethargy on these public interest issues. Firstly, due to his role as the principal legal advisor of the Government and his participation in Cabinet meetings, the Attorney General identifies himself more with the Government than as an independent constitutional defender. Secondly, instead of clarifying his constitutional role in upholding the Constitution and other laws, the *Office of the Attorney General Act 1994* entrenched the Attorney General's position as the representative of Government in all legal proceedings against the Government.<sup>333</sup> Under the Act, the Attorney General may direct that "any matter before a court be defended at the expense of the state" where in his opinion that is "in the public interest to do so".<sup>334</sup> The Act is thus silent as to the possibility and circumstances under which the Attorney General may *institute* legal proceedings in the public interest. Thirdly, the political influence over the Attorney General has benumbed the Attorney General's "public interest" senses to the extent that his role has been watered down to simply the defender of Government. Finally, there is no clear constitutional or legal framework of public accountability on the part of the Attorney General. Notwithstanding the constitutional mandate to protect and uphold the Constitution, the Attorney General is effectively a hireling at the service of Government.

#### 5.4.2 The consequences of constitutional review practice trajectories

##### 5.4.2.1 Horizontality and decentralisation: ensuring pluralism, participation, democracy and constitutional justice

I turn to deal with the consequences of the constitutional review practice trajectories that have been taken by the Mahomed, Steyn and Ramodibedi Courts. Firstly, I wish to highlight briefly some of the values sought to be protected by the twin transformative tools of horizontality and decentralised constitutional review. When the constitutional designers

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<sup>333</sup> See *Office of the Attorney General Act 6/1994*, sec 3. Also see *Motanyane* where the effects of this conditioning led the Attorney General to seek to represent Government Ministers in defamation proceedings in which they appeared in their personal and not official capacities.

<sup>334</sup> *Office of the Attorney General Act 6/1994*, sec 4.



prescribed for a horizontally applicable Bill of Rights that is enforceable by all courts, they sought to establish for Lesotho a polity in which the rights and obligations of individuals and the community to which they belong were reconciled in a stable social order and preserved from abuse of power in any of its forms.<sup>335</sup> What was hoped for was a social order in which everyone is enabled through several channels of expression<sup>336</sup> to participate in public discourse and deliberations that result in decisions that shape social life and preserve constitutionalism and the rule of law.

That Lesotho is a “sovereign democratic Kingdom”<sup>337</sup> was not to be exemplified by citizenry participation in electoral and political processes only but also through judicial processes. The decentralisation of constitutional jurisdiction and therefore constitutional review in Lesotho was the entrenchment of an opportunity and processes for a plurality of voices – both assenting and dissenting – to be heard in connection to the promises of the Constitution and the constitutional agenda. A decentralised system of constitutional review, as Sarubbi observes, “channel[s] wide-ranging public discussion, enriched by many voices” thereby ensuring – not in a traditional way though – wide citizenry participation, “by means of litigation capable of shaping society in ways that are often unattainable by majorities”<sup>338</sup> Speaking of the decentralised constitutional review and democracy, Sarubbi aptly points out that:

If democracy is understood not as a right to vote, but as a right to participate in public deliberation that results in a decision that shapes social life, then state courts with constitutional judicial review competences proffer an arena to enhance the possibilities of citizen participation, otherwise not available if interpretation is exclusively given to federal courts, since arguments of policy (social, economic and political) might form legal argument that renders a law interpretation ‘permissible’.<sup>339</sup>

Furthermore, through horizontality and decentralised constitutional review, the constitutional designers sought to ensure that the people of Lesotho, in particular the poor and marginalised, enjoyed constitutional justice. By constitutional justice, I refer to a system of justice according to which power – whether political, public or private – is limited by a *constitutional norm*, and the *procedures* have been designed and the *institutions* created to

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<sup>335</sup> Basutoland Council 1963:83.

<sup>336</sup> For example, legislative chambers as “laboratories of democracy”, and courts as “laboratories of constitutional protection and enforcement”.

<sup>337</sup> The Constitution, sec 1(1).

<sup>338</sup> Sarubbi 2011:57-58.

<sup>339</sup> Sarubbi 2011:57.

enforce such a limitation.<sup>340</sup> Constitutional justice generally implies the institutionalisation of courts intended for the protection, enforcement and implementation of the private actor's entrenched constitutional rights and freedoms. The main content of constitutional justice is the vindication of the supremacy of the Constitution and the protection and enforcement of the private actor's entrenched rights and freedoms. Effective constitutional justice is discharged, Harutyunyan observes, when all constitutional subjects are eligible to apply to the courts and all normative acts adopted by all constitutional subjects may become the object of constitutional justice.<sup>341</sup> A broad-based constitutional justice enforced by all courts in Lesotho at the instance of any aggrieved private actor is a clear feature of Lesotho's constitutional framework.<sup>342</sup> These values have however been greatly affected by the constitutional review practice under consideration.

#### 5.4.2.2 Exclusion of the people from constitutional justice

The constitutional review practice trajectories of the Mahomed, Steyn and Ramodibedi Courts have had far-reaching consequences on the poor and marginalised masses of the people of Lesotho as far as the administration of justice generally and the constitutional justice in particular are concerned. Through narrow requirements for standing in constitutional matters and the failure to discover other access routes to constitutional jurisdiction, these Courts have narrowed the path leading towards the vindication of the Constitution generally and the protection and enforcement of fundamental human rights and freedoms in particular. This means that human rights violations pass without judicial redress.<sup>343</sup> As will be shortly indicated, only a limited number of persons have access to the constitutional jurisdiction of the High Court. The corrective justice paradigm on which private-law disputes adjudication is performed has entrenched the hegemony of the common law and the official customary law with the consequences that the distributive demands of the Constitution are largely excluded from consideration and application. Coupled with the separatist approach in terms of which the Mahomed, Steyn and Ramodibedi Courts have excised constitutional jurisdiction of the High Court and the subordinate courts in incidental constitutional review, this common law and official customary law hegemony means that,

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<sup>340</sup> See Cappelletti 1985:4-5.

<sup>341</sup> Harutyunyan 2009:5-6. A report presented at the Conference in Mexico is available online at <http://www.concourt.am/armenian/structure/president/articles/Mexico.pdf> (accessed on 5 October 2015).

<sup>342</sup> See the Constitution, sec 2, sec 4(2), sec 22, sec 156(1).

<sup>343</sup> Sakoane 2004:385.

contrary to the section 4(2) constitutional imperative, no private actor is able to rely on the Bill of Rights as a basis of his claim or defence, nor any adjudicative body is able to rely on constitutional principle or values to modify and develop existing law to be compatible with the Constitution.

There is no doubt that since 1903 when the *Laws of Lerotoli Code* came into existence to date, Basotho customary law, like any other African societies customary laws,<sup>344</sup> has “undergone a cathartic change”.<sup>345</sup> The mechanical application of the official customary law notwithstanding the Constitution and current social custom and practice has resulted not only in the subjecting many of the Basotho to archaic laws that have long lost legitimacy regard being had to the living customary law but also in condemnation of Basotho to the injustices and prejudices of the colonial past. The application of the official customary law without adapting it to the ever-changing social circumstances has also entrenched the social stratification of Basotho society into the privileged minority and the under-privileged rural majority with the concomitant denial of constitutional rights and freedoms especially to the latter social strata.<sup>346</sup> Because of its nature as a power enforcement tool rather than rights-conferring and power-limiting system, the official customary law, to use Sibanda’s expression, continues to be an “incredible edifice rooted in its colonial legacy that perpetuates marginalization and exclusion” of the majority of Basotho who are “confined to its strictures” and who remain the subjects and prisoners of an oppressive past.<sup>347</sup>

Research on African states indicates that between 80% and 90% of the population in these states are governed by customary justice system and they have little or no contact with the mainstream justice system.<sup>348</sup> Odinkalu observes that being inherently racial in origin, despotic in operation and often discriminatory and unfair in outcome, African customary justice system “affords the dominant indigenous elites of Africa a choice in both the forum and location of the justice process, a choice that is not available to the overwhelming majority of the continent’s poor people”.<sup>349</sup> According to Odinkalu, “the obstacles to accessing formal structures of justice delivery are overwhelming” for most of the continent’s

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<sup>344</sup> See Mokgoro 1997:1281-1282.

<sup>345</sup> Palmer and Poulter 1972:195-196.

<sup>346</sup> According to Mokgoro (1997:1282), the “dichotomy between customary law and social reality causes serious hardships for rural communities in general and for women in particular”.

<sup>347</sup> Sibanda 2010:34-35.

<sup>348</sup> Ubink and Van Rooij 2011:7-8; Odinkalu 2006:143.

<sup>349</sup> Odinkalu 2006:141,146-147.

rural people.<sup>350</sup> It is against the rule of law that the Bill of Rights does not apply to customary norms because of the constitutional review practice of the Mahomed, Steyn and Ramodibedi Courts.

While Odinkalu's observations are applicable to the situation in Lesotho also, the exclusion of the people from the mainstream justice system, in particular, constitutional justice, is, sadly, institutionalised and pervasive and does not discriminate between rural and urban areas. With more than 70% of the population in Lesotho living in rural areas,<sup>351</sup> more than 90% of the population favouring and depending on customary justice system for resolution of their disputes,<sup>352</sup> and regard being had to the poverty levels,<sup>353</sup> it is clear that the overwhelming majority of the masses of the people of Lesotho are incapable of enforcing their constitutional rights in private-law dispute adjudication. Even of the less than 30% of Lesotho's urban population, only an average of seven cases that involve direct constitutional review, which are annually filed and heard by the High Court. The High Court constitutional cases record reflects a very bleak state of direct constitutional review trend over a period of 14 years from 2002, with 2006 recording only one case and a highest record of only 16 cases in 2013. Furthermore, there are no records of referrals of constitutional cases from the subordinate courts to the High Court pursuant to sections 22(3) and 128(1) of the Constitution. The absence of these records is understandable in the light of the dormancy of the subordinate courts in exercising constitutional jurisdiction.

The constitutional review practice unconstitutionally subjects litigants to unfair hearing of their disputes adjudication where the most fundamental and probably dispositive issues in the litigation<sup>354</sup> – constitutional questions – are removed from consideration and determination by courts. As Keyzer correctly observed, "it is palpably unfair to expect people to take the risk of criminal prosecution, conviction and the possible penal consequence of imprisonment before they can raise a constitutional question".<sup>355</sup> These sentiments apply

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<sup>350</sup> Odinkalu 2006:158.

<sup>351</sup> Urban population in Lesotho was estimated at 27.6% of the total population in 2011. See <[http://www.indexmundi.com/lesotho/demographics\\_profile.html](http://www.indexmundi.com/lesotho/demographics_profile.html)> (accessed on 25 September 2015).

<sup>352</sup> Juma 2007:88.

<sup>353</sup> Nearly 40% of the Lesotho population lives below the international poverty line of \$1.25 USD per day. See <<http://worldpopulationreview.com/countries/lesotho-population>> (accessed on 10 October 2015).

<sup>354</sup> See *Nova Scotia v Martin* [2003] 2 SCR 504:528-529.

<sup>355</sup> Keyzer 2010:68.

with equal force in civil proceedings, where unsuccessful litigants may face civil execution against their private property. The result is that unconstitutional laws and conduct of private actors and of public authorities are immunised from constitutional review. The constitutionalisation agenda where private law would be infused with the objective values underlying the new constitutional order for the benefit of the masses of the people has been dealt a fatal blow and rendered nugatory.

#### 5.4.2.3 Subjection of the people to illegitimate judicial decisions

The judicial system continuously subjects Basotho to judicial decisions that lack substantive legal and sociological legitimacy.<sup>356</sup> A decision is legitimate if it is based on fair processes that not only ensure quality of treatment but also considers and acknowledges the litigants' constitutional rights and therefore ensures fair distributive outcomes.<sup>357</sup> It is the compatibility of judicial process outcomes with the value patterns of the constitutional order.<sup>358</sup> Constitutional legal arguments, Epstein points out, are "the forum for checking the legitimacy of judicial opinions".<sup>359</sup>

The common-law rationality of judicial decisions which depends on legal rules that are potentially out of step with the constitutional norms (and therefore invalid) and which take no account of the imperatives of the new constitutional order seriously affects and undermines the legitimacy of such decisions. Lack of procedural fairness caused by exclusion of constitutional questions from adjudicative processes, lack of distributive justice according to which constitutional demands are factored into judicial decisions and law,<sup>360</sup> the immunisation of the Court of Appeal from accountability by *Lepule* in the event of its violation

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<sup>356</sup> By "legitimacy" I refer to the degree to which the law and legal decisions represent and reflect the norms and values as well as interests of the people as entrenched in the Constitution and do not serve only the interests of those in power or the dominant in the society, whether private individuals or public officials. See Tyler 2003:310. Substantive legal legitimacy reflects the correctness or reasonableness of judicial decisions based on constitutional law, norms and values. Judicial decisions possess sociological legitimacy insofar as the public regards them as justified, appropriate or deserving of support. See Fallon 2005:1794-1795.

<sup>357</sup> Tyler 2003:329-330.

<sup>358</sup> See Stillman 1974:42, 45.

<sup>359</sup> Epstein 2014:38.

<sup>360</sup> Distributive consequences of laws and judicial decisions must be taken into account if such laws and decisions are to have legitimacy. See Kronman 1980:474.

of the Bill of Rights and the lack of public confidence<sup>361</sup> in the fairness of procedures and outcomes of judicial decisions as well as in judges to protect the Constitution and democracy are clear indexes of the illegitimacy of judicial decisions in Lesotho. Speaking on the public confidence as an index or determinant of legitimacy of judicial decisions, Barak states that all that a judge has is the public's confidence in him, a fact that means, "the public recognizes the legitimacy of judicial decisions, even if it disagrees with their content".<sup>362</sup>

#### 5.4.2.4 Impact on the administration of justice generally

The general administration of justice has also suffered greatly because of the constitutional review practice of the Mahomed, Steyn and Ramodibedi Court. Quite apart from the denial of access to constitutional justice by the masses of the people of Lesotho and the whittling down of the rule of law and constitutionalism which Mahomed P has so much crusaded for in *Swissborough*<sup>363</sup> and elsewhere,<sup>364</sup> the constitutional review practice has placed an unnecessary colossal burden not only on the litigants but also on the justice system as a result of the parallelism existing between constitutional and ordinary proceedings emanating from the excising of constitutional jurisdiction from ordinary jurisdiction. This bifurcation of judicial proceedings into ordinary and constitutional matters in circumstances where a constitutional question arises during ordinary proceedings and the direction that the litigant follows the *Constitutional Litigation Rules* procedures for the determination of such questions by the so-called "Constitutional Court" is both time-consuming and more expensive for the litigants.<sup>365</sup> In a similar context, involving access to administrative tribunals' constitutional jurisdiction without the need to refer the constitutional questions to the courts, the Canadian Supreme Court strongly deprecated the parallelism of proceedings in *Nova Scotia v Martin*:

In La Forest J.'s words, "there cannot be a Constitution for arbitrators and another for the courts" ... This accessibility concern is particularly pressing given that many administrative tribunals have exclusive initial jurisdiction over disputes relating to their enabling legislation, so that forcing litigants to refer *Charter* issues to the courts would result in costly and time-consuming bifurcation of proceedings.<sup>366</sup>

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<sup>361</sup> Public confidence depends, among other things, on judicial accountability. See Pholo 2013:10.

<sup>362</sup> Barak 2002:59-60.

<sup>363</sup> *Swissborough*:224.

<sup>364</sup> Mohamed 1989:1.

<sup>365</sup> For example, in *Mota*: [27], the High Court directed the accused to launch parallel constitutional case to determine a constitutional question arising out of ordinary criminal proceedings.

<sup>366</sup> *Martin*:529.

Where a litigant is unable to pursue the constitutional prong of his case for any reason, the ordinary prong will ultimately be decided notwithstanding the constitutional challenge. While the Constitution as a supreme law and the source of all legal power and authority must be respected by all including courts, the split procedure lays down the foundation for general disrespect for the Constitution and its authority as the courts now have the authority to make decisions in ordinary proceedings notwithstanding the constitutional challenge. This in effect means that courts are entitled to apply the law and to uphold conduct, which is otherwise inconsistent with the Constitution, such law and conduct thus taking precedence over the Constitution. The Canadian Supreme Court has made it clear that from the principle of constitutional supremacy flows, as a practical corollary, the idea that the people should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings.<sup>367</sup> Besides duplication of proceedings, the parallel proceedings result in serious delay in the delivery and dispensation of justice. In *Mota*, Makara J, quite alive to the injustices of the parallel proceedings, decried, “What appears to be a challenge ahead is for the [Constitutional Litigation] Rules to provide for a mechanism which would render justice easily accessible *speedier, economically and simply*”.<sup>368</sup>

## PART IV

### 5.5 Conclusion

In his contribution in *Falls the Shadow: Between the Promise and the Reality of South African Constitution*, Nathan recalls how passengers boarding a train at one of London’s underground stations are sometimes warned by a sombre disembodied voice, broadcast over the intercom system, to “mind the gap” between the platform and the train.<sup>369</sup> Nathan employs this warning and how it should be heeded in relation to the “more exalted and serious matter” of South African Constitution. He also addresses himself to the “yawning gap” between the South African constitutional promise and its realisation.<sup>370</sup> In a similar fashion, I have in this chapter “minded the gap” that exists between our constitutional promise and the harsh reality in which the marginalised and disadvantaged masses of the people of Lesotho find themselves. Dissecting this gap, I indicated how the constitutional review practice of the Mahomed, Steyn and Ramodibedi Courts has pushed the frontiers

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<sup>367</sup> *Martin*:529.

<sup>368</sup> *Mota*: [25]. Emphasis in the original.

<sup>369</sup> Nathan 2013:1.

<sup>370</sup> Nathan 2013:1, 6-8.

between the constitutional text and the social reality since 1993 to date. Whereas the constitutional framework prescribes for the horizontal application of the Bill of Rights and the decentralised constitutional review at the heart of which lay the attainment of the rule of law, constitutionalism, constitutionalisation of private law, protection of fundamental rights and freedoms and the guarantee of constitutional justice, Mahomed, Steyn and Ramodibedi Courts depleted these twin transformative constitutional tools as they moved towards and settled on the high seas of verticality and concentrated constitutional review.

I have also indicated factors that account for the trajectories these Courts have taken and the dire consequences of these trajectories on the people of Lesotho. The constitutional review practice has not only influenced the administration of justice negative and subjected Basotho to illegitimate judicial decisions, but also effectively priced the greatest majority of the masses of the people of Lesotho out of the constitutional system and banished them to the margins of constitutional justice. The Constitution no longer belongs to the people but has effectively become, to adopt the McLachlin J's exposition in *Cooper v Canada*, "some holy grail", which only the judicial initiates of the upper echelons of judiciary and the privileged elites may touch.<sup>371</sup> The constitutional review practice under review has rendered the Constitution and constitutional justice tokenistic. Facilitated by the upper echelons of the Mohamed, Steyn and Ramodibedi Courts, the "elite capture"<sup>372</sup> of constitutional justice has rendered constitutional justice "an arena of legal quibbling" for the few urban privileged elites with long purses<sup>373</sup> rather than being "the last course for the oppressed and the bewildered".<sup>374</sup> Regard being had to its dire consequences, Basotho have little or nothing to boast about the constitutional review practice of the Mahomed, Steyn and Ramodibedi Courts because these Courts, unlike the sovereign which Lord Brougham aspired, left the constitutional justice in a state far from what the constitutional framers had designed: dear, sealed, the patrimony of the rich and the sword of craft, domination and oppression.<sup>375</sup>

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<sup>371</sup> *Cooper v Canada* [1996] 3 SCR 854:899.

<sup>372</sup> "Elite capture" refers to the usurpation or "capture" by the elite of resources and social goods designated for the benefit of the larger population. For a detailed discussion of elite capture, see Glaeser *et al* 2003:199; Hellman *et al* 2002:751.

<sup>373</sup> See *Kesavananda Bharati v State of Kerala* 1973 AIR 1461 (SC):1485.

<sup>374</sup> See *State of Rajasthan v Union of India* (1978) 1 SCR 1:70.

<sup>375</sup> The description is taken from the Scottish jurist and Politician, Lord Brougham's speech on the law reform, quoted by Iyer J in reference to the democratisation of judicial remedies through Public Interest Litigation in *Fertilizer Corporation Kamgar Union*:[50] ("It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be the sovereign's boast



Lesotho's constitutional system is system where the courts are embedded in traditional adjudicative ideology and methodology in terms of which "people's causes *appeared* merely as issues, argued arcanelly by lawyers, and decided in the mystery and mystique of the inherited common-law-like judicial process".<sup>376</sup> This system deals with "mechanical, slot machine-type justice".<sup>377</sup> This is a system, using Mark Twain's template, in which *we have those three unspeakably precious things: the horizontally applicable Bill of Rights, the decentralised constitutional review and the prudence never to practise either of them.*<sup>378</sup> This has had a devastating impact on the constitutionalisation project, the rule of law and constitutionalism as has been indicated. In the next and final chapter, I shall consider the typology of means for the calibration of the constitutional review practice to be compatible with the constitutional framework, thereby attempting to narrow or eliminate the gap between the constitutional promise and the social reality.

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when he shall have it to say that he found law dear and left it cheap; found it a sealed book and left it a living letter; found it the patrimony of the rich and left it the inheritance of the poor; found it the two-edged sword of craft and oppression and left it the staff of honesty and the shield of innocence.")

<sup>376</sup> Baxi 1985:107-108.

<sup>377</sup> Bhagwati and Dias 2012:175.

<sup>378</sup> Mark Twain, speaking of the USA, had stated that "... in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them". See Mark Twain Official Website <<http://www.cmgtw.com/historic/twain/about/quotes3.htm>> (accessed on 8 July 2015).

## CHAPTER 6: CONCLUSION, LIMITATIONS, SUGGESTIONS FOR FURTHER RESEARCH AND RECOMMENDATIONS

... the journey to move from [constitutional] promise to reality is a daunting one which requires very deliberate, decisive and transformative actions from all actors – the state, non-state actors and citizens. There is an imperative to act, as inaction is not an option.<sup>1</sup>

... our obligation therefore is to reconsider our assumptions, re-examine our institutions and re-visit our laws ...<sup>2</sup>

### 6.1 Introduction

This study has set out to determine and explore the constitutionalisation of Lesotho's private law through the twin transformative constitutional tools of the horizontal application of the Bill of Rights and the decentralised constitutional review. The latter was looked at through the prism of the principle of subsidiarity. The study reflected on these constitutional tools not only as crucial arsenals in the constitutionalisation project but also as the constitutional framework for the attainment of constitutional justice for the people of Lesotho. The study comprised two hypotheses. The first hypothesis was that the Bill of Rights applies horizontally, with the result that a private actor has a constitutional right to rely on the Bill of Rights provisions in his or her private-law disputes with another private actor. The second hypothesis was that Lesotho's constitutional review is decentralised, with the consequence that all courts have constitutional jurisdiction to control the constitutionality of laws and conduct.

In its statement of the problem, the study indicated that as a result of the constitutional review practice and other contributing factors, the Bill of Rights has not had the intended effect or influence on Lesotho's private law, as a result of which private law continues to harbour principles, rules, standards and doctrines that are at variance and inconsistent with the Constitution and are applied in this form to private-law disputes. Adopting a historical and comparative methodology based on desktop research, the study sought to answer four research questions, which shall be restated below. Through comparative constitutional theory based on the review of comparative literature, the study located the place and

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<sup>1</sup> Ndomo 2011:132,137-138.

<sup>2</sup> L'Heureux-Dube 1997:338.

contours of horizontality and decentralised constitutional review in Lesotho's Constitution. It thus contributed and provided new insights into the theoretical framework and the practical application of the above important constitutional tools, which have largely remained unexploited for a period of more than two decades since 1994 when the new constitutional dispensation was ushered in.

This chapter provides a synopsis and review of the research highlighting the main arguments of the study in Part I. Part II of the chapter chronicles the findings and conclusions relevant to the specific research questions of the study and teases out the wider implications of these findings and conclusions. Part III draws attention to the limitations of the study and makes suggestions for further research. Several recommendations are sketched out in Part IV. These recommendations set out the typology of means geared towards the constitutionalisation of Lesotho's private law and the attainment of constitutional justice in Lesotho. The recommendations provide further policy directions, both administrative and legislative, for the creation of a human rights culture, which is supportive of the practical actualisation of these constitutional goals. Concluding remarks are made in the final part, Part V, of the chapter.

## **PART I**

### 6.2 The synopsis and review of the research

Serving as an introduction to the study, Chapter 1 outlined the background and the problem that precipitated the research being undertaken. It provided the objectives of the study, the research methodology and the review of the literature on which the research was conducted.

The second chapter dealt with the doctrine of horizontal application of the Bill of Rights. In that chapter, it was argued that, whereas the classical liberal political theory of the public-private distinction presented a hurdle and an impediment for human rights to influence private law on account of the conceptualisation of human rights as a shield against the state and therefore applicable in vertical legal relationships only, this conceptualisation has been dismantled by the Constitution of Lesotho. The Constitution provides for the horizontal application of the Bill of Rights. As a result of this horizontality, all private actors should be able to rely on the Bill of Rights in their private-law disputes adjudication and the courts have a constitutional obligation not only to respect the private actors' entrenched human rights and freedoms but also to ensure that they (the courts) do not themselves infringe such rights and freedoms.

Through the lens of the structural principle of subsidiarity, chapter 3 dealt with the constitutional review framework in Lesotho. It was argued in that chapter that, on the basis of

this principle and regard being had to comparative constitutional jurisprudence, which provides for three models of constitutional review – the American, the European and the hybrid models – the Constitution prescribes a decentralised constitutional review. According to this model of constitutional review, not only the High Court and the Court of Appeal but also all the subordinate courts have constitutional jurisdiction to determine the constitutionality of laws and conduct and to uphold the supremacy of the Constitution and the rule of law.

The fourth chapter set out how fundamental human rights and freedoms cross the classical liberal public-private divide into Lesotho's private law. It was argued that it is through the exercise of constitutional jurisdiction that Lesotho's private law interacts and is infused with the Bill of Rights and the objective value system that underlie Lesotho's constitutional order. Demonstrating how customary law as part of Lesotho's private law is also subject to the influence of the Bill of Rights and the objective value system, it was argued that section 18(4) of the Constitution is not an impediment to gender equality and justice as the courts have found so far. I argued that when it comes to the issue of gender equality and justice, the Constitution prescribes an evolutionary model for the elimination of discriminatory laws by the courts.

In the fifth chapter, the focus was on the constitutional review practice of the Mahomed, Steyn and Ramodibedi Courts and considered the trajectories these courts have taken away from the constitutional framework of horizontality and decentralised constitutional review, thereby creating a gap between the promise of the Constitution and the lived reality of the people of Lesotho. It was argued that, notwithstanding the horizontal application of the Bill of Rights and the decentralised constitutional review prescribed by the Constitution, the Mohamed, Steyn and Ramodibedi Courts ushered in our constitutional space the verticalisation of the Bill of Rights and the European model of constitutional review. The latter concentrates the constitutional review power in the High Court. Having traced the pathology of these trajectories to a number of factors, it was finally argued that constitutional review practice of the Mahomed, Steyn and Ramodibedi Courts has not only had a negative influence on the general administration of justice but has also excluded the overwhelming majority of the people of Lesotho from constitutional justice.

## **PART II**

### **6.3 Findings and conclusions of the study**

The following paragraphs present the summary of the research findings and conclusions specific to the research questions that were the subject of the study. Presented in bullet-

point formation, these findings and conclusions can be interpreted properly and therefore better understood in conjunction with the theoretical analysis and arguments as well as conclusions made in previous chapters where the specific research questions were discussed.

Does Lesotho's constitutional Bill of Rights apply horizontally?

- While the classical liberal political theory of the public-private distinction conceptualises fundamental human rights and freedoms as applying only in vertical and not in horizontal legal relationship, both section 22(1) and section 4(2) of the Constitution of Lesotho reject the liberal public-private dichotomy.
- Sections 22(1) and 4(2) of the Constitution of Lesotho therefore prescribe a horizontally applicable Bill of Rights.
- Consequently, a private actor is constitutionally entitled to rely on the Bill of Rights provisions in his private-law dispute with another private actor.
- A horizontally applicable Bill of Rights entitles a private actor whose rights and freedoms have been infringed by a judge or judicial officer's decision or judgment to apply for redress before the appropriate court.<sup>3</sup> In their capacity as "public officers", these judges and judicial officers are constitutionally obliged not only to respect the entrenched constitutional rights and freedoms of private actors but also to ensure that they do not contravene such rights and freedoms.

Is Lesotho's constitutional review model centralised in the High Court, or is it diffused so that even the lower levels of judicial structures and hierarchy – the subordinate courts – have constitutional review power?

- Taking into account the unified broad-based pyramidal judicial structure of the judicial system in Lesotho, the absence of an express exclusion of the subordinate courts and the general constitutional obligation to shepherd the limits and corridors of power, the constitutional review framework of Lesotho is based on the principle of judicial subsidiarity. Subsidiarity is a structural principle which not only allocates, but

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<sup>3</sup> See the Constitution, sec 4(2), 154(1) ("public office", "public officer", "public service") and 154(3). See, however, *Lepule v Lepule* 4/2013. This High Court's decision is available online at <<http://www.lesotholii.org/ls/judgment/high-court/2014/72>> (accessed on 4 September 2015). Also see *Lepule v Lepule* 34/2015:46-50, a Court of Appeal decision available online at <<http://www.lesotholii.org/ls/judgment/court-appeal/2015/29>> (accessed on 28 November 2015).

also organises and regulates the power between the superordinate and subordinate within the multi-tiered order or hierarchy and directs that the *locus* of decision-making should repose in the lower appropriate governance level functionaries closest to the ordinary citizens.<sup>4</sup>

- The Constitution organises and centrifugalises the constitutional review power, and regulates the relationship between the superior courts (in particular, the High Court) and the subordinate courts. The allocation of constitutional jurisdiction to the subordinate courts was based on the fundamental principle that these courts are the best *locus* for the control of the constitutionality of laws and conduct based on their close proximity to the great masses of the people of Lesotho and the primary role these courts play as front liners in the constitutionalisation project and the attainment of constitutional justice. The decentralisation of constitutional jurisdiction further assumed the competence of subordinate courts in realising the constitutional bargain and promise.
- It is only where the subordinate courts cannot discharge their constitutional duties and mandate effectively and efficiently that the upper echelons of the judiciary, the High Court and the Court of Appeal, are entitled to intervene by providing guidance to these lower-tier functionaries through standard-setting and unification (supervisory) roles of the superior courts. In this regard, the High Court and the Court of Appeal may intervene in specific instances: where constitutional questions arise during proceedings in the subordinate courts as to the contravention of the Bill of Rights<sup>5</sup> or as to the interpretation of the Constitution<sup>6</sup> and on appeal or review from subordinate courts through normal appeal or review procedures.
- Lesotho's constitutional review architecture is therefore decentralised. All courts in Lesotho have constitutional jurisdiction to determine the constitutionality of laws and conduct, following the American constitutional review model. Thus, the Constitution does not provide for the centralised and concentrated constitutional review where only the High Court (and the Court of Appeal) may exercise constitutional jurisdiction as the European model prescribes. This latter model centralises constitutional review in a specialised court, the Constitutional Court.

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<sup>4</sup> Follesdal 2013:37; Stoa 2014:31; Blank 2010:532-533; Du Plessis 2006:207-208; Follesdal 1998:231.

<sup>5</sup> See the Constitution, sec 22(2).

<sup>6</sup> See the Constitution, sec 128(1).

- By prescribing a decentralised model of constitutional review, the Constitution does not separate constitutional jurisdiction from ordinary jurisdiction. This is intended to enable the courts to apply constitutional jurisdiction in ordinary proceedings so as to uphold the supremacy of the Constitution and the rule of law.

What is the horizontal effect of human rights on Lesotho's private law and how is it effectuated?

- The horizontal effect is the influential authority of constitutional principles, norms and values on private law.<sup>7</sup> It is the horizontal application of the Bill of Rights in the adjudication of private-law disputes. The consequence is that private-law principles, rules and doctrines are influenced by and conform to the standards, principles and values of the Constitution.<sup>8</sup>
- Based on the historiographies of the Four Kingdoms Lesotho, the present Bill of Rights is an amalgam of pre-colonial African cultural values and western liberal ideals. The African Basotho cultural value of communalism in terms of which the sharing of a common social life, commitment to the social or common good of the community, appreciation of mutual obligations, caring for others, interdependence, commonality, collective responsibility and solidarity were expressed, and respect for the individuality pervades the entire Bill of Rights. Together with the liberal ideals and values of the autonomy of the individual, freedom, liberty, equality before the law and equal protection of the law, a limited government and judicial review, the African concept of communalism constitutes the fundamental constitutional principles and objective value system underpinning the new constitutional order in Lesotho.
- Once access to the courts' constitutional jurisdiction has been accessed, the courts are constitutionally obliged to apply, directly or indirectly, the Bill of Rights to the impugned law or conduct.
- It is through the exercise of constitutional jurisdiction by all the courts in horizontal legal relationships that private law interacts and is infused with Bill of Rights and the objective values of the constitutional order. Through this interaction and influence, private power or ordering is restricted and reconfigured, resulting in the constitutionalisation of private law and the attainment of constitutional justice.
- Customary law, being part of Lesotho's private law, is also subject to the influence of

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<sup>7</sup> Moran 2009:20-22.

<sup>8</sup> Oliver and Fedtke 2007:4; Rivera-Pérez 2012:190.

the Bill of Rights and the objective values of the Constitution. Contrary to the popular view that the Constitution ring-fence customary law and therefore sanctions discrimination, the Constitution prescribes an evolutionary model for the elimination of discriminatory laws. Firstly, customary law is by nature and definition adaptable and subject to modification by Parliament, the courts and the society that is subject to it. Secondly, the courts are constitutionally obliged to develop and modify customary law to be in conformity with the Constitution. Thirdly, the courts, as part of Lesotho's public authorities, are enjoined to achieve gender equality and justice progressively in the performance of their judicial functions.<sup>9</sup> Fourthly, taking into account the history behind section 18, the Constitution prohibits *only* a direct application of section 18 of the Constitution, due to its disruptive consequences, which were feared by the National Constitutional Commission.<sup>10</sup> Through the evolutionary model, courts must ensure on a case-by-case basis that the constitutional goal of gender equality and justice is realised in the customary justice system.<sup>11</sup> Consequently, section 18(4) of the Constitution is not an impediment to the attainment of gender equality and justice in Lesotho.

- Not only the descriptive and positivist approach to legal dualism or legal pluralism by the courts, but also the corrective justice paradigm on which private-law disputes adjudication is performed has been inimical to the Bill of Rights influencing Lesotho's private law. Firstly, approaching legal pluralism in terms of the colonial paradigm, the courts took a descriptive and positivist approach to the plural legal orders of Lesotho, concentrating on the rules on conflict of laws in order to make a choice of one legal order over another for the application to resolve the disputes before them, disregarding the most important feature of legal pluralism: the determination of the relationship, interaction and interpenetration of plural legal orders and the hybridisation thereof. Using this dominant feature of contemporary conceptualisation of legal pluralism, this study identified and suggested a pluralist framework within which customary law and the Bill of Rights interlink and relate. It is through this framework that discrimination on evolutionary basis may be removed from the normative content of customary law.

- Secondly, according to the corrective justice approach to adjudication, parties to

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<sup>9</sup> See the Constitution, sec 25 and 26. Also see *Ranjan Dwivedi v Union of India* AIR 1983 SC 624.

<sup>10</sup> Maope 2001-2004:399-400. Also see NCA 1992:31-33.

<sup>11</sup> Mosito 2014:1577; Gangal 2015:89.



litigation are treated on the basis of formal equality with the focus on the maintenance and restoration of the pre-existing and value-neutral balance in their legal relationship without factoring into the determination any independent external determinants or considerations such as constitutional values. A paradigm shift to distributive justice methodology by the courts would not only ensure that the external demands of the Constitution are made part of their reasoning and decisions, but would also equip them with wide-ranging discretion to fashion innovative tools and effective remedies for the enforcement of the Bill of Rights in horizontal legal relationships.

Is Lesotho's constitutional review practice aligned to the constitutional review framework based on horizontal application of the Bill of Rights and decentralised constitutional review?

- Despite the constitutional framework prescribing for the horizontal application of the Bill of Rights and the decentralised review, the constitutional review practice of the Mahomed, Steyn and Ramodibedi Courts has established a vertically applicable Bill of Rights in Lesotho's constitutional space, except in extremely limited instances where, through direct access, the privileged few may rely on the Bill of Rights in private-law disputes. The practice has also introduced a centralised constitutional review in the manner of the European or Kelsenian constitutional review prototype. As a consequence, only the High Court exercises constitutional review through direct access to its constitutional jurisdiction under section 22 of the Constitution following the procedure laid down under the *Constitutional Litigation Rules*.
- Through the Mahomed, Steyn and Ramodibedi Courts' constitutional review practice, foreign concepts, approaches, methodologies or principles, which are at variance with the new constitutional order, were introduced in Lesotho's constitutional space. The incorporation into the legal system of these legal transplants re-established the classical liberal wall of public-private distinction. Through the instrumentality of the *Constitutional Litigation Rules*, the trilogy of *Moriényane*, *Chief Justice* and *Mota* excised constitutional jurisdiction from the ordinary jurisdiction of the High Court and the subordinate courts. The net effect of the courts' constitutional review trajectories was the creation of a separation between constitutional jurisdiction and ordinary jurisdiction, and consequently between the Constitution and the ordinary laws. This, in turn, incapacitated and withered away the High Court and subordinate courts' constitutional power in incidental constitutional review to control the constitutionality of laws and conduct. This has effectively immunised private law from the influence of the Bill of Rights and the objective values of the constitutional order.

- The study has, however, established that, apart from section 22(1) of the Constitution, which regulates standing in relation to personal reliefs relating to the Bill of Rights, in terms of which the applicant need only to *allege* in his or her papers the contravention of the Bill of Rights and that such contravention is in relation to his or her rights or a detained person, the Constitution provides liberal rules of standing for public interest litigants through the portals of the supremacy clause<sup>12</sup> and section 156(1). Through these provisions, a public-interest litigant has the standing to raise constitutional questions of incompatibility of any law or conduct with the Constitution, for either private or public reasons, without the need to establish that his or her personal rights or freedoms have been contravened. The study established that the purpose of these public-interest liberal standing rules is to ensure that no law or conduct is immune from constitutional review simply because of the absence of a person who may establish personal injury to his or her rights or freedoms.
- The study established that a panoply of factors accounts for the constitutional review-practice trajectories. These factors include the ideology and methodologies of corrective justice legal culture, such as judicial deference to private ordering based on *laissez-faire* ideology, the public-private distinction, the adversarial nature of legal proceedings, the formalistic traditional methods of legal interpretation and analysis, and the role of judges, which is limited to discovering the law and not making the law. Other factors include the dormancy and failure by subordinate courts to exercise constitutional jurisdiction since 1993 when the Constitution came into effect; the declining levels of judicial vigilance and sensitivity against constitutional infractions contrary to the initial position adopted by the Mahomed and Steyn Courts; the low levels or lack of legal literacy among the masses of the people of Lesotho notwithstanding the high literacy rate in this African Kingdom; Lesotho's legal education; and the office of the Attorney General's failure to discharge its public interest function of upholding the Constitution, the rule of law and constitutionalism as mandated by the Constitution.
- Because of the constitutional review practice trajectories of the Mahomed, Steyn and Ramodibedi Courts, there is a yawning gap between the constitutional promise and the lived reality of the masses of the people of Lesotho. Consequently, the overwhelming majority are incapacitated from enforcing their constitutional rights, as they are banished to the margins of constitutional justice. The practice has a further

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<sup>12</sup> See the Constitution, sec 2.

serious impact on the general administration of justice resulting from the parallelism between constitutional jurisdiction and ordinary jurisdiction, with concomitant costly and inconvenient bifurcation of proceedings into constitutional and ordinary matters and the consequential general delay in the delivery of justice.

#### 6.4 General conclusions: snowballing effect of “elite capture” of Lesotho’s constitutional review system

It is clear from the above specific findings and conclusions that, notwithstanding a constitutional framework that prescribes the horizontal application of the Bill of Rights and the decentralised system of constitutional review, none of these constitutional tools has been put into operation to protect and enforce private actors’ fundamental rights and freedoms. The result that private law’s normative content remains at variance with the constitutional order. Lesotho’s constitutional review system is under “elite capture” facilitated, ironically, by the very institutions that are supposed to be the guardians of the Constitution – the High Court and the Court of Appeal. With an average of only seven persons per annum able to employ the processes of the constitutional review system in order to enforce their entrenched fundamental rights and freedoms, the superior courts have loudly pronounced their exclusionary reception policy on the doorsteps of the constitutional review system.

Secondly, this “elite capture” has cascaded naturally into a further impediment in the constitutional review system. Despite the entrenchment of the Bill of Rights, the constitutional prescription for the Bill of Rights to have application in horizontal legal relationship and the enforcement of the Bill of Rights by all courts, the constitutional review practice of the Mohamed, Steyn and Ramodibedi Courts has rendered the Bill of Rights and, therefore, constitutional justice, tokenistic.

Thirdly, the symbolic character which the Mahomed, Steyn and Ramodibedi Courts has endowed on the Bill of Rights, particularly in horizontal legal relationships, has serious consequences for the sociological and moral legitimacy, not only of the Constitution itself, but also of the judicial system and the decisions and judgments handed down by the courts. In the final analysis, the “elite capture” of the constitutional review system snowballed into failure by the Mahomed, Steyn and Ramodibedi Courts to realise the broad goal and vision of the people of Lesotho when advocating for and suggesting a court-enforced Bill of Rights . This was an ideal of seeing established for Lesotho a just social order, “a polity in which the rights and obligations of the individual citizens, one to the other, and the rights and obligations of the community to which they belong, are reconciled in a stable social order,

and preserved from the abuse of power in any of its forms".<sup>13</sup>

### **PART III**

#### 6.5 Limitations of the study and further research suggestions

This study obviously has some limitations. Together with the findings of the study that which have uncovered new areas for research, these limitations have generated further questions that have to be explored by further research. These specific avenues for further research will be sketches out later under this Part.

##### 6.5.1 Limitations of the study

Notwithstanding the fact that this study has achieved its objectives by answering the research questions, it nevertheless has several limitations. To begin with, the study focused on the horizontal application of the Bill of Rights and pitched the discourse at the methodological level as to how the Bill of Rights principles and the objective values underling the constitutional order may radiate or be transferred into private law, thus reconfiguring private rights and legal relationships. Whereas it was indicated that the Bill of Rights principles and objective values are transferred into private law through private law's open-ended legal standards and abstract concepts and notions (value terms) such as reasonableness, autonomy and freedom of the individual, wrongfulness and moral convictions of the society, fairness, justice and equity, good faith, due care, legality and public policy, I did not in any way attempt to make any threshold analysis of these terms. Neither did he employ the horizontal effect methodologies on any of the rules, principles, standards or doctrines of Lesotho's private law against the constitutional standards.

From this follows the second, but related limitation of the study. Although the study provided several examples of the Bill of Rights' influence in specific areas of private law (the law of delict and the law of contract) drawn from judicial pronouncements from various jurisdictions such as Germany, Israel and the UK, these examples do not serve as being descriptive of the law of Lesotho on the issues discussed. These comparative jurisprudence is demonstrative only of how and what aspects of private law (whether specific rules, principles, standards or doctrines) may be subjected to the constitutional jurisdiction of the courts in Lesotho in an effort to create a horizontal effect on such private-law aspects.

Thirdly, and owing to the general absence in Lesotho of the literature on the horizontal

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<sup>13</sup> Basutoland Council 1963:83. The same ideal, in my view, applied equally to the 1993 Bill of Rights, which is structurally and substantively similar to the 1966 Bill of Rights.

application of the Bill of Rights and on decentralised constitutional review, some of the judicial authorities and pronouncements by the superior courts of Lesotho that were relied on in this study are concerned with the vertical application of the Bill of Rights. The purpose of the use of such authorities in this study is to demonstrate the importance of the application of the principle laid down therein or of the approach and methodology adopted by the Court and not so much the person or authority in favour or against whom the Bill of Rights was enforced. For example, I have demonstrated through *Moletsane*<sup>14</sup> how Maqutu J (High Court) correctly exercised his constitutional jurisdiction when the issue of the constitutionality of the *SDA Legal Notice* declaring the applicants' properties as the SDA arose during ordinary civil proceedings. As a result, the learned judge declared the said legal notice as unconstitutional, notwithstanding the fact that he had refused an application for amendment by the applicants to include a declarator in the notice of motion. The fact that the respondents were government officials does not detract from the importance of the fact that Maqutu J correctly assumed constitutional jurisdiction in incidental constitutional review by testing the legality of the legal notice in question.

#### 6.5.2 Suggestions for further research

Some of the limitations and findings of the study have generated further questions, which, in turn, need to be fully explored by further research. The new avenues discovered by this study and which can be explored by future research include the following. Firstly, since the study has been limited to laying down the methodologies of the constitutionalisation of private law without engaging in the constitutional assessment of the constitutionality of any aspect of private law, further research is necessary to explore the horizontal effect of the Bill of Rights on certain aspects of the private law. Specific rules, principles, standards and doctrines of the whole body of private law (customary law, delict, family law, corporate law, law of contract and property law, among others) need to be examined and tested by theoretical and comparative research taking into account the constitutional framework of Lesotho and the objective values underlying the constitutional order.

Secondly, there are certain aspects which constitute the legal culture of Lesotho and which have been found to be inimical to the Bill of Rights influencing the private law. These aspects include the corrective justice baseline on which private-law dispute adjudication is presently performed; the adversary nature of the dispute adjudication processes and the traditional

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<sup>14</sup> *Moletsane v Attorney General* 163/2001 (by Maqutu J on 18 October 2004) is available online at <<http://www.lesotholii.org/ls/judgment/high-court/2004/123>> (accessed on 20 July 2015).

role of judges as neutral umpires; the legal education and its influence on the role of lawyers (and judges) in matters of public interest and their inability and incapacity to be the agents of social change using their legal capital;<sup>15</sup> and the colonial paradigm and approach to legal pluralism which disregard the interaction and interpenetration as well as cross-fertilisation of Lesotho's plural legal orders.<sup>16</sup> These issues require investigation and change.

Thirdly, there is a need for further investigation of the theoretical framework of the distributive justice, the legal methods and methodologies of distributive justice in dispute adjudication and resolution, as well as the proper role of the judges, lawyers and public interest litigants within this new paradigm. This is precisely so because the Constitution mandates the assessment of distributive concerns and outcomes in disputes adjudication involving the assumption by courts of constitutional jurisdiction. Whereas the present corrective justice-based dispute adjudication approach provides restrictive rules of standing by insisting on personal relief in relation to rights that are personally held, judges, lawyers and public interest litigants play a fundamental social engineering role under distributive justice.

Fourthly, there is a need to establish through further research the legality and constitutionality of the establishment by the Chief Justice through rules of practice and procedure several "courts" and the conferment of jurisdiction of such "courts". Whereas the Constitution prescribes that courts or tribunals exercising judicial power shall be established by Parliament, it has become common practice in Lesotho to establish "courts" through the instrumentality of rules of practice and procedure.

## **PART IV**

### **6.6 Recommendations: towards constitutionalisation of Lesotho's private law**

The study has clearly established that the pith of the problem impeding the constitutionalisation of Lesotho's private law and constitutional justice, thereby whittling down of the rule of law and constitutionalism, is attributable to the constitutional review practice of the Mahomed, Steyn and Ramodibedi Courts. The study further identified several factors that are responsible and account for the trajectories of the courts' constitutional

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<sup>15</sup> Manteaw 2008:919-920.

<sup>16</sup> There is a need for a shift to the contemporary conceptualisation of legal pluralism which provides new avenues and tools for the understanding of conflicts between customary law and human rights as well as how these systems interrelate and interpenetrate so as to produce a jural space consistent with the normative objective value system that underlie Lesotho's constitutional order.

review practice. Specific recommendations sketched out here seek to address these two problematic areas. These recommendations are targeted towards the calibration and alignment of the constitutional review practice with the constitutional review framework of horizontality and decentralised constitutional review.

Secondly, the recommendations are focused towards the creation of a human rights culture that is conducive to and supportive of the actualisation of the constitutional goals of constitutionalising private law, attainment of constitutional justice and the upholding of the rule of law and constitutionalism. The intention is to urge and prod the judiciary and relevant stakeholders to move urgently towards the constitutionalisation of Lesotho's private law and the attainment of constitutional justice for the people of Lesotho through the suggested action. The very same courts must be the chief architects of this new direction and development.

#### 6.6.1 Calibrating the constitutional review practice with constitutional review framework

##### 6.6.1.1 Discard the principles and concepts of the trilogy

The principles and concepts laid down by the trilogy of *Morienyane*, *Chief Justice* and *Mota* continue to define our legal space and framework as they continue to find application before the superior courts of Lesotho. These legal transplants are clearly inconsistent with the Constitution and the constitutional framework. The starting point is for the Chief Justice or the President of the Court of Appeal expressly to discard them.

##### 6.6.1.2 Amend the *Constitutional Litigation Rules* 2000

The Chief Justice urgently needs to consider effecting the necessary amendments to the *Constitutional Litigation Rules*. The amendments must include the following:

- A provision that these Rules apply not only in the enforcement of the fundamental rights and freedoms and questions as to membership to Parliament but extend to the whole of the Constitution.
- A provision that the Rules apply to the practice and procedure in *direct* constitutional review before the High Court.
- A provision that in incidental (*indirect*) constitutional review – proceedings in which constitutional questions arise in ordinary proceedings before the High Court and the subordinate courts – the High Court and the subordinate courts never the less retain their respective constitutional jurisdiction to decide the matter without the necessity of

referring the matter to the High Court.

- A provision that elaborates on the practice and procedure for referral or reference of constitutional questions from the subordinate courts in terms of sections 22(3) and 128(1) of the Constitution.

#### 6.6.1.3 High Court and subordinate courts to resume incidental constitutional review

In terms of the Constitution, the High Court and the subordinate courts still possess constitutional jurisdiction in incidental (indirect constitutional review). These courts must immediately resume the exercise of these constitutional powers in the control of the constitutionality of laws and conduct. The Chief Justice or the President of the Court of Appeal must prod, through an appropriate practice directive, the High Court and the subordinate courts in the exercise of this power. Taking a decisive step towards the decentralisation of justice and the protection of human rights consistent with the Mexican Constitution and International obligations of Mexico, the Mexican Supreme Court issued a practice directive to all Mexican courts, regardless of their federal or local character, to engage in constitutional review of laws and conduct, and stopped the Mexican constitutional review practice's fluctuation between the decentralised and centralised models of constitutional review.<sup>17</sup>

This should enable private actors to rely on the Constitution, in particular, the Bill of Rights provisions in private-law disputes against other private actors. Where private actors, owing to the level of legal literacy in Lesotho, are not aware of their rights and freedoms involved in the specific litigation, the High Court and the subordinate courts must be encouraged to raise the issues *mero motu*.

#### 6.6.2 Constructing a human rights culture for the constitutionalisation of Lesotho's private law and constitutional justice

##### 6.6.2.1 Liberalisation of standing and adoption of a distributive justice approach to litigation

The High Court and Court of Appeal's restrictive standing rules and the baseline of corrective justice on which private law disputes adjudication processes are carried out seriously impede the Bill of Rights principles and objective values radiating into the private law. Consequently, the liberalised standing rules (including liberal public-interest standing rules) and the new distributive justice-based approach to litigation need to be adopted by all

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<sup>17</sup> See Medécigo 2013:3.



courts. A public-interest litigant should normally have the necessary standing to challenge the constitutionality of laws and conduct under sections 2 and 156(1) of the Constitution, even if he or she is not personally affected provided he or she is able to establish the following:

- That the matter raises a serious legal question;
- That he or she has a genuine interest in the resolution of the question; and,
- That the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court.

The granting or refusal of the standing to public interest litigants should be based on the above criteria to be determined on a case-by-case basis after the factual and legal contexts of the case have been taken into account. In this way, the High Court and the Court of Appeal would be able to strike a balance between the two conflicting public interest aspects: “the desirability of encouraging people to participate actively in the enforcement of the law” and “the undesirability of encouraging meddlesome interlopers invoking the jurisdiction of the courts in matters they are not concerned”.<sup>18</sup> It is through developing liberal and flexible rules of standing as suggested above that the immunisation of law would be prevented, the rule of law and constitutionalism would be upheld and legality would be promoted.

The justice system must adopt a turnaround strategy on ideology, legal methods and methodologies of corrective justice in favour of the distributive justice paradigm. This shift would require pervasive changes in the present legal culture of corrective justice based on jurisprudential conservatism to a baseline that is more distributive, outcome-oriented and adjudicative. The shift should involve changes in the following unarticulated cultural premises and outmoded assumptions, among others:

- The adversarial nature of judicial proceedings where judges and judicial officers only play a role of neutral arbiters who merely discover and apply the law. Judicial proceedings must now be judge driven, and judges and judicial officers must not hesitate to make political decisions geared towards enforcing constitutional imperatives and to be involved in judicial law making, as well as monitoring the outcomes of judicial proceedings. At any rate, such decisions are authorised by the Constitution.

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<sup>18</sup> Woolf *et al* 2007:69-70. See also *Attorney General v Downtown Eastside Sexworkers United Against Violence Society* [2012] 2 SCR 524:[23], [38].

- The judicial deference to individuals' arrangement of their private affairs based on *laissez faire* ideology must be replaced by appropriate judicial activism and assertiveness through which the horizontal space is subjected to distributive demands of the Constitution, with the consequential reordering of private power and rights.
- Corrective justice methods and methodologies limit the capacity and remedial discretion of judges and judicial officers to providing backward-looking remedies aimed at the restoration of the formal equality of the parties that would have been disturbed by the breach. Here the remedies are circumscribed within correlativity of the wrong and the harm. The new distributive approach would require a profound change. Judges and judicial officers would have to forge new tools and fashion innovative forward-looking remedies geared towards the enforcement and the protection of the parties' fundamental rights and freedoms.
- The classical liberal political theory of public-private distinction that pervades the thinking of judges and lawyers and influences the directions and outcomes of adjudicative processes requires attention. A cultural change which accepts and nourishes the horizontality in the application of the Bill of Rights should be devised, developed, ingrained and embedded in the thinking habits of judges and judicial officers as well as in the legal methods, methodologies and techniques of adjudication and litigation. Section 4(2) of the Constitution requires "a reconsideration of the public-private dichotomy in the prevailing legal culture", as it prescribes and underpins "a social democratic than a classical liberal Bill of Rights".<sup>19</sup>

#### 6.6.2.2 Restructuring of legal education and lawyering: from scientific to experiential legal education

The pool of judges and legal professions we have today is a product of a legal education whose pedagogies, methods and methodologies are principally scientific in character: the library is their laboratory and reported cases their data.<sup>20</sup> They are admitted into legal practice and office of a judge largely incapacitated to employ their scientific legal capital in social engineering in order to bridge the gap between the society and the law. Since the quality of legal education is important to the quality of justice,<sup>21</sup> there is a dire need for

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<sup>19</sup> Hunt 1999:100.

<sup>20</sup> Moliterno 2015:32.

<sup>21</sup> Geraghty and Quansah 2007:88.

transformation in pedagogical methods, tools and techniques of the system of legal education left in place or developed following colonial rule<sup>22</sup> and whose primary focus continues to be litigation rather than other aspects of lawyering.<sup>23</sup> That transformation must move towards a more experiential legal education where “law serves to implement public policy and protect the democratic process”<sup>24</sup> and students “receive first-hand experience of the shortcomings of the justice system in relation to under-served populations, as well as government and human rights organisations’ responses to those needs”.<sup>25</sup> In order to meet the Basotho society’s developmental needs, the redesign of the legal education and lawyering programmes in Lesotho should include, among others, the following critical changes:

- Graduate qualifications should be the entry or admission requirement to the school of law. Maturity and the relatively broad-based knowledge of the society and the problems bedevilling it should qualify a student for entry into the school of law.<sup>26</sup>
- The employment and implementation by the school of law of “culturally and historically relevant teaching methodologies”.<sup>27</sup> The primary responsibility of legal educators of the school of law should be:

... to create new teaching materials, including text books, case books, and training materials that arise out of the social milieu of their society and national context. The materials should provide a historical perspective, a sense of contemporary necessities for social development and national priorities in support of legislation, constitutional provisions, rules promulgated and the goal to be achieved.<sup>28</sup>

- Experiential education with pedagogies, methods and methodologies going beyond the framework of clinical legal education and the attachment programme currently in place. Such experiential education needs to be multi-disciplinary, “drawing intellectual strength and clinical skills from many sources such as philosophy, history, social sciences, and the study of developmental and societal problems”<sup>29</sup> and

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<sup>22</sup> Jessup 2002:386-387.

<sup>23</sup> Manteaw 2008:912, 938-939.

<sup>24</sup> Moliterno 2015:34.

<sup>25</sup> Geraghty and Quansah 2007:100.

<sup>26</sup> Ndulo 1985:451-452.

<sup>27</sup> Jessup 2002:389.

<sup>28</sup> Jessup 2002:390; also see Ndulo 1985:449-450.

<sup>29</sup> Manteaw 2008:950.

teaching practical skills in “counselling, advocacy, negotiation, mediation, arbitration, dispute resolution, law office management, computer applications, legal drafting, construction of documents, and use of law as an aid to development”.<sup>30</sup>

- A tutelage or practical training of at least two years before entry into legal practice.
- Statutorily prescribed periods of at least 30 days of free legal service by the legal practitioners, particularly to the poor and marginalised.
- Periodic, continuous training of judges and judicial officers on thematic issues in human-rights protection and enforcement, distributive justice and constitutional justice.

#### 6.6.2.3 Establishing rules for the ascertainment of the living customary law

The official customary law that was codified through the *Laws of Leretholi Code* since 1903 and continues to be applied to the majority of the people who are subject to the customary justice system, notwithstanding social change and development that have established new customs, practices and traditions – the living customary law. Both the courts and Parliament have constitutional obligations to adopt a policy that ensures that customary law is compatible with the Constitution.<sup>31</sup> However, there has been little or no development in that direction. There remains a need for the courts not to apply the ossified official version of customary law mechanically, but to ascertain the living version thereof in every case in which the official version is sought to be applied or is relied on. The ascertainment of the living version thereof is a matter that no longer needs to be left to choice or chance by the courts. Legislative intervention prescribing a legal framework for judicial ascertainment of the living version of customary law is long overdue. Such a framework should include, among others, the following:

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<sup>30</sup> Manteaw 2008:950.

<sup>31</sup> See the Constitution, sec 18(4) (the proviso); sec 26; sec 154(1) (“customary law” definition); and sec 156(1) (Customary law is part of the existing law that need to be modified). As to the quasi-legislative power of a court under section 156(1) of the Constitution; see *Tan Eng Hong v Attorney General* [2012] SGCA 45:[49]-[50], [58], a Singaporean Supreme Court decision available online at <<http://www.singaporelaw.sg/sqglaw/laws-of-singapore/case-law/free-law/court-of-appeal-judgments/14979-tan-eng-hong-v-attorney-general-2012-sgca-45>> (accessed on 18 June 2015); *Ghaidan v Godin-Mendoza* [2004] 3 All ER 411:[63]-[64]; *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433:[21]; *Kanda v Government of the Federation of Malaya* (1962) MLJ 169; *Director of Public Prosecutions (Jamaica) v Mollison* [2003] 2 AC 411:[16]-[17].

- Any reliance on official customary law rules by any party in customary law disputes should be approached with due circumspection by the courts.<sup>32</sup> Taking into account the ossified and distorted nature of the official version of the customary law, its potential to perpetuate undesirable customs and those that are moribund<sup>33</sup> and the stifling of new rules adopted by the community,<sup>34</sup> a presumption of unconstitutionality against a rule of official customary law or that such a rule is no longer “law” is justified. Today’s customary law is certainly not the customary law that was practised by Basotho more than a century ago. Today’s “customary law” is a blend of customary African laws and western values, “coloured by the forces of globalization, technology, capitalism and socialism, local, regional and international political economics, decades of development work, and multiple other factors”.<sup>35</sup> Courts should be “cultural barometers” in the observation and determination of cultural changes.<sup>36</sup>
- The onus of proof should lie with the party relying on the official customary-law rule that such a rule reflects the living version of the customary law or that it is consistent with the Constitution.
- Clear rules prescribing the methodological aspects of ascertaining the existence or substantive content of the rule of the living customary law should be put in place as a guide for the courts and the parties.<sup>37</sup> Taking into account the disparity between the official and the living versions of customary law, a customary rule must be established as a question of fact (and not of law) in any judicial proceedings.<sup>38</sup> Perhaps section 8 of the draft *Application of Customary Law Bill* suggested by the SALC is a satisfactory starting point for this purpose:

**Proof and ascertainment of customary law or foreign customary law**

8(1) In order to prove the existence or content of a rule of customary law, or foreign customary law, a court may –

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<sup>32</sup> *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC):[54]; *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC):[151].

<sup>33</sup> Palmer and Poulter 1972:195.

<sup>34</sup> *Shilubana v Nwamitwa* 2008 2 SA 66 (CC):[55].

<sup>35</sup> Knight 2010:23. Also see Juma 2013:172.

<sup>36</sup> Juma 2002:499.

<sup>37</sup> See *Shilubana*:[49] for several factors informing the South African Court’s decision in ascertainment of customary law rule’s existence or content thereof.

<sup>38</sup> See Allott 1957:246-253.

- (a) consult cases, textbooks and other authoritative sources;
  - (b) receive expert opinions either orally or in writing; and
  - (c) appoint assessors from the community in which the rule of customary law applies.
- (2) The provisions of subsection (1) shall not prevent a party from presenting evidence of a rule contemplated in that subsection.<sup>39</sup>

- Caution<sup>40</sup> must be exercised to the fact that cases, textbooks and other authorities on a customary law rule's existence and content "merely record the position of a given custom as it prevailed at a particular point in the life or history" of the community or society "but not subsequently".<sup>41</sup> This material is useful "merely as reference points to ascertain what stage of development the custom had reached at that point".<sup>42</sup>
- To determine the content of a customary law rule, "the prevailing societal ambience of the concerned community must loom large in the inquiry", with contemporary records, recent case studies and oral evidence providing "a better source for ascertaining the current state of the customary law".<sup>43</sup>
- Where a customary-law rule, whether official or living version, falls short of the standards of the objective values underlying the Bill of Rights, the court must invoke section 156(1) of the Constitution and modify or develop the relevant rule to be compatible with the Constitution<sup>44</sup> before it considers invoking the provisions of section 18(4)(c) of the Constitution, for example. Thus, the court must first apply the Bill of Rights indirectly before considering the direct application thereof. This approach is consistent with the evolutionary model for the elimination of discriminatory laws.

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<sup>39</sup> South African Law Commission 1999:111-112. The unpublished report of SALC is available online at <[http://www.justice.gov.za/salrc/reports/r\\_prij90\\_conflict\\_1999sep.pdf](http://www.justice.gov.za/salrc/reports/r_prij90_conflict_1999sep.pdf)> (accessed on 20 October 2015). Also see *Alexkor*: [54].

<sup>40</sup> According to Maqutu and Sanders (1987:384), courts should be more circumspect when dealing with the ascertainment of the country's customary law.

<sup>41</sup> *Ramantele v Mmusi* [2013] BWCA 1: [77]. This Botswana Court of Appeal decision is available online at <<http://www.africanlii.org/content/ramantele-v-mmusi-and-others-cacgb-104-12-2013-bwca-1-3-september-2013>> (accessed on 20 October 2015).

<sup>42</sup> *Ramantele*: [77].

<sup>43</sup> *Ramantele*: [77].

<sup>44</sup> See, *Shilubana*: [48].

#### 6.6.2.4 The Attorney General to marshal the defence of the Constitution

The office of the Attorney General, as the first defender and guardian of the Constitution, needs to wrestle itself away from the Government's hard grip, which subordinates it to a defender of Government. The Office of the Attorney General needs to establish an appropriate balance between its role as the principal legal advisor to the Government and its public interest role in defending the Constitution. Statutory intervention is necessary to trigger and speed up the process. The amendment to the *Office of the Attorney General Act*<sup>45</sup> must therefore incorporate the following:

- Provisions prescribing and clarifying the role of the Attorney General in public interest service particularly in the area of the protection and upholding of the Constitution (including the Bill of Rights) and other laws of Lesotho through litigation in terms of section 98(2(c) of the Constitution.
- Provisions establishing a framework within which the Attorney General may authorise *retalor suits* or *ex rel* where, for some legitimate reasons, the Attorney General may not be expected to take legal action himself or through officers subordinate to him in a particular matter in which the unconstitutionality of a law or conduct, public or private is alleged.<sup>46</sup> Through *retalor suits* or *ex rel*, the Attorney General may authorise a private actor, mostly an NGO involved in public interest litigation, to institute a suit in the *name* and by the *consent* of the Attorney General in order to uphold and defend the Constitution, rule of law and constitutionalism.
- In turn, a framework that guarantees public accountability and the liability of the Attorney General to ensure that the guardian of the Constitution is guarded by the public.

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<sup>45</sup> *Office of the Attorney General Act* 6/1994.

<sup>46</sup> On account of financial and human resources and the consideration of the public interest issues involved in a specific case, it is clear that the Attorney General may not be in a position to undertake legal action in every case concerning the allegation of unconstitutionality. Also see the comments made by the Court of Appeal in *Attorney General v His Majesty The King* 13/2013:[52]-[55], available online at <<http://www.lesotholii.org/ls/judgment/court-appeal/2015/1>> (accessed on 28 September 2015).

## PART V

### 6.7 Concluding remarks

Constitutionalisation of Lesotho's private law and the attainment of constitutional justice have been the centrality of this study. The call made above in the form of recommendations in that direction and development is an easy one. It may not be an easy one to carry out. Nevertheless, I must confess that the fundamental premise deeply hidden in the discourse about remedial action suggested by this research and which has the appearance of an irony is that the hortatory directives may not, in themselves, achieve these ultimate constitutional goals. Their fundamental importance and value, however, lie in the fact that they are intended to create a culture – a human-rights culture; a culture that will shape further action by providing a repertoire or toolkit of habits, skills, styles and methodologies from which new strategies of action may be constructed.<sup>47</sup> Speaking of this new culture in the context of the UKHRA and how it would affect UK judges and lawyers and the then prevailing legal culture in the UK, Hunt appositely notes:

If the present generation of judges and lawyers are to transform these existing elements of legal culture into the fully-fledged changes of approach described above as necessary, they will need to acquire a habit for critical self-reflection on their roles and techniques. This will require them to show a new sense of humility and critical inquiry, qualities for which, with some notable exceptions, they have not hitherto been renowned. It demands an open-mindedness, a receptiveness to new ideas, a willingness to reappraise long-held convictions and assumptions about the nature of law and legal practice, and to shed those reflexive techniques and methodologies which are no longer appropriate. Above all they will need to be alert to the ability of the prevailing legal culture to absorb change by an invisible assimilative process.<sup>48</sup>

The human rights culture that is projected through this study is a cornerstone in the reconstruction of a quality possessed by every citizen of Lesotho and which directly influences his or her ability to enjoy the rights and freedoms that are entrenched in the Bill of Rights in effective and meaningful ways.<sup>49</sup> It is in, metaphorical terms, a nutritious soil that nourishes and sustains the lawn.<sup>50</sup> It is a culture that can form a basis and act as a vehicle

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<sup>47</sup> See Swidler 1986:273.

<sup>48</sup> Hunt 1999:102.

<sup>49</sup> See Almqvist 2005:40.

<sup>50</sup> I use the metaphor employed by Tuori, who likened the visible lawn to the laws and the nutritious soil beneath the lawn and which sustains the life of the lawn by nourishing it, as the legal culture. According to him, legal culture functions as nutrition to the laws. See Tuori 1997:433.



for moving the constitutional review practice from the turbulent “high seas” of the centralised model of constitutional review on which it is currently “homed” and effectuate a rapid oscillation towards conformity with the constitutional framework. This human rights culture will, to a greater degree, be a buffer against sliding into the verticalisation of the Bill of Rights and the concentration of constitutional review in the High Court after the manner of the European constitutional review archetype.

Until then, the journey towards constitutionalisation of Lesotho’s private law and the attainment of constitutional justice begins with the suggested action. Reversing the old culture ingrained in the minds of judges, judicial officers, lawyers and officials because of long ages of familiarity, socialisation and experience is a daunting task. The creation or imposition of the new human-rights culture in place of the prevailing legal culture will be difficult. However, it is a task that should be undertaken, greatly enthused by the valuable objectives of constitutionalisation, rule of law and constitutionalism and moving the majority of the people of Lesotho from the margins into the mainstream of constitutional justice. It is therefore imperative to act, both backwardly and forwardly at the same time. Inaction is not an option. Our backward action should hasten the demise of the outdated and outmoded assumptions, ideologies, legal methods, methodologies, techniques and processes, while the forward action accelerates the establishment of the new paradigm envisaged more than two decades ago by the Constitution.

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Convention on the Elimination of Racial Discrimination

European Convention on Human Rights

International Covenant on Civil and Political Rights

Treaty of the European Union

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Universal Declaration of Human Rights

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