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GOOD GOVERNANCE IN LESOTHO: AN ANALYSIS OF THE RELATIONSHIP BETWEEN THE RULE OF LAW AND CONTROL OF CORRUPTION

by

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2010101323

Submitted in fulfilment of the requirements for

Masters Degree qualification

in the

Department of Governance and Political Transformation

in the

Faculty of Humanities

at the

University of the Free State

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Submitted: December 2017

ABSTRACT

Good governance has been highly promoted by Bretton Woods institutions and donor partners as pivotal to the development of any state. The study set out to analyse the relationship between the rule of law and control of corruption which are attributes of good governance.

The study employed qualitative approaches in order to explore court cases of politically exposed persons in Lesotho. Comparison was made between these cases and corruption case of President Zuma in light of Shabir Shaik's corruption case and consequent conviction in order to draw any similarities. Deductive approach was used to draw conclusions.

In recent years, Lesotho has been mired in political instability emanating from control of corruption. Several cases of politically exposed persons have been brought before the courts since 2012 when the first coalition government of Lesotho came into power. This shows the country's potential to detect corruption and prosecute, as well as how prone the systems are to corruption. Corruption continues to occur despite established anti-corruption institutions and laws. Efforts have also been made to institutionalise the rule of law. It is therefore important to study if the relationship between the rule of law and corruption actually promotes good governance in Lesotho or not.

The study observed that political power is closely associated with how the case progresses. It concluded that consolidation of the rule of law portrays weaknesses symbolised by a degree of arbitrariness by government and unequal treatment before the law in that those without political clout are made to face the full effect of the law while the politically powerful are afforded room to escape convictions. In this manner, the rule of law is failing to curb corruption in Lesotho when it comes to crimes committed by those who are politically connected.

The study also concluded that corruption undermines the rule of law in Lesotho. As politically exposed persons seek to continue to make personal gains from positions held, they leave detected weaknesses in the governing laws and regulations unchanged and they also manipulate them to manoeuvre their way out of indictments.

Overall, the relationship between corruption and the rule of law in Lesotho does not promote good governance.

Keywords: Corruption, rule of law, good governance, relationship, legal system, politically exposed persons, one-party government, coalition government, anti-corruption laws, political instability

DECLARATIONS

I,Limakatso Martinah Lehobo, declare that the Master's Degree research dissertation or interrelated, publishable manuscripts/published articles, or coursework Master's Degree mini-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 a qualification at another institution of higher education

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ACKNOWLEDGEMENTS

First and foremost I thank God for the grace to complete this study.

To my supervisor Dr Anel Keuler, I am very grateful for her professional guidance and commitment.

I would like to thank my family and friends for their support, inspiration and believing in me.

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LIST OF ACRONYMS

ABC	All Basotho Convention
AML	Anti-Money Laundering Authority
ANC	African National Congress
BCP	Basotho Congress Party
BNP	Basotho National Party
DA	Democratic Alliance
DC	Democratic Congress
DCEO	Directorate of Economic Offences
DPCI	Directorate for Priority Crime Investigation
DSO	Directorate of Special Operations
FIU	Financial Intelligence Unit
GDP	Gross Domestic Product
IMF	International Monetary Fund
LADB	Lesotho Agricultural Development Bank
LHDA	Lesotho Highlands Development Authority
MEC	Movement for Economic Change
MFP	Marematlou Freedom Party
NDPP	National Director of Public Prosecution
NEC	National Executive Committee
NGO	Non-Governmental Organization
NIP	National Independent Party
NPA	National Prosecuting Authority
PAC	Public Accounts Committee
PCEO	Prevention of Corruption and Economic Offences
PEP	Politically Exposed Persons

PFD	Popular Front for Democracy
RCL	Reformed Congress of Lesotho
SABC	South African Broadcasting Cooperation
SACU	Southern African Customs Union
SAP	Structural Adjustment Programmes
SAPS	South African Police Services
SARS	South African Revenue Service
SIU	Special Investigating Unit
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNDP	United Nations Development Programme
USAID	United States Agency for International Development

CHAPTER 1: Introduction and Orientation

1.1 Background of the Study

The concept of good governance surfaced in 1989 in the World Bank report on Sub-Saharan Africa which characterised the crisis in the region as a “crisis of governance” (World Bank, 1989). The World Bank coined the term good governance during the period in which corruption was soaring, aid was not effective, and there was lack of commitment to implement reforms by countries that received donations (World Bank, 1989). The World Bank (1999) defines good governance as “the manner in which power is exercised in the management of a country’s economic and social resources for development”. The Bank together with the International Monetary Fund (IMF) and other donor countries influenced the global economic policy by ensuring that good governance was central to any policy framework. They made it a precondition for receiving any form of financial assistance. Good governance continues to drive international development policy to-date.

According to Kaufman, Kraay and Zoido-Lobaton (1999:5), good governance consists of six main dimensions: firstly, voice and accountability, secondly, government effectiveness, thirdly, lack of regulatory burden, fourthly, the rule of law, fifthly, independence of judiciary and finally, the control of corruption. In 1998, the World Bank began to promote the establishment of the rule of law through legal and judicial reforms as fundamental to economic development. “The international organisations, donor governments and private foundations embraced the idea that building the rule of law might itself be a strategy for development” (Kennedy, 2003:2). In the words of Thomas Carothers (1998:96), it became “a new credo in development field that if developing and post-communist countries wish to succeed economically they must develop the rule of law”. The rule of law as per the United Nations (UN) refers to “a principle of governance in which all persons, institutions and entities... are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards" (Staton, 2010: 1461).

The rule of law was perceived to promote good governance and economic development through its role in the control of corruption. The notion that weak rule of law breeds rampant corruption has been supported as early as 1964 in the work of Leff followed by Huntington in 1968. It is common ground that the establishment of

the rule of law can greatly discourage corruption if law is enforced and acting contrary to the rule of law is always punished (Iwasaki and Suzuki, 2012: 56). Carothers (1998:99) is in agreement that strengthening the rule of law would help to control corruption and ultimately result in good governance. Finn (2004:12) also denotes that the rule of law deters corruption through consistent and equal application of the law to all which ensures transparency at all levels within a country.

Corruption refers to various activities inclusive of bribery. There is no *consensus* on the definition of corruption. It is commonly defined as misuse of public office for private gain. African Development Bank (2006) defines it as "behaviour on the part of officials in the public and private sectors in which they improperly and unlawfully enrich themselves, or those close to them, by misuse of the public power entrusted to them." This study will embrace this definition of corruption.

Empirical research affirms that there is a correlation between the rule of law and corruption. Hertzfeld and Weiss (2003:625) are of the opinion that when corruption is triggered by external forces, it weakens the effectiveness of the legal system thus reducing the ability to detect and consequently punish corruption thus increasing the allure of corruption. In the same vein, Andvig and Moene (1990:12) agree that government officials' inclination to engage in corruption depends on the effectiveness of the legal system and the chances of being exposed and accordingly punished. Andvig and Moene (1990:12) expounded that it was imperative whether the corrupt politicians were caught by a non-corrupt or corrupt public officer as the corrupt one would most likely permit the corrupt act to go unpunished while the non-corrupt one would seek to fully enforce due punishment. To summarize, corruption is the converse of the rule of law (Licht, Goldschmidt and Schwatz, 2003:9-10).

Corruption weakens the legal system and the ineffective legal system creates an environment that breeds further corruption (Sandgren, 2005: 724). Systemic corruption usually results in behaviour and informal rules of operation that contradict the fundamentals of the rule of law (Alberti, 1996:276). Besides entrenching a culture of disrespect for the rule of law, systemic corruption leads to dysfunctional judiciary system and law enforcement agencies (Litch *et al*., 2003:10). In countries with weak legal systems, leading politicians engage in corruption as another income stream that they seek to protect to such an extent that once they are corrupted they attempt to further reduce the effectiveness of the legal system and the judiciary through

influencing appointments made in key positions as well as budget allocation (Jain, 2001:72). In turn, reduced resources make it difficult for any legal system to make necessary reforms in order to combat corruption, thus allowing corruption to spread even more. Yeh (2011:194) observed in his study that corruption denied the relevant anti-corruption institutions a chance to implement reforms to enhance checks and balances; instead it paralyses them and makes them ineffective in their fight against corruption. Kostovicova (in Kaufmann *et al*., 2010:6), states that oftentimes when corruption has invaded a society, it is not because the government is not aware nor incapable of confronting the predatory rule of its leaders. Political leaders actually sustain a "system of arbitrary rule" and institutional instability to such an extent that the state remains weak but does not collapse and allows them to make personal gains from the situation (Kostovicova in Kaufmann *et al.*, 2010:6).

Corruption is a by-product of lack of comprehensive legal framework and accountability (Girling, 2002:110). Different forms of corruption originate from weak legislation that is poorly drafted which manifests through vague legislative processes, inconsistent legislative acts and poor observance of the law (Levin and Satarov, 2000:3). In their study on the relationship between the scale of corruption and legal theories, Pellegrini and Gerlagh (2008:253) observed that the scale of corruption in a government is often correlated to the laws that are put in place. It is government controls and regulations that facilitate corruption (Cheung, 1996:1).

1.2 Problem Statement

Corruption remains commonplace in Lesotho; sometimes even happening under the premise of law. There are even instances in which the legal framework itself was used to justify abuse of entrusted power for private gain. For example, the 2006/7 case in which government introduced regulation to allow statutory employees, including judges, to purchase its luxury cars for less than five percent of their prevailing market value. In 2016, government settled private debts of individual legislators to the tune of M32 million substantiating this with legal provisions.

Both petty and grand corruption is common in the public services sector (Ardigo, 2014:1). It is at this backdrop that Prime Minister Motsoahae Thomas Thabane stated that "corruption in Lesotho is the worst enemy after AIDS" (Lesotho Times, 25 July 2013:7). The recent trends also reflect an increasing number of Politically Exposed Persons (PEPs) who are indicted for corruption. PEPs refer to political

leaders such as ministers and directors in government departments. Several PEPs including former principal secretary at the Ministry of Finance, Mr Mosito Khethisa; former Principal Secretary in the Ministry of Home Affairs, Mr Retselisitsoe Khetsi and the current deputy Prime Minister Mr Monyane Moleleki, were charged on counts of fraud and corruption. Most of the indictments involving PEPs happened post-2012 elections. This was during the reign of Lesotho's first coalition government under the leadership of Prime Minister Motsoahae Thabane of All Basotho Convention (ABC). The coalition had declared in its policy document (2012) that it would fight corruption and strengthen the relevant institutions, including the Directorate of Corruption and Economic Offences (DCEO), as well as implement policy on declaration of assets by public servants. According to Majoro (in Business Day, 3 October 2014:1 of 2), resistance to anti-corruption initiatives by some PEPs within the coalition government resulted in the collapse of government in 2014. The parliament was prorogued and the country went to early national elections in 2015.

Post-February 2015 elections, the seven-party coalition government led by Prime Minister Pakalitha Mosisili of Democratic Congress (DC) also indicated in its agreement that it would "make transparency and good governance a hallmark of the government" and "eliminate corruption at all levels of society and government" (Government of Lesotho, 2015:4). However, the coalition government was soon enmeshed in corruption scandals and there were no attempts to hold the alleged perpetrators to account. Political tension within DC emanating from unbridled corruption, particularly around the fleet services tender which the finance minister, Dr Mamphono Khaketla, undeservedly awarded to Bidvest, resulted in the split of the party (Sunday Express, 9 November 2016: 8). Mr Monyane Moleleki who is currently deputy Prime Minister also made an allegation of organised corruption by the former seven-party coalition government, in which the parties recruited security services from their party followers only (Lesotho Times, 17 March 2017:4). Failure by the then Prime Minister, Mosisili, to act against corruption and enact Southern African Development Community (SADC) reforms partially instigated the passing of motion of no confidence in the government in March 2016 (Lesotho Times, 3 March 2017:4). Consequently, elections were scheduled for 3 July 2017, making it the third national elections within a space of five years. Following the elections, Lesotho is governed through a coalition government led by Prime Minister Thabane.

The frequent breakdown of governments in Lesotho instigated by corruption is not unique to Lesotho. According to Ravi (2013:47), coalition governments in many developing and developed countries experienced higher levels of corruption. Romania's centre-left coalition government collapsed in 2009 after nine months as social democrat ministers resigned in protest over the firing of the interior minister following comments he made about potential fraud in the run-up to elections. Later, in 2012, the Romanian coalition government once more collapsed after only two months following a vote of no confidence in the ruling government of Prime Minister Mihai Razuan Ungureanu (Bilelfsky, 27 April 2012:1). Kyrgyzstans' three-party coalition government collapsed on the 18 March 2014 as the smallest of the three parties in the ruling coalition quit, accusing Prime Minister Zhantantoro Satybaldiyer of abuse of office and corruption (Bneintellinews, 19 March 2014:2 of 2). In Bulgaria, the Bulgarian Social Party and Movement for Rights and Freedoms coalition government was dissolved on the 6 August 2014 following a scandal involving one of the country's largest banks and persistent allegations of corruption (Spendzharova, 7 August 2014:1 of 2).

The matter of concern is that corruption hampers good governance. The study fundamentally seeks to analyse the relationship between the control of corruption and the rule of law as a problem statement. The relationship between the two concepts has significant implications for good governance which ultimately has a bearing on economic development.

1.3 Aims and Objectives of the Study

The study seeks to debunk the relationship between the rule of law and the control of corruption in Lesotho. The first aim of this study is to define and discuss the concepts of corruption and the rule of law. The second aim is to determine how the rule of law deters or sustains corruption and vice versa.

The specific objectives are:

- To assess how the rule of law has contributed to curbing corruption hence promoting good governance in Lesotho.
- To assess how corruption has eroded the rule of law, thus undermining good governance.

- To make remarks on what the study deduces in terms of the relationship between the rule of law and control of corruption under one party system and under the various coalition governments.
- To provide recommendations on how to strengthen the rule of law and curb corruption.

1.4 Research Methodology

Studies that explore dynamics between good governance indicators tend to use different approaches. In his study, Nwekeaku (2014:26) attempts to determine the extent to which democracy and the rule of law have influenced good governance in Nigeria. He uses a political economy approach based on the Marxian dialectical materialism of the society as a framework for analysis. Mirugi-Mukundi (2006:59) employed desk review analysis of books, articles, case law, international and Kenyan instruments on corruption and internet sources in her study on the relationship between the rule of law, corruption and good governance.

The study will utilise case study research, specifically court cases of PEPs. One of the most prominent advocates of case study research, Robert Yin (2009:14) defines it as "an empirical enquiry that investigates a contemporary phenomenon in depth and within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident".

1.4.1 Approach and Sample Description

Through deductive and a mix of other qualitative approaches including desk review and one-on-one interviews where necessary, legal cases of PEPs will be analysed. The study will analyse four cases involving (former) ministers and principal secretaries in light of court cases of the former clerk of the national assembly, Mr Matlamukele Matete and corruption case of President Jacob Zuma. According to Eisenhardt (1989:545), "while there is no ideal number of cases, a number between 4 and 10 cases usually works well...With more than 10 cases, it quickly becomes difficult to cope with the complexity and volume of data".

The study will narrate court proceedings of the respective cases. The proceedings and developments surrounding the cases will be utilized to analyse congruence with the rule of law principles and implications for the control of the corruption. Court cases form the basis for case law which refers to written decisions that indicate

which cases were followed previously in the respective cases and why those cases followed the logic they did. Starting with recent cases first is efficient because it will reflect the prevailing state of the law as well as contains information of other preceding relevant cases (Thurgood Marshall Law library guide, 2016-2017:2-6). The cases selected are not only recent but characteristic of the more important public sector corruption cases investigated in the country.

The analysis of the court cases will yield insights on procedural consistency, compliance with court decisions and enforcement of court decisions as some of the indicators of consolidation of the rule of law. It focuses on the PEPs because if they are not protected against the law the rest of the society is most likely to be judged according to the law. How political leaders conduct themselves within a state has a crucial bearing on general governance (Balachandruru, 2006:814).

In addition, the study will bring forth a theoretical and conceptual framework which will debunk the concepts of corruption and the rule of law. The corruption cases will be analysed in light of corruption theories while the rule of law will also be assessed in light of perspectives and deliberations on the concept.

1.4.2 Data Collection

The study will use secondary data from national reports including media reports, legal cases, and journal articles while interviews will serve as primary data sources that will help substantiate desk review sources and vice versa. The study will employ purposive sampling method.

1.4.3 Limitations

The study seeks to analyse a sensitive issue that cuts across respect for the rule of law and corruption, hence, some stakeholders might not be as forthcoming if they fear that any genuine, yet negative, observation could lead to retaliation.

The parliament has not passed the Access and Receipt of Information Bill. This could give public officials a leeway to withhold information on government affairs pertaining to issues at hand. On the other hand, some of the information on the cases selected under this study has not been transcribed hence making some parts of the proceedings not easily available.

1.4.4 Ethical Considerations

This study seeks to conduct meaningful research that would promote good governance. All the resultant findings will be valid and will be accurately reported and portrayed. Interpretations, recommendations, and conclusions that emanate from the research findings will consequently be legitimate and could prove to be significantly insightful in the fight against corruption and strengthening of the rule of law.

1.5 Research Design

Chapter two provides conceptual and theoretical background on the rule of law. It also discusses the contentions on the concept of rule of law as well as rule of law as an anti-corruption tool.

Chapter three defines corruption and discusses the general notions held about its causes and forms. It also studies the impact of corruption and different approaches to curb it.

Chapter four provides contextual background on Lesotho's anticorruption legal and institutional framework. Bearing in mind that corruption is not purely an outcome of misconduct by individuals but can be instigated by imbalance in the political system, particularly democracy and the economic system (Girling, 2002:8), the chapter briefly discusses the political economy of Lesotho as well as the historical development of legal framework in Lesotho. This concurs with an observation made by Staton (2010:1468) that the rule of law should not be limited to the role played by the judiciary but should also take into account that in the long-term, the stability of the law is affected by the political system within which the legal institutions operate.

Chapter five outlines and analyses five corruption cases of PEPs namely: Mr Monyane Moleleki, Dr Timothy Thahane, Mr Lebohang Phooko, and Mr Mosito Khethisa. The fifth case of Mr Matlamukele Matete will be included to represent high ranking public officers without political clout. This will allow comparison in terms of how cases of ordinary public officers are handled relative to those who are in high echelons within their political parties. It studies the respective cases to get an understanding of the dynamics between the rule of law and control of corruption in Lesotho.

Lesotho is not just in close proximity with South Africa but also shares economic, political and legal ties. Chapter six draws lessons from a PEP case in South Africa. It

focuses on President Jacob Zuma's alleged corruption charges. Since the case has not been heard before the courts, the chapter reviews President Zuma's charges in light of evidence provided in Shabiar Shaik's court case. It relays Shaik's corruption case and uses the basis of Shaik's charges and developments around Zuma's case to draw lessons from which Lesotho could learn.

The final chapter provides recommendations on how forms of corruption identified through these court cases could be countered in order to enhance good governance. The chapter also looks at how the rule of law could be strengthened to guard against corruption and undermining of good governance.

CHAPTER 2: Conceptual Orientation of the Rule of Law

2.1 Introduction

This chapter starts by discussing the conceptual origins of the rule of law. It narrates development of the rule of law concept from as far back as ancient civilizations including the works of among others Aristocle and Plato, to the recent years when the rule of law forms part of the agenda of neoliberal capitalism. Subsequently, the Chapter attempts to lay a framework to define the rule of law, although acknowledging that there is no consensus on the definition of the rule of law. The modern meaning of the rule of law varies depending on whether emphasis is placed on economic, political, legal or human rights based issues.

In the same vein, theorists of the rule of law have been divided between two main schools of thought, namely, substantive or thick concept of the rule of law, which is grounded in liberal democracy and human rights and formal or thin rule of law, which is concerned with procedures followed in enacting and enforcing laws rather than with their content. The chapter explains these theories.

There are several arguments posed against the concept of the rule of law. These include indeterminacy thesis, legal instrumentalism and illegality of the law. The chapter highlights these common debates.

2.2 Historical Overview on the Conceptualisation of Rule of Law

The origin of the rule of law is found in Western legal history, in particular, the works of key Greek philosophers, Plato and Aristocle. It emerged as states attempted to derive the ideal form of government (Salman, 2006:4). Plato held that the best form of government was rule by a “philosopher king” who would willingly subject himself to the established laws even though his authority positioned him above the law (Chesterman, 2008:333; Cooper and Hutchinson, 1997:1402). This view was opposed on grounds that it described and supported Voltaire’s notion of “benevolent dictatorship”, which gives that a tyrant who can govern without public consultation would willingly govern in a manner that advances the common good (Wolff, 2006:62). However, Plato acknowledged that it would be a mammoth challenge to identify an individual with characteristics of a “philosopher king”.

Both Plato and Aristocle advocated for the rule of law because they were aware of the likelihood that the law could be manipulated to serve interests of those in power.

They recognised that human reason could easily be clouded by passion; and that being endowed with power to rule over others could potentially corrupt those in power and result in abuse of the led (Tamanaha, 2012:244). In other words, they were in agreement with the famous quote by Lord Acton that “power corrupts and absolute power corrupts absolutely”. Aristotle emphasised that “where the law is subject to some other authority and none of its own, the collapse of the state...is not far off; but if law is the master of government and the government its slave, then the situation is full of promise and men enjoy all the blessings that gods shower in a state” (Tamanaha, 2004:8-9). In summary, Aristotle insisted that government should be bound by law.

Aristotle opined that the rule of law was better than the rule of man because the latter added what he called “element of the beast”, which refers to influence on legal judgements emanating from an individual’s desire and passions (Tamanaha, 2012:243). He equated desire to a wild beast and perceived passion to pervert the mind of those who ruled (Tamanaha, 2012:243). Aristotle declared that the law was “reason unaffected by desire" and that the rule of law was reason while the rule of man was passion (Waldron, 2002:141). According to him (Aristotle), the fundamental condition for the rule of law was that the individual charged with making legal judgements should be capable of making such decisions based solely on reason and not passion (Tamanaha, 2004:9).

The notion of the rule of law changed from a medieval concept to one influenced by rational constructivism, and ultimately to the final one characterized by procedural justification (Colombatto, 2007:1167). The medieval perspective referred to the rules required to enforce (God-given) natural law. Natural law was considered to be part of divine order, either revealed by God through the Holy Scriptures or to be discovered by philosophers through use of reason (Colombatto, 2007:1165). According to Tamanaha (2012:237), in this era monarchs and government were restrained by law in three ways. Firstly, the monarch accepted that the law guided its conduct. The famous example being King John’s signing of the *Magna Carta*. Secondly, it was widely understood that the monarch and government officials operated within a framework of laws that applied to everyone. Thirdly, the routine operations of the monarchs and government officials occurred within the confines of the law as applicable to everyone else, although they still received favourable terms. The prince

would enforce the law and the church was to make sure the ruler would not abuse his power. There were, however, instances in which the kings or government officials acted outside of the law. The church would excommunicate the wayward kings as a way of enforcing divine law against them (Tamanaha, 2012: 238).

Natural law, as was conceptualised by John Locke, also entailed man's fundamental rights, including the right to life but not to harm others in their enjoyment of life, freedom and accumulation of wealth. However, the absence of a judge left room for biased punishment in cases where the rights of others were infringed (Tamanaha, 2004:48). Locke perceived government to be a result of conscious decision of men coming together and establishing it in order to make gains they could not attain as individuals; the government would draft and execute the laws for the community (Tamanaha, 2004:48). In turn, the community would adhere to the conditions or contract that formed the basis for government. In this contract the public agreed to give a ruler power only with regards to enhancing their welfare and protection of their property (Bassu, 2008:21). Locke advocated for separation of powers between legislature and executive, but not a separate judiciary, in order to ensure that government acted according to applicable laws (Tamanaha, 2004:48).

Like Locke, Hobbes also noted that human beings are self-interested beings, who being left to conduct their own affairs without any form of regulations or laws, would most likely take what belonged to others or resort to drastic measures to protect their property (Tamanaha, 2004:48). In addition, Hobbes added that individuals were also rational beings who realised that they would be better off if there were laws in place to ensure that justice was served and peace reigned. Consequently, the rational thing to do would be to enter into a contract in which they cede their power to an authority that would confer justice (Udehn, 2002:8). This contract has often been referred to as the social contract. This social contract, as explained by Rousseau, affirmed the will of the populace which was captured through the supreme law (Chesterman, 2008:337).

Montesquieu, pivotal in the French revolution, focused on methods of governance and concluded that it was essential to limit power and ensure that it worked to serve the social contract and not to be an end itself (Chesterman, 2008:337). Montesquieu stated that constitutional monarchy was an ideal form of governance because it decentralized power within a sovereign state, resulting in checks and balances on

the respective powers that ultimately curb authoritarianism (Cranston, 1986:1). It is at this backdrop that he advocated for separation of powers between judiciary, executive and legislature, which gave rise to constitutionalism (Chesterman, 2008:337). Montesquieu reasoned that the judiciary would make sure that the executive ruled according to the laws passed by the legislature, and that the legislature could not legislate outside the constitution, thus ensuring that law ruled (Bassu, 2008:21). He drew an example from England, where governance was shared among the crown, parliament and the courts of law.

In summary, the rule of law as grounded in divine natural rights which legitimised power only if it protected individual rights and enforced property rights, was aggressively challenged towards the end of the 18th century (Colombatto, 2007:1167). Legitimacy conferred by divine was replaced by a more democratic political order, "popular sovereignty", which was popularised by English, French and American revolutions. Popular sovereignty decreed that no one person or group should have property rights to political authority such that they could dispose of it as they pleased (Yack, 2001:518-519). This became justification for democratic forms of government which are formed through majority vote which are an expression of the people's will, following elections (Yack, 2001:518-519). Democracy, therefore, became the preferred procedure that legitimises the law. Law is considered good if it follows the right procedure and this includes engaging citizens in drafting the content of the law. According to Mattei and Nader (2008:14) and Kalawole (2013:133), the dominant liberal democratic tradition conceptualises the rule of law in two ways. Firstly, the rule of law ensures that contractual obligations are adhered to and that the public's property rights are protected from any potential unlawful seizure by the government. Secondly, the rule of law implies that government does not rule the public arbitrarily, but by the laws.

2.3 Conceptualization of the Rule of Law

2.3.1 Definition of the Rule of Law

The definition of the rule of law has changed in various ways since its inception. Definitions of the rule of law also border on the rule of law as a principle of law or as a principle of governance. Nonetheless, the two are still related in the sense that governance by law means governance by rules that fulfil the requirements of the rule of law as a principle of law (Rijpekema, 2013:795). As a principle of governance, the

rule of law describes the fundamental principles or regulations that should guide behaviour and power relations within society (Rijpekema, 2013:795). As a principle of law, the rule of law describes the fundamental principles that should regulate a legal system.

Bingham (2010:8) refers to the rule of law as governance where “all persons and authorities within the state, whether public or private should be bound by and entitled to the benefit of the law publicly and prospectively promulgated and publicly administered by the courts”. On the other hand, Matlosa (2006:39) defines it as governance in which the supremacy of the constitution is institutionalised and equality of citizens before the law is guaranteed. Tamanaha (2012:233) provides a simple definition that it means government officials and citizens are bound by the law and must abide by it.

Other definitions include ideals such as human rights and democracy and these are referred to as thick definitions. As was expressed by former United Nations (UN) Secretary General Kofi-Annan, UN defines the rule of law as a “a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards”. It also requires “measures to ensure adherence to the supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, the separation of powers, active participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency” (Fitschen, 2008:349). According to United States Agency for International Development (USAID), the rule of law refers to a state in which citizens, corporations and the state itself obey the law, and the laws are derived democratically (USAID in McCubbins, Rodriquez, and Weingast, 2010:9). Jallow (2009:77) refers to the rule of law as a principle of governance in which all persons, institutions and entities, including state itself, are accountable to laws consistent with international human rights norms and standards.

2.3.2 Conceptual Framework

The rule of law was coined by Oxford scholar and lawyer, Albert Dicey, in 1885 in his introduction to the “Study of the Law of the Constitution”. His conceptualisation of the rule of law has formed the basis for nearly all subsequent work on the rule of law.

According to Stein (2009:296) and Staton (2010:1465), Dicey perceived the rule of law to be shaped by three broad principles.

1. The first is the absence of arbitrary government power. In Dicey's words, "no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land". This implies that at no point should community be punished for anything except that which is clearly stated in the published law.
2. Secondly, Dicey stated that "every man, whatever be his rank and condition, is subject to the ordinary law of the realm and amenable to jurisdiction of the ordinary tribunals". In essence, all people should be treated equally before the law, whether ordinary citizens or political and economic elites.
3. Thirdly, constitutional law should serve as fundamental law. Dicey uttered that "the general principles of the constitution...are...the result of judicial decisions determining the rights of private persons in particular cases". This implies that judicial decisions in any court case should be in line with provisions of the constitution.

Drawing from Dicey's contribution and complementing it, Economist Friedrich Hayek through his 1960 publication, "the origins of the rule of law", traced historical developments in the concept of the rule of law taking into account contributions by Greek, Roman and British philosophers, as well as the French enlightenment. Hayek noted that there was *consensus* in their writings on principles of the rule of law that law should be superior, non-arbitrary, enforced by independent judiciary separate from the lawmakers and that all should be treated equally before the law (Stein, 2009:298). Hayek defined the rule of law as follows, "stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in a given circumstance and to plan one's individual affairs on the basis of this knowledge" (Hayek, 2007:112; Hayek, 1979:54). Kapás and Czeglédi (2007:10) contested this Hayekian definition on the grounds that it limited the rule of law to the coercive activities of the government and neglected the non-coercive ones which limited functions of government to those carried out through general rules.

Joseph Raz expanded on the work done by Dicey. He acknowledged that law should conform to standards such as prospectivity, generality, transparency, clarity and stability in order to effectively guide action. Raz (1979:226) concluded that “a knife was not a knife unless it had some ability to cut”; hence for the law to be regarded as law, it must be capable of guiding behaviour, even if it is inefficient. He was of the perception that the rule of law was not necessarily a moral compass, but rather, an inherent virtue of the law (Raz, 1979:226). He expounded that the rule of law had to do with set general principles that enabled the law to effectively and efficiently guide behaviour (Bennett, 2011:609). His significant contribution was adding institutional dimensions of the rule of law, namely, independent judiciary, judicial review and that discretion of crime preventing agencies should not be allowed to prevent the law (Staton, 2010: 1467). Independent judiciary refers to judiciary that has been granted the freedom to carry out its duties without fear, favour, prejudice or pressure from other branches of government while judicial review refers to a set of legal principles that guide the conduct of public bodies such as the executive. Lack of or non-adherence to judicial review results in authoritarian or totalitarian states, but with judicial review states comply with the rule of law (Street, 2013:12). Raz stated that not only should courts be easily accessible but the courts’ judgements should be guided by law in all cases; the hearings should also be open and fair without any bias (Waldron, 2011:11).

Waldron (2011:6) argues that Raz’s institutional characteristics should be matched with a list of procedural characteristics that are equally indispensable to the rule of law. These requirements are often associated with terms such as "natural justice," which are essential to the rule of law. According to Waldron (2011:6), the requirements ensure that no individual experiences any form of “penalty”, “loss” or “stigmatization” unless it is a direct result of procedures that involved:

- A hearing by an impartial tribunal that is required to act on the basis of evidence and argument presented formally before it in relation to legal norms that govern the imposition of penalty, stigma, loss, and so forth;
- A legally trained judicial officer, whose independence from agencies of government is ensured;
- A right to representation by counsel and the opportunity to properly prepare a case;

- A right to be present at all critical stages of the proceeding;
- A right to confront witnesses against the detainee;
- A right to assurance that the evidence presented by the government has been gathered in a properly supervised way;
- A right to present evidence in one's own behalf;
- A right to make legal argument about the bearing of evidence and about the various legal norms relevant to the case;
- A right to hear reasons from the tribunal in their final decision-making in response to the evidence and arguments presented before it; and
- The right of appeal to a higher tribunal.

Ronald Dworkin also made a significant contribution in the literature on the rule of law. He distinguished two different substantive conceptions of the rule of law. According to Salman (2006:8), the first one is “the rule book conception” which purports that government should only exercise its power against individuals within the confines of the law. This law should have been made known and availed to all in advance. The second conception of the rule of law is “the rights conception” which idealises that the “rule-book” covers and enforces moral rights (Dworkin, 2000:11-12).

In his work, “the third theory of law” which together with the work of John Rawls became known as “law as integrity”, Dworkin (1986) focused on, among other matters, legal reasoning in hard cases. He stated that hard cases often arose when the body of law was silent on the matter at hand and when prior rulings were not adequate to resolve disputes emanating from conflicting responses (Keating, 1987: 526-527). Hard cases, therefore, encourage deeper understanding of the law and force judges not only to adhere to pre-existing legal rules but to also come up with moral principles in line with the law (Dworkin, 1986:185). In terms of the principle of integrity in legislation, Dworkin articulated that the legislators should keep the law coherent. They should maintain coherence by ensuring that past judgements and reasons why they were reached were allowed a ‘special power’ in the courts. In addition, the judges should holistically consider the body of law they administer and not as a set of discrete decisions that they could easily make or amend at will (Dworkin, 1986:167). According to Dworkin (1986:167), these were the requirements

that formed part of the conception of law, thus being a direct expression of the rule of law.

Lon Fuller added two criteria to the list of qualities that enabled law to fulfil its functions. Firstly, he stated that law should not require the impossible and secondly, that laws should not contradict each other (Staton, 2010:1466). He premised his work on eight conditions which he referred to as, “inner morality of law”. He penned that the rule of law should adhere to the principles of “inner morality of law” and that total disregard for the internal morality of law was incompatible with the existence of law (Bennett, 2011:607). In other words, failure to conform to these principles would result in a flawed legal system. Fuller’s eight inner moral characteristics of the law as articulated by Staton (2010:1466) are as follows:

- **Generality** - the legal prescriptions have to apply to general populace or acts and not individuals or a particular act respectively.
- **Publicity** - the rules have to be promulgated as the people can only be guided by them if they know them. People have to be aware of the rules they follow.
- **Prospectivity not Retroactivity** - law must prescribe modes of behaviour prospectively so that no one will be subject to the "threat of retrospective change". Rules that are meant to influence behaviour that has already occurred before a rule was set cannot achieve the purpose of actually guiding human conduct.
- **Clarity/Understandability** - the rules can only guide behaviour if the subjects understand what it requires. Promulgation is not enough. If unclear they leave subjects confused, hence unable to follow the prescriptions.
- **Consistenc**y - rules should not be contradictory because if a rule prescribes one thing and at the same time something else, the subjects cannot follow both.
- **Possibility** - that is, the prohibition of "rules that require conduct beyond the powers of the affected party". A rule or prescription may be comprehensible and not inconsistent but, in practice, impossible to follow. A rule that people cannot follow is a rule that cannot guide human conduct, even if it is understood perfectly well. Suppose that you order me to fly without any

mechanical assistance. I understand what you say, and I know what following your command would be like, but I just cannot do it. To guide human conduct, rules must require conduct that is possible for the ruled subjects to perform.

- **Stability** - It is generally assumed that some level of stability over time is essential for the law to achieve its purposes, whatever they are. The law can change, of course, and changes in the law are not infrequent in any modem legal system, but the assumption is that if changes are too frequent, people cannot follow the law. This stems partly from the fact that many of our actions which the law purports to regulate require advance planning preparation and a certain level of guaranteed expectations about the future normative environment.
- **Congruence between the stated rules and their actual administration** – "Promulgated and actual application of the law needs to be consistent in order to guide behaviour. This principle requires that law enforcement agencies actually apply rules promulgated by law in practice".

Fuller states that these principles are important because they maintain reciprocity between government and the citizens. Government abides by the rule of law; in return, citizens obey the law (Bennett, 2011:607). Fuller's contribution was contested by some legal philosophers who maintained that the values associated with the rule of law were not moral values since it had no effect to make the law good in a moral-political sense but merely in a functional way (Marmor, 2004:1).

2.3.3 Theories of the Rule of Law

Theories of the rule of law are grounded in either a positivist or negative account of law. According to Moore (2013:191), the fundamental assumption of the positive myth model is that law is legitimate and that the majority of people strongly believe that other people adhere to the rule of law principles, thus making contrary behaviour a social disgrace. It follows that in such societies, the law reigns over all citizenry, prevailing politics and personal interests, those who make laws (legislators) as well as bureaucrats and public officials who implement the laws (Moore, 2013:191). To the contrary, the negative myth culture is one in which there is lack of respect for the law and the implementing institutions, and this is reflected by citizens who frequently

violate the law and engage in corrupt practices because they think others are also conducting their affairs in the similar manner (Moore, 2013: 191).

The different theories of the rule of law are clustered in formal versions and substantive versions that span into three different forms as in Figure 1.

Figure 1: Versions of the Rule of Law

	Thinner ⟹ Thicker		
Formal Versions	**Rule by Law** (Law as instrument of government action)	**Formal legality** (Prospective, general, clear, certain)	**Democracy and Legality** (consent determines)
Substantive Versions	**Individual rights** (property, contract privacy, autonomy)	**Right of dignity and/or justice**	**Social Welfare** (substantive equality)

Source: Tamanaha (2004:91)

2.3.3.1 Formal Versions of the Rule of Law (Thin Versions)

Formal versions of the rule of law mainly focus on the conformity of principles of the legal system to certain principles. These principles are: the existence of a formal independent and impartial judiciary, publicised laws, laws that apply to all citizens regardless of their societal standing and the provision for judicial review of government action. Formal versions also place emphasis on whether the law is clear enough to guide behaviour, whether it is prospective and the manner in which the law was disseminated, and whether this was done by a legally authorised individual or entity (Tamanaha, 2004: 91). In a nutshell, formal conception doesn't impose any requirements upon the actual content of the law seeing that it is not concerned with whether the law is good or bad as long as basic precepts of the rule of law are met (Craig, 1997:1). As articulated by Barak (2005:2), formal conception of the rule of law is not limited to a certain political system, what matters is whether public order is upheld.

a) Rule by law

This is the thinnest version that has its roots in the works of, among others, Montesquieu and Holmes. In terms of literature, the rule by law is generally described as either the minimal rule of law or a political arrangement in which rulers treat the law as an instrument of control. Balasubramaniam (2009:405) explained that the rule by law existed when the government exploited the law to employ arbitrary power but portrayed a picture of political and legal legitimacy. As the minimal rule of law, rule by law is meaningless in dictatorial governments where rulers could pass laws, amend or repeal them at any point in time (Cheema, 2016:454).

As articulated by Thomas Holmes, the rule of law and the rule by law are not mutually exclusive; rather, they are a gradual transition from one state to another regarding the rule of law (Holmes in Maravall and Przeworski, 2003:19). This means that a state could be at various levels towards achieving a fully fledged rule of law. The rule by law could therefore be regarded as a level higher than the rule of man which makes it ideal for rulers who don't want to subject themselves to the stipulations or principles of practice as per substantive rule of law (Bedner, 2010:48). The rule by law undermines the rule of law by exploiting the legal framework in order to serve illegitimate private ends rather than the common good (Cheesman, 2014:104). Cheesman (2014:105) concluded that rule by law came into force when institutions were not allowed to function efficiently but still functioned enough to enact some laws but those laws and institutions are manipulated by those in power for personal gain.

The difference between the rule by law and the rule of law also lies in the distribution of power and resources as well as organised interests (Maravall and Przeworski, 2003:3). Society comes closer to achieving the rule of law when there is no close proximity between wealth and political power (Cheesman, 2014:106). In addition, society progresses towards the rule of law, when no group in society becomes powerful and influential to the point of dominating others and the law (Maravall and Przeworski, 2003:3). According to Maravall and Przeworski (2003:3) the rule of law emerges on the continuum. Firstly, self-interested rulers willingly make their behaviour predictable by restraining it as per the law; in turn, the groups

commanding valuable resources in society voluntarily cooperate and offer sustainable support. Lastly, the rulers reward the cooperation with protection of the groups' interests.

b) (The emptiness of) Formal legality

This concept is a dominant notion of the rule of law within liberalism and capitalism and provides predictability of law (Tamanaha, 2012:240). It was espoused by Hayek but Joseph Raz and Lon Fuller also adopted this version. As did Hayek, Raz believed that the law should be capable of guiding the behaviour of its subjects and identified elements of the rule of law to include: prospectivity, generality, clarity, public promulgation and general stability (Tamanaha, 2012:240). Fuller added consistency between the rules and actual practice to the elements of the rule of law identified by Raz. Raz argued that if the rule of law was taken to encompass necessity for 'good law' the concept ceased to have any useful independent function, he proposed that instead people should refer to voluminous literature which addressed rights or other factors regarding good law (Craig, 1997:2).

However, Raz, Hayek and Fuller disagreed on the understanding of equality requirement and whether the rule of law itself represented a moral good. Hayek (in Tamanaha, 2004:94) was of the opinion that if all people were regarded as equals, this would eliminate any arbitrary application of the law. Fuller argued that the rule of law is a moral good as it helped the people to govern their lives (Fuller, 1969:209-10). He further elaborated that the rule of law could be equated to good because legal systems with the formal characteristics were more likely to also have law with fair and just content; and he emphasised that legal system would not be regarded to exist if it did not adhere to the principles of legality or inner morality (Cheema, 2016:455). Raz (in Tamanaha, 2004:95) argued that "like a knife which is neither good or bad in itself, but could be used to kill a man or to slice vegetables, the morality of law is a function of the uses to which it is put", to such an extent that the rule of law in an immoral legal regime would be immoral. Raz (1977:211) further argued that a non-democratic legal system based on denial of human rights, abject poverty, racial divide and persecution, as well as sexual inequalities could in principle meet the requirements of the rule of law better than any of the legal systems of liberal democracies. In other words, an oppressive and unjust legal system could excellently meet the requirements of the rule of law as exemplified in

the legal systems of the Apartheid South Africa and Nazi Germany as well as the United States which legally enforced slavery and racial segregation (Raz, 1977:211). It is on this account that Tamanaha (2004:93), stated that this account of the rule of law was compatible to evil because it made no effort to differentiate between good or bad content of the law.

The emptiness of formal legality contradicts the fundamental objective of the rule of law which is to restrain power in order to discourage arbitrary rule by government (Tamanaha, 2004:95). Formal legality therefore implies that government could do as it wished as long as it could carry out those activities in consistency with general, clear, certain and public legal rules declared in advance.

c) Democracy and formal legality

According to this version, the legitimacy of positive law is guaranteed by whether the procedure followed to enact it was rational (Habermas, 1988:260). Law derives its legitimacy from democratic processes while democratic process could in turn derive their legitimacy from the prevailing laws that shape the political framework and systems for dispute resolution (Cheema, 2016:456). This brand of formal rule of law demands that government acts in accordance with the law which is derived through democratic processes (Cheema, 2016:456).

Various philosophers contributed in the literature of this version. Rousseau (in Prokhovinik, 2013:42) postulates that good procedure entailed ensuring that the content of law was derived by those who would be subject to it. Similarly, Kant (in Chou, 2016:44) states that it is the consent of the people that determined the rightfulness of the law. This means that if the right procedures that legitimise law are followed, the law should get its authority from the assent of the citizens. Kant expounded on the issue of consent that it did not mean what citizens agree upon when consulted, rather what they would agree to if they acted consistent with reason (Tamanaha, 2004:100). Jurgen Habermas (in Baxter, 2011:100) reiterated that legitimacy of the law required unanimous or universal consent, but emphasised that this did not mean that all citizens should be in accord as this would hinder beneficial initiatives should some decide to hold others ransom. In agreement, Locke (in Tamanaha, 2004:100) explained that requiring direct participation and anonymous public consent would stifle progress; instead he proposed democratic governance in which individuals give their consent and majority helps with final direction

In summary, formal legality especially its requirements of certainty, equality of application derives its authority from and serves democracy. According to Tamanaha (2004: 99), in the absence of formal legality, democracy would be undermined as public officials disrespected the law; conversely, in the absence of democracy, formal legality would lose its legitimacy since the content of law would not be derived through the correct or legitimate process. The main weakness of this theory is that in a country that fronts democratic governance, the government could use law to advance its agenda while claiming legitimacy conferred by democracy.

2.3.3.2 Substantive Versions of the Rule of Law

It acknowledges the formal precepts of the rule of law but it also distinguishes between good and bad laws on the basis of content and compliance with these rights or justice (Tamanaha, 2004:91; Cheema, 2016:456).

a) Individual rights

According to Dworkin (1985:11-12), citizens have moral rights and duties towards one another and political rights against the state which should be recognised in law and enforced through judicial institutions. However, determining the components of individual rights is a controversial matter. According to Tamanaha (2004: 104), “no right is absolute, so consideration of social interests must always be involved, which cannot be answered through consultation of rights alone”. Barak (2005:19) concurred that basic right was not absolute, but relative, as the right of one person has to be limited in order to protect others and maintain a balance between rights and obligations. For instance, one’s freedom of expression might infringe on another’s dignity which denotes conflicting interests, which require being managed by law (Barak, 2005:19).

However, the indeterminacy of law could undermine individual rights if the judges apply own views where the law is silent on some rights, thus resulting in rule of men, the judge, and not the rule of law (Tamanaha, 2004:105). Furthermore, if the state makes laws based on majority principle and in the process violates the basic rights of the minority and detracts from social justice, the rule of law becomes compromised (Barak, 2005:17). The rule of law supports both public and social order.

b) Right of dignity and/or justice

The rule of law is a precondition of human dignity and demands the legal system to have consistency in protecting human rights (Riley, 2015:92). This version follows stipulations of the Universal Declaration of Human Rights, 1948 (Article 1), which states that “all human beings are born free and equal in dignity and rights”. It follows that dignity of every man should be protected regardless of their status or circumstances. Barak (2005:18) explains that even the dignity of a prisoner or detainee should be guarded and they should not be tortured to divulge information during interrogation but should be afforded the respect to willingly speak the truth.

In this context, human dignity is limited to the moral stance within the legal system, taking into account the relationship between the systems and justice, integrity and respect (Riley, 2015:92). It can, therefore, be deduced that the rule of law can be attained when certain institutional arrangements are in place (Allan, 1993:21-22).

c) Social Welfare

This is the thickest version and it includes legality, individual rights, democracy and “social welfare rights”. The social welfare conception of the rule of law expects government to take measures that improve the wellbeing of the citizens to the extent of applying distributive justice where such a need arises (Tamanaha, 2004:113).

2.4 Contentions on the Rule of Law

There are several arguments around the concept of the rule of law. Aristocle argued that the rule of law could be used for evil purposes in some political situations (Chesterman, 2008:337). The work of Raz also portrayed a similar stance. He stated that a non-democratic legal system based on the denial of human rights, abject poverty, racial divide, sexual inequalities and religious prosecution might observe the requirements of the rule of law in comparison to democratic ones (Cheesman, 2009/10:599). For instance, legal systems of apartheid South Africa and Nazi Germany used law to achieve pernicious ends. According to Marmor (2004:15), this occurs because the rule of law does not consider who made the laws, thus allowing illegal laws to come into force in some instances. In addition, as articulated by Raz (in Mattei and Nader, 2008:4), the rule of law is not concerned with whether the law is good or bad but whether the law guides behaviour of the citizens or whether they adhere to the principles of the rule of law. Consequently, Marmor (2004:15) argues

that citizens should not be bound to respect and act in accordance with such corrupt and unjust legal systems simply because they are legal.

Walker (in Mootz, 1993:274) also contended that the rule of law could be undermined in two ways. Firstly, when legislation fails to promulgate laws that guide general conduct of the citizens; rather, some groups lobby for protective laws. Secondly, the rule of law could be deterred if judges adjudicated on the basis of the status of litigants and not laws relevant to such cases, resulting in *ad hoc* judgements.

In the same vein, Mattei and Nader (2008:4) opined that the rule of law could be illegal when the judiciary does not apply law consistently across citizens, thus victimising the weak or when authorities apply the law "criminally, arbitrarily and capriciously". Mattei and Nader (2008:4) also emphasised that the double-edged nature of the rule of law should not be overlooked as the rule of law could either favour oppression or empower the oppressed in either a domestic or international context. That is, law could serve as a mere tool for government to oppress its subjects. The same point was emphasised by Nuitjen and Nader (2007:14) who cautioned that rulers could use the pivotal role they ought to play in bringing about social change and direction by abusing the legal rules and procedures to the benefit of certain economic groups.

Some arguments stated that the rule of law might be impossible because of indeterminacies in the law. According to Aristocle, vagueness of the rule of law made arbitrary governments inevitable; this follows that the ideal rule of law is to some extent unattainable (Endicott, 1999:1). The indeterminacy of the law exposes the citizens to the will of the judges or the courts in the sense that where law does not make provisions for some cases, judges need to use their discretion to resolve the cases. Montesquieu (1748:157) argued that when the judge becomes the lawmaker, the life and liberty of the subjects were exposed to arbitrary control. This implies that when the law is vague it becomes impossible to adhere to the principle of the rule of law which demands that the courts should always treat similar cases in a similar manner (Endicott, 1999:4). Moreover, allowing the courts discretion to resolve cases where the law is vague creates room for the rule of man. It is at this backdrop that both Aristocle and Plato contended that the best form of governance was the rule by man and not the rule by law as law could not guide behaviour in all situations, given

that some are difficult to anticipate, hence, to draft relevant laws resolve them (Tamanaha, 2004:10).

Postmodernist, Joseph Singer (1989:94) argued that “if traditional legal theorists were correct about the importance of determinacy to the rule of law, then - by their own criteria – the rule of law has never existed anywhere”. What singer meant was that if the existence of the rule of law demanded law to be determinate in every situation, which was impossible, then this would translate to the fact that the rule of law could not hold in any state. Focusing on linguistic indeterminacy, Mootz (1993:256) argued that language also hindered clarity of the legal rules which made it difficult to comprehend or follow them across different cases or interpreter’s opinion. He based his argument on the fact that English is commonly used as the preferred language by different stakeholders including the legislature and the judiciary, which implies that the law is valid to the degree of its semantic meaning as opposed to the prevailing law.

Some of the work attempted to explain that indeterminacy of the law did not equate to non-existence of the rule of law. According to Kelsen (1991:124), “law regulated its own creation”. In this manner, the ideal of the rule of law still held as law is able to inherently resolve its creation as well as changes. Endicott (1999:13) also explained that vagueness of the law did not mean that the rule of law was limited because the rule of law requires that law resolves cases; this is in the same way that discretion does not result in any deficit. Endicott (1999:19) emphasised that vagueness in law only created a deficit when it was manipulated by authorities to serve their passions and elevate themselves above the rule of reason.

The other argument was the rule of scepticism by Thomas Hobbes. He found it illogical that a ruler could be bound by the law because the law is the “command of the sovereign”. According to Hobbes, one who creates laws could not be limited by them as he could alter the laws at will (Staton, 2010:1464). He (Hobbes) concluded that the rule of law was not possible because the government, whether monarchy or parliament, was highly unlikely to subject itself to the legal rules which would ensure that the rule of law was applicable to the governed and governor alike (Staton, 2010:1464). Hobbes opined that the only way for the ruler to be subject to law was if the sovereign was in turn answerable to another authority that was known to

everyone and supreme to all earthly leaders such that ultimately it's not the text that has the final say (Chesterman, 2008:335; Tamanaha, 2004:48).

Another argument on the rule of law was that it could also be affected by the view taken on the law. Tamanaha (2004:7) argued that a lawyer who viewed law as an instrument to win the case without observing innate integrity of law could manipulate the legal rules and processes in the interests of the client; while a lawyer with a non-instrumental view would respect the legal rules and maintain the integrity of the law. In the same manner, an instrumental judge could manipulate the applicable legal rules to make a personally favourable ruling while non-instrumental judge would remain committed to following applicable legal rules regardless of the outcome. This implies that consolidation of the rule of law would be difficult to achieve without respect for the rule of law.

Non-partisans of democratic rule including, Aristocle and Plato, argued that it potentially legalised the "rule of the mob" in which individuals who lacked competence, will or moral fibre to prioritize citizens' wellbeing became the sovereign (Tamanaha, 2004:10). Colombatto (2007:1170) contested that changing the rule of law conception from moral legitimacy or God given moral standards to procedural (democratic) had reduced the rule of law to a mere mask behind which discretionary power could be freely exercised by senior civil servants and politicians who determine the trajectory of government initiatives, which may be done with disregard to protection of citizens' rights or in simple collusion with other bureaucrats or politicians for personal gain. Ngugi (2005:517) argued that the orthodox view of the rule of law as per neoliberal formulation was an institutional mechanism through which government ceded its economic role to the market participants. In other words, it was likely that the rule of law was mainly shaped and dictated by external influences more than local social and cultural dynamics. Ngugi (2005:217) further asserted that this version of the rule of law had undertones of totalitarianism in the sense that it allowed imposition of what has already been decided under pretence that there is citizen participation.

2.5 Recapitulation

A political system is effectively led by the rule of law when its leaders abide by the law and submit to it; but it lacks the rule of law when the leaders act in disregard of the laws and are not held accountable (Mattei and Nader, 2008:14). Essentially, the

behaviour or conduct of individuals should be solely and consistently judged on the basis of the written law and not any other random demands (Cohen, 2010:4). The rule of law requires fairness and equality before the law so that the government and the citizens are all held accountable under the publicized laws through established systems of checks and balances, either institutional or constitutional (Rosenfeld, 2001: 1307). According to O'Donnell (2004:33), equality before the law implies that administrative application or judicial adjudication of legal rules is consistent across similar cases despite societal status or political affiliation and that procedure is pre-established. It is a "mechanism for democratizing power by disciplining power" (Finn, 2004:12).

It is worth emphasizing that the rule of law is not concerned with imposing restrictions on power; rather, it seeks to create an environment in which power of public leaders is shaped and directed by laws that are known to the general public (Finn, 2004:12) and not arbitrariness. In a nutshell, the key objective of the rule of law is to curb arbitrariness by government. An arbitrary government is characterised by: dictatorial tendencies manifesting through governance by the will of the rulers and not the law, lack of consistent treatment of citizens in that similar cases are not treated alike and lack of a clear stance and communication to the general public by government on issues such as their rights and duties within a state (Endicott, 1999:3). In simple terms, the government is arbitrary if it is not subservient to the law, inconsistent in its decisions and actions, and detracts from the provisions of the law.

2.6 Conclusion

Although the rule of law has come to be observed as a political ideal, it still remains a contested concept. There is disagreement on what it is and this is manifested in the different conceptions of the rule of law. Generally, it refers to a principle of governance and law that laws should be public and general, clear to guide behaviour and binding to both government and citizens alike. The common arguments include the indeterminacy thesis which argues that the rule of law was impossible in practice given that law itself did not clearly give provisions for all various cases that were likely to happen. The argument is that since law itself is vague in some regards, it could not always be able to provide solutions or clearly guide behaviour. This, in turn, brings in the element of discretion and the will of the judges, who ultimately

adjudicate such cases. If corrupt, judges could make a ruling on some of the cases based on how they felt and not the facts at hand. Arguments with relevance to application of the rule of law, in democratic states, emanated from the fact that it was possible within a democratic state to legalise rule of the unlearned and corrupt individuals who legally undermined the rule law. In such instances, the rule of law is used to achieve personal ends and not the common good as purported by legal instrumentalists.

The main conceptualisations of the rule of law are formal/thin and substantive/thick conceptions. The former views the rule of law to be concerned about form of law and the procedure by which law is made; while the latter requires law not only to be done through right procedures but that law must also comply with other standards. In other words, the thicker conception approaches the rule of law not only from a legal perspective but from an economic, political, human rights, democracy and human security perspective as opposed to thin definitions which are more concerned with procedural compliance.

The rule of law ideal is pivotal in curbing arbitrariness within states. It is intended to ensure that the government and its institutions are subject to law as much as ordinary citizens are, and that all cases are judicially handled the same, regardless of an individual's societal or financial status. In addition, the rule of law is meant to order behaviour such that all people know what is expected of them and the consequences of failure to comply.

CHAPTER 3: Conceptualization of Corruption

3.1 Introduction

This chapter provides an understanding of corruption as deviation from the common good. Although there is no consensus on the precise definition of corruption, it has come to be generally regarded as the use of public office for private gain. The chapter provides some of the working definitions of corruption.

Corruption is often equalled to bribery, but this is a narrow perception of corruption as it entails different forms. These forms are also explained, particularly the distinction between grand and petty corruption. That is, the distinction between corruption of society's elite and the corruption by the lower echelons respectively.

Various factors spanning from low salaries, organisational culture, moral flaws and weak legal framework or system instigate corruption. Identifying causes of corruption in a specific context is very important as the causes vary from country to country, organisation to organisation or from one public administration to another. The chapter discusses different theories that expound on the possible causes of corruption. These causes dictate the solutions to be employed to curb corruption. The section discusses three schools of thought on approaches to combating corruption namely: economist, business and lawyers approaches.

3.2 Corruption Defined

The genesis of the word corruption is latin "*corrumpere*" which means to "break in pieces, destroy, ruin, spoil, mar, adulterate, falsify, draw to evil, seduce, [or] bribe" (Moore, 2009: 36-37). As a concept, corruption denotes a process and behaviour that departs from the law and norms, ethics, morality and is generally not in the interests of the common good. Although there is no *consensus* on the universal definition of corruption, there are working definitions that are generally used globally. Girling (2002:10) opines that an effective definition of corruption should portray the interplay between power, wealth and values. Specifically, it should demonstrate that corruption results when power is misused for private ends while wealth or economic power is abused to exploit the powerless, and finally when market values which prioritise profit-making penetrate the political system resulting in a shift from serving the common good (Girling, 2002:2).

Corruption is widely defined in normative terms. Hungtington (1989: 377) defines corruption as the “behaviour of public officials which deviates from accepted norms in order to serve private ends”. Similarly, Nye (1967:419) defines corruption as “deviation from the normal duties of a public role for private, pecuniary or status gains. Such violations of duties or roles include bribery, nepotism and misappropriation of public resources for private use”. Agbiboa (2012:327) uses a harsh tone and refers to corruption as “political prostitution”, where civil servants sell their public offices to the highest bidder for personal gain, whether pecuniary or non-pecuniary.

The normative definitions allude to the fact that corruption is a process that contradicts the very foundation on which a state and citizenry were founded; which is for the elected leaders to act in the best interests of the citizens or common good at all times. Balogun (2003:129) states that corruption exists when an “approved code or rules have been ignored to attain personal ends or manipulated to frustrate public intentions”. African Development Bank (2006) defines it as “behaviour on the part of officials in the public and private sectors in which they improperly and unlawfully enrich themselves, or those close to them, by misuse of the public power entrusted to them.” Similarly, Transparency International (in Sandgren, 2005: 722) defines corruption as “misuse of entrusted power for private gain”. World Bank (1997:19) defines corruption as “the illegal use of public resources for personal gain” while the International Monetary Fund (IMF) (2005) defines corruption as “the abuse of Public authority or trust for private benefit”. In its study ‘Fighting Corruption to Improve Governance’, the United Nations Development Programme (UNDP) (1998) defines corruption as “the misuse of public power, office or authority for private benefit...”

Lambsdorff (2007:16) breaks down the meaning of corruption by explaining its core components: private benefit, public power and misuse. He asserts that private benefit involves nepotism and favouritism where decisions are influenced or regulations are manipulated in ones’ favour. On the other hand, Lambsdorff (2007:16) explains public power as exercised by bureaucrats and politicians appointed and elected into their respective offices such as the judiciary, customs and taxes, police, public utilities and other government services. Finally, Lambsdorff (2007:16) explains that misuse could either emanate from behaviour that is contrary to formal duties of a public office or where private interests are pursued.

3.3 Types of Corruption

Corruption can either be “according to the rule” or “against the rule”. The former denotes corruption in which payment is made to receive preferential treatment for something that the bribe receiver is required to do by law, such as, renewing a driver’s license at the traffic department. The latter refers to activities such as a bribe paid to obtain services that the bribe receiver is prohibited from providing, for example, issuing a driver’s license to someone who has not undergone driving tests and other due processes (Transparency International, 2006).

Corruption can also be active (coercive) or passive (submissive) depending on who has the power to make decisions and from whom a service is requested. According to Lwaitama and Hellsten (2004:148), coercive corruption entails a scenario in which a public servant or an agent solicits a bribe in order to make personal gains from the transaction or activity. Conversely, in the context of passive corruption, a client initiates a bribe to the official, who in turn agrees and offers services that are not part of his or her duties.

The commonly identified types of corruption are petty corruption and grand corruption. Petty corruption includes bribing police officers, customs officials, private sector individuals and civil servants, often in return for services. Lodge (1998:159) sums it up as “habitual extortion of bribes by junior officials”. Blundo and De Sardan (2006:73-81) indentified seven forms of petty corruption, the first being “commission” which is payment made in exchange of illicit favours, for instance, kickbacks for an awarded government tender. The second is what they term “gratuity”, which is the payment to a civil servant for doing his or her official responsibilities while the third is “having connections” with civil servants so that they may “pull strings”. The fourth one is “payment” for services rendered, in addition to official charges. The fifth form is “petty white collar theft” which is the use of public resources for private purposes while the sixth is “misappropriation”, which entails the requisition of public property for private gain by concealing its origin. The final one is “extortion”; it refers to demands imposed on citizens by public officials like police officers who place a payment request of a fine for made-up violations against the law.

Grand corruption happens when officers engage in corruption at a scale which undermines effectiveness of institutions and systems of anti-corruption in place (Alberti, 1996: 275). Lodge (1998:158) explains that grand corruption is “located

within the institutions of government involving intentionally dishonest acts". It is associated with big projects, large sums of money, and individuals in the upper echelons of corporations and government, as well as political power-holders. It can occur as financially established companies influence national policies and legislation, as well as its institutions to their advantage, that is, "wealth chasing power" (Sandgren, 2005: 724). Alternatively, grand corruption can be instigated by political leaders through coercing private companies to take business decisions that would benefit them or their political parties, "power chasing wealth" (Sandgren, 2005:724). Examples of grand corruption include paying a government minister a hefty kickback to facilitate favourable review of tender application and payment of large sums to senior customs officials to be allowed to import goods without paying tax or custom duty.

Another type of corruption is political corruption. Cooksey (2010:183-184) describes political corruption "as a kind of manipulating public resources for maintaining public order and keeping rulers in power". In simple terms, it involves how politicians use public resources to remain in power and maintain a certain order in the public sector. Gyekye (1997:193) defines political corruption as the "illegal, unethical and unauthorized exploitation" of one's political or official position for personal advantage. According to Etyang (2014:72), political corruption takes place when public officials chose not to uphold the will of the people that they have been legally entrusted with through democratic elections. Political corruption could be in the form of granting favours with a view of advancing one's political ambitions, graft, fraud, nepotism, favouritism, clanism, cronism, kickbacks, and blatant misappropriation of public funds done by public officials in order to enrich themselves or advance personal interests (Etyang, 2014:72). Sometimes political corruption is considered to be an amalgamation of grand corruption and looting. Looting occurs when the state pays large sums of money for goods or services that are not delivered (Masobo, 2014:150). In summary, corruption extends to the dynamics of the relationship between state and society; and wealth and power (Nuitjen and Anders, 2007:2).

Another type of corruption is systemic corruption which applies when corruption has infiltrated the entire economy, such that it has become an integrated aspect of the economic, social and political system (Wallis, 2006:30). In this case, major

institutions and processes of the state are dominated by corrupt individuals and groups.

3.4 Forms of Corruption

Rose-Ackerman (1978, 1999) has shown that corruption in government exists in various forms, and is nurtured by incentives. Corruption takes the forms of bribery, extortion, and embezzlement, ranging from petty to grand corruption (Stefes, 2005:6). The Public Service Commission (2002:22) identified additional forms of corruption such as fraud, abuse of power, conflict of interest, insider trading, favouritism and nepotism. The meanings are as in Figure 2.

Figure 2: Forms of Corruption

Forms of corruption	Definition
a. Bribery	Bribery is a payment, financial or otherwise, that is given or received in a corrupt relationship in order to either hasten government bureaucratic processes or achieve favourable outcomes (Masri, 2006:6). The United Nations (2004:24) defines bribery as an offer of money or favours to influence a public official.
b. Fraud	Fraud involves manipulation or distortion of information, facts and expertise by public officials who seek to draw private profit (United Nations, 2009:6).
c. Embezzlement	This equates to "when a person holding office in an institution, organisation or company dishonestly and illegally appropriates, uses or traffics the funds and goods they have been entrusted with for personal enrichment or other activities" (Transparency International, 2009:10)
d. Extortion	Transparency International (2009:11) defines it as an "act of utilising one's access to a position of power and knowledge, either directly or indirectly, to demand unmerited cooperation or compensation as a result of coercive threats". Morris (2011:3) defines it as "when the

	public official threatens to use (or abuse) state power to induce the payment of a bribe"
e. Nepotism	According to Alatas (1990:1), nepotistic corruption is "corruption that refers to the preferential treatment of or unjustified appointment of friends or relatives to public enterprises or public office in violation of the accepted guidelines in public service recruitment".
f. Favouritism	Favouritism means the act of unfairly treating one person better than others because one likes or values them better than the others (Hornby, Turnbull, Lea, Parkinson and Phillips, 2010: 1 of 1).
g. Kickback	Kickback is similar to bribe but differs in terms of timing of payment. This "illegal payment is made after the service is rendered, usually from a portion of the government award itself" (Morris, 2011:3).

3.5 Causes of Corruption

Causes of corruption are encapsulated in various theories that span from an individual's character to the prevailing environment. A personal attribute such as greed, coupled with private circumstances such as holding a job with low salary, yet it leaves room for monopolistic decision-making, make one prone to engage in corruption. The leadership, structure and culture of an organisation within which one works, as well as national judicial and political environment, are some of the determining causes of corruption.

3.5.1 Public Choice Theory

Central to this theory is "principal-agent analysis" in which a rational individual tries to maximize his or her utility. Principal-agent analysis examines the relationship between the citizens, the principal (a governor), and an agent (a public official) who manages the relationship between the citizens and the government (Klitgaard, 1988:24). The basic underlying assumptions include differing interests and the existence of information asymmetry, which tends to give the agent an advantage,

compelling the principal to solve the information gap through negotiating some pay-off measures (Feng and Johanson, 2016:3). The principal therefore faces both adverse selection and moral hazard as he or she has limited information on the agent, his or her activities, productivity, competence or reliability; this leaves the principal at the mercy of the agent who is prone to use his discretion of serve his interests above those of the principal (Andvig, Fjeldstad, Amundsen, Sissenar and Søreide, 2001:90). Moral hazard refers to a case in which both parties have asymmetric information before a transaction takes place but the other party acts contrary to terms of agreement once the contract is sealed, while adverse selection refers to lack of symmetric information between the parties before they get into a contract or effect a transaction (Henke, 2016:3).

De Graaf (2007:47) emphasises that as per this theory, actions of corrupt officials are a result of a rational, well-thought out and deliberate weighing process. An incentive to engage in malfeasance arises whenever a public official has discretionary power (Rose-Ackerman, 1997:31). Klitgaard (1988:70) sums up this process of rational weighing through the formula; [Corruption = Discretion + Monopoly – Accountability]. This means that agents engage in corrupt activities when they are afforded wide discretion in their decisions and activities, little accountability is demanded of them and they have monopolistic control (Riley, 1998:134; Lopez and Santos, 2014:697). Moreover, individuals would rationally choose to be corrupt if the benefits of corruption minus the probability of being caught times its penalties were greater than the benefits of not being caught (Klitgaard, 1988:70). Similarly, Rose-Ackerman (1997:31) noted that public officials would be enticed to engage in corrupt activities as they weighed that potential benefits of corruption exceeded the potential costs, that is, if the chances of being caught and prosecuted were low and penalty was not severe.

De Graaf (2007:50) argued that this theory gave a very simplistic explanation. What De Graff meant was that the theory had a narrow focus on the factors that could lure an individual to opt for corruption because public officials could simply be seeking higher social status or doing it just for the fun of it, and not necessarily because of the above permutations.

3.5.2 Bad Apples Theory

The theory attributes the root of corruption to the bad apples, that is, people with faulty (moral) character. The theory states that there is a link between bad character, which is prone to criminal activity, and corruption. The theoretical sect of bad apples theory, namely, social learning theory developed by the sociological school of thought, argues that individuals chose corruption because of interacting and associating with others who engaged in such practices. According to this school of thought, the group that one becomes part of provides the medium through which corruption could be learned. Reinforcing this argument are individuals such as former *de facto* president of Nigeria, Sani Abacha who only surrounded himself with people who were loyal to him; through this association, individuals like Jerry Useni stole more than USD 3 billion from government coffers and acquired property worth billions of Naira (Etyang, 2014:81).

3.5.3 Organisational Culture Theory

The organizational culture theory explores how corrupt activities become institutionalized (Brief**,** Buttram and Dukerich, 2001:473). This theory holds the notion that corruption is contagious. As identified by De Graaf (2007:51), the fundamental assumption seems to border on the logic that a culture of a certain group leads to a certain mental state and that mental state leads to corrupt behaviour. In the case of government, public officers would indulge in corrupt acts not because of their flawed character but due to weak government systems (De Graaf, 2007:51).

Central to institutionalization as well as normalisation of corruption in an organisation is the socialization process (Ashforth and Anand, 2003:25-34). Socialization happens in two major ways which work in tandem, namely seduction and surrender. According to Moore (2009:49), there are two seduction forces, an internal one which has to do with one's own biases and way of analysing tempting situations plus an external force which is the environment one is exposed to, which gradually shapes their moral attitudes and ethical standards. The external force happens through the process that Ashforth and Anand (2003:13) term "habituation" in which individuals gradually comply with the expectations of colleagues. This implies that an individual's judgement of acceptable behaviour is clouded without their realization over time as they yield to expectations. In the same manner, surrender happens

through the process of desensitization in which an individual gives into the pressure of socialization and conforms to the norms and unethical standards after repeated exposure (Ashforth and Anand, 2003:13).

Some studies (Klitgaard, 1988; Caiden and Dwivedi, 2001) concur that once an organizational culture is corrupt; every person who is exposed to it also runs a significant risk of becoming corrupt. This implies that corruption itself promotes further corruption through institutional culture of corruption that traps any new individuals who become part of the system. In essence, corruption becomes institutionalised within an organisation as corrupt activities are so routinely done that they are no longer perceived as corrupt with time, but become the order of the day (Misangyi, Weaver and Elms, 2008:752). In this sense, corruption would not be spurred by an individual but would become an act of the collective (Ashforth and Anand, 2003:4).

Similar to rational choice (principal-agent), organizational structure frameworks argue that "systems corrupt people more than people corrupt systems" (Shihata, 2000:206). Žižek (in Nuitjen and Anders, 2007:17) explained that public officials engaged in corruption or what he called the “unwritten rules of shadowy realm” not only to benefit from public office but because the penalty for breaking these unwritten rules was greater than that of set public rules. It translates, therefore, that formal legal systems are undermined by a plethora of informal networks and corrupt transactions effected informally. For instance, in Florence in the seventeenth and eighteen century, noblemen who mainly held senior positions in the administration enriched themselves through their offices but punishing such conduct ran the risk of undermining the relationship between monarch and nobility; consequently, even those rulers who wanted to end the corrupt conduct could not; rather they appeased the elite (Waquet, 1991: 193). In recent years, public administrations of various countries, including Nigeria and India, are replete with corruption to the extent that it is not easy for civil servants to individually confront internal corrupt practices without facing the wrath of colleagues.

3.5.4 Clashing Moral Values Theory

According to this theory, the values and norms of society affect those of individuals. In turn, values influence behaviour of individuals making them corrupt. The theory identifies the individuals’ lack of distinction between private and public roles as the

cause of corruption. Practices that are acceptable in the private sector could be classified as corrupt if done in the public sector. Since offering gifts to potential clients, actual clients or other industry players or giving contracts and jobs to one's friends or any other relational network is acceptable and valuable in the private sector; individuals tend to import same practices into the public sector thus failing to distinguish between private and public life (De Graaf, 2007:47). People make same decisions they would make in private sector where "private appropriation of the spoils" of the office would not be viewed as immoral.

Hoffling (2002) also addressed another aspect of this theory through what he coined micro and macro morality. By micro morality Hoffling (2002:71) refers to close social interrelations, such as family and friends, where obligations are based on informal norms such as, we help friends and family just as we expect them to help us. Macro morality is the process through which morals are made uniform (Hoffling, 2002:71). Macro morality of public officials requires them to treat different persons equally, whereas micro morality requires them to favour friends, family and those close to them whenever possible, which brings conflicts in society.

Central to this theory is the rule of the clan. According to Weiner (2013:160), it takes on three different forms. The first entails legal structures and cultural values of societies, organized primarily on the basis of the relationship held. In this context, kinship is the fulcrum of individuals' social and legal actions as they strive to maintain a strong clan identity. On a second note, the rule of the clan shapes political structures such that societies are governed by what Weiner (2013:161) terms 'clannism'. This is characterised by a government that is shaped by the prevailing informal networks of kinship and treats citizens not as independent actors, but rather, dependents to be managed. Finally, the rule of the clan results in weak authority which perpetuates formation of various community cliques.

The other aspect of clashing values theories is reflected in the African tradition of Ubuntu philosophy, which gives that "I am because you are and so you are, I am" which simply means that a person is a person through others. Ubuntu philosophy imposes a cultural expectation to serve own people before the rest by encouraging those who are in power or economically endowed to act as their "brother's keeper" (Gade, 2011:303). The innate notion of communalism embedded within Ubuntu philosophy also fails to distinguish between private and public funds (Van der Walt,

2003:406). This ultimately contributes to political corruption as political leaders act on the pressure to meet the needs of their relatives and followers through misuse of government resources. Dassah (2008:46) and Egbue (2006:85) are also of the view that supporting the communal networks results in a system that misuses government resources and does not comply with applicable rules.

When clarifying corruption, specifically nepotism and favouritism emanating from different cultural backgrounds, Sebola (2014) made an interesting comparison between former South African president Thabo Mbeki and current president Jacob Zuma. Sebola (2014:302) opines that if Thabo Mbeki visited his place of birth, Idutywa, and his village people told him of the various challenges they faced with regard to access to public services such as acquiring birth certificates, he would refer them to the relevant department or office for enquiries and do everything by the book. On the contrary, if president Zuma went to his birth place, Nkandla, his response to a similar situation would be to liaise directly with the responsible manager or officers to ensure that they provided the service the same day or the next day (Sebola, 2014:302). That is, president Zuma's response would reflect the spirit of Ubuntu in serving own constituency and clan. It is in such scenarios that Blundo and De Sardan (2006:12) concluded that "it is not possible to dissociate corruption analytically from a regime of favours, preferential treatment, recommendations, string-pulling, nepotism and myriad advantages bestowed in the name of family, neighbourly relations, friendships, school, university and professional relationships and professional protectionism". Etyang (2010:80) explained that the above does not equate to stating that closely knit communities are more corrupt than individualistic ones as corruption and several injustices are historically observed in individualistic states too.

3.5.5 The Ethos of Public Administration Theory

It is closely related to organisational culture but is more concerned with the culture within public management and society in general. Pollitt and Geert (2000:176) differentiate between four public management reform strategies: maintain, modernise, marketize and minimise. They perceive "maintain" to be concerned with maintaining the old administration models in which the focus is to cut costs and strengthen controls imposed through different tiers in the organisations. "Modernise" focuses on enhancing service delivery, introducing accounting systems that keep

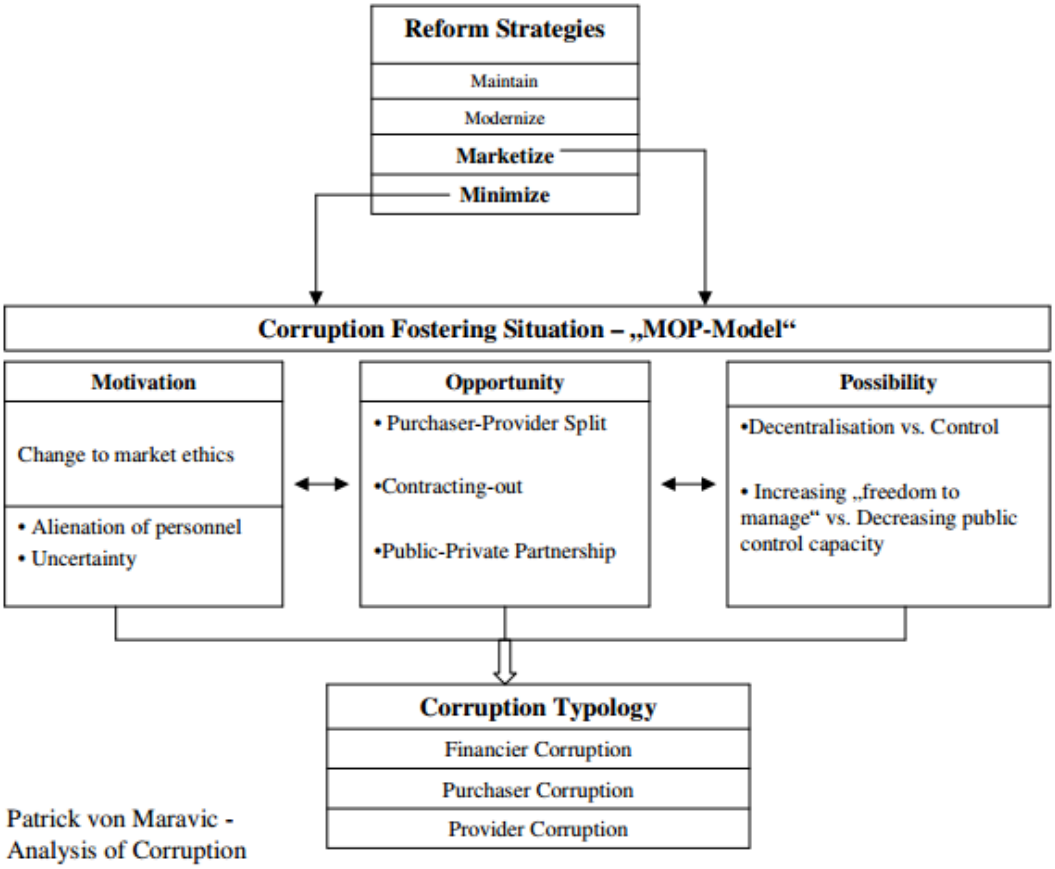
record of expenses and revenues regardless of when cash was exchanged (accrual accounting) while “marketize” stands for competition in the public sector and management culture. Finally, they stated that “minimise” is about promoting public-private partnerships, purchaser-provider split and downsizing.

According to Von Maravic (2007:133), new public management reforms transform the ethics of the public sector to be in alignment with market ethics. This could result in uncertainty, alienation and a complete shift in bureaucratic ethos structures, thus creating incentive to engage in corruption (Von Maravic, 2007: 137). Von Maravic (2007:133) also cautioned that the transition would most likely endow managers with more decision-making authority and blur the lines of responsibility in terms of public-private sector partnerships and purchaser-provider splits. Gregory (1999:67) expounded that as the public sector values of civic duty and citizenship become overshadowed by market principles such as utility maximization and consumerism, public servants would be drawn to (purchaser) corruption as some begin to act as agents of commercial interests. In other words, corrupted civil servants begin to consider their offices as businesses from which they could raise additional income (Van Klaveren, 1990:26).

On the other hand, since market values promote competition, motivation for (provider) corruption is instigated by the need to win the tender (Gregory, 1999:67). The provider (private business owner) would therefore seek to influence the purchaser (public administrator/bureaucrat) to reveal information on the competitors, value of the tender or even influence decision making of the tender in order to win the tender. Similarly, a financier (politician) could unlawfully extract information on a tender from the purchaser. This demonstrates that contracting out not only “de-publicizes public sector” (Jorgensen & Bozeman 2002:75) but also undermines established public sector routines and checks on corruption (Adonis, 1997:104). In agreement, Von Maravic (2007:130) opines that the higher role of competition intensifies rent-seeking behaviour between market competitors and makes it difficult for the state to control the market. The downside is that ‘‘If bureaucrats are able to earn more income from external sources (for example, from interest groups seeking government transfers) than from their regular employment, they may pay more attention to the demands of interest groups than to the needs of society as a whole’’ (Mbaku, 1992:247).

The fact that the awarding of respective contracts tends to be done once off, gives providers an incentive and opportunity to engage in corrupt practices like bribery and other irregularities (Painter, 2000:170). As articulated by Meny (2000:205), corruption thrives more where government and private firms have a commercial contractual relationship. However, it is worth noting that literature clarifies that new public management reforms could increase the risk of corruption but does not necessarily guarantee corrupt activities (Von Maravic, 2007:134).

Figure 3: Analysis of Corruption



Source: (Von Maravic, 2007:134)

In terms of alienation and uncertainty, motivation for corruption would be ignited by concern for own welfare. If civil servants perceive that government doesn't support or guide their decision-making process and does not highly regard their wellbeing through new public management strategies, they will pursue their own interests. In the words of Gregory (1999:67), "citizens who feel excluded from governing process may display increasingly cynical attitudes towards public administration, and those who operate within those processes, seeing themselves primarily as experts or

managers rather than citizens, may feel increasing contempt for those beyond. A vicious circle of contempt and cynicism cannot be a fertile source of trust and goodwill necessary for effective and non-corruptive governance".

3.5.6 Correlation Theory

Correlation theory is based on empirical studies that show correlation between corruption and other factors such as development. For instance, some studies indicate that rampant corruption regresses development.

3.6 Impact of Corruption

On a macro level, many scholars believe that corruption slows down economic growth and hampers sustainable development (Kaufmann 1997:118–120; Tanzi and Davoodi 1998:33–42; Andvig *et al*. 2000:91–102; Balogun, 2003:130). This occurs as tax revenue meant to improve service delivery and supply public goods is diverted to public officers or politicians' pockets for personal use. This reduces public investment because developments such as public infrastructure are often compromised. Productivity also declines as public officers focus on how to enrich themselves instead of applying themselves and their competence solely to do their jobs. Corrupt activities such as assisting business owners to evade taxes also reduce government revenue and this is sometimes addressed by increasing national taxation in the hopes of collecting more revenue. In turn, higher tax rates undermine the country's global competitiveness in trade and attracting foreign direct investment (Lumumba, 2014: 27).

In terms of social dynamics, corruption disrupts equitable allocation of goods and services to the citizens. Since the poor are more dependent on government services, corrupt activities like robbing hospitals of medical supplies and substandard service delivery affects them more than the rich as they mainly consult private medical practitioners (Tanzi, 1995:571). The politically connected individuals who mostly benefit from corrupt business activities tend to be rich individuals; this further increases the divide between the rich and the poor (Tanzi, 1995: 572).

Corruption also stalls consolidation of democracy and fosters anti-democratic environment characterised by deteriorating moral values, disrespect for the rule of law and public institutions at large. Corruption "reduced the legitimacy of the state, eroded the credibility of political leaders, replaced merit and hard work with strong

and complex patron-client relations, accentuated inefficiency, ineffectiveness and general disorder in the bureaucratic apparatuses and led to mismanagement, waste and, ultimately, economic crisis" (Ihonvbere and Shaw, 1998:151). Early philosophers, Plato and Aristocle, long posited that corruption was "a general disease of the body politics" that was destructive to any political order (Friedrich, 1989:18). Corrupt governments tend to spend time trying to device measures to stay in power as well as compete to hold positions of economic power that would easily allow rent-seeking, which is perceived to erode and undermine capacity of state institutions (Johnson, 2004: 9). It also results in "predator elites", that is, political leaders who are concerned with making personal gains at any cost with disregard for national needs (Kalombo, 2005:3).

In the words of Kofi Annan, former Secretary-General of the United Nations, in the foreword to the United Nations Convention against Corruption, "corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish".

3.7 Schools of Thought on Curbing Corruption

Sung (2002) identifies three competing schools of thought on combating corruption. These are: lawyer's approach, businessman approach and economist approach. Each approach seeks to counter different causes of corruption.

3.7.1 Lawyers' Approach

Nuijten and Anders (2007:13) state that it is through a set of laws that a practice can be classified as corrupt or not. It follows that the legal framework itself could be used as a tool to deter corruption. Lawyers therefore argue that the way to reduce corruption is to reform the legal system and relevant institutions in order to increase the punishment for breaking the law (Ades and Tella, 1999:982).

According to Sung (2002:140), legal measures to curb corruption include making extensive use of the sworn declaration of wealth, passing draconian laws, setting up anti-corruption agencies with far-reaching powers. Sworn declaration of wealth is often implemented through national laws that demand public officials to declare their assets as they enter public office in order to evaluate these against what they have

accumulated since they have been in that office. Similarly, draconian laws are meant to discourage any form of corrupt behaviour through severe penalties. The downside is that severe and complex laws often require additional and relatively more expensive and insightful law enforcement measures in order to monitor the law (Immordino and Pagano, 2010:1104). On the other hand, setting up anti-corruption agencies with sweeping powers would ensure that investigations were made against any alleged acts contrary to prevailing anti-corruption laws. In a nutshell, lawyers presuppose a causal link between the anticorruption laws and enforcement, and the actual lowering of corruption.

Sung (2002:140) optimistically stresses that international anti-corruption legal frameworks could also significantly reduce corruption if resolute legal measures were taken to combat corruption. Global convergence of anti-corruption laws is embodied in various international laws such as the United Nations Convention against Corruption (UNCAC), which came into force in December 2005 and has been ratified by several countries across the world. It is important to note that reforms that are limited to domestic laws, regulations, agencies and personnel are susceptible to corruption (Yeh, 2011:205). History has proven through actions of politicians that political authorities could easily manipulate the law. For instance, Italy's premier, Silvio Berlusconi, amended the law so that his previously illegal accounting practices could be reclassified as legal (Haller and Shore, 2005:4).

Davis (2012:185-186) explains four key ways in which law could deter corruption. Firstly, law can influence corruption by defining the opportunities presented to the respective public officers for corruption through powers that they are endowed with and the appropriate ways to exercise that power. Secondly, legal sanctions could be enforced in order to deter corruption. These include imprisonment, fines and forfeiture of assets. Thirdly, law guides behaviour through legislation and court rulings which show consequences of non-adherence to the law. Fourthly, legal processes also provide information on corruption cases because the legal proceedings disseminate information about who the perpetrators are, what or how much they took, who they paid and how much. This public display of information discourages corruption.

3.7.2 Businessman Approach

It suggests that corruption results because bureaucrats earn much lower salaries relative to their counterparts in the private sector. Consequently, proponents of this school of thought propose that corruption could be minimised by running the public sector like private companies and raising the wages of public servants (Ades and Tella, 1999:982). The underlying assumption is that public officials would resist corruption if their salaries and utility exceeded economic returns obtained from bribes and extortion (Sung, 2002:140). However, if salaries of civil servants remain so low that they could generate much more from corruption than what they earn, their focus will remain on rent-seeking opportunities and not their public duties (Mbaku, 1992:247). Some empirical studies (Van Rijckeghem and Weder (2001), Gagliarducci and Nannicini (2013), Ferraz and Finan (2009), Armantier and Boly (2011) and Van Veldhuizen (2013)) across different countries show that increasing salaries or higher salaries of civil servants as well as informal incentives tend to reduce the incidence of corruption.

Opponents of this theorization indicate that while the number of corrupt acts might be reduced, the total amount of money solicited in bribes might not necessarily fall (Tanzi, 1998:573). They argue that while higher salaries could curb the total incidence of corruption; they will not totally eliminate the element of greed; hence increase in salaries can only increase the amount demanded by those who will continue to engage in corruption as they compensate the risk of losing their higher paying jobs. For example, a study undertaken in Ghana between 2006 and 2012 indicated that after salaries of police officers were doubled in order to counter corruption on the roads, corrupt officers demanded bribes that were at least twenty percent higher in value than before but allowed between ten and nineteen percent more trucks pass the checkpoints without requesting bribes (Foltz and Opuku-Agyemang, 2015:4).

3.7.3 Economist Approach

Economist approach proposes that the best way to curb corruption is to allow forces of competition in the public sector and the briber's market or the level of the official receiving bribes (Sung, 2002:140). The approach follows the logic reflected in the work of Rose-Ackerman (1978), Shliefer and Vishney (1993) and Ades and Di Telia (1996) that perfect competition deters bribery. When there is no competition,

bureaucrats with monopolistic power over some services have room to be corrupt because lack of competition gives them an incentive to slack in their jobs and demand higher rents (bribes) to do their job quicker (Tanzi, 1998:566).

3.8 Conclusion

This chapter discussed corruption. Corruption has gathered much attention due to its ill-effects, which include widening social inequalities, distortion of budget allocation, declining profitability and productive investment, poor service delivery and poor governance at large. Although corruption has commonly come to be defined as abuse of public office for private gains, it is not an exhaustive definition that is applicable in all contexts. The economic-politico dynamics of a certain country imply that the nature of corruption in one state could be different from another, as much as the nature of corruption in one government department might be different from another's. Several factors, including legal provisions and culture, shape what is corrupt or not. What is culturally acceptable to one public officer and his culture group might be viewed as corrupt by others even if it is within the same country, particularly where the law is indeterminate about such a cultural issue. This creates challenges in terms of the universal understanding of corruption.

The difficulty to draw a clear delineation on what is categorised as corrupt implies that the remedial measures taken might be inappropriate. An economic or business approach could be employed in a context where the lawyers' approach would have been the best. There needs to be clear rules and laws that best define corruption, and the socio-cultural and political economy dimensions should also be threshed out to clarify at what point a transition is made to corrupt activities.

Corruption exists in different sizes and forms, but each of these should be taken seriously in terms of measures taken to avert them. While petty corruption, which occurs at the implementation level, might seem to be less harmful due to the relatively low amounts paid per corrupt activity, these amounts add up and the effect on the economy is often visible even if it cannot always be quantified in monetary terms. As civil servants stall services such as issuing licenses, passports, health and education services unless they are bribed, not only do they increase the depth and impact of the socio-economic ills they are employed to resolve, but they also discourage investors, further regressing development and economic growth.

Grand corruption is arguably perceived as worse because it insinuates that citizens and the common good are not at the centre of decision-making by policy-makers, politicians or public administrators. Instead, decisions are mainly influenced by how best to shape policies or allocate the national budget towards projects that would yield best rents and not necessarily meet the needs of the people and advance the nation. Grand corruption should be addressed first because as corruption stops at higher echelons, the lowly public servants would be deterred from engaging in corrupt activities due fear that they might lose their jobs or face harsh penalties at the hands of their non-corrupt masters who would have ensured that institutional and legal frameworks adequately punished corruption.

CHAPTER 4: Historical Perspective: The Rise of Government and the Rule of Law to Control Corruption in Lesotho

4.1 Introduction

Lesotho, a territory formerly referred to as Basutoland during the colonial era has transitioned politically, economically and legally from a Moshoeshoe 1-led nation. It changed from a chieftaincy governance model to colonial rule, and thereafter to the current democratic rule. All these have a bearing on how the law is currently framed and administered. Simultaneous changes were also brought about in economic governance and the state of the national economy, gradually shaping the nature of corruption. Economic governance transitioned from communal economy to a liberal economy that subscribes to policy dictates of the Bretton Woods institutions, specifically the IMF and the World Bank.

This chapter narrates Lesotho's historical transformation. Specific focus will be placed on how legal and institutional framework changed with each era of governance and provides an overview of the current legal framework with regard to combating corruption. It helps to identify whether the colonial rule instilled corruption in Lesotho; and puts into perspective the current legal framework, in particular the dual nature of Lesotho's legal system.

4.2 From Moshoeshoe 1's Reign to Colonial Rule

Lesotho was under the complete rule of Moshoeshoe 1 until it was annexed to South Africa in 1871. When Moshoeshoe 1 brought together the different tribes to form the Basotho nation each tribe had its own chiefs. However, Moshoeshoe through what became known as "shrewd placings", rendered all the chiefdoms subject to a chieftaincy controlled by his family (Juma, 2011:99). His brothers, sons and male relatives were imposed on other tribes as local chiefs across the kingdom (Fleminger, 2010:21) in order to acquire the status of national protector and that of a superior leader of the entire nation. By 1834 Moshoeshoe had established himself as the sovereign ruler of the Basotho nation (Juma, 2011:99).

Chieftainship was the prevailing form of governance during Moshoeshoe's reign. It had its own political and legal characteristics. Chiefs were the ultimate "ruler, judge, maker and guardian of the law, repository of wealth, dispenser of gifts, leader in war, priest and magician of people" (Schapera, 1938:62). Nonetheless, national decisions

were reached through participation of citizens within a framework of bottom-up approach. Moshoeshoe administered law through the *khotla*, which is a court of village elders where minor disputes are settled. The *khotla* helped to deter abuse of chiefly power. At *khotla*, citizens were afforded freedom of speech hence would freely criticise authority. This was embraced in idioms such as "*moro khotla ha o okoloe mafura*" which means in court a spade is called a spade; and "*mooa khotla ha a tsekisoe*", meaning any criticism against the chief during public deliberations should not be met with sanctions. Punishment for contravening laws took the form of fines.

Moshoeshoe also used *lipitso*, public gatherings, in order to engage citizens on national affairs. According to Weisfelder (1977:163), *lipitso* were a platform through which Moshoeshoe unified his subjects; assured them he was at their service and strengthened his non-hereditary chieftaincy. *Khotla* and *lipitso* allowed direct participation in governance by citizens, thus ensuring that governmental power resided with them at all times. As articulated by Lerotholi (in Mahao, 1993:150), chieftainship as a governance model was characterised by harmony between the citizens and the chiefs. The Chiefs gained their power to rule from the citizens.

The pre-colonial economy of Lesotho evolved around the homestead and was mainly sustained by agriculture and through the barter system. Basotho grew crops and supplemented them with edible wild plants they gathered from the fields, reared animals, hunted and exchanged commodities depending on their needs (Eldredge, 1993:19). Chiefs were endowed with powers to apportion land for residential purposes, farming, designating land for grazing of livestock as well as rights over trees and thatching grass to such an extent that no one could build without their knowledge and consent (Ellenberger and MacGregor, 1912: 265-66). Chiefs also had a right to impose *sethaba-thaba*, tax paid in the form of cattle, on their subjects in order to support administration of the chiefdom. The community also supported the chiefs through *letsema*, which is communal labour. This was attributed to the fact that the chiefs' wealth fed the impoverished, supported military expeditions and ran the administration (Juma, 2011: 98). Overall, the economic positioning of chiefs made them the richest men within their communities.

When Boers threatened Moshoeshoe in want of land, he sought British alliance. The Boers invaded the kingdom through military force in 1867. Moshoeshoe put his

people under British protection, through the Annexation Proclamation 14 of 1868. When the British took over in 1868, they established a new system of governance in which white district commissioners were placed in towns across the kingdom. However, the financial burden of administrating the kingdom let Britain to place it under direct administration of the colony of the Cape of Good Hope (Juma, 2011:104), the current Western Cape in South Africa. Consequently, Basotho were governed as per laws passed by the Cape parliament while the land was still considered British territory simply administered from the Cape.

The Cape government aggressively introduced new colonial laws that undermined the powers of the chiefs and Basotho's traditional customs (Thabane and Pule, 2002:104–105). Magistrates were appointed and given judicial authority and powers to allocate land, which had traditionally been done by chiefs. Their presence undermined the authority of chiefs and importance of chiefs' courts as people who were dissatisfied with the rulings made by chiefs could now appeal to magistrates (Juma, 2011:105). Paramount chiefs could still make laws in terms of Sections 8 and 15 of the Native Administration Proclamation 61 of 1938, as long as the law upheld standards of justice and morality (Juma, 2011:105). The new rules and way of governance made magistrates unpopular with the communities. Basotho were dissatisfied with the impact of these new colonial laws and regulations. However, the pivotal policy for the Cape Colony rule was an attempt to disarm Basotho. The chiefs resisted and protected the rights of their people to bear arms. This triggered the Gun War which erupted in 1880 and lasted till 1881. Basotho won the war. They were placed under British rule again in 1884, this time under the system of indirect rule which was meant to mitigate unpopular policies of the Cape colonial authority (Juma, 2011:106).

When the crown took over in 1884, its plan was to extend more governance responsibilities to Basotho (Gocking, 1997:69). The colonial administration created a new western legal system in an attempt to end the European court system that was introduced by the cape colonial rule (Burman, 1981:91-99) and in order to support the administrative functions of the colonial authorities (Fleminger, 2010:21). This was effectuated through the General Law Proclamation 2B of 29 May, 1884.

The General Law Proclamation of 1884, through regulations 1, 2, 3, 4 and 12 repealed magistracy and maintained the application of common law of the Cape

Colony that had been in use since 1871, as well as customary law which was administered by chiefs (Juma, 2011:109). In a nutshell, the 1884 Proclamation created a dual legal system consisting of common law and customary law. Common law was administered by resident commissioner's courts which replaced magistrates of the past. Colonial administrators could review the decisions of the chiefly courts and could apply a mixture of Cape Colony Roman-Dutch law and English common law to non-natives. It is important to note that because of this Proclamation, Lesotho's common law remains the same as that of South Africa to this date. A strict application of Sesotho customary law was the norm for natives (Gocking, 1997:63). In this manner, Lesotho was no different from other colonised countries in which the colonial administration established new legal systems in disregard of existing ones because they considered them ancient and relevant to the nationals only (Joireman, 2001:571).

The new legal system reshaped customary law. With time, the establishment of modern courts led to evolving custom which in turn created new body of tradition (Ranger, 1983:25). This was not an uncommon trend. Generally, colonial powers re-invented African customs and traditions so they could be administered through the new modern legal systems (Juma, 2011:110).

According to Makoa (2004:80), although chieftainship was incorporated into the new system of governance, some chiefs were stripped of political power and employed as civil servants. They were directly responsible for collecting hut taxes which still made them important to the colonial administration. Hut taxes were payable per hut or wife's residence. The tax was collected by the principal chief who was paid ten percent of net hut tax collected as inducement for collecting it (Machobane, 1990:65). The British strengthened power of the senior chiefs, especially paramount chief (Gocking, 1997:69). This centralised power in the hands of a few chiefs and other individuals who were appointed and exposed to colonial education system.

The colonial administration fell short of indirect rule standards as per Alan Pim's report on Financial and Economic position of Basutoland (1935). The new power structures of the British allowed traditional legal institutions to influence how native affairs were run (Juma, 2011:106). This concurs with the observation made in other colonies that "colonial administrators dismantled traditional checks and balances as they created a system in which chiefs were made petry legislators, administrators,

judges and policemen all in one" (Yeh, 2011:192). The colonial administration also protected chiefs and in the process resulted in senior chiefs who were not responsive to the needs of the people (Weisfleder, 1977:160). Moreover, the colonial officers failed to draw a clear divide between political and judicial functions for the chiefs, who were now employed as civil servants. Consequently, absolute rule became the norm for chiefs as there were no legal constraints except that they had to be careful not to lose confidence of the colonial administrators (Juma, 2011:112).

Chiefs attracted much criticism from the citizens due to their vast mismanagement of their judicial powers (Juma, 2011:112). It is on account of such developments that studies such as Yeh (2011) conclude that corrupt tendencies in Africa were ingrained by the colonial rule. Yeh (2011:192) argues that corruption in Sub-Saharan Africa is rooted in colonial practices which ingrained a "self-reinforcing", "self-perpetuating" system that resulted in institutions that are insulated from anti-corruption reforms. Sergio and Jorge (2006:58) concluded in their analysis on the roots of corruption in Cuba that "seeds of corruption arrived in Cuba with Columbus's feet".

One deduces that while colonisers may have not trained Basotho chiefs in direct activities of corruption, the weak state of the economy and structural changes facilitated such behaviour. The emergence of market economy which promoted commoditisation of production through private property rights of individual producers, rattled chiefs who had in the past been the richest in their communities and held everything in trust for the communities. The fear to lose the wealth, coupled with unrestricted power, saw many chiefs become pre-occupied with self-interest. As articulated by Matlosa (2017:17), Lesotho's weak economy, specifically the private sector, focuses "all eyes ...on the state as a site of accumulation". The same notion is held by Yeh (2011:193) that the instilled centralization of both economic and political power turned the state into "a pot of gold" that politicians (in this context, chiefs) competed to capture. As long as they are in power politicians can financially enrich themselves and those close to them from the state coffers (Yeh, 2011: 193).

The corrupted colonial administration attracted a myriad of complaints from the general public and some chiefs. Some chiefs demanded reintroduction of participatory governance structures. In response, the colonial administration engaged traditional institutions in an effort to reform traditional justice system. The then Resident Commissioner to Lesotho, Marshal Clarke, requested the High

Commission to establish a “council of advice” to be composed of chiefs and headmen nominated by the paramount chief but approved by Resident commissioner (Machobane, 1990:77; Juma, 2011:113). Deliberations between the British and chiefs resulted in establishment of a council, Basotho National Council (BNC), which was a body responsible for enacting the laws of Lerotholi (Juma, 2011:106).

BNC was only established in 1903 but operated without legislative force till 1910, when regulations were made by the residential commissioner and later approved by high commissioner (Machobane, 1990:82). The council came up with Laws of Lerotholi, which consisted of: succession to chieftainship, supremacy of the principal chief, the rights to appeal the decisions of chiefs, chiefs’ access to free labour and appeals from decision of principal chief to the Resident Commissioner, application of due process to the custom of ‘eating up’, debtors’ rights, allocation of land and forfeiture of land use. However, there was discrepancy between laws of Lerotholi and modern courts. For instance, in the case of succession of King Lerotholi, the laws of Lerotholi denied his widow queen ‘Mantsebo to succeed him, that is, customary law did not allow a female to rule. On the contrary, the modern courts ruled in her favour as per precedence set by the prior case of *Van Breda vs Jacob*. This case dealt with the requirements for a custom to become a legally binding rule of law. As earlier highlighted, tradition changed as court records were made and a new unchanging body of tradition was created.

The Basotho courts were ultimately engrossed in sluggish administration of justice and corruption, which attracted bitter criticism (Gocking, 1997:72) that called for changes. Soaring corruption manifested through arbitrary rule and application of law by some chiefs, coupled with disgruntled chiefs whose power had been usurped by paramount chiefs and later the British, necessitated the revision of customary law and restructuring of the judicial process (Rugege, 1987:159,162-3). Consequently, the resident commissioner proposed reforms and suggested that they should come from Basotho. In 1922, the government issued a revised edition of the laws of Lerotholi. The new version incorporated seven new laws that the BNC passed in 1918-19 which dealt with wills, bride price and court procedure (Poulter, 1972:152). The laws were not adapted to the changing socio-economic landscape, thus resulting in challenges during the hearing and discharging of cases.

The legal reforms weakened chiefly courts further. Not only did they undermine chiefly judicial power, but they also led to changes in the structure and operation of chiefly courts (Gocking, 1997:74). One of the legal changes introduced by the BNC was to give Basotho the right to bypass chiefly courts and go directly to the Assistant Commissioner's court if they felt that the chiefs would not give them a fair hearing. The Resident Commissioner was afforded more authority and endowed with power to elect chiefs who would establish courts as well as the power to dismiss or suspend any members of the courts who contravened the Native Administration Proclamation 1938 and Native Courts Proclamation 1938.

Chiefly courts were phased out in 1939. The structure of the courts in Lesotho was changed through Proclamation 62 of 1938. The chiefs' courts were replaced by local and central courts. The cases that were in the chiefly courts prior to the changes were transferred to the high court which presided over criminal and civil cases as well as played the appellate role. The high court was established by Act 5 of 1978. Ordinary chiefs were no longer administrators of justice. This role was assumed by judges, assessors, ward chiefs nominate and paramount chiefs. The Judicial Commissioner's Court served as an intermediate appeal court before the high court in matters of Sesotho Law. Appeals from local courts were brought before the central courts while appeals from the central or local courts were brought before the judicial commissioner's courts, and further appeals could be made to the high court. Other courts were introduced through various legal provisions. Subordinate courts and the court of appeal were introduced through Proclamation 16 of 1988 and Act 10 of 1978 respectively. In the 1940s the high court began to reject archaic Sesotho laws and the court's interpretation of the colony's customary law differed with Laws of Lerotholi.

Changes in administration that relegated some chiefs to lesser chiefs and headmen had an adverse impact as chiefs fought to stay in power. Some chiefs resorted to medicinal murders in an attempt to clothe themselves with power hence be restored to their chiefly role and consequent economic security (Jones, 1951:65). Medicine murders increased from two cases in 1941 to twenty cases in 1948 (Murray and Sanders, 2000:50). Chiefs resorted to such desperate measures to cling to power because Lesotho was a weak economy which did not offer chiefs other political or economic opportunities when compared to commercialised countries like Ghana in

which chiefs still held political power by acting as advocates for their communities against monopolistic practices of the metropolitan firms that dominated the colony (Danquah, 1995:92-3). In other words, the introduction of the market economy in Lesotho brought a shift in perspective from communal ownership and service to individualism; resulting in leaders who sought to hold onto power as a means of livelihood and for self-enrichment.

It is important to note that as much as chiefs were disgruntled by loss of power, their service to ordinary citizens was unsatisfactory. BNC failed to address problems facing commoners, mainly on matters pertaining to land allocation (Makoa, 2004:86). A group of learned Basotho called Basutoland Progressive Association (BPA), which was formed in 1907 with the purpose of representing the commoners, engaged the colonial government to eliminate chiefs from the BNC. This was because they perceived the chiefs to be incapable and unqualified to catapult Lesotho into civilization (Makoa, 2004:81; Thabane, 2002:122). Later, in 1919, another movement namely '*Lekhotla la Bafo'* (Commoners' League) led by Josiel Lefela was established. It demanded an end to colonial rule in Lesotho and restoration of chiefs on condition that they provided for the citizens, kept one (national) field and demanded less free labour (Edgar, 1987:11). BPA together with commoners' league pressurised the colonial government into making political concessions that ultimately transitioned the country towards constitutional rule (Makoa, 2004:82). Several reforms followed. These include: outlaw of the 'placement system' of Moshoeshoe 1 in which he placed his sons and relatives as chiefs over other tribes which were not Kuena across the country, abolishment and replacement of chiefs' courts with western local courts and judicial system and the birth of political parties (Makoa, 2004:82).

4.3 The Rise of Political Parties and Struggle towards Democratic Consolidation

The first modern political party, Basutoland Congress Party (BCP), was formed in 1952. It was led by Ntsu Mokhehle and it advocated that Basotho should self-govern (Makoa, 2004:82). However, division build up later in the 1950s as efforts were made to establish a legislative council. BCP split in 1957, giving rise to Marema-Tlou Party (MTP) which was formed by senior chiefs who feared that commoners would have greater influence in the Legislative Council and that the Regent 'Mantsebo would

give all governing powers to the chieftaincy (Makoa, 2004:82). It is this party that called for the appointment of Bereng Seeiso as paramount chief (Makoa, 2004:86). He was eventually inaugurated as Moshoeshoe II in 1960. MTP later merged with Freedom Party (FP) to form Marema-Tlou Freedom Party (MFP) which exists to date. BCP split again in 1958 as the junior chiefs in alliance with the Catholic Church formed Basutoland National Party (BNP) which was led by Chief Leabua Jonathan. The breakaway happened at the backdrop of Mokhehle's vision to transform chieftainship to be democratic, as well as radical Pan Africanist views (Makoa, 2004:82).

Together, these parties negotiated independence of Basutoland. Elections were set for 1965 followed by independence. The parliament of Lesotho passed an independence order of 1966 on the basis of which a new constitution, which was approved by British Royal Degree in January 1965, was adopted by Lesotho (Maqutu, 1990:260). The Constitutional Review Commission that was appointed by Moshoeshoe II agreed to a British Westminster Parliamentary governance system for Basutoland following independence (Saha and Abdulrauf, n.d:2). The country's legislature consisted of two houses; the lower house (national assembly) which had 60 seats that would be determined by voters, and the Senate (upper house), which consisted of 33 seats; 22 seats were for principal and ward chiefs and 11 members would be nominated by the monarch. There are currently 120 members of the national assembly, 80 of which are elected through first-past-the-post voting method and 40 on the basis of proportional representation.

The Constitution was based on the British model although it had a Bill of Rights which was influenced by the United States of America's constitutional practice. The general public did not participate in the drafting of the constitution and it was never subjected to vote through referendum (NSDP, 2012:152). It had many contentions including the scope of application shortly before and after independence such that at independence, there was no *consensus* on the fundamentals of governance and absolutely no respect for the Constitution (Makoa, 2004:86). There was revolt against constitutional values. The monarch violated the Constitution in 1965/66 and attempted to overthrow government in violation of the Constitution. The king expelled pro-government senators that he had appointed as he perceived the government to

be an enemy that had stripped him of his power and reduced him to a 'ghost' (Maqutu, 1990:263).

The same disrespect for the constitution was portrayed after the 1970 elections when Prime Minister Jonathan Leabua of BNP annulled the 1970 elections and rejected victory by Ntsu Mokhehle. Leabua suspended the constitution for five years, starting January 1970, and retained power with the support of Lesotho security forces and the South African apartheid regime (Weisfelder, 2014:52). During this era Lesotho was an authoritarian state dominated by the BNP and did not embrace constitutionalism (Makoa, 2004:86).

BNP was in government until 1986 when it was ousted by the military. The military also continued to govern without recognising the constitution (Makoa, 2004:86). It only stepped down due to persistent pressure from non-governmental organisations (NGOs), local and international donors and trade unions which demanded multi-party democratic government (Kapa, 2013: 66). National elections were ultimately held in 1993 and were won by BCP.

On 16 March 1993, the Lesotho Constitution Commencement Order was published and the new constitution came into force on 2 April 1993. However, this constitution was not different from the old one. It was also drafted under very selective process and it was also never subjected to vote through a referendum (NSDP, 2012:152). Section 118 of the Constitution vested judicial power in Lesotho courts. These are: the court of appeal, the high court and subordinate courts. The appeal court is the highest court followed by the high court. Section 119 which established the high court gave it jurisdiction to hear and determine any civil or criminal proceedings as well as power to review decisions or proceedings of any subordinate courts. Subordinate courts include: magistrate courts, central and local courts, judicial commissioner's courts and specific tribunals. Parallel to the high court is the labour court which specialises in dealing with industrial and labour matters. Local courts were given jurisdiction on matters of customary law and only handle cases involving Basotho.

The Lesotho political system was dominated by one party even after BCP lost elections to its splinter party LCD in 1997. LCD was in government for 15 years. Its era of governance was marked by abuse of political dominance and a significant number of electorates that were alleged to be corrupt and arrogant. It is due to

corruption that Mr Kelebone Maope ultimately broke away from LCD in 2001 to form Lesotho People's Congress (LPC). According to Maope, "LCD politicians did not have the audacity or decency to say they have taken more than enough from public purse" and he referred to them as "gluttons" (Lesotho Times, 25 August 2016: 2 of 2). One of the corruption cases that caught the eyes of the international community during this era is the 2007 sale of fairly new Mercedes-Benzes to ministers and senior officials for amounts ranging between M3 000.00 and M4 000.00. Former Prime Minister Mosisili's failure to address rampant corruption and the public's disgruntlement regarding politicization of the public services created further divide within the LCD (Weisfelder, 2014:55).

LCD split further. On 13 October 2006, Prime Minister Motsoahae Thomas Thabane along with seventeen other former LCD members of parliament (MPs) formed the All Basotho Convention (ABC). Later in February 2012, the infighting within LCD resulted into two rival groups within the party, Monyane Moleleki's 'Fire-eaters' faction and Mothejoa Metsing's 'fire-extinguishers', which resulted in another splinter party. When Mosisili could no longer control his party, he followed same decision that was earlier taken by Ntsu Mokhehle in 1997 and formed a splinter party named the Democratic Congress (DC), with the support of the Moleleki faction. Mosisili continued to "govern through controversial parliamentary manoeuvres" (Letsie, 2013:71-72). In December 2014, just before the 28 February 2015 snap general elections, LCD had another breakaway party led by Mrs Keketso Rantso named the Reformed Congress of Lesotho (RCL).

Following the May 2012 elections, Lesotho was governed by its first coalition government which consisted of ABC, BNP and LCD. The coalition collapsed leading to early elections in May 2015 due to internal discord mainly emanating from Deputy Prime Minister Metsing's resistance to anti-corruption efforts (Majoro in Business Day, 3 October 2014). Following the 2015 elections, DC formed a coalition government along with six other parties: LCD, BCP, LPC, MFP, National Independent Party (NIP), and Popular Front for Democracy (PFD). In the same manner, this coalition also failed. The key reasons were failure by Mosisili's government to satisfactorily implement SADC reforms, to uphold the rule of law and control unbridled corruption, particularly around the government fleet services tender which was undeservedly awarded to Bidvest Bank Limited (Lesotho Times, 3 March

2017:4). According to Lesotho Times (28 July 2016: 2 of 2), lack of commitment from Mosisili to confront corruption in the procurement of government fleet services from Bidvest Bank Limited at sixty percent more costs than the previous service provider, AVIS, brought a wedge within the DC. Mosisili suspended ten members of the National Executive Committee (NEC) of DC, including his deputy Moleleki (*The Post*, 8 December 2016:1 of 2). Consequently, Moleleki along with those members of the NEC and other DC followers formed a splinter party, the Alliance of Democrats (AD) in January 2017 (*The Post*, 8 December 2016:1 of 2). When DC split, the government lost the numbers that warranted it to continue as government.

Mosisili prorogued government in March 2016 and snap elections were set for 3 June 2017 after a motion of no confidence against his government was successful. On the other hand, Selibe Mochoboroane absconded from LCD to form the Movement for Economic Change (MEC) in February 2017. The two new parties also contested in the 3 June elections. Following the elections, Lesotho is governed by yet another coalition government led by ABC's Thomas Thabane as Prime Minister and Moleleki of the AD as his deputy. The other members of the coalition government are RCL, and BNP whose leaders both went into exile along with Thabane in fear of their lives during the reign of the former coalition government (*The Post,* 04 July 2016: 2 of 2).

4.4 Overview of Political Economy

The historical journey above shows that corruption has been part of the nation from the chiefly rule to the current democratic governance. Consequently, Lesotho has been adopting policies that seek to curb corruption since the introduction of market economy. Due to high dependence on international funding, Lesotho, similarly to many other countries, had to embrace policy framework recommended by the IMF and World Bank. In the dawn of neo-liberal era, the IMF and the World Bank underwent organizational restructuring after which they became global legislators that influenced legal systems of the nations they technically or financially assisted (Mattei and Nader, 2003:16). One of the earlier policies promoted by these institutions was Structural Adjustment Programmes (SAPs). The World Bank first initiated and implemented SAPs in Lesotho in 1988. The policy was introduced in order to create relevant institutional and policy conditions for economic growth and hence propel development.

The results of policy implementation followed trends of other countries that also adopted SAPs. Lesotho experienced a favourable macroeconomic environment. Gross Domestic Product (GDP) registered a growth of 6.3 per cent from 1988 to 1997 (Bureau of Statistics, 2000); inflation declined to single digits dropping from 18 per cent in 1991 to 9 per cent in 1995 while public budget changed to an average surplus of 2.1 per cent as at 1997/98 from a 10 per cent deficit in the 1987/8 fiscal year. However, poverty remained persistently higher and structural challenges remained prominent, particularly those that had to do with vulnerable groups (Khalapa Development agency, 2004:18). The economic gains were reversed following the 1998 political unrest, drought, retrenchment of almost half of Basotho mineworkers in South African mines, financial instability of Lesotho Bank and the Lesotho Agricultural Development Bank (LADB) and poor performance of state owned telecommunications and electricity companies (Khalapa Development Agency, 2004:3).

The World Bank attributed failure of the economy to sustain economic growth and stability to poor governance. With a global policy shift to poverty reduction, Lesotho joined the bandwagon and adopted poverty reduction strategies of the IMF. Poverty reduction strategy significantly promoted institutionalization of the rule of law and anti-corruption measures as the key to socio-economic development. The current NSDP in Lesotho continues in the same spirit that perceives the rule of law and anti-corruption initiatives as some of the key prerequisites for social and economic development. It is important to note that the Lesotho legal framework long provided for the rule of law. Section 19 of the Constitution of Lesotho of 1993 emphasises adherence to the principle of ‘equal protection of the law’. The rights to equality and to equal protection of the law are guaranteed in Chapter 2 of the Constitution.

Lesotho’s economy remains weak despite the adoption of these policies. According to the World Bank (2017), approximately 56.2 per cent of the population lived in abject poverty in 2016. The economy is still dominated by the public sector which in itself is faced with a mammoth challenge of reducing its wage bill and creating other avenues of income generation to remain sustainable. Southern African Customs Union (SACU) revenue declined from 25 per cent of GDP in 2014/15 to 13.6 per cent of GDP in 2016/7, and is expected to remain low in the medium term. Domestic private sector remains pre-dominantly at the micro-enterprise level and is dependent

on the public sector activity and non-tradable sectors. This is attributed to constraints such as access to finance and cost of capital. What the study deduces from this brief socio-economic picture is that Lesotho's private sector still doesn't present a sustainable alternative for livelihoods of the citizens.

The next section briefly discusses the current legal framework aimed at curbing corruption.

4.5 Legal System and Control of Corruption

Unlike the rule of law, corruption is not clearly explained in the Constitution of Lesotho of 1993, nor does it make provisions for the establishment of an anti-corruption agency. The country has ratified international and regional instruments of anti-corruption. These include: the United Nations Convention Against Corruption (UNCAC), African Union Convention on Preventing and Combating Corruption (2003) and Southern African Development Community Anti-corruption Protocol (2001).

The key national acts that make provisions for corruption are: Prevention of Corruption and Economic Offences (PCEO) Act, 1999, Money Laundering and Proceeds of Crime Act, 2008 and the Penal Code Act, 2010, which shows the relevant penalties to crimes committed. Additional legal instruments include Public Procurement Regulations, 2007, Public Finance (Management and Accountability) Act, 2011 and Criminal Procedure and Evidence Act of 1981. The section below gives extracts of three of the primary acts.

4.5.1 Prevention of Corruption and Economic Offences (PCEO) Act, 1999

It is the primary Act that makes provision for the prevention of corruption in Lesotho. It confers power on the Directorate of Corruption and Economic Offences (DCEO) to investigate suspected cases of corruption and economic crime. The functions of the Directorate as outlined in Section 6 of the PCEO Act include:

- To receive and investigate any complaints alleging corruption in any public bodies;
- Investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation;

- Investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of Lesotho;
- To investigate conduct of any person which may be connected with or conducive to corruption;
- To prosecute, subject to the consent of the Director of Public Prosecution, any offence committed under the Act;
- Assist law enforcement agencies in the investigation of offences involving dishonesty or cheating the public revenue;
- Examine practices and procedure of public bodies to facilitate the discovery of corrupt practices and to secure revised methods of work or procedures which may be conducive to corrupt practices.

DCEO's activities are divided into: prevention, investigation and public education. It is established as a public office; hence it is regulated by the Public Service Act, 1995. It is accountable to the Public Accounts Committee (PAC) and the Minister of Justice and Correctional Services and provides a report of activities to the latter annually.

The director is responsible for direction and administration of the DCEO. He/she is appointed by the prime minister to serve a five-year term. The main prerequisite for the appointment of the director as per Section 6(4) of the PCEO Act, 2006 is that the individual must be registered as a legal practitioner under the Legal Practitioners Act 1983. He is supported by two deputy directors in the management of DCEO.

DCEO is capacitated to achieve its mandate through various provisions of the PCEO Act. Section 8 of the Act empowers the director to obtain information to assist or expedite investigations into offences of corruption or economic offences. Therefore, any suspected person or those to whom a suspected person has any financial affiliation or business dealings with, as well as the banks are obliged to provide information requested by the director. PCEO Act overrides any oaths of secrecy on client information. Once DCEO has completed an investigation and a violation of PCEO Act has been confirmed, it refers the matter to DPP for his decision. No prosecution of an offence shall be instituted except by his written consent.

According to Section 36 of the Act, the director shall also hold an enquiry refereed by the Attorney General in relation to the alleged commission of a serious economic

crime. Section 37 entitles the Attorney General, upon the request of the director and upon obtaining a court order to that effect, to seize or freeze bank accounts or assets of any person the director reasonably suspects to have committed an offence under the Act.

Sections 4 (a) (b) and 8(2) of PCEO Act as amended in 2006 empower DCEO to do its functions independently. It shall not be subject to the direction or control of any person in the exercise of its duties except in accordance with the PCEO Act.

4.5.2 Money Laundering and Proceeds of Crime Act, 2008

This act establishes Anti-money Laundering Authority and the Financial Intelligence Unit to enable identification of all unlawful proceeds of serious crimes, trace, freeze, seize and eventually confiscate and require accountable institutions to take prudential measures to help combat money laundering. A person who commits money laundering offences shall, on conviction, be liable to imprisonment for a period of not less than 10 years or a maximum fine of not less than M50 000.00 or both and in the case of a body corporate a fine of not less than M500 000.00. A person who opens an account using a false name or fraudulent documents will face imprisonment for a period not exceeding 10 years or a fine of not less than M50 000.00 or both. In the case of a legal person, a fine of not less than M250 000.00 would be imposed.

A person who divulges information or other matters which is likely to prejudice an investigation of an offence or possible offence of money laundering shall be liable to a conviction of imprisonment for a period not exceeding 10 years or a fine not less than M50 000.00 or both. A person who solicits, receives, provides or possesses funds or other property enters into or becomes concerned where property is made available for the purposes of terrorism or for an organisation commits an offence and is liable on conviction of a fine not less than M100 000.00 or to imprisonment for a term not less than 10 years. Being involved in concealing, removal from jurisdiction, or transfer to another person of terrorist property makes one liable on conviction to a fine of not less than M500 000.00 or imprisonment for a term not less than 5 years.

According to this Act, the DCEO is the Anti-money Laundering Authority (AML) and accordingly the Director General of DCEO also holds the same position in the Authority. The AML Authority may:

1. Conduct any investigation into money laundering and financing of terrorism;
2. Instruct any accountable institution to take such steps as may be appropriate to facilitate any investigation anticipated by the authority
3. Consult with any relevant person, institution or organisation for the purpose of exercising its powers or duties; and
4. Extend legal assistance to foreign jurisdictions with respect to property tracking, monitoring and confiscation orders.

The Authority is given power to examine records and inquire into the business of accountable institutions for the purpose of investigating an offence under this Act or regulations made thereunder. The court shall ask the accountable institution or an officer or employee to pay a monetary penalty in the sum of not less than M100 000.00 or imprisonment for a period of not more than 10 years should it fail to comply with orders. It is important to note that no prosecution of any offence under this Act shall be instituted except with the consent of the Director of Public Prosecutions (DPP).

Financial Intelligence Unit (FIU) is the central agency responsible for:

1. Receiving, analysing and assessing reports of suspicious transactions issued by accountable institutions.
2. Supervising and enforcing compliance by banks, accountable institutions and members of relevant professions.
3. Issue back, accountable institutions and members guidelines to combat money laundering and financing of terrorism activities.
4. Providing assistance in the investigation or prosecution of money laundering offences to other countries.
5. Compiling statistics, records and dissemination.

4.5.3. The Penal Code Act, 2010

The Penal Code indicates the fine that is applicable to a crime that is committed. It categorises fines in 5 levels as follows:

Level 1: A fine of up to M1000.00

Level 2: A fine between M1 000.00 and M5 000.00

Level 3: A fine between M5 000.00 and M10 000.00

Level 4: A fine between M10 000.00 and M15 000.00

Level 5: A fine between M15 000.00 and M20 000.00.

The code stipulates that a person who offers a bribe (active bribery) to an employee of the Government of Lesotho, a public company, public institution or public officer, commits an offence. A person who accepts a bribe (passive bribery) also commits an offence. A case in which one considers to or gives someone a gift as an incentive to do or not do something with regard to that person's job is considered a bribe. Similarly, a person who accepts the offer and responds as per incentive is considered to have accepted the bribe. Under the Penal Code, a person who commits an offence of bribery may, upon conviction, be sentenced to imprisonment for up to 20 years. Fraud also attracts imprisonment of up to 20 years while extortion is penalised up to 15 years. Obstructing the cause of justice and officially constituted public enquiry is fined under level 3 or imprisonment up to 3 years or both. A person who commits what is described as a 'serious economic offence' in Lesotho will, upon conviction, be liable to a fine or imprisonment for a term not less than ten years, or both.

4.6 Conclusion

The chapter gave a historical background of governance in Lesotho. It went as far back as the chiefly rule, colonial rule to the current democratic rule. The main objective was to lay the foundation of understanding the genesis of corrupt tendencies in Lesotho and demonstrate how the country politically and legally evolved. The chapter mentioned legal provisions for principles of the rule of law and outlined a primary national legal framework for anti-corruption.

Various scholars attribute foundations of corruption in African countries to colonial rule. This chapter concluded that corruption in Lesotho emanated from the need to secure and improve individual welfare. The introduction of market economy principles such as property rights rattled chiefs who had held all factors of production in their communities and therefore controlled all economic wealth. As governance structure changed during colonial rule, chiefs used any form of power they still had to economically benefit themselves. This included unjust accumulation of wealth which

was sometimes carried out through corrupt use of the legal system. Chiefs made arbitrary rulings and applied law unequally oftentimes in their favour. The poor state of Lesotho's economy did not present chiefs with any lucrative opportunities in the private sector. Hence, they perceived holding onto power to the point of killing as the only means to decent livelihood.

The same trend is observed since the introduction of political parties and democratic rule. Every government has grappled with corruption. In most cases corruption resulted in party splits and in recent years the collapse of government itself. The weak state of the private sector still continues to make holding positions of influence in the public sector a 'pot of gold' through which political leaders could enrich themselves.

The colonial rule introduced western legal system along the existing customary law. This is the foundation of the prevailing dual legal system in Lesotho. Initially, Basotho were exposed to strict appreciation of customary law while non-Basotho made use of the modern legal system in which a mixture of Roman-Dutch law and English common law were used. With time, the colonial committees gave Basotho flexibility to have decisions by chiefly courts reviewed in modern courts. This changed customary law. Legal institutions subsequently transformed. Chiefly courts were slowly phased out and the high court was assigned all of its cases in 1939. Other courts were established which ultimately led to the current judicial structure which consists of the appeal court and subordinate courts.

Despite the persistent trend in corruption, Lesotho has been employing economic policies aimed at curbing corruption. The key policies include IMF and the World Bank inspired SAPs, poverty reduction strategy papers and the NSDP, all of which were intended to promote control of corruption and institutionalization of the rule of law. The Constitution of Lesotho of 1993 makes provision for the principles of the rule of law while control of corruption is primarily regulated through the PCEO Act, 1999 and Money Laundering and Proceeds of Crime Act, 2008.

The next chapter discusses court cases of corruption involving PEPs which will ultimately be used to analyse the relationship between control of corruption and the rule of law.

CHAPTER 5: Case Study - Corruption among PEPs in Lesotho

5.1 Introduction

The consistent handling of cases of political leaders plays a significant role in the institutionalization of the rule of law and the control of corruption. As articulated in earlier chapters, when the law is justly applied to political leaders, the ordinary citizens automatically expect the hand of the law to apply in their lives too. Political leaders would avoid corruption because of the unflinching knowledge that there would be dire consequences to such a consideration. However, if political leaders are given lenient treatment and do not face the full wrath of the law when they engage in corrupt activities not only would they continue unabated but they would further cripple the rule of law.

This chapter focuses on five court cases of PEPs. The cases demonstrate how cases of PEPs were dealt with, the measures in place to control corruption and what they insinuate about the application of the rule of law. The study outlines the charges, the rules and the reasons for the judgement where possible. However, other court cases only allow for a narrative on the developments surrounding them and the judgement of the court as the cases were not comprehensively argued in court. These cases took place in the magistrate, high court and some even went before the appeal court.

In the analysis of these court cases, a contrast will also be made against a court case of a public officer who was not clothed with much political clout and was also charged on counts of corruption and fraud. The prominent case is that of *Matete v Crown (C of A (CRI) 4/2010) [2010] LSCA 27 (22 October 2010)*.

5.2 The Court Cases

5.2.1 *Thahane v The Crown* CR/1082/13 and (C of A (CRI) 1 of 2016) (12 May 2017)

a) Background

The Government of Lesotho through the Ministry of Agriculture and Food Security put in place a block farming programme to assist specific individual farmers and farming associations. Block farming was intended to cover seeds and other input costs such as fertiliser, but not capital expenditure or vegetable farming. The various agricultural associations and farmers had mentors most of whom were

parliamentarians. Dr Thahane mentored Temo-moho Mpharane Agricultural Association of Leribe.

DCEO pressed charges against Dr Thahane in November 2014. He was consequently dismissed from his duties as cabinet minister following his first appearance in the magistrate court. According to the then deputy prime minister Mr Mothejoa Metsing, the removal was meant to give him time to deal with the case and "protect image of the cabinet" (Lesotho Times, 7 November 2013:4). At the time of the supposed crime, Dr Thahane was the minister of Finance and Development Planning in the LCD-led government.

b) The charges and summary of facts

Dr Thahane was charged with two counts of fraud. In terms of count one, he was charged with fraud; alternatively, fraud in contravention of Section 68 (1) of the Penal Code Act, 2010. According to the charge sheet, on 6 June 2008, the accused wrongfully, unlawfully and with the intention to defraud pretended to Standard Lesotho Bank that block farming policy would also be applicable to vegetable farmers. This was based on the letter in which he purported that the then Prime Minster of Lesotho, Pakalitha Mosisili, had endorsed the expansion while endorsement by Minister of Agriculture and Food Security was yet to be sought. This prejudiced both Standard Lesotho Bank and the government. Standard Lesotho Bank paid out sums totalling M18 092 587.50 towards vegetable farming thus resulting in government losing the equivalent amount. The charge sheet added that Dr Thahane knew when making such representation that the Prime Minister had not endorsed the extension of block farming policy and that he would not seek endorsement of the Minister of Agriculture and Food Security.

The letter referred to above reads as follows:

> *'**SUPPORT FOR VEGETABLE GROWERS FROM THE GOVERNMENT GUARANTEED LOAN FOR BLOCK FARMING***
>
> *Let me acknowledge with appreciation the excellent manner in which your bank has administered the above loan under Programmes I, II, and III. The crops appeared good in the fields and we look forward to better yields and repayment by the farmers as the planning for the next circle continues. We also look forward to the introduction of diversification of crops by adding high*

value cash crops, poultry, and piggery in order to reduce dependence on drought – prone maize production.

The difficulty which the farmers currently face is to harvest their crops on time and at reasonable costs. Hopefully, the Ministry of Agriculture and Food Security will once again come through.

To provide resources for pilot of the introduction of vegetable farming, I will propose to my colleague, Hon. Lesole Mokoma, Minister of Agriculture and Food Security, that we set aside from the remaining balance of the loan about M5 Million that would provide loans to vegetable farmers. Unlike block farmers, vegetable farmers must possess three things:

(a) assured purchaser or market of produce;

(b) irrigable land; and,

(c) a sound Business Plan that will show the project cashflows.

The Right Hon. Prime Minister suggested the above approach when he visited Programmes I, II and III in the North of the country – Tsikoane, Mpharane and Kolojane. I expect Hon. Mokoma to agree with me in the approach which has also been endorsed by the Right Honourable Prime Minister.

In the meantime, I suggest that you process any applications that may be referred to you in the coming days for vegetable farming as long as they meet the above criteria. You may also make them sign the same or slightly modified agreements as are signed by Block Leaders.

Hon. Mokoma and I will meet with you in the coming weeks to further formalize the above arrangements and expand the programme throughout the country. Given the current high cost of food it is urgent that farmers plant crops and poultry that will give them quick income.

With best regards,

Yours sincerely

_____

TIMOTHY THAHANE

MINISTER OF FINANCE AND

DEVELOPMENT PLANNING'

As part of his statement as witness, the Mosisili had stated, "I intimated to the minister (Dr Thahane) that the project could be pursued, but also said if it was to be done, two things would have to be done first". Firstly, the Minister of Agriculture should have drafted the memorandum to cabinet and the Minister of Finance would also have to concur. Secondly, the ministers should jointly present the memorandum before cabinet. Dr Thahane did not do any of the two. Mosisili explained further that Dr Thahane should have prepared a document inviting the cabinet to approve vegetable farming and that if he wanted the proposal to include vegetable-production for the Mpharane Temo-'Moho project, he should have prepared a fresh memorandum and presented it in cabinet.

On the second count he was charged with fraud; alternatively fraud in contravention of Section 68(1) of the Penal Code Act, 2010. Dr Thahane was accused of pretending to Standard Lesotho Bank that the amounts of M188 990.34 and M87 400.00 invoiced on 15 December 2010 and 25 March 2011 were payable by Standard Lesotho Bank to Matete Construction for erection of a storage shed for the benefit of Temo-'Moho and pursuant to block farming. The bank and government were prejudiced to pay the said amounts whereas in truth and fact the accused knew that such amounts were not due and payable to Matete Construction by Standard Lesotho Bank because Omnia had entered an agreement with Temo-'Moho to pay it so that it could in turn pay Matete Construction for its services.

In 2010, Omnia Fertilizer Limited of Ladybrand, South Africa, noted an opportunity of erecting a storage shed at Temo-'Moho to facilitate the efficient supply of fertilizers in Leribe. This would benefit both Omnia and the farmers. Omnia would use the shed as a depot to supply fertilizer in summer while Temo-'Moho would use it in winter as a storage facility for their tractors and also to stockpile and distribute the harvested maize. Omnia proposed to pay for steel construction work to be done by a company called SKK Steelworks. Ominia had already bought and paid for steel towards the project from this company. However, during the phone call between Omnia employee, Mr Janus Van der Westhuizen, and Dr Thahane in which the former was informing Dr Thahane that they were ready to erect the shed, Dr Thahane suggested

that the work be done by Matete Construction. Matete Construction was accordingly engaged to erect the shed.

The agreement entered into by the parties was that Omnia would shoulder the costs of erection and the steel while Temo-'Moho would pay for all other costs. Upon completion, Matete Construction invoiced Omnia M188 990.34 for columns and M87 400.00 for erection and roofing of the steel structure, transport of roof sheeting from Maseru to Mpharane and three days' hire of excavation for lifting structure. In line with the agreement, Omnia requested that invoicing should be done by Temo-'Moho. Omnia obliged to the invoice from Temo-'Moho and paid the total amount due of M276 390.34 by cheque on 13 October 2011.

On the other hand, Temo-'Moho forwarded invoices from Matete Construction to Standard Lesotho Bank to be paid under block farming. Dr Thahane, supposedly aware of the agreement with Omnia, signed and approved the two invoices and letters addressed to the bank's managing director together with chairman and secretary of Temo-'Moho on 22 November 2010 and 23 September 2010 respectively. The letters and invoices instructed the bank to pay Matete Construction the sum of M188 990.34 towards excavation for steel works while another requested payments of M58 000.00 for clearing topsoil and M11 000.00 for re-enforcement of columns. The bank's financial statements submitted with the court indicated that the bank paid Matete Construction M188 990.34 on 15 December 2010. The Crown did not allege that there was anything wrong with this payment.

Matete Construction also invoiced Temo-'Moho M87 400.00 for erection and roofing of steel structure, transport of roof sheeting from Maseru to Mpharane, as well as three days' hire of excavator for lifting structure. The invoice did not have the accused's signature or a note of approval by the accused on it. Nedbank Lesotho records brought before the court indicated that a payment of M87 400.00 was made.

In the interview with the DPP, Mr Leaba Thetsane, on 10 May 2017, he indicated that the challenge that led to delay of hearings and ultimate compromise of the case was the fact that his office first had to apply for funding to carry out investigations from the Ministry of Finance. Secondly, the case needed mutual legal assistance which they could not get. He stated that as an institution they learned that they should not rush cases and rather wait till mutual legal assistance is ready in order to avoid sabotaging cases.

c) Judgement

The trial judge, Monapathi, acquitted Dr Thahane on both counts in terms of Section 175(3) of the Criminal Procedure and Evidence Act, 1981. That section provides that the court may acquit an accused at the close of the prosecution's case if it considers that *'there is no evidence that the accused committed the offence charged in the charge.'*

d) Appeal

The prosecution appealed against the judgement. Senior Counsel Advocate Guido Penzhorn urged the court of appeal to overturn the high court judgement. He said that the high court should not have acquitted Dr Thahane because there was evidence that he made a misrepresentation to the bank through the letter he wrote alleging Mosisili had endorsed the vegetable project under block farming project.

During the appeal process, the counsel for the respondent argued that Van der Westhuizen's statement plus documents (invoices, letters and bank statements) presented before the court serve as proof of the existence of an agreement that Omnia would partially pay for the project.

The defence argued against the Crown that the evidence did not establish the alleged misrepresentation in respect of the invoices that the amount of M188 990.34 was due and payable by Standard Lesotho Bank to Matete Construction. In addition, the defence argued that the word "approved" was simply an instruction to the bank to debit its customer Temo-'Moho's account with the said amount and pay it to Matete Construction and it did not indicate that the amount was payable by the bank to Matete. Moreover, the defence contested that there was no evidence that pointed that Dr Thahane had anything to do with the non-payment or even knew that Temo-'Moho failed to reimburse the government when Omnia paid it eleven months later. The defence concluded that the Crown did not establish a *prima facie* case against Dr Thahane in respect of this payment; the same applies to the payment amounting to M87 400.00. The defence could not furnish evidence that the respondent authorised it.

In terms of count one, Thahane's defence stated that during cross-examination, the prime minister stated, "I don't remember saying it, but I could have said it", referring to endorsing the vegetable project. The acting president of the high court of appeal

Ian Farlam commented that the Prime Minister had not denied that he informally endorsed the project. It was on this account that all other statements in which Mosisili articulated the set processes that Dr Thahane should have followed to get approval for vegetable production under block farming, as detailed above, were nullified.

Judge Farlam concluded that the appeal failed and the order made by the *court a quo* to acquit the respondent at the close of the Crown case was confirmed.

5.2.2 *Rex v Mosito Khethisa, Timothy Thahane, Civa Innovations, Mokhethi Moshoeshoe* CR/1039/13

a) Background

Mosito Khethisa was accused together with Timothy Thahane and Civa Innovations Management (Pty) Ltd as well as its director Mr Mokhethi Moshoeshoe in 2013. Moshoeshoe is Khethisa's cousin. Khethisa was only suspended from his office of the principal secretary of the Ministry of Finance and Development Planning in the LCD-led government in April 2014. This is contrary to Dr Thahane who was immediately dismissed as a minister after first appearance in court. The alleged crime took place within the 'Wool and Mohair Product Development Project'.

c) Charges and summary of facts

Khethisa was accused on two counts. He was charged with fraud; alternatively fraud in contravention of Section 68(1) of the Penal Code Act, 2010 in the first count. According to the charge sheet, "the accused, sharing a common purpose unlawfully, deliberately and with the intent to defraud, represented to the government of Lesotho or the Ministry of Finance and Development Planning that an agreement entered into between the Ministry and accused three (Civa Innovations Management (Pty) Ltd) on 29 April 2010 in respect of Wool and Mohair Product Development complied with the Public Procurement Regulations of 2007." This was done with the intention that the Ministry should act upon the said misrepresentation to its prejudice and to the prejudice of the government of Lesotho, by paying the accused three sums: M8 379 070.50, M9 772 000.00 and M915 596.85 and did thus commit the crime of fraud.

Secondly, Khethisa was charged with bribery; alternatively bribery in contravention of Section 80 of Penal Code Act, 2010. The charge sheet gives that "on a date

unknown to the Crown but before 29 April 2010, accused three (Civa Innovations) and four (company director Moshoeshoe) corruptly offered a consideration to accused one (Dr Thahane) and two (Khethisa) who corruptly agreed to accept such consideration in return for action in their official capacities as public officials...such consideration was in the form of a share in the proceeds of funds received by accused three in respect of such contract". In summary, Dr Thahane and Khethisa facilitated the contract between the government of Lesotho and Civa Innovations in respect to Wool and Mohair Product Development for a share of profits in the contract.

In the magistrate court, the learned counsel advocate Loubser recounted to the court the number of postponements of this criminal matter. He uttered this at the backdrop of lack of progress with indictment due to postponements. He posed that the prescribed period as per Section 5(3) of Trials Act, 2002 to institute indictment proceedings had lapsed. Consequently, he submitted that the charge should be dismissed under Section 12(1)(b) of the said Act. He also referred the court to the affidavit of the application which relayed personal circumstances of prejudice and potential prejudice the applicant was likely to suffer if the matter was not expedited or terminated by dismissal. Responding on behalf of respondents, advocate Seema acknowledged that the time prescribed by the statute had lapsed. He urged the court to take into account that the statute was established in the interest of administering justice as a whole, and not personal circumstances *per se*. He further articulated that Section 9(2) puts in place the high hand of judicial discretion to be exercised judiciously based on the merits of each case. He invited the court to consider that in line with Section 9(3)(b) the case was peculiarly complex by nature of it being fraud and involving cross-border transactions. He submitted that in light of the peculiarities, Section 9(3)(b) did not warrant the case to be expedited as per stipulation of this statute and that it would be unreasonable to expect the adequate preparation for the pre-trial proceedings or for the trial itself with the time limit established by the statute.

The learned counsel invited the court to consider the state's interest in the matter in that it involves fraud of around M19 million which was allegedly stashed in foreign banks. He added that attached affidavits showed the serious nature of the offence. The learned counsel persuaded the court to consider Section 12(2) in regard to circumstances that had resulted in delays such as procuring services of

PriceWaterhouseCoopers audit firm as well as bureaucratic delays emanating from lack of mutual legal assistance.

Magistrate Peter Murenzi stated in his judgement that the case could not be dismissed only on grounds of investigations. He stated that while the law requires the trial to take place within sixty days of plea, he had to weigh the immense public interest and the seriousness of charges and that the prosecution needed to have evidence to prosecute. He argued that dismissing the case would be more prejudicial to the state's case because accounts that had been frozen by order of the court would be unblocked which would prejudice the crown's case. He thus dismissed the application in the event this decision was not appealed and ordered that the indictment be made within sixty days to avoid further prejudice to the accused. This case was transferred to the high court on 22 September 2014.

In November 2014 when they appeared in the high court expecting dates of hearing, Justice Makara postponed the case to 2 March 2015 but proceedings only happened in May 2015. Prosecution asked the high court to reschedule trial because it wanted to bring more evidence from South Africa that they intended to use. This included report from PriceWaterhouseCoopers. After considering all submissions made by the lawyers on both sides, Justice Makara granted the postponement application. The postponement was allowed for a maximum of three weeks. Justice Makara ordered that there must not be any other postponement.

c) Judgement

Judgement on the case was made in March 2016. The prosecution presented before the high court that they had entered into a plea bargain with Khethisa and other co-accused with the exception of Dr Thahane who would be tried separately as per the request of senior counsel Penzhorn. The three negotiated a plea and sentence agreement with the Crown which were subsequently reduced to a court order. Khethisa was convicted on a charge of contravening Section 22(1) of the PCEO Act, 1999 as amended. He was fined M30 000.00 or twelve months imprisonment while Civa Innovations was fined M100 000.00 and asked to compensate the government of Lesotho the sum of M6 500 000.00, which is the money the company fraudulently got paid for work not done (Lesotho Times, 12 March 2016:6).

5.2.3 *Monyane Moleleki v The Crown* C of A (CIV 14/2012)

a) Background

Mr Moleleki was accused of fraud and corruption. He allegedly contravened mining laws when awarding Refela Holdings prospecting mining licenses while he held the position of the Minister of Natural Resources in 2012. The next minister, Mr Tlali Khasu, cancelled Refela Holdings permits on 31 October 2012 on the grounds that they were issued under suspicious circumstances. The ABC-led coalition government laid the charge against Moleleki in March 2013. The supposed crime took place during the DC-led government. When the DC-led coalition came into government, Moleleki was not excused from a ministerial role; he was assigned to be the Minister of Police and Public Safety. The government engaged the late senior counsel Siphosihle Mdhuli, a former director of public prosecutions in Lesotho, based in South Africa at the time, to prosecute the case.

b) Charges and summary of facts

Moleleki was accused of fraud by abusing his ministerial position and violating the provisions of the Mines and Minerals Act, 2005. According to the charge sheet, Moleleki was accused of helping Refela directors to acquire a prospecting mining license without going through the proper application processes.

According to the charge sheet, between 1 May and 29 May 2012 Refela Holdings underwent the process of applying for diamond prospecting licenses in the Mosaqane and Ha Ramatseliso in Qacha's Nek as well as Ha Semenyenyane in Leribe. According to the charge sheet, "the applications were non-compliant, irregular and invalid in one or more of the following respects: the Environment Director had not given clearance for the applications and when such a clearance was given on 4 June 2012, it was for two days only". In addition, the furnished financial statements were of another company namely, Refela Trading CC based in South Africa. It had no affiliation with directors of Refela Holdings. The attached financial recommendation from Standard Bank, based in Kimberly, was also drafted on behalf of Refela Trading CC and not Refela Holdings. Likewise, the company's mining skills component indentified M.L Sithole and T.J. Mokaloba as the individuals who would be providing necessary skills. However, the two were found not to be in the employment of Refela Holdings nor under any contract to provide professional services of that nature.

The charge sheet further shows that when the application was made, no tax clearance certificate was submitted and the one on file was only issued by Lesotho Revenue Authority (LRA) on 18 June 2012. Police clearances of the directors were not submitted as required. In addition, the requirement to submit reports from site visits conducted by the Director of Environment or a representative from his office at the sites in question was not met because the site visits did not take place. The attached project briefs indicating that community meetings took place were also false. The application in general was not presented to the mining board as required by the Mines and Minerals Act, 2005.

Despite the above facts, information before the court indicated that on 29 May 2012 Moleleki in his capacity as minister issued three licences to Refela Holdings. The licences gave it prospecting rights until 29 May 2014. In this manner, Moleleki deliberately and falsely represented to Basotho that the prospecting permits were legitimately issued.

Moleleki was due to appear in court on 3 February 2014, but failed to make it due to ill-health. The matter was postponed to 19 February 2014. However, the court had to postpone again to 7 May 2014 due to Moleleki's illness. Judge Monaphathi stated that the matter was postponed because the Crown, represented by Mdhluli with the support of Mr Khotso Nthontho, could not provide any solid opinion to counter Moleleki's medical reports which warranted his absence from court on the specific dates. The medical reports indicated that Moleleki had stage three inoperable tonsilor cancer and that he underwent chemotherapy on 10 December 2013 and 7 January 2014. He was supposedly operated and underwent irradiation for two weeks, starting from 25 February 2014. The prosecution disputed the discrepancy in the dates Moleleki was treated and the fact that they coincided with the dates of the corruption trial. An instance of a discrepancy argued against by the prosecution was that his doctor had stated that his cancer was inoperable yet the report showed a date on which he was operated on. Mdhluli also argued that there was doubt in what Moleleki's doctor wrote in the medical report and that the report did not even justify why Moleleki had to stay in Bloemfontein for three months.

The case was postponed once more on 25 August 2014 because of Moleleki's ill-health. Judge Monaphathi postponed the matter to September 2014 after advocate Phafane, who represented Moleleki, stated before the court that his client was still in

a bad shape. Moleleki was not in court. Justice Monaphathi articulated that the decision to postpone the case was reached following deliberations with the prosecution. The parties also concluded that a medical report of doctors attending Moleleki should be sought within fourteen days in order to help the court to decide on whether Moleleki was fit enough to appear before the court.

On 12 May 2015, Mdhluli appeared in court in order to set dates for the next hearing, only to find it was just him and that the DPP had already set the date for 1 August 2015 without informing him as senior counsel for the Crown (court notes, 2015). Mdhluli subsequently withdrew from the case and alerted the high court judge and the DPP of the decision. According to the magistrate court notes (2015), Mdhluli addressed the judge saying, “we were supposed to appear before the court yesterday and set the date for the hearing but I understand other people appeared before you and set the date in August for mention.” Judge Monaphathi responded that the date was set before his clerk not himself. Mdhluli intimated that the postponement to August was not his decision and that he had been ready to proceed with the case more than six months ago. He stated that the postponements have mainly been due to Moleleki’s illness and on one account of the co-accused’s health. Mdhluli then made the following remarks; “I would want to make this clear because I have my integrity to protect. To me, it seems the manner in which this case has been dealt with is a fuzz; it’s a joke...Now all the accused persons are not before the court—something which I’ve never experienced for a long time I have practiced (law) in this country...I was the Director of Public Prosecutions here for about 12 years, but I never saw such a thing whereby even counsel are all not before the court...My Lord, I’ve done my level best to ensure that the case proceeds; I am in no way to blame...I can see the direction this case is taking and I don’t want to be caught in the middle. Whatever happens after now, I’m not part of it. There has been great resistance from some quarters that this case doesn’t proceed. Even now, I can smell something sinister. I smell a rat” (Lesotho Times, 14 May 2015:6). Judge Monaphathi accepted his withdrawal from the case and postponed meeting to set the trial date to 1 August 2015. On the day, Mdhluli had to appear before the court for handover to advocate Moletsane Lenono but he wasn’t in court.

On the set date of 1 August 2015, Moleleki was also not in court. The case was postponed to 27 November 2015. According to advocate Phafane, the date for

setting the trial date was not only postponed on account of Moleleki's ill-health but also due to the fact that a new prosecutor was assigned to the case (court notes, 2015). On 27 November 2015, the high court set the dates for continuation of the trial to 14-17 March 2017 and it had to proceed in the week of 28 March 2017. The date was reached by counsel of both sides.

c) Judgement

Judgement was reached on 14 March 2017. On the day, advocate Phafane argued that "the defence has since 2013 asked the prosecution to furnish them with all documents the prosecution intended to use for the trial...the court on November 2013 had shown concern that the defence had not yet been given all documents it required and that the Crown was bound to do so...Even when argued before court, the Crown admitted that it only gave some documents to us, not all documents" (Lesotho Times, 17 March 2017:4). The documents advocate Phafane referred to included, three books which forensic experts who had to be called as witnesses used to identify hand writings and the investigation diary which would show the procedure followed by the investigating officer. In response, advocate Lenono stated that the investigating officer indicated that he could not locate the docket when he requested it in order to be able to interview the witnesses. Therefore, he had not accessed the documents advocate Phafane was referring to.

Judge Monaphathi asked advocate Lenono what he proposed to be done to protect the accused given that the accused remained charged since 2013 but the prosecution failed to provide all documents to the defence. Advocate Lenono asked for a few days to provide advocate Phafane with requested documents. However, Phafane asked the court to proceed with the case as his client was prejudiced by the case because government was using it against him to get political mileage since he formed a splinter party, AD (Lesotho Times, 17 March 2017:4). He added that "the court should call the accused persons to plead to the charges and if the Crown fails to prosecute them, they should be acquitted." (Lesotho Times, 17 March 2017:4). In response, advocate Lenono attempted to withdraw charges to allow prosecution to reinstate them later. However, Judge Monaphathi explained that the court was careful to protect the crown and Moleleki who had been prejudiced by the prosecution's failure and unwillingness to proceed with the case. Monaphathi continued, "I cannot also disguise that on the part of Moleleki there is prejudice...but

most importantly the court's decision must be obeyed. The court's dignity is also affected. If orders of the court are not obeyed, what remains to our democracy? I now ask the accused to stand up and plead" (Lesotho Times, 17 March 2017:4). The accused pleaded not guilty. In response, judge Monaphathi acquitted Moleleki.

5.2.4 *Rex v Lebohang Phooko and Another* CR 2235/12

a) Background

Mr Lebohang Phooko was charged along with six other individuals namely: Mr Tikoe Matsoso, Mrs Moliehi Ntlhakana, Mrs Lerato Sello, Mr Bahlakoana Makhera, Mr Mochekoane Ramashamole and Mr Moeketsi Matsepe. He was charged for not following the procedures governing the procurement of goods or services.

He supposedly committed this offence in 2012 under the DC-led government, just before the 26 May 2012 elections which heralded another government. He held the office of the principal secretary in the Ministry of Public Works and Transport.

b) Charges and summary of facts

According to the charge sheet, Mr Phooko and others were charged with one main count of contravening Section 21(3) of Prevention of Corruption and Economic Offences Act (as amended) 1999, read with Sections 2, 30 and 34 of the said Act. According to the charge sheet, around January and March 2012, Mr Phooko and others, in their capacity as public officers, unlawfully and intentionally abused the functions or position of their offices. They procured stores, equipment and vehicles for re-gravelling and upgrading of Roma-Mangopeng loop and Ha Ngabene-Selomo roads from Metsi-a-Pula Civils and Sethojane Transport and Plant Hire for the ministry. This involved respective amounts of M562, 704.00 and M636 240.00. They did this for the purpose of obtaining an undue advantage for themselves or Metsi-a-Pula Civils and Sethojane Transport and Plant.

In terms of an alternative charge, on or about the period January to March 2012, they unlawfully and intentionally procured the supply of stores or equipment or services for works along Roma-Mangopeng loop and Ha Nqabene-Selomo roads. They procured these from Metsi-a-Pula Civils and Sethojane Plant Hire respectively for more than a fair and reasonable price and without authority. They failed to comply with the law governing the procurement of the said goods or services; in particular

they failed to comply with the Public Procurement Regulations, 2007 made in terms of Section 37 of the aforesaid Finance Order.

The evidence brought before the court indicated that Mr Tsepo Mahase, who was the transport officer at the ministry, invited quotes for the upgrading of Roma-Mangopeng loop from Metsi-a-Pula and Sethojane companies in January 2012 through phone calls as per instruction of Matsoso. The two responded by placing their quotations in the ministry tender box. Bids from the two companies were evaluated by Mahase and Ramashamole (accused 6) although they were both not part of the evaluation team (Magistrate court notes, 2012).

Matsoso, in his capacity as director of Roads Directorate, instructed Mahase to draft a letter requesting authorization from Phooko, the principal secretary, to hire equipment and vehicles for emergency works along Roma-Mangopeng and Ha Nqabene-Selomo road network. This letter was drafted despite the fact that the irregular procurement process was already done. Phooko accordingly granted authority to the ministry to hire equipment and vehicles as requested. This is despite the fact that Public Procurement Regulations, 2011 and the Finance Order, 1988 or other laws governing public procurement did not give him such authority.

On 15 February, Metsi-a-Pula was recommended to the tender panel to be granted the contract to upgrade the Roma-Mangopeng road. Matsoso instructed that Sethojane be automatically granted the Ha Nqabane-Selomo road works contract. On the same date, following instruction from Matsoso, Nthlakana recommended Metsi-a-Pula and Sethojane to be granted the works. Nthlakana made the recommendation although all necessary documents to reach that decision were not submitted with her. The document had to include: an application letter requesting authority or waiver from the minister, approval of waiver or authority from the minister and an evaluation report from the evaluation team.

The magistrate court notes (2012) indicate that on 20 February the tender panel approved the recommendation to award Metsi-a-Pula and Sethojane the contract for road works at Roma and Ha Nqabene respectively. They did this without being authorised by the Procurement Policy and Advice Division (PPAD). In addition, the amounts due to the contractors was above M100 000.00 which warranted the procurement process to be on open tender. Alternatively, the ministry should have launched an application with PPAD for waiver to procure from a specific service

provider. One other matter was that Roma-Mangopeng road was not budgeted for and did not fall within the jurisdiction of the ministry.

The case was first remanded on 12 December 2012. Hearing dates were set for the 17, 18, 24 and 25 September 2013 but were later postponed after appearance before the court on 17 September 2013. This is because on 17 September, the Crown, represented by advocate Peter Matekane of the DCEO amended the charges and withdrew charges against five of the seven accused and presented them as accomplice witnesses. At this, the defence applied for postponement of the hearing to 28 and 29 May 2014 and 10 to 12 June 2014.

On 10 June 2014, Phooko and Matsoso appeared before the court together with advocate Matekane for the Crown and advocate Molapo for defence. The hearing was however rescheduled for 3 July 2014. On this set date, both the accused and the defence counsel were in court. The advocates presented before the court that they had an exception to make with regard to the charges and requested to make a written submission which would be filed and argued on 18 August 2014 while the matter would be heard on merits on 15 and 16 October 2014.

When the case proceeded on 29 July 2015, the accused were before the court but the hearing was rescheduled to 4 May and 11 to 12 May 2016. On 20 October 2016, the matter did not proceed in court. The court asked to stand the trial down till 27 October for an update. On the said date, all the parties were in court. Advocate Matekane submitted a directive from the DPP dated 25 October 2016 to withdraw the charges against Phooko and Matsoso.

The Savingram from the DPP read as follows:

"...In the savingram under reference your office recommends that the above-cited matter be withdrawn on account of insufficiency of evidence following the demise of "two star witnesses" for the prosecution. I note with grave concern that the matter under reference had been marred by countless postponements at the instance of mostly either the defence or the presiding magistrate. Had it not been for the said postponements the matter could have long been disposed.

In the circumstances, the Crown is left with no option but to resort to the Provisions of Section 278(3) of the Criminal Procedure and Evidence Act, No. 7 of 1981

authorizing the Director of Public Prosecutions or the Prosecutor to withdraw any charge at any time before the accused has pleaded..."

Consequently, it is directed that the matter be withdrawn.

5.2.5 *Matlamukele Matete v The Crown* (C of A (CRI) 4/2010) [2010] LSCA 27 (22 October 2010)

a) Background

Matete is a former clerk of the national assembly. He was accused of corruption for attempting to use his capacity as a public officer to make personal gains from the procurement of a photocopy machine. His court case represents that of public officers without political clout.

b) Charges and summary of substantial facts

Matete was accused on two counts. The first was contravention with Section 22(1), read together with Sections 20 and 34 of the Prevention of Corruption and Economic Offences Act 5, 1999. In terms of count one, Matete ordered a photocopy machine from Konica at the grossly inflated price of M1 475 259.29. However, Konica was unable to obtain the machine from the South African distributors, Minolco Pty Ltd, trading as Minolta South Africa because its product manager perceived the price at which Konica proposed to sell the machine to the government of Lesotho to be too high.

Mr Alan Griffiths, the managing director of Minolta, made a statement before the court that Mr Khuele, one of the directors at Minolta, called him in an attempt to persuade him to sell the machine to Konica. Khuele also mentioned that he had entered into an agreement with Matete to give him half a million from the profits.

On the second count, Matete was accused of fraud. On or about 13 December 2005, he "unlawfully and with the intent to defraud, misrepresent to the Principal Secretary of the Ministry of Finance and Development Planning either expressly or by implication that the minister had afforded National Assembly a waiver to purchase a heavy duty photocopy machine from Konica Enterprises (Pty) Ltd at the price of M1 475 259.29".

Matete requested the principal secretary to facilitate acquisition of the copier from Konica at the above said price. Through false representation, he persuaded the

principal secretary to influence the Minister of Finance to accept the purchase of the machine from Konica at the exaggerated price. According to the transcription of the court case, when Matete did this, he knew that the minister had not provided waiver for the purchase of the Bizhub machine from Konica. The previous minister had provided a waiver in March 2005 following which the national assembly procured a heavy duty copier from Beaunet for M562 435.70. The machine was accordingly delivered to the National Assembly. However, in the letter dated 13 December 2005, Matete indicated that the National Assembly was yet to procure the machine and that the acting Minister of Finance had approved the waiver. He requested that since the purchase had not been budgeted for it was necessary to apply for the provision of this amount from the government contingency fund. The then Minister of Finance, Dr Timothy Thahane, in his statement before the court, indicated that he provided the waiver because he was given the impression that the acting Minister of Finance, Dr Mamphono Khaketla, had already approved it.

c) Judgement

The High Court judge, Hlajoane, and two assessors, convicted Matete on the two counts. He was sentenced to five years imprisonment or a fine of M10 000.00 on the first count and ten years imprisonment or a fine of M50 000.00 on the second count. Both sentences were ordered to run concurrently. The trial judge explained that this was reached because both counts happened within one transaction. He appealed against the convictions.

d) Appeal

In terms of the first count, the judge relied on the decision made by the Appellate Division of the Supreme Court of South Africa, *R v Miller* 1939 AD 106 and *R v Mayet* 1957 (1) SA 492 (AD) which were both used with approval by the Lesotho Court of Appeal in *R v Mochebelele and Another* C of A (CRI) 2/08. Reference was also made to a passage appearing in *R v Leibbrandt and Others* 1944 AD 253*,* which was quoted when the case went on appeal and was approved in *R v Mayet*. The passage read as follows:

“As we understand the position, once there is other evidence of the conspiracy and the parties thereto the acts and statements, executive as opposed to narrative, of one of the co-conspirators are admissible to confirm the scope of the conspiracy and

the nature of the steps taken to carry it out, and there seems to be no reason why such evidence as to the parties who took part therein"

The appellant's lawyer, Matoane, contended that the judge made an error by admitting evidence of Griffiths against Matete. He articulated that what Griffiths said before the court was a confession made by Khuele which was admissible against Khuele and not to Matete as per amended Section 230 of the Criminal Procedure and Evidence, Act 9 of 1981. He further argued that the statement was not an "executive statement" as in the cases to which the judge has referred to. Lastly, Matoane opined that there was no evidence apart from the statement itself, which supported the suggestion that Matete conspired with Konica.

Judge Farlam opposed the points made by Matoane in that there was nothing substantial about them. Firstly, he argued that referring to Section 230 which read, "No confession made by any person shall be admissible as evidence against any other person", did not hold. This was at the backdrop that the legal rule on whether executive statements made against a co-conspirator in a crime were admissible in court was not to be regarded as applicable only in terms of the rule stipulated in Section 230. Moreover, he stated that the statement made by Griffiths could not be considered a "confession" because that expression was used in the context of Criminal Procedure and Evidence Act which defines it as "an equivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law" (*R v Becker* 1929 AD 167 at 171).

Judge Farlam also argued that the statement made to Griffiths was clearly meant to persuade him to facilitate the transaction between Minolta South Africa and Konica in order to purchase the machine at a price Griffiths regarded as too high. The transaction would advance the common goal of selling the machine at a high profit margin in order to give Matete a share of the profits for using his position to get the government to agree to the purchase.

Advocate Woker (for the Crown) went further to summarise other uncontested evidence. Woker narrated that on 23 March 2003, Matete attended a meeting together with the Minister of Finance, speaker of the National Assembly, acting Principal Secretary of the Ministry Finance and the Accountant General during which the Minister of Finance agreed that one machine could be bought through a waiver process. He provided the condition that the purchase of any other machines would

have to follow the normal procurement channels. Shortly after the minister's approval, the national assembly purchased a high volume Canon 105 photocopier from Beunet Environmental Factor (Pty) Ltd for M562 435.70.

In May 2005, Minolta South Africa informed Lesotho Minolta Ltd of the Bizhub Pro 1050 high volume photocopier it was introducing to the Southern African Market. It is worth noting that the specifications of this machine were found to be comparable to those of the Canon 105 copier purchased from Beunet Company. A representative of Lesotho Minolta, Mrs Thamae, approached Matete to share information on the new machine and to entice him to purchase one for the national assembly. He indicated that his office could not buy the Bizhub as another company had been awarded the job, which was in fact false.

At a later stage, Matete arranged for an official delegation including representatives from the Department of Finance and Government Printing Unit to attend a trade exhibition in Johannesburg to choose a photocopier for the National Assembly. The delegation was led by Khuele, director at Konica Enterprises (Pty) Ltd, and they were shown the Bizhub Pro 1050 photocopy machine only.

In November 2005, the appellant applied for a waiver from the Minister of Finance in order to purchase the Bizhub from Konica at a cost of M1 475 259.29, which is approximately three times the Canon 105. The waiver was granted by the acting Minister of Finance, Dr Khaketla, on 21 November 2005. However, Konica struggled to procure the machine from Minolta South Africa. Post Khuele's death, his wife contacted Mrs Thamae of Minolta Lesotho Ltd to procure the machine for the National Assembly from Minolta South Africa. Thamae accordingly prepared a quotation for the supply of the copier and submitted it to Matete. He queried it because it was M275 000.00 less than M1 475 259.29. Matete requested Thamae to revise the quotation and leave the original pricing unchanged.

On the basis of this evidence and reference to a trial court's judgement in *R v Leibbrandt and others* 1944 AD 253 Judge Farlam concluded that the evidence provides the "foundation" required to warrant use of the statement that Khuele made to Griffiths. Hence, Judge Farlam concluded that Mr Matoane's third point that Mr Griffiths' evidence was inadmissible should be rejected. In light of the summarised evidence and absence of any evidence from the appellant, the judge concluded that the appellant was rightfully convicted on count one.

In terms of count two, Judge Farlam argued that Matete misrepresented to the Principal Secretary that the Minister of Finance had provided the waiver. The appellant did this with a clear knowledge that the minister gave a waiver in March 2005 to purchase one machine only, which was bought from Beunet for M562 435.70.

Matoane argued on behalf of Matete that the letter was written after the acting minister had approved the appellant's application for a waiver to purchase Bizhub machine at M1 475 259.29. He emphasised that the incorrectness could least be technical because indeed the acting Finance Minister, Dr Khaketla, gave the waiver while the Finance Minister, Dr Thahane, gave consent for the amount to be availed from government coffers. Secondly, he argued that no alleged misrepresentation was done as the letter did not state that the price was fair. The letter read as follows:

"Following the conclusion that there is a need to have two heavy duty photocopying machines through a meeting in which the Honourable Minister of Finance was present, we were afforded a waiver to purchase one machine from Itec Lesotho.

The machine was not provided for in the 2005/2006 budget estimates. Your good office is, therefore, requested to grant us One Million Four Hundred and Seventy Five Thousand, Two Hundred and Fifty Nine Maloti and Twenty Nine Lisente (M1 475 259.29) to facilitate acquisition of the same".

Matoane concluded his argument in that the Crown had failed to prove that the appellant was guilty on count two and that his conviction should be set aside. In response to the appeal, Judge Farlam concluded that the appeal on count one was dismissed while the appeal on count two was successful. He reiterated that the appellant took considerable time of close to a year attempting to implement the scheme and that although he did not financially benefit from it as it didn't succeed, he would have significantly benefited from the deal. He added that the courts repeatedly stress the seriousness of corruption and made reference to Lesotho Highlands Development Authority (LHDA) corruption cases: *Acres International Ltd v The Crown* LAC (2000-2004) 677 at 707 B-I, *Mochebelele v The Crown* C of A (CRI) 12/2009 and *Sole v The Crown* LAC (2000-2004) 612 at 655 E-I in which it was stated that it was "inappropriate to impose a fine on a natural person in serious case of corruption such as this". Judge Farlam stated that in his opinion it is in such cases where a custodial sentence is called for in order to deter others from similar

behaviour. He opined that the appropriate sentence would be a fine plus imprisonment part of which was suspended.

The sentence imposed on Matete in respect to count one was therefore changed. Matete was sentenced as follows:

“M10 000.00 or five years imprisonment plus an additional seven years imprisonment of which three years are suspended for three years on condition that the accused is not convicted of an offence of bribery or corruption, under the Prevention of Corruption and Economic Offences Act 5 of 1999 as amended, during the period of suspension and in respect of which he is sentenced to imprisonment without option of a fine”.

5.3 Comparative Analysis of the Cases and Developments Surrounding Them

5.3.1 Courts’ Application of Statutory Law

The summary of substantial facts and judgements of all the cases above, with the exception of Matete, demonstrate that the courts did not comprehensively apply statutory provisions of the acts governing corruption, if at all. The high court and the court of appeal were able to substantively apply the provisions of the Prevention of Corruption and Economic Offences, Act 5 of 1999 in the case of Matete and accordingly convicted him. In the court of appeal, Judge Farlam laid out the ultimate judgement on Matete in line with the provisions of the Prevention of Corruption and Economic Offences, Act 5 1999, as well as his judicial discretion coupled with common law.

In the case of Khethisa, the prosecution and defence counsel entered into a plea bargain which resulted in a lenient sentence to the accused. As for the cases of Moleleki and Phooko, they suffered perpetual postponements, such that judgements of the courts were based on missing files and deaths of the two key witnesses respectively. In essence, the judgments were dictated by the circumstances surrounding the cases and the not the application of relevant statutory law. In the case of Dr Thahane, the prosecution and defence counsel had an opportunity to argue before the courts. The case grounded its arguments on Criminal Procedure and Evidence (Amendment) Act, 2002 to nullify evidence brought before the court. The majority of the arguments were however based on technicalities. Dr Thahane was acquitted due to the prosecution’s failure to establish a *prima facie* case against

him. The general lack of application of the law in the majority of these court cases makes it difficult to assess general fairness in the application of the law.

5.3.2 General Discretion of the Courts

The prosecution in Moleleki's case took more than a year after the court had ordered it to provide the defence counsel with evidence that it would use against the defendant in court, as is legally mandatory. The prosecution's negligence to handover the evidence to the defence counsel facilitated the acquittal of Moleleki. If the prosecution had handed a copy of the docket to the defence earlier, the trial could have continued. Allowing prosecution to withdraw charges and reinstate them later after re-compiling the evidence following non-compliance to court ruling for a year would not only prejudice Moleleki, but most importantly, it would set precedence that prosecution could get away with not providing evidence to be used in the court as standard. In summary, the court judiciously applied its discretion on the merits of the case.

In the case of Khethisa, the high court accepted a plea bargain entered into by the prosecution and the accused which dictated the sentencing. The court failed to apply its discretion judiciously. What makes the matter more disconcerting is that after his sentencing, Khethisa openly showed lack of remorse. In his interview with Nthakoana Ngatane (2017), a South African Broadcasting Cooperation (SABC) correspondent for Lesotho, he indicated that he simply pleaded guilty of contravention with the Prevention of Corruption and Economic Offences, Act 5 of 1999 and not to corruption and did that to "help" the DCEO prosecute him. In his statement, he portrayed that there was nothing wrong with what he did when he contracted his cousin Moshoeshoe for the job without taking the job to open tender although the amount involved (above M100 000.00) legally demanded him to do so or at least apply for a ministerial waiver for selective tendering. He also did not acknowledge that it was wrong of him to have paid Moshoeshoe M6 500 000.00 for work not done. Instead, he defended his decision on the basis that it was common practice in all other ministries. He uttered, "even now if you go to finance (referring to Ministry of Finance) you will find a list of requests for retrospective approval where somebody has already provided work to somebody else not following procurement. What I have done is something that in Lesotho is being done every day. But these are administrative and there are penalties for not following procurement... It is

unfortunate that my case went to court while other cases are not going court. It's unfortunate that I ended up being fired while others are doing the same thing ..." said Khethisa.

At the magistrate level, the court judiciously applied its discretion in Khethisa's case. When the case had taken longer than it should to go on trial, the court took into account all factors surrounding the case including the nature of the crime, the amount of money involved and the administrative, financial and legal hurdles the prosecution had to go through to compile the evidence it needed in order to prosecute and also the possibility of prejudicing the state by withdrawing the case. On the basis of common law, the court allowed prosecution more time but set a limit on the time they could take.

In Dr Thahane's case, the courts used their discretion judiciously and in line with the principles of evidence. The letter in which Dr Thahane had stated that the then Prime Minister, Mosisili, had approved the expansion of block farming project to cover vegetable production served as direct evidence. However, the case fell apart when the prosecution's witness who would give circumstantial evidence to determine whether Dr Thahane was guilty of misrepresentation or not was not compelling or convincing enough to the courts. The failure of the prosecution's circumstantial evidence to proof Dr Thahane's intent in writing the letter and authorizing payments nullified the evidence brought before the court.

5.3.3 *Stare Decisis*

It is arguably in the case of Matete only in which the court seems to have comprehensively applied the principle of determining points in litigation according to precedent. A comparison of some of the PEP cases with the past cases of corruption, mainly those involving bribery and corruption in the LHDA project such as *C v Mochebelele* and *Sole v Crown* which were used as precedence in Matete's case, shows that the Lesotho courts have detracted from a trend in judgements which regarded bribery, fraud and corruption in a very serious light. By so doing they have deviated from the principle of *stare decisis*.

In *Sole v Crown* LAC (2000-2004) 612 at 655-E1 the court stated, "the sentence imposed by the court must express the public abhorrence of what has transpired and in particular emphasise that Lesotho simply will not tolerate corruption in its midst. In this respect the sentence imposed must be as such deterrence to others in the

future". The manner in which the prosecution handled Khethisa's plea gain did in no manner reflect the stringent approach to corruption, fraud and bribery that the prior cases took. While it is common cause that Khethisa's case resulted from a plea bargain and therefore could not constitute any kind of precedent as was the case in *R v Du Plooy* (CRI/T/111/1999) 2003 LSHC 122 (17 October 2003), the monies involved in the case should have been taken into consideration. Jacobus Michael Du Plooy acted as an intermediary of international firms that bribed Sole of the LHDA. He pleaded guilty of bribery in the LHDA corruption matter. The courts noted that he had shown remorse and sentenced him to suspended prison sentence and a fine of M500 000.00. Bearing in mind that Mr Khethisa authorised a payment of M6 500 000.00 to Civa Innovations, which was managed by his cousin, for a service not rendered thus making the government loose that much; a sentence of M30 000.00 or twelve months imprisonment does not discourage such behaviour. It is such negligible fines made through judgements relative to financial gains of corruption that continue to make corruption enticing to PEPs in Lesotho.

5.3.4 (Non) Arbitrary Decision-Making by Government

The cases reflect that the manner in which the government handled the accused after they were charged was arbitrary. While Dr Thahane was immediately excused from his office of Minister of Finance at the backdrop of protecting the image of the cabinet, Khethisa was only relieved from his job later. What happened to Dr Thahane was not a strange action as other public officers were suspended or send on indefinite leave on indictment. For example, Mr Retselisitsoe Khetsi was sent on indefinite leave from his position as principal secretary in the Ministry of Home Affairs immediately when he was indicted. Former principal secretary in the prime minister's office, Mr Kubutu Makhakhe, was also suspended pending ministerial investigations against him.

It is worth noting that Mr Mothejoa Metsing who was then the Deputy Prime Minister in the ABC-led coalition government and had personally announced that Dr Thahane would be fired from his ministerial post due to corruption charges against him, remained in office in the DC-led coalition government while he was also under investigation for corruption. Likewise, Moleleki continued with his ministerial duties after he was charged. He was appointed as a Minister of Police and Public Safety in the DC-led coalition government while his case was already in the courts. As for

Phooko, he never assumed his office again after the change in government. He was therefore not a principal secretary anymore because of the change in government and not because he was excused from his position. Matete was employed on contract basis.

5.3.5 Equality before the Law

Matete's case represents that of many public servants without political clout. Such cases often allow the full hand of the law to take its course. The difference between PEPs with political clout as opposed to those with no political power or strong political affiliation is reflected in such cases. It does not seem as though there is equality before the law between PEPs with greater influence in their parties to those with no political clout in the ruling party and ordinary public servants. As the then Members of Parliament, Rantelai Shai and Ramootsi Lehata, put it, "there are people within the government ministries who seem to be above the law as they are never brought to book …in cases whereby measures are taken to bring civil servants to book, police dockets often disappear" (Lesotho Times, 29 September 2010:5).

Telephonic communication of May 2017 with the office of the Auditor General reaffirmed observations that were shared in an interview with the then Deputy Auditor General, Mafanie Masoabi in 2015. She asserted that the general trend was that it was easier or common to have junior public officers held accountable for their misdemeanours and prosecuted, but it was not so easy when it came to the political elites. Although the Auditor General Reports highlight several cases of corruption and fraud every year, negligible action is taken where it involves principal secretaries or ministers. The weak Public Accounts Committee (PAC) coupled with lack of political will to address the issue of lack of accountability and mismanagement of public funds sustains corruption of PEPs.

5.3.6 Coalition Government v One Party

All the four PEPs were indicted during the ABC-led coalition government while the supposed criminal activities were done during either the LCD or DC era. To the contrary, Matete committed the crime during the LCD era and was convicted then. Since some of the PEPs' cases specifically those of Phooko and Moleleki happened just before the elections that resulted in the ABC-led government, one would deduce that the coalition government was more effective in confronting corruption. This is derived at the backdrop that there are other corruption cases of PEPs that occurred

during the fifteen-year rule of LCD/DC governments which were never taken before the courts. It was also noted that as the governments changed; the manner in which the cases progressed in court changed. For instance, Moleleki who had never been able to make it to court on account of ill-health was appointed to be the Minister of Police and Public Safety and was in perfect health when the DC-led coalition government came into power after the 2015 elections. However, his case was postponed for more than a year. As it was stated by his lawyer during the court proceedings on 28 March 2017, pressure for the case to continue before the courts only intensified when he broke away from DC, which led the coalition government.

It seems that the change in government from one dominated by one party to the ABC-led coalition government in 2012 broke the pattern in which politically connected public officials engaged in corruption without being brought to account. The control of corruption in high echelons requires subjecting PEPs and ordinary citizens to similar legal rules. In summary, a coalition government with the majority of parties which are determined to curb corruption results in a relationship between the rule of law and control of corruption that mutually promotes good governance. On the contrary, a coalition government that predominantly lacks the political will to combat corruption and protects its political party members from prosecution as seen in the DC-led coalition government after 2015 elections, specifically the case of Dr Khaketla, undermines appropriate legal response. Consequently, the relationship between control of corruption and the rule of law in such a case deters good governance.

5.4 The *Zuma* Corruption Case

5.4.1 Background

South Africa boasts a comprehensive anti-corruption legal framework which is touted internationally (Chêne and Hodess, 2010:8). Its key anti-corruption laws include: Prevention and Combating of Corruption Activities Act, (Act 12 of 2004 (the Corruption Act), Financial Intelligence Centre Act (Act 38 of 2001 (FICA)), the Prevention of Organised Crime Act (Act 121 of 1998 (POCA)) and Electronic Communications and Transactions Act (Act 25 of 2002 (ECTA)). Institutions of anti-corruption and economic crimes include the Directorate for Priority Crime Investigation (DPCI) known as the Hawks, the South African Revenue Services (SARS), the Special Investigating Unit (SIU), the South African Police Services

(SAPS), the National Prosecuting Authority (NPA), the Public Protector, Asset Forfeiture Unit and the Anti-corruption Task Team.

The study explained in chapter 4 that due to being a former protectorate of the Cape Colony, Lesotho's legal system bears some similarities with that of South Africa in terms of common law. Moreover, some judges work in both the Lesotho and South African courts. This section draws contrasts and similarities between the above cases to that of President Zuma in light of Shabir Shaik's corruption case. The study refers to Shaik's case because all charges against him emanated from his relationship with Zuma. Although Zuma's case has not been heard before the courts, as at the time of writing this study, the proven close affiliation with Shabir Shaik as detailed in the charge sheet and developments surrounding the case offer a relevant point of reference.

The decision to charge and prosecute President Zuma emanated from investigations that were done as early as 2001. According to *S v Zuma and others* (CC358/05) [2006] ZAKZHC 22 (20 September 2006), Zuma supposedly committed the crimes between 1995 and 2005 when he was a Member of the KwaZulu Natal Executive Committee for Economic Affairs and Tourism and subsequently the Deputy President in South Africa.

Zuma initially faced two charges of corruption based on the indictment in the Shaik trial. Fourteen charges including racketeering, fraud and money laundering were added later on the grounds that Zuma, Thales and Shaik formed a company, Nkobi Investments, because of their corrupt activities. All other charges related to allegedly evading paying income tax on funds received from Shaik and non-declaration of benefits gained to the parliament and cabinet as it is mandatory. Zuma's charge sheet disclosed that between 1995 and 2005, Zuma or his family allegedly received 783 payments totalling more than R4 million from Shaik or his companies.

5.4.2 S v Shaik and Others *2007 (1) SA 240 (SCA); 2007 (1) SACR 247 (SCA); Case CCT 86/06*

Shabir Shaik was Zuma's financial advisor. He was charged on three counts together with his nine companies. These are Nkobi Holding (Pty) Ltd, Nkobi Investments (Pty) Ltd, Kobifin (Pty) Ltd, Kobitec (Pty) Ltd, Proconsult (Pty) Ltd, Procon (Pty) Ltd, Kobitec Transport Systems (Pty) Ltd, Glegton (Pty) Ltd, Floryn Investment (Pty) Ltd and Chartley (Pty) Ltd.

a) Charges

On the first count, he was charged of corruption in contravention of Section 1(1) (a) of the Corruption Act, 1992. According to the charge sheet, Shaik made payments to Zuma from October 1995 to September 2002 with the objective to influence him to use his office and political influence to benefit him and his businesses.

The second count was fraud. Shaik was accused of fraudulently deducting payments he made in favour of Zuma and other loans from the financial records of his various companies in order to portray a better financial position to the bank.

The third count had to do with a specific payment made to Zuma in contravention of Section 1(1) (a) (i) of the Corruption Act. The first alternative charge to count three was of money laundering in contravention of Sections 4(a) and (b) of POCA. Shaik allegedly conspired with Mr Alain Thétard, a local director of French company called Thomson-CSF (Pty) Ltd (Thomson), later renamed Thint (Pty) Ltd, to pay Zuma in exchange for promoting the interests of the company in the "arms deal" and other projects. The arrangement was accepted and confirmed by an encrypted fax which Thétard send to Thomson's head office in Paris. The fax was admitted as evidence by the High Court.

b) Judgement

Shaik was convicted on two counts of corruption and one of fraud on 2 June 2005. He was sentenced to fifteen years imprisonment.

All the companies were found guilty on the first count (corruption). The fourth, seventh, ninth and tenth applicants were convicted on the second count (fraud), while the remaining corporate applicants were acquitted. All the companies were acquitted on the main charge to count three (corruption), but the fourth and fifth applicants were found guilty of the first alternative charge of contravening Sections 4(a) and (b) of the Prevention of Organised Crime Act, 1998 (money laundering).

Shaik appealed the court's judgement.

c) Appeal

With regard to the first count, the defence counsel argued that the prosecution had failed to prove the nature of the duties Zuma did between 1995 and 2005. Secondly, the defence contested that the payments that Shaik made to Zuma were loans made to him as a friend.

In response, the prosecution indicated that during the period in question Zuma was at first a Member of the KwaZulu Natal Executive Committee (MEC) for Economic Affairs and Tourism and eventually the Deputy President of South Africa. The Constitution clearly outlines that a person assuming roles such as MEC, Deputy President and member of cabinet as Zuma did during the time in question should not undertake any other paying job, act in a manner that causes conflict of interest between job responsibilities and private interests. The prosecution therefore argued that if Shaik gave Zuma any benefits to influence his actions, which he did, then he committed corruption.

In the matter regarding payments made by Shaik to Zuma, the prosecution accepted that there was a lot of evidence before the court that indicated that Zuma and Shaik had a relationship. The evidence also showed that Shaik frequently exploited the relationship for both business and personal gains. The prosecution specifically referred to four occasions in which Zuma acted on Shaik's request to advance his business interests, including the Defence Force's arms procurement program. It is through Zuma's efforts that Shaik benefited from the contract to supply arms for the Navy's new corvettes. The prosecution further argued that the evidence points to the fact that Shaik had to borrow funds to be able to deliver on the contract while Zuma's financial position indicated that, in reality, he could not afford to make repayments except through use of his name and political office to advance Shaik's business interests. The court deduced from the evidence that the only logical conclusion was that Shaik made payments to Zuma in order to influence him to act in a manner contrary to his responsibilities and in his favour. The court concluded that Shaik was rightly found guilty of count one of corruption.

In terms of count two, the defence argued that the auditors did not act under the instruction of Shaik when they wrote off debt to the tune of M1 282 027.63 in the Nkobi Holdings financial records. The court admitted that it was the auditors who wrote off the debt in the manner in which it was done, but argued that they could not

do that without instruction. Circumstantial evidence and witnesses' statements showed that Shaik was involved in the decision. The court concluded that the appellant was rightfully found guilty of count two of fraud.

In the third count, the prosecution had brought evidence before the court which formed the basis of this charge during the trial. It was an encrypted fax which detailed an agreement entered into by Shaik, Zuma and Alain Thetard of Thomson. The prosecution was able to prove that the fax was send to Thomson bosses in France and that they accepted the terms. It detailed that Zuma had accepted through the encoded text that he would receive R500 000.00 per year for a certain period. In return, Zuma would protect the company from investigations into its involvement in the arms' deal and guard their business interests in South Africa. The trial judge had accepted this evidence as admissible before the court. It proved that Shaik requested a bribe on behalf of Zuma. The appeal court opined that even if Zuma had not accepted, evidence still points that Shaik committed the crime that the courts charged him with. The appeal court therefore concluded that he was rightly charged.

The appeal court also concluded there was no compelling evidence to change the prison sentence charge imposed by the trial judge.

c) Developments around Zuma's Corruption Charges: The Legal Journey

On 23 August 2003, the then National Director of Public Prosecutions (NDPP) at the NPA, Bulelani Ngcuka, made an announcement that he would be indicting Shaik on two counts of corruption in which the corrupt payments were made out to Zuma (*National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1). He stated that he would not charge Zuma yet although there was a *prima facie* case of corruption against him. Following Shaik's conviction and sentencing which implicated Zuma in 2005, the then President, Thabo Mbeki, dismissed Zuma from his position as Deputy President (*National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1).

After Vusi Pikoli took office as NDPP, he made an announcement of his intention to indict Zuma on 20 June 2005. The case came before judge Msimang on 31 July 2006. It charged Zuma on two counts of corruption similar to Shaik's conviction (*National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1). However, Msimang dismissed the case when prosecution failed to continue with the

trial immediately and demanded an extended period in order to carry out further investigations.

Mbeki later suspended Pikoli due to a matter unrelated to the indictment of Zuma. In the meanwhile, Mr Mokotedi Mphse acted as the NDPP. On 27 December 2007 he resuscitated indictment of Zuma. According to the *National Director of Public Prosecutions v Zuma* (2009), this time along there was a total of eighteen charges of tax evasion, corruption, money laundering, racketeering and fraud; and the evidence was a lot more concrete.

In June 2008, President Zuma launched an application in terms of Section 179 of the Constitution of the Republic of South Africa, 2009, in the Kwa-Zulu Natal Provincial Division of the High Court to review the decisions by Pikoli and Mpshe to prosecute him. The presiding judge, Chris Nicholson, granted an order that: “the decision taken by NPA during or about 28 December 2007 to prosecute the applicant...is invalid and is set aside” (*Zuma v National Director of Public Prosecutions* (8652/08) [2008] ZAKZHC 71). In simple terms, he dismissed the corruption charges against Zuma.

The NDPP challenged Nicholson's judgment in the Supreme Court of Appeal. On 12 January 2009, the Supreme Court of Appeal overturned Nicholson’s judgment. Zuma’s hearing had been set for August 2009. However, in an address to the media on 6 April 2009, the acting NPA director Mpshe announced that charges against Zuma would be dropped because of “allegations that the timing of indictment against him was politically motivated and carried abuse of legal processes” (NPA, 2003:9). He expounded that the decision was based on the transcripts of telephone calls between former director at DSO (nicknamed Scorpions) namely Leonard McCarthy, and Ngucka which were submitted by Zuma’s attorney as they made a representation for Zuma not to be prosecuted (NPA, 2012:3). These transcripts are often referred to as “the Spy Tapes”. They revealed that McCarthy and Bulelani Ngcuka worked together to change the timing of the announcement that corruption charges against Zuma would be reinstated in order to dampen competition he posed to Mbeki in the race for the ANC presidency (NPA, 2012:3). A week after the ruling, the then President, Mbeki, was recalled from the presidency and he was replaced by Zuma.

In April 2016, the DA approached the High Court in Pretoria to review and correct Mpshe’s decision to discontinue Zuma’s criminal prosecution and to declare that the

decision of the NPA was unconstitutional and invalid (*Democratic Alliance v Acting National Director of Public Prosecutions and others* (19577/2009) [2016] ZAGPPHC 255). The court ruled in favour of the DA. It concluded that the decision was "irrational and should be reviewed and set aside" (*Democratic Alliance v Acting National Director of Public Prosecutions and others* (19577/2009) [2016] ZAGPPHC 255).

The NPA and Zuma challenged the decision made by the High Court that the decision made in 2009 before the Supreme Court of Appeal in Bloemfontein to withdraw corruption charges against Zuma was irrational and should be set aside. The court hearing took place in August 2017. The presiding judge in *Zuma v Democratic Alliance and others* concluded that in light of the evidence and arguments presented before the court he found no fault with the decision that was made by the High Court. The NPA legal team and Zuma's lawyer, advocate Kemp, conceded in the Supreme Court of Appeal that the decision initially made by the prosecutors was irrational and stood to be set aside. However, Kemp stated that his client would like an opportunity to make fresh representations to advocate Shaun Abrahams who was the NDPP.

The court left the decision to indict Zuma with Abrahams. Abrahams initially gave Zuma until 30 November 2017 but postponed this to 31 January 2018 to make fresh representations of why he should (not) be indicted (News24, 01 December 2017). Abrahams has since been excused from his position as NDPP by the Pretoria High Court following their findings that at the time of his employment, the office was not entirely vacant as his predecessor, Mxolisi Nxasana, was unlawfully dismissed (Timeslive and Mailovich, 08 December 2017). While Section (179)(1)(a) of the Constitution provides that the NDPP should be appointed by the President, the court ordered that the new appointment should be made by the Deputy President, Cyril Ramaphosa, because Zuma is enmeshed in legal matters that could make him non-neutral in his appointment. Zuma will be appealing the court's decision on the grounds that it bridges "the principle of separation of powers, constitutional legality and the rule of law" (ENCA, 08 December 2017).

d) Handling of President Zuma's Corruption Case

The manner in which the NPA has handled Zuma's corruption case has undermined legality hence the rule of law in various regards. Mpshe decided to withdraw charges

against Zuma on the grounds of the spy tapes and the supposed abuse of process. This was despite the prosecution team's advice that he should continue with the prosecution. The prosecution team gave their recommendation following an evaluation of representations by the Zuma legal team. As articulated in *Zuma v DA*, the prosecution team had concluded that the representations were not made under oath, were self-serving and failed to address the merits of the case against Zuma. Moreover, the alleged political conspiracy by McCarthy and Ngcuka which Zuma's legal team strongly build their case on did not indicate any involvement of the prosecution team. In the same manner, the evidence that resulted in the indictment against Zuma was not affected.

In addition, Mpshe used case law to justify his decision. However, the Supreme Court of Appeal ruled out the cases as non-applicable in the Zuma case. Mpshe seemingly used a legal decision in an attempt to resolve a political situation, thus undermining legality. The decision also undermined Section 32(1)(a) of the NPA Act that requires serving "impartially and exercise, carry out or perform his or powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the constitution and law".

Although Mpshe legally had the final decision making power, his discretion had to be applied within the confines of the law; when there is a *prima facie* case it has to be prosecuted; except for compelling reasons that would warrant motion for *nolle prosequi*. In Zuma's case, there was compelling evidence to prosecute, most of which was gathered during and after the Shaik trial. This indicates abuse of office to protect Zuma. The NPA undermined equal treatment of all persons before the law. While Shaik was sentenced fifteen years imprisonment for crimes that mirror those of Zuma, the latter has not been on trial for his alleged crimes. The fact that Shaik was also given medical parole although he was not terminally ill further substantiates that not all citizens are subject to equal legal rules.

Judge Nicholson also set a bad precedent in his judgment and failed to use his discretion judiciously. He acted in breach of a fair hearing including hearing all sides of the dispute. He denied Mbeki the right to be treated fairly as he implicated him in "political meddling" and made inference to his cabinet. He did not afford Mbeki an opportunity to defend himself. In summary, Nicholson's decision could in no way be justified within the framework of the rule of law.

5.4.3 The *Zuma* Case and Lesotho PEP Cases: Lessons Learned

The above cases show that allowing a permissive environment for corruption at the high echelons of government, mainly for an extended time, results in institutionalized corruption. The fact that Zuma remains uncharged on corruption although there is a *prima facie* case against him sets a trend for others who are politically connected to follow the same manoeuvres. This ultimately leads to a corrupt administration that undermines good governance. The same was deduced when studying the Lesotho PEP cases that the prevailing culture of disregarding the set procurement regulations has permeated the system to such an extent that corruption in public financial management is considered normal. This clearly insinuates that the law does not hold a pivotal role in controlling behaviour when corruption flows from top administration of government.

The evidence of political influence on appointed NDPPs in the matter of Zuma's indictment or lack of it shows that the legal provisions on who should appoint candidates to this key position matters. Zuma as the President of South Africa has the constitutional power to appoint the NDPP. It is this subjective power that has paralysed the role of the NDPP and reduced it to puppet of the president. While the DPP in Lesotho has not entirely been free from scandalous rumours of actively protecting some political leaders from indictment on corruption, at least the appointment of such an officer is made by a public service committee. The Zuma case gives a lesson that when the office of public prosecution is captured, political leaders will remain above the law which undermines the rule of law and does not foster good governance.

Moreover, when public institutions are used to fight political battles of politicians, they become ineffective and irrelevant in their mandate. In this manner, corruption undermines the rule of law by neutralising institutions that should be enforcers of the law. This also diverts resources of the judiciary from other cases that could only be resolved through the courts thus limiting effectiveness of the judiciary in the delivery of speedy trials.

Delay tactics prejudice the state and undermine the rule of law. The fact that Zuma has so many charges of corruption against him and with evidence but is not prosecuted shows the entire nation that not all people are equal before the law. The perpetual delays of court hearings of PEPs in Lesotho also show tolerance of the

judiciary to the lack of respect for the courts and offers PEPs room to manoeuvre out of corruption charges.

DA's persistence to ensure that Zuma's corruption charges were reinstated shows that for the rule of law to be established and for corruption to be effectively confronted in high echelons of government, different stakeholders need to play an active part. Specifically, it signals to opposition parties in Lesotho that they need to take practical measures to stop corruption even before they are elected into government contrary to the current scenario in which control of corruption has become central to political campaigns with no immediate action to demand indictment on cases that surface.

5.5 Conclusion

The chapter discussed some of the cases of PEPs brought before the Lesotho courts. It also included the case of a high ranking public officer without political clout for comparison purposes. The analysis of these cases focused on whether and how the law was applied in the cases, discretion of the courts and circumstances surrounding the cases, including how the government treated them upon indictment and equality before the law. It ended off with discussing *Zuma* corruption case and how it has been handled so far in order to draw lessons from it.

The courts generally applied their discretion judiciously in most of the PEPs' cases with the exception of the *Khethisa* case in which they allowed prosecution to dictate judgement without intently reviewing the merits and implications of the plea bargain reached. Due to several postponements in the Moleleki and Phooko cases, the disappearance of evidence and death of witnesses respectively formed the foundation of their acquittal. This means that judgment of the cases could not be based on application of the key anti-corruption laws. Dr Thahane was also acquitted on the basis of technicalities. The *Zuma* case indicates that political influence can restrict application of the law, hinder anti-corruption institutions from fulfilling their mandate and in the process deter the rule of law.

CHAPTER 6: Conclusions and Recommendations

The study sought to debunk the relationship between the rule of law and the control of corruption in Lesotho. Firstly, the study gave a theoretical and conceptual framework of the concepts of corruption and the rule of law. Secondly, it assessed how the rule of law has contributed to curbing corruption hence promoting good governance in Lesotho; and how corruption has eroded the rule of law, thus undermining good governance.

The study also made remarks on the relationship between control of corruption and the rule of law under one party system and under the various coalition governments. In order to set background for this remarks, the study gave historical account of Lesotho in terms of political economy dynamics that shaped corruption and the rule of law. The remarks were drawn based on this history as well as analysis of the developments around the court cases selected in the study. Finally, the study aimed at providing recommendations on how to strengthen the rule of law and curb corruption.

In order to answer these questions the study reviewed the relevant literature and employed quantitative approaches mainly the case study analysis. Specifically, the study revisited five court cases of PEPs in Lesotho. It also reviewed the *Zuma* corruption case or journey in order to draw similarities and lessons that would help in understanding the relationship between the rule of law and the control of corruption and to make constructive recommendations.

6.1 Relevance of the Theories of the Rule of Law and Control of Corruption in Lesotho

The study observed in the literature that various forms of corruption emanated from underdeveloped body of legislation manifesting itself in poor awareness of the law or ill-defined legislative processes. Moreover, corruption could arise due to lack of effective controls such as democratic accountability. The nature of corruption identified from the PEP court cases under study was incentivised by the weak legal framework in public procurement which was easily manipulated. Lack of accountability further made it easy for public officers to abuse their offices for private gain.

In addition, the study concluded that as per the principal agent theory, actions of some of these PEPs resulted from a rational, conscious and deliberate weighing process. They rationally chose to be corrupt because benefits of corruption were more than the probability of ever being prosecuted. It is however acknowledged that other PEPs were socialized into the prevailing organisational culture in the government of Lesotho, particularly during the fourteen year rule of LCD when public officers in high echelons within the party were hardly brought to book for corrupt activities. The organisational culture theory clarified that institutionalization of corruption occurred through a socialization process.

As laid out in the literature, corruption within high government echelons creates an environment characterised by deteriorating moral values, disrespect for the rule of law and public institutions at large. Khethisa's comments on perennial unlawful practices in public procurement reflect how corruption has permeated the government structures making what is wrong acceptable and totally disregarding the guiding laws and regulations. The ministers and principal secretaries who have to be watchdogs over the state have become violators of the laws governing the state.

With regard to the rule of law, literature shows that it evolves around at least three key issues: absence of arbitrary government power, equal treatment of all people before the law and establishment of constitutional law as fundamental law. It was discussed in the literature review that equality before the law implies that administrative application or judicial adjudication of legal rules is consistent across similar cases despite societal status or political affiliation and that the procedure is pre-established.

Some of the PEPs' cases point to the existence of rule by law which is the minimal rule of law or a political arrangement in which rulers treat the law as an instrument of control. The study sees a scenario in play where prosecution particularly in the cases of Khethisa and Moleleki tries to project a picture of legal legitimacy by exploiting the legal form while in fact the full might of law has not been effected. In a nut shell, rule by law undermines rule of law. The study concludes that rule by law exists because institutions such as the DCEO, DPP and the judiciary itself do not function optimally or with efficiency but well enough that some law can be enacted.

6.2 The Rule of Law and Corruption

6.2.1 Did the rule of law curb corruption?

The general idea is that when the rule of law is established in a country, all persons are equal before the law, which may lower corruption. When assessing adherence to the rule of law based on the absence of arbitrary rule of government and equal treatment before the law in the PEP cases, the study concludes that the rule of law was not entirely upheld. The PEPs themselves were not treated in a consistent manner following their convictions. While some were removed from their offices, others were still given ministerial offices despite the fact that their cases were not completed before the courts. For instance, Moleleki was never suspended or dismissed from his post while Khethisa and Dr Thahane on the other hand were dismissed. This implies that provisions of the law were applied in other cases but overlooked in others.

The circumstances surrounding the majority of the cases did not permit application of the relevant anti-corruption laws in order to fairly determine if the PEPs were equally subjected to relevant legal rules. The review of the *Matete* case shows that the adjudication process was governed by legal rules. The judgement was based on the relevant laws and common law thus ensuring consistency with precedence. It is worth mentioning that the court's acceptance of a lenient sentence reached through plea bargaining between the prosecution and Khethisa does not portray the courts' previous judgements that convey that corruption is a serious crime that should not be tolerated.

On the other hand, negligence and poor legal administration which marks some of the cases in question shows mixed signals about the public prosecution. While the prosecution brought the cases before the courts, the manner in which the cases proceeded left one wondering about what the objectives of the prosecution were. That is, whether they wanted to seem to be taking action against corrupt politicians as government had set out but did not have the intentions to see them face the full might of the law. For example, in *Moleleki*'s case the prosecution did not provide the defence with the docket as was legally appropriate and as per the court order. In addition, the prosecution failed to withdraw the case in time in order to reconstruct the docket and reinstate charges once evidence needed to prosecute was compiled. This is bearing in mind that the office of the DPP was led by the same director,

Thetsane, who was responsible for the conviction of the LHDA corruption offenders like Sole.

The study concludes that minimal adherence to the rule of law facilitated corruption. It created an environment in which PEPs were not certain whether regulations and laws would be applied to them. That is, whether the anti-corruption authorities would charge them for their corrupt activities or turn a blind eye as they did in some of the cases. In short, the cases give evidence to the effect that the minimal rule of law is not effective in discouraging corruption hence fails to advance good governance.

6.2.2 Has corruption undermined the rule of law?

Corruption created a need to manipulate the law and the legal system in order to avoid penalties. It is through perpetual postponements that Phooko and Moleleki were eventually able to get out of their corruption charges. The postponements shielded them from full application of the legal rules relevant to their contexts. In the process, the effectiveness of law enforcement institutions was undermined.

Corruption also led to regressive jurisprudence. It introduced new completed cases that do not reflect the heart and principles of prior cases. The lenient sentence in the *Khethisa* case detracts from the initial image that has been portrayed by government is cases such as *Sole v Crown* that corruption is a serious offence. In summary, the case indicates that corruption affected the rule of law by adding new body of law which does not mirror prior cases; makes light of corruption; and lowers public trust in the ability of the anti-corruption and law enforcement institutions to carry out their mandate effectively.

6.2.3 Coalition Government v One party government

Corrupt activities in the cases at hand took place during one party rule but indictments took place during the reign of a coalition government. However, in two of the cases the violations were done just before elections which brought in a different government; meaning that the one party government possibly did not have enough time to investigate and prosecute. The study discussed in chapter four that during the era of one dominant political party, LCD/DC, corruption was commonplace among high ranking public officials. However, no action was taken against them. Moleleki, Phooko, Khethisa and Dr Thahane were all accused of other corrupt

activities prior to the cases discussed above but not all those cases have been prosecuted.

The developments surrounding the cases point to the fact that if the ruling party lacks political will to curb corruption, it will allow unbridled corruption and in the process weaken relevant anti-corruption institutions to protect suspected party members from facing the full might of the law. The study deduces from the inaction or paralysis of the DPP when it comes to prosecuting some of the PEPs with political power that the rule of law was undermined in order to protect the corrupt public officials in high echelons during the LCD and DC governments.

The study observed that being governed by a coalition government does not automatically translate to lower corruption and adherence to the rule of law. The checks and balances presented by having different political parties in government might contribute to the control of corruption as was observed in the ABC-led coalition government post 2012 elections. Corruption within a coalition government would be confronted if the majority of the coalition members including the lead party were committed to curbing corruption and observing the rule of law.

To the contrary, coalition governments might encourage corruption if the coalition members collectively decide to engage in corrupt activities and keep a blind eye to corruption done by their coalition partners. This is substantiated by what was observed during the DC-led coalition government. When Dr Khaketla was accused of corruption in the procurement of government fleet services, DC as the leading party did not take any active decision of asking the public prosecution to look into the matter or hold internal investigations into the contract. Instead, Prime Minister Mosisili transferred Dr Khaketla from the position of Minister of Finance to the Minster of Foreign Affairs. Other members of the DC-led coalition government were totally silent on this alleged corruption scandal. It is mainly the DC youth league, who also supposedly had vested interests, that took a stand against Dr Khaketla's alleged corruption.

6.2.4 Overall Conclusion of the Study

The study concludes that the rule of law could not deter corruption due to the influence of politics in the legal administration. Instead, the lowest form of the rule of law, rule by law, is in force. On the other hand, corruption seemingly has an adverse impact on the rule of law by affecting law enforcement agencies and the body of law

itself. Overall, the cases show that the influence of corruption in undermining the rule of law outweighs the role played by the rule of law to deter corruption in Lesotho. This undermines good governance.

6.3 Recommendations

The majority of corruption cases considered in this study point to flouted procurement regulations. Since the private sector in Lesotho remains weak, the government is seen as the "pot of gold" to draw from in order to enrich oneself. This calls for the processes to access the public purse to be aggressively guarded against corruption at both institutional and legal levels. There is a need to strengthen institutions that monitor procurement such as the PPAD which is established to ensure legality, accountability, efficiency, transparency and responsible expenditure in public procurement in line with UNCAC's prescriptions (Regulation 6(1) of Public Procurement Regulations 2007). In addition, public procurement regulations need to be revised to mirror national anti-corruption laws in order to ensure that the procurement process is legally protected. Comments such as those made by former principal secretary Khethisa that flouting public procurement is the norm indicates the dire need to speed up procurement legal reforms.

De-politicization of anti-corruption agencies is indispensable. The lesson learned from President Zuma's case is that once anti-corruption agencies are politicized, it becomes easy to be selective in terms of prosecuting and combating corruption. This in turn undermines the credibility of the anti-corruption institutions and makes it impossible to uphold the rule of law when the prosecution's agenda has shifted from combating corruption to shielding politicians. It is therefore recommended that as the office of the DPP in Lesotho transitions from the leadership of Thetsane who has been repeatedly criticised for acting in the interests of the LCD party, that his predecessor will be placed under more accountability layers to ensure that no cases go unprosecuted because of political influence.

The PEP cases together with the *Zuma* case demonstrate that allowing corruption at high echelons of government to be the order of the day could quickly result in institutionalization of corruption. When corruption by high ranking officials goes unchecked, it creates a complacent attitude that cuts across different sectors including the judiciary. For instance, Chief Justice Nthomeng Majara is currently embroiled in a corruption scandal in which procurement processes were not followed

before getting into an agreement signed by the high court and the court of appeal registrar on behalf of the judiciary to rent a house for M27 000.00 per month, at the expense of the government, when her official house allowance is only M4 000.00. Such conduct compromises the credibility and effectiveness of the judiciary as it might be perceived to be more inclined to be lenient in their judgement of corruption cases emanating from flouted procurement processes as it is what the judiciary practices too. The study accordingly recommends that penalty on irregular administration of public funds by high ranking officers should be intensified relative to the juniors in order to discourage corruption at this level.

Civil society and other state actors can only be able to hold the government accountable if they are well informed. Lesotho has not passed the information Bill that compels the government to share its decisions with general public. The secrecy that surrounds government activities has also contributed to a civil society that is unable to hold the government accountable from an informed perspective. For Zuma's case shows that the DA has been able to fight for reinstatement of his corruption charges because they had access to information. Lesotho has not passed the information Bill that compels the government to share its decisions with the general public. The secrecy that surrounds government activities has also contributed to a civil society that is unable to hold the government and anti-corruption authorities accountable from an informed perspective. The study recommends that in order to strengthen checks and balances that will ensure adherence to the rule of law and fight corruption, the government has to make information accessible to the public. This includes ensuring that the public also has easy access of the professionally transcribed court cases unlike the current situation in which some of the cases are not easily accessible while others are not transcribed and some written by hand.

It is also important to have systems in place to electronically backup information compiled in the dockets. This is to ensure that those in contravention with the law do not walk free when dockets held with the police or prosecutors' office disappears.

The observable trend in the cases is the perpetual postponements that resulted in the respective PEPs not satisfactorily appearing before the courts, which does not allow fair application of statutory laws. In some cases however, the postponements were initiated by the prosecution due to administrative processes it still had to

undergo to secure relevant information for the case. For instance, during Khethisa's investigation, the DCEO had to secure additional funding to secure services of forensic auditors. This implied that they had to approach Khethisa as principal secretary because he held the responsibility to sign off any additional funding that was not budgeted for in the annual budget. While the study had not set out to determine if Khethisa influenced the delays in any way, it deduces that the prosecution (DCEO) needs financial independence in order to effectively carry its mandate. The lack of financial independence of the DCEO means that it has to incur delays during investigations because of administrative red tape.

Finally, the study recommends that in order to strengthen the rule of law, the office of the DPP needs to be held accountable for how it handles corruption cases. Checks and balances need to be enhanced. In order to strengthen checks and balances and ensure that PEPs are charged for corruption as much as junior public officers are charged and convicted, the office of the Auditor General needs to be given greater authority in the sense that its recommendations should be binding. At present, the recommendations it makes following its findings on public financial mismanagement are not binding. This is one of the matters that brought the office of the DPP in disrepute as findings of corruption involving PEPs by the auditor general were not followed through. Increasing the authority of the auditor general would facilitate that the DPP prosecutes identified corruption cases within the public sector; whether committed by senior or junior officers. Ultimately, this will promote the rule of law, curb corruption and generally enhance good governance.

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